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THE
GUYANA
LAW REPORTS

This volume of the
Guyana Law Reports
is dedicated to the memory of
J.O.F. Haynes
Chancellor of the Judiciary
of Guyana
1976 – 1980

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**THE
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LAW REPORTS**

1975
Volume 1

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SCOPE OF THE REPORTS

These Reports cover cases decided in the Court of Appeal and High Courts of Guyana listed under the heading of “Citation” below.

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**JUDGES OF THE
SUPREME COURT OF JUDICATURE OF GUYANA
1975**

COURT OF APPEAL

THE HON. SIR. EDWARD VICTOR LUCKHOO	–	Chancellor, O.R.
THE HON. MR. JUSTICE LILADHAR BHOWANI	–	Justice of Appeal
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HIGH COURT

THE HON. SIR HAROLD BRODIE SMITH BOLLERS	–	Chief Justice
THE HON. MR. JUSTICE AKBAR KHAN	–	Puisne Judge
THE HON. MR. JUSTICE GEORGE AUBERT SYDNEY VAN SERTIMA	–	Puisne Judge
THE HON. MR. JUSTICE DHANESSAR JHAPPAN	–	Puisne Judge
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THE HON. MR. JUSTICE RUDOLPH H. HARPER	–	Puisne Judge
THE HON. MR. JUSTICE CLAUDE MASSIAH	–	Puisne Judge

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DENI NARINE
Appellant
v.
D. PERSAUD AKA NANKI
Respondent

[Full Court (Bollers, C.J. and Vieira, J.) November 14, 1975]

Infants contract – Voidable at common law – Exception – Contract for necessities – Action against infant on contract for necessities.

Infants contract – Whether any action could be brought for the repayment of money lent to infant – Infancy Act, Cap 46:01 Laws of Guyana.

The respondent filed a plaint in the Magistrate’s Court against the appellant/defendant claiming the sum of \$186.00 which she alleged was the outstanding balance of a loan of \$275.00 lent to appellant.

The respondent alleged that on 23rd June, 1972 the appellant requested of her a loan of \$300.00 to buy furniture in order to accommodate his relatives who were visiting from England. The respondent lent him \$275.00 for which he signed a receipt and promised to repay the loan at the rate of \$25.00 each month-end. The appellant reneged on his promise and only made payment totalling \$89.00.

The appellant denied being indebted to the respondent and specifically pleaded that on the 23rd June, 1972, he was an “infant”.

The magistrate gave judgment in favour of the respondent/plaintiff.

On appeal to the Full Court,

HELD: The crucial issue in the case was not whether the furniture could be said to be necessities but whether the respondent could in fact bring any action in relation to a contract for the repayment of money lent to an infant which is absolutely void by statute.

**Appeal allowed. Order set aside.
Leave to appeal to the Court of Appeal.**

Editorial note: In a strongly worded *obiter*, the judges noted that the furniture could not be considered as necessities because it was not purchased for the personal use of the appellant and it was not proved that the furniture purchased was suitable to the appellant’s station and condition in life and actually required by

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him at the time and also that he was not sufficiently provided with such furniture at the time.

As from 1st January, 1974 the age of majority was reduced from twenty – one years to eighteen years. See s. 2 of the *Representation of the People (Adaptation and Modification of Laws) Act, Cap. 1:09*.

Cases referred to:

- (1) *Inman v. Inman* (1873) L.R. 15 Ex. 260
- (2) *Martin v. Gale* (1876) 4 Ch. D. 428

R. Eleazer for Appellant

F. L. Brotherson for Respondent.

VIEIRA, J. (delivered the judgment of the Court): On 27th February 1974, the respondent (plaintiff) filed a plaint in the Magistrate’s Court of the Georgetown Magisterial District against the appellant (defendant) claiming the sum of \$186.00 (one hundred and eighty-six dollars) which she alleged was the outstanding balance of an amount due, owing and payable by him to her on an “on demand” note dated 23rd June 1972, made by him to and in her favour for value received.

In his written defence, the appellant denied being indebted to the respondent in the sum claimed or at all and he specifically pleaded that on the 23rd June, 1972, he was an “infant”.

It was the case for the respondent that on 23rd June, 1972, she was at Dr. Prashad’s Hospital in Georgetown where both the appellant and her reputed husband, one Albert Edward Lewis, were working at the time. The appellant, who is a relative of hers, approached her and requested of her a loan of \$300.00 which he explained he needed so as to buy a big bed and some chairs so as to better accommodate his mother-in-law and sister-in-law who were coming over from England to spend some time with him, as the small bed that he had was not convenient for that purpose. She lent him \$275.00 for which he signed a receipt (Ex. “A”) and he promised to repay the loan at the rate of \$25.00 every month-end. The appellant reneged on his promise and only made six payments amounting to a total of \$89.00, all of which were made after Albert Lewis’ death on 25th January, 1973.

It was the case for the appellant, who had been a chauffeur since January, 1974, that he borrowed the sum of \$275.00 from Albert Lewis personally who told him to make payments to the respondent, and gave as the reason for the loan his indebtedness to the New India Insurance Company Limited in relation to an accident involving one Deopaul Ramoutar’s car PZ 7931 which was insured with that company and which he was driving at the time, and a receipt (Ex. “C”) which

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was made out in the respondent's name was tendered by consent, whereby the said company acknowledged receipt of the sum of \$275.00 in relation to the said accident. He accepted that the balance due on Ex "A" was correct and stated that he would have paid off the balance had it not been for the fact that the respondent was constantly molesting him on the road.

The learned magistrate gave judgment in favour of the plaintiff as claimed and sought to justify his decision in a most unsatisfactory and contradictory Memorandum of Reasons for Decision. He apparently accepted that the money was actually lent by Lewis and not by the respondent and that it was "probably true" that the respondent was authorised to receive the payments made by the appellant, but he subsequently contradicted himself by stating that he accepted the respondent's testimony that she "or Lewis" lent the money to the appellant. This is clearly erroneous as the respondent never said any such thing but has consistently maintained at all times that it was she alone that lent the money and not her reputed husband. Further, there can be no real doubt that the learned magistrate accepted and believed that the true basis for the loan was the appellant's representation that he wanted the money to purchase furniture so as to better accommodate his in-laws and again the magistrate clearly contradicted himself when, in almost the very next breath, he stated "it was also probable that he borrowed the money to pay off his debt with the Insurance Company." It seems to us that the only proper and reasonable inference that can be drawn in relation to these findings is that although the loan was requested and given specifically to purchase furniture, this was not in fact done but utilised instead by the appellant to pay off the Insurance Company as witness Ex. "C" which, significantly, we think, is made out in the respondent's name and for the exact amount of \$275.00 borrowed.

The appellant was born on 12th November, 1954, as appears from a certified copy of his birth certificate (Ex. "B") and was, therefore, under the age of twenty one years which, at 23rd June, 1972, the date of the loan, was the legal age of majority in this country but which has recently been reduced to eighteen years. Clearly, therefore, the appellant was an "infant" in law at the relevant time. At common law, an infant's contracts were, in general, voidable at the instance of the infant, although binding upon the other party. One of the main exceptions was a contract for "necessaries" which is defined at p. 1867 of *Volume 3 of the Third Edition of Stroud's Judicial Dictionary* as follows—

"(2) (a) The "necessaries" for which an infant may contract liability are not confined to such articles as are necessary for the support of life; but extend to such articles as are reasonably fit to maintain the particular person in his state, station and degree, and are suitable to his fortune and circumstances."

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The basis for the protection given to infants is well-expressed in the following passage appearing at p. 468 of *Treitel's Law of Contract, 3rd Edn. (1970)* –

“The law governing infants’ contracts is based upon a compromise between two principles. The first, and more important, is that the law must protect infants against their own inexperience. The second is that, in pursuing this object, the law should not cause unnecessary hardship to adults who deal with infants.”

We consider the following statement appearing at para. 320 of Volume 21 of the 3rd Edition of *Halsbury's Laws of England* under the heading “Liability for necessaries” as an authoritative statement of principle –

“The law considers it to be clearly for the benefit of an infant that he should be capable of binding himself to pay for the supply of necessaries of life to himself and members of his household (h). In order to maintain an action against an infant in respect of necessaries, it must be shown that they were of a nature suitable to his condition in life and actually required by him at the time and that he was not at the time otherwise sufficiently provided with them (i).

The onus of proof is on the plaintiff (k); and the plaintiff’s absence of knowledge as to the infants’ existing supplies is irrelevant (l).

The question whether or not the goods can be necessaries is a question for the judge, and the question whether or not they are necessaries is a question of fact for the jury; but it is also a question of law whether there is any evidence upon which the jury can find them to be necessaries and if the judge holds there is no such evidence, he should direct the jury to find for the defendant or withdraw the case from them and direct judgment to be so entered (m).”

The common law rules were, however, to some extent, altered by the *Infants Relief Act, (1874)* s. 1 of which provides as follows –

“All contracts, whether by speciality or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.”

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Section 2 of the *Infancy Act, Cap 46:01* of the revised laws of Guyana is in almost identical terms with s. 1 of the English Act upon which it is based and it seems to us that neither the learned magistrate nor counsel concerned fully appreciated that the crucial issue here was not whether the furniture could be said to be “necessaries” as the learned magistrate apparently thought, but whether the respondent could in fact bring any action in relation to a contract for the repayment of money lent to an infant which is absolutely void by statute. In Inman v. Inman (1873) L.R. 15 E. 260, it was held that an infant is not liable for money lent although the money be applied by him in paying for necessaries and even if it was obtained by a misrepresentation as to age. But in Martin v. Gale (1876) 4 Ch. D. 428 it was held that a Court of Equity will order repayment of money to the lender where the money was advanced to the infant who expended same on necessaries or in paying debts incurred for necessaries.

Although it was not necessary for us to decide whether the furniture purchased can be said to be “necessaries” or not, nevertheless, had we to decide the point we would have unhesitatingly answered in the negative because (i) it was not purchased for the personal use of the appellant but for the use of his in-laws and (ii) the respondent failed to discharge the onus cast upon her to prove not only that the furniture purchased was suitable to the appellant’s station and condition in life and actually required by him at the time but also that he was not sufficiently provided with such furniture at the time.

For these reasons, therefore, we allowed the appeal and set aside the order of the learned magistrate and awarded costs to the appellant fixed in the sum of \$24.00 and granted leave to appeal to the Court of Appeal.

**Appeal allowed. Order set aside. Leave to
appeal to the Court of Appeal.**

HUGH DESMOND HOYTE

Plaintiff

v.

LIBERATION PRESS LIMITED

and

POST PAPERS LIMITED

Defendants

[High Court – In Chambers (Churaman, J.) May 15, 16, 19, 1975]

Libel – Damages – Damages awarded against a corporation – Liability of Directors of a corporation.

Statute – Interpretation – Liability for damages – Corporation – Legislation – Retrospective effect of legislation – Newspapers Act, Cap .21:01, s. 18.

Section 18 (1) of the *Publication and Newspapers Act, Cap.21:01* which came into force in September, 1972, provides as follows:

‘Where a person against whom a judgment is recovered in a civil action for libel published in a book or newspaper is a body corporate, the judgment shall, subject to the provisions of subsections (2) and (3), be enforceable jointly and severally against the body corporate and every person who was a director or an officer at the time of the publication.’

In February, 1972, the plaintiff commenced an action against the defendants, a body corporate, in which he alleged that he had been libelled by them in January of the same year. He obtained judgment against them in October, 1973, and was awarded damages and costs. He subsequently sought an Order from a judge in Chambers to issue execution against nine defendants personally who are directors of the first named defendant corporation in accordance with s. 18 of the Act.

HELD: That the amendment to the Act which transmitted judgment against a body corporate onto others whom the law has already regarded as distinct, separate and apart from the former, was a serious interference with a substantive right; and that on the established rule of construction, legislation relating to substantive rights must be construed prospective only.

Application refused.

Hoyte v. Liberation Press Ltd. & Anor**Leave to Appeal granted.**

Editorial Note: This case is also reported at 22 W.I.R. 175. [By virtue of *Law Revision Act, 1972* (No. 4/1972) the corporate veil was lifted by Parliament exposing individuals of a body corporate, in defined circumstances, to personal liability for a judgment recovered from the corporate entity for the tort of libel (*per* CHURAMAN, J.)]

Cases referred to:

- (1) Gardner v. Lucas [1878] 3 A.C. 582, H.L.; 44 Digest (Repl.) 289, 1189.
- (2) Re Athulmney [1899] 2 Q.B. 547; [1895-99] All E.R. 329; 67 L.J.Q. B. 935; 47 W.R. 144; 42 Sol. Jo. 740; 5 Mans. 322; *sub. nom.* Re Athulmney (Lord), *Ex. p.* Wilson & Hasluck 79 L.T. 303; 44 Digest (Repl.) 295,1243.
- (3) Re Joseph Suche & Co. Ltd. [1875] 1 Ch. D. 48; 45 L.J. Ch. 12; 33 L.T. 744; *sub. nom.* Re Suche (Joseph) & Co. Ltd. *Ex. p.* National Bank 24 W.R. 184; 44 Digest (Repl.) 299, 1291.
- (4) Turnbull v. Foreman 54 L.J. Q.B. 489; 53 L.T. 128; 49 J.P. 708; 33 W.R.768; 1 T.L.R. 557; C.A.; 44 Digest (Repl.) 1185.
- (5) Saloman v. Saloman & Co. [1897] A.C. 22; [1895-99] All E.R. 33; 66 L.J. Ch. 35; 75 L.T. 426; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89; H.L.; *revsg.* S.C. *sub. nom.* Broderip v. Saloman [1895] 2 Ch. 323; C.A.; 44 Digest (Repl.) 299, 231.
- (6) Croxford v. Universal Ins. Co., Ltd. [1936] 1 All E.R. 151; [1936] 2 K.B. 253; 105 L.J.K.B. 294; 154 L.T. 455; 52 T.L.R. 311; 80 Sol. Jo. 164; 54 Ll. L. Rep. 171; C.A.; 29 Digest (Repl.) 543, 3703.
- (7) Hutchinson v. Jauncey [1950] 1 All E.R. 165; [1950] 1 K.B. 574; 66 (pt. 1) T.L.R. 195; 94 Sol. Jo. 48, C.A.; 44 Digest (Repl.) 299, 1295.
- (8) Williams v. Williams [1971] 2 All E.R. 764.

Sir Lionel Luckoo, S.C. for Applicant.

B.O. Adams, S.C. for 3rd and 7th Respondents.

M. Fitzpatrick for 2nd, 4th, 5th and 10th Respondents.

A. Chase for 6th, 8th and 9th Respondents.

CHURAMAN, J.: It could hardly be denied that on the 23rd September, 1972 with the enactment of the *Law Revision Act* of 1972 (*Act No. 4 of 1972*), Parliament for the first time in the history of our jurisprudence lifted the corporate veil and exposed the directors of a corporate body in certain clearly defined circumstances to personal liability for a judgment recovered from the corporate entity for the tort of libel. The relevant portion of the Act is now contained in s. 18 of the *Publication and Newspapers Act, Cap. 21:01* hereinafter referred to in this judgment as the 'Act'.

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In January, 1972, the defendants herein libelled the plaintiff. The plaintiff commenced an action in February, 1972. Section 18 of the Act, passed by Parliament during the pendency of the plaintiffs action, received the Presidential assent on September 23rd, 1972. The matter was heard by GEORGE, J. who on October 5th, 1973, entered judgment for the plaintiff with costs. The judgment against the defendants herein remain unsatisfied, their assets appearing insufficient. The applicant/plaintiff by a Summons in Chambers now calls in aid s. 18 of the Act seeking leave of the Court to issue execution against nine named directors, hereafter called the respondents, of the first named defendant, they presumably comprising the directorate in January 1972 when the libel was published.

Section 18 of the Act reads thus:

“18. (1) Where a person against whom judgment is recovered in a civil action for libel published in a book or newspaper is a body corporate, the judgment shall subject to the provisions of subsections (2) and (3), be enforceable jointly and severally against the body corporate and every person who was a director or an officer at the time of the publication.

(2) Execution for the enforcement of the judgment shall not issue against any such director or officer save with the leave of the Court.

(3) Leave to issue such execution shall be granted if it appears to the court that the assets of the body corporate are insufficient to satisfy the judgment, unless the director or officer satisfies the court that the libel was published without his knowledge and that he exercised all due diligence to prevent the commission thereof and to mitigate (by way of suitable public apology or otherwise) any damage or prejudice caused or likely to be caused to the person libelled as a result of the libel.”

Learned counsel for the applicant contends that notwithstanding the fact that s. 18 came into force in September, 1972, on a true and proper interpretation of that section, Parliament clearly manifested an intention that it should embrace a libel published in January, 1972; in short, that the wording of the section on a simple reading would include any judgment given after the 23rd September, 1972, even in respect of a libel published prior to that date.

Counsel for the respondents in a conjoint submission contend that the provisions of subsection (3) manifestly lead to an inference that Parliament did not intend the section to apply to libels published prior to its enactment, but only libels subsequent thereto.

Some additional points were urged by Mr. Adams and Mr. Chase, but I think it

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fair to say that the question whether or not the section is retrospective (in the sense with which that word has come to be used in the law of statute interpretation) formed the focal point of the arguments urged by counsel for the respondents and in view of the conclusions I have reached on this point it is unnecessary to express any opinion on any other point.

It is therefore vital to examine the Act as a whole to determine whether or not s. 18 applies only to libels published after 23rd September, 1972, or all libels whether before or after that date. The section does not expressly say whether or not it does, for it is trite law that where the words of a statute are precise and unambiguous, then it is the function of the Court to give expression to it, regardless of its consequences. But the section is not free of ambiguity, for it is silent as to whether or not its provisions apply to libels prior to its enactment.

I therefore accept my function to be to determine the true intention of Parliament, insofar as prior libels are concerned, as expressed by the words used in the Act; and in so doing I must enquire into the scope and object of the Act, the subject matter with which it deals, and the words by which Parliament has chosen to express itself; to bear in mind the effect of a construction which would make it retrospective and to say whether it is to be supposed that such a construction was intended by Parliament to be given to it. And in doing this I must bear in mind that a Court would be slow to construe an Act as retrospective thereby disturbing substantive rights unless Parliament expressly or by necessary implication has so decreed.

The general rule is expressed in the maxim, “*Nova constitutio futuris formam imponere debet non praeteritis*” – *prima facie*, any new law that is made affects future transactions, not past ones (See *Gardner v. Lucas* [1878] 3 A.C. 582 at p. 603). And WRIGHT, J. expresses it thus in *Re Athulmney* [1898] 2 Q.B. 547 at p. 551:

“Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only.”

WRIGHT J., was merely restating what JESSEL, M. R. had enunciated in 1875 in *Re Joseph Suche & Co. Ltd.* [1875] 1 Ch.D. 48, at p. 50 when that very learned Master of the Rolls expressed this view:

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“I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any case of a winding up which had been commenced before the Act came into operation.

I so decide because it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments unless in express terms that they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights and it is suggested here that the alteration made by this section is within that exception. I am of the opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a Company in liquidation.”

In Re Joseph Suche & Co. Ltd., (*supra*), the learned Master of the Rolls was deciding that s. 10 of the *Judicature Act 1875* [U. K.] (to the effect that in the winding up of a Company whose assets were insufficient for its debts, the same rules shall be observed as may be in force under the law of bankruptcy), was not retrospective. The learned Master held that s. 10 was not to be accorded a retrospective interpretation to include a winding up commenced before the enactment of s. 10 of the Judicature Act 1875 as that Act sought to interfere with the creditors right to prove for a debt that was not in the learned Master’s view a mere matter of procedure.

And yet in the later case of Turnbull v. Foreman [1885] 15 Q.B.D. at p. 236. BRETT, M. R. re-echoed the general rule when he said:

“... unless the language used is clear to the contrary, an enactment affecting rights must be construed prospectively only and not retrospectively so as to affect rights acquired before the Act passed”.

And (*ibid.*, at p. 238,) BOWEN L. J. expressed it thus:

“Where the legislature mean to take away or lessen rights acquired previously to the passing of an enactment, it is reasonable to suppose that they would use clear language for the purpose of doing so; or to put the same thing in a somewhat different form, if the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights...”

The question must now be asked. Did s. 18 of the Act interfere or take away or

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impair any substantive right previously enjoyed by the respondents as directors of the defendant company? Did the Act seek to lessen or whittle down any right previously enjoyed by them? The answer to these questions must be ascertained by determining what rights, if any, were vested in the directors of the respondent company; a company whose liability I assume for this judgment to be of limited liability.

Upon the issue of a certificate of incorporation a company is legally incorporated; it assumes a legal *persona*, a body corporate, distinct, separate and apart from those whose endeavours brought it into existence. It assumes a character, even if metaphysical, by virtue of law like any independent person with its own rights and liabilities unto itself, and the motives of those who created the *corpus* or of those who control and guide its future, are absolutely irrelevant in determining what those rights and liabilities are, in neither of which, generally, do its directors share.

This separate legal personality accorded to a corporate body was recognised as long ago as 1896 by the House of Lords in the celebrated case of Saloman v. Saloman [1897] A.C. 22. And as LORD MACNAGHTEN observed (adopting the views of the respected author, Mr. Palmer, on *Company Law*) ([1897] A.C. at p. 52);

“Among the principal reasons which induce persons to form private companies are the desire to avoid the risk of bankruptcy ...

By means of a private company ... a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law.”

Those observations so felicitously expressed, seem particularly relevant to the matter at hand.

On the authority of Saloman v. Saloman (*supra*) it seems clear that the liabilities of a corporate entity are its own and not those of its shareholders or its directors. The tort of libel was committed in January, 1972, by the corporate body against whom action was commenced. When Parliament on 23rd September, 1972, sought to transmit a judgment obtained against a body corporate onto others whom the law had always regarded as distinct, separate and apart from the former, there is no doubt in my mind that that was a serious interference with a substantive right, and cannot on any true basis be viewed as a mere matter of procedure.

And on the question of substantive right, it seems very clear to me that Parliament itself recognised the existence of this right as s. 18 of the Act is clearly

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intended to destroy the corporate veil, the veil of protection, previously enjoyed by directors of a corporate body. Holding as I do that the enactment interferes with a substantive legal right, I must go on to state, even if it is superfluous, that s. 18 does not in my view deal with a mere matter of procedure. To say that a statute, giving a plaintiff the right to levy execution against someone separate from and other than the true defendant, deals merely with a matter of procedure and not of substantive legal right needs only to be so stated to earn its own refutation.

The Act as a whole informs me that Parliament intended to prevent directors of companies of straw and, it would appear, of dubious printing and publishing motives, invoking the protection of the corporate veil to avoid liability for damages for libel recovered against such companies. It seeks to achieve this by a clear imposition of the consequences to follow and to inform directors and officers of such companies that libellous matters are published, so to speak, *suo periculo*, but at the same time goes on to afford a director or officer an opportunity of avoiding liability if the following circumstances co-exist:—

- (a) that the publication was without his knowledge;
- (b) that he exercised due diligence to prevent it;
- (c) that he exercised due diligence to mitigate any damage or prejudice caused by the libel.

It becomes immediately obvious that Parliament has sought to provide a limited defence to only those innocent in a true sense, free of any indirect or improper motive, and possessed of a contrite disposition; for it makes a clean sweep of the more impenetrable protection under the law as it stood before – the protection of the corporate veil.

It therefore becomes a matter of urgency to determine the true scope and limits of the defence afforded by subsection (3) of s. 18 of the Act, and to enquire whether or not implicit therein, Parliament has by necessary implication manifested an intention in support of or against retrospectivity. Pertinent questions arise for answer, such as: Is it to be supposed that Parliament in speaking of “due diligence” intended that the conduct of those under scrutiny should be viewed and determined without reference to and in isolation from the date when it became known (i.e 23rd September, 1972) that certain legal consequences should arise? Does the defence postulate a certain affinity between the date of publication of the libel and the conduct of the ‘tortfeasors’, not only at the time thereof and subsequent thereto, but also prior in point of time? Would the efficacy of the defence be lost or become dissipated so that the respondents may be handicapped therein if the publication of the libel was previous to the imposition of the legal burdens in s. 18 of the Act?

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In attempting to provide the answers, one must clearly bear in mind that prior to 23rd September, 1972, a director was never in law personally liable for a judgment recovered from a corporate body, irrespective of his conduct as a director; and also irrespective of whether or not the publication was with or without his knowledge. In January, 1972, therefore, assuming he had knowledge of the publication, he was not in law personally liable and therefore under no obligation. But on the 23rd of September, 1972, his position became altered. To avoid liability he must prove *inter alia*, that he did not have knowledge. But he did. He is virtually caught in a vice with his hands completely tied. Was this the true intention? I entertain no doubt that it never could have been. Mr. Fitzpatrick relies strongly on the authority of Croxford v. Universal Ins. Co. Ltd. [1936] 1 All E.R. 151. It is an important case and should be examined closely. The case concerned the extent to be placed upon the interpretation of s. 10 of the *Road Traffic Act 1934 [U. K.]*. By the previous 1930 Act., insurance companies were liable to third parties even though they had no notice of an accident; by s. 10 of the 1934 Act, a further immunity was taken from them: they could no longer avoid liability by virtue of any right to avoid or cancel the policy unless the company had, in an action commenced before or within 3 months after the commencement of the “running down” proceedings, obtained a declaration to avoid or cancel the policy. Now in the Croxford case, the accident occurred on June 7, 1934; action was commenced on August 3rd, 1934; judgment for plaintiff entered on February 6, 1935. On January 1st, 1935, s. 10 of the 1934 Act came into force. It will be readily seen that under the 1934 Act for the insurance company to obtain a declaration under s. 10, they would have had to commence an action within 3 months after the commencement of the running down action i.e. on or before November 25th, 1934. It is obvious that the insurance company could not in November avail themselves of the machinery in s. 10 as it did not come into force until January 1, 1935. SLESSER, SCOTT L.JJ, and EVE J. unanimously held that s. 10 was not intended to apply to the Croxford claim and found for the insurance company.

SLESSER L. J. expressed his views thus ([1936] 1 All E. R. at p. 163):

“It follows therefore that... it was impossible at any time for this Insurance Company to avail themselves of the machinery for exempting themselves from s. 10, and if the plaintiffs here are right, it follows that the effect of this Act in these cases of judgment obtained after s. 10 came into operation, but of actions brought before, is that Insurance Companies are in this invidious position, that they are liable for all the burdens of s. 10 and have no right to take advantage of any of the exceptions or protections” (underscoring mine).

And at p. 164

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“... in other words, you cannot apply s. 10 as its burdens without equally giving to the person to be adversely affected the benefits of the section.”

The Croxford case is remarkably striking in its similarity to the matter at hand. The effect of s. 18 of the Act is clearly circumscribed in subsection (1) by the words “subject to the provisions of subsections (2) and (3)”. Whatever rights subsection (1) gave therefore can only be enforced if the provisions of subsections (2) and (3) do not prevent their being enforced. The rights acquired by the applicant herein was subject to subsection (3) which is intended to give a defence, and the only one at that, to the respondents to avoid liability.

In the matter at hand, publication was in January, 1972. Under the law as it then stood, a director was not burdened to exercise due diligence. In September, 1972, he is told to exercise all due diligence if he is to avoid liability. How could anyone in September, 1972, exercise diligence to prevent something that has already occurred? The proposition only has to be so stated to reveal its manifest and basic absurdity.

Then there is the further aspect of mitigation; that word has a juridical import in the law of defamation. Section 18 deals with defamation in the form of libels. To mitigate in the law of defamation is to manifest such contrite conduct e.g. apology as would tend to lessen or reduce damages. The apology, to have meaning and realism, must be sufficiently proximate to the date of publication; but that cannot truly be said to have been possible in the circumstances herein. Sir Lionel says the respondents must mitigate now to escape liability. I do not agree. The damages have already been fixed; it was by GEORGE J., on October 5th, 1973. How could one mitigate in the law defamation when the damages have already been ascertained and fixed by the Court? And of course the words ‘or otherwise’ after ‘apology’ are significant. They appear to me to allow for proper amends to be made, and that can only be achieved prior to a final assessment of damages by a competent Court.

Implicit in subsection (3) therefore is a clear defence available to directors or officers of companies; it is the only manner by which they are afforded protection from subsection (1), and as subsection (3) gives to them this defence, the efficacy of which is directly referable to the date of the publication of the libel, then, on any view of the matter, it would be impossible for the respondents to avail themselves of the statutory defence. To say that they must do the best they can in the circumstances is to deny them the “safety-line” in subsection (3), their position may be likened to one caught within a chasm, who, as he clutches the safety line suddenly finds himself plummeting through the void of the insubstantial, for alas! the other end of the line had been left unsecured. Parliament could never

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have intended the respondents to be placed in this dilemma.

It follows by necessary implication that Parliament must have intended the section to apply only to libels published after September 23rd, 1972, and not before.

Learned counsel for the applicant relied upon a number of authorities to support his contention that the section ought to be construed retrospectively, or at least as appertaining to a mere matter of procedure. It would serve little purpose to travel through them all. I am content to say that they are all distinguishable from the matter at hand because of the necessary implication of language used in the statutes – considered in those authorities. It is of moment to note that *EVERSHED. M.R. in Hutchinson v. Jauncey* [1950] 1 W.N. 32 accepted that the general principle of substantive right did not strictly apply to the *Rent Restriction Acts*. Nor does *Williams v. Williams* [1971] 2 All E. R. 764 assist the applicant as retrospectivity was only accorded in that case because it was necessary’ so to do in order to give efficacy to the Act. I see no such necessity in the matter at hand. On the contrary, the pendulum swings to the other side and the necessity appears to be against retrospectivity so as to give efficacy to s. 18 (3).

There is one other aspect. Sir Lionel contends that, the words “who was a director... at the time of publication” in subsection (1) shows a clear intention of retrospectivity by the use of the past tense of the verb ‘was’. But the use of the verb ‘was’, in my view, is not intended to refer to a past time which preceded the Act but to a time which is made past by anticipation – i.e. a time which will have become a past time only when the event occurs on which the Act is to operate, and I entertain no doubt that in this anticipatory sense it was merely intended to identify the directors to be affected.

I am accordingly of the firm and steadfast view that the section, silent as it is with respect to actions then in pendency, must on the established rule of construction relating to substantive rights be construed as prospective only and confined to libels published after its enactment; a view sustained and fortified by necessary implication arising from the wording of subsection (3) the effect of which in my view leaves no doubt upon the conclusions I have reached.

To construe the section as appertaining to libels published prior to September, 1972, would be in my opinion to whittle down and smother the efficacy of the only defence afforded by the section; to do so would be against all the canons of construction and contrary to a true sense of justice. For indeed, where the law gives to one a sword against him who holds but only a shield, I take the latter to mean without his hands tied. To hold otherwise would be to make a mockery’ of the law.

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The application is accordingly refused. Costs to each respondent to be taxed certified fit for Counsel. Leave to appeal granted.

**Application refused.
Leave to appeal granted.**

Solicitors:

D.P. Bernard for Applicant.

Dabi Dial for Nos. 3 & 7 Respondents.

M.A.A. McDoom for Nos. 2, 4, 5 & 10 Respondents.

H.B. Fraser for Nos. 6, 8 & 9 Respondents.

OSWALD GOBIN
BONIFACE GRIFFITH

Appellants

v.

THE STATE

Respondent

[Court of Appeal (Haynes, C., Bollers C.J., Crane, R.H. Luckhoo and Jhappan. J.J.A.) February 27, March 2, 3, 10, 11, 12, 22, 23, 24, 25, 29, 30, 31, 1976].

Criminal Law – Evidence – Confession statements – Allegation that confession not made by accused but prepared by someone else – Allegations of threats of violence and actual violence as inducement to confess – Whether statements voluntary – Admissibility – No ruling by trial judge nor trial within a trial held – Whether statements properly left for jury’s consideration.

Stare Decisis – Judicial review – Principle underlying – Whether there is jurisdiction in Guyana Court of Appeal to overrule its previous decisions – Whether there should be unanimity in overruling – Jurisdiction to do so a continuing one – Practice direction of House of Lords of July 26, 1966.

These two appeals containing as they do related questions of law on the admissibility of confession statements were by consent consolidated and heard together. In Oswald Gobin’s appeal, the accused and his uncle Harry Samsair, were drink-

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ing bush rum together when there arose an altercation between them over the lighting of a lamp, whereupon the accused threw kerosene oil on Samsair and set him alight. Samsair died as a consequence of the burns received and the accused was charged with murder. He made a statement confessing his misdeed and at his trial, objected to its admissibility on the ground that it was not made by him nor on his instructions. He alleged that the signature was elicited from him by threats of violence, and by actual violence he was forced to sign and write on the statement. The trial judge admitted the statement without holding a *voir dire* telling the jury that as the accused was saying it was not his own statement, its admissibility was a matter of fact for them to decide.

In Boniface Griffith's appeal, the accused objected to the admissibility of a confession statement to the effect that he had stolen two typewriters on the ground that force and violence were used in order to obtain it from him. He alleged he had been pushed about, cuffed in the abdomen and as a result was induced to sign the confession. At the *voir dire*, it turned out that he was complaining that the statement had been prepared beforehand by the investigating officer and he was ill-treated in the manner described to sign it. Whereupon the trial judge halted the trial within a trial and ruled that as the accused was not saying he was beaten to sign a statement of which he was the author but a statement concerning which another person in fact was the author, it became a question of fact for the jury whether or not the statement was that of the accused. He thereupon refrained from ruling on voluntariness, although he admitted the statement and caused it to be read to the jury.

HELD: (1) (*per* HAYNES, C., JHAPPAN, J.A. concurring): In each case (abovementioned), the trial judge erred in ruling that the objection did not raise the issue of voluntariness; and in not ruling on all the evidence upon the *voir dire*, including the defence evidence of inducement, whether the statement was voluntary or not.

- (2) In each case reliance was misguidedly placed on Williams v. Ramdeo and Ramdeo and Herrera and Dookeran v. R. which laid down law contrary to well-established common law rules.
- (3) In each case the majority opinion in Harper v. The State was erroneously distinguished or disregarded.
- (4) In each case the objection raised challenged the voluntariness of the written statement and a ruling after a trial within a trial was essential upon all the evidence including the evidence of the accused (if any) of any compulsion exercised by any police officer to induce him to sign it.
- (5) In each case, the omission to rule was a fatal irregularity.

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- (6) In each case, as a result, the confession was received in evidence although not duly shown to be voluntary. In Gobin's case it was legally impermissible to leave it to the jury to determine whether or not it was voluntary.
- (7) The court deprived itself of the opportunity to learn facts relevant to determining whether or not to exclude the evidence on discretion, even if voluntary.
- (8) (*per* CRANE AND LUCKHOO. JJ.A): In Gobin's case the trial judge was wrong in ruling that the admissibility of a confession statement was a matter of fact for the jury to decide, because admissibility of evidence is always a question of law for the trial judge and not for the jury to decide on.
- (9) In most cases, if not in all cases, a trial within a trial should be held to decide and rule on the admissibility, i.e., the voluntariness of confession statements.
- (10) It is not the law that the accused must raise by way of challenge objection to voluntariness by alleging there was an inducement to him to confess, so as to entitle him to a *voir dire* and ruling thereon, because no matter what the ground of challenge, the accused is entitled to a ruling on voluntariness *vel non*. Voluntariness of a confession statement automatically arises whenever admissibility is in issue.
- (11) The judgment of Harper v. The State, on the one hand, conflicts with those of The State v. Fowler and The State v. Dhannie Ramsingh, on the other. The *ratio* in both the latter cases is harmful to the spirit of a fair trial and repugnant to the proper administration of justice, and must be overruled.
- (12) (*per* HAYNES, C., CRANE, R. H. LUCKHOO and JHAPPAN, JJ.A): The principle underlying *stare decisis* in the Guyana Court of Appeal is not the same for criminal as for civil cases. In criminal cases it is less rigid. Jurisdiction of the court to overrule previously decided cases is a continuing one. Our court will exercise judicial review whenever there is to be determined "some broad issue of justice, public policy or question of legal principle"; and in a criminal cause or matter which is plainly wrong and manifestly unjust will overrule it without hesitation.
- (13) (*per* BOLLERS, C.J., dissenting): The decisions of the majority in Dhannie

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Ramsingh and Fowler were correctly made and ought not to be disturbed. The doctrine of *stare decisis* must prevail. Alternatively, even if those decisions are wrong, it is better that the law is certain rather than perfect.

- (14) The trial judge's direction in Gobin's case was clearly wrong as admissibility of evidence is never a question for the jury, but always for the judge. The trial judge erred when he took no preliminary evidence on voluntariness in the presence of the jury and gave no ruling on the matter.
- (15) The trial judge's procedure was wrong in bringing the *voir dire* prematurely to an end in Boniface Griffith's case for the objection was based on the ground that force and violence were used to obtain the confession. All evidence should have been heard on the issue and then a ruling made on the voluntariness of the statement.

Practice direction in Seepersaud v. Port Mourant Ltd. (1972) 19 W.I.R. 237 applied.

The State v. Fowler and The State v. Dhannie Ramsingh overruled.

Williams v. Ramdeo and Ramdeo and Herrera and Dookeran v. R. not followed.

Appeals allowed. Decisions of the High Court set aside.

Editorial note: Notwithstanding the recent majority decisions of the Court of Appeal in The State v. Fowler and in The State v. Dhannie Ramsingh which laid down the law for Guyana on the admissibility of confession statements, the law appeared to be far from settled. A plethora of confession statements followed in the wake of the decision in Dhannie Ramsingh's case, and trial judges frequently appeared to find difficulty in its application. These two consolidated appeals are evidence of such difficulties, and that is why it was considered fitting to reconvene a full bench of five for a second time in three years to endeavour to settle the matter of the admissibility of confession statements finally. The recent decision of the House of Lords in D.P.P. v. Pin Lin was most timely and was of tremendous assistance to the Court of Appeal in its task by showing the sole issue on a *voir dire* is voluntariness *vel non*.

See report of this case in (1976) 23 W.I.R. 256

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- (2) John Lilburn (1637) 3 St. Tr. 1315.

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- (3) Attorney-General v. Samuel Mico (1658) 145 E.R. 419.
- (4) John Entick v. Nathan Carrington and Others (1765) 19 St. Tr. 1030.
- (5) R. v. Rudd (1775) 168 E.R. 160; 1 Cowp. 331; 1 Leach 115, 14 Digest (Repl.) 533, 5173.
- (6) R. v. Jacob Thompson (1783) 168 E.R. 248.
- (7) R. v. Warickshall (1783) 168 E.R. 234; 1 Leach 263; 14 Digest (Repl.) 468, 4518.
- (8) R. v. Warringham (1851) 169 E.R. 575; 2 Den. 447, n.
- (9) R. v. Baldry (1852) 169 E.R. 568; 2 Den. 430; 21 L.J.M.C. 130; 19 L.T.O.S. 146; 16 J.P. 276; 16 Jur. 599; 5 Cox C.C. 523. C.C.R.
- (10) R. v. Benjamin Scott (1856) 169 E.R. 909; 1 Dears and B. 47.
- (11) R. v. Thompson [1893] 2 Q.B. 12; [1891-94] All E.R. Rep 376; 17 Cox C.C. 641; 62 L.J.M. C. 93; 69 L.T. 22; 57 J.P. 312, 14 Digest (Repl.) 468, 4521.
- (12) Attorney General of New South Wales v. Patrick Martin (1902) 9 Crim. L.R. 713.
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- (15) Cornelius v. R. (1936) 55 C.L.R. 235.
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- (18) Commissioners of Customs and Excise v. Harz and Another [1967] A.C. 760; [1967] 2 W.L.R. 297; [1967] 1 All E.R. 177; 131 J.P. 146; 111 Sol. Jo. 1551 Cr. App. R. 123; 83 L.Q.R. 162.
- (19) R. v. Alberto Isequilla [1975] 1 W.L.R. 716; [1975] 1 All E.R. 77; 60 Cr. App. R. 52. C.A.
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- (21) R. v. M. [1961] Crim. L.R. 824. C.C.A.
- (22) R. v. McLintock [1962] Crim. L.R. 371, C.C.A.
- (23) R. v. Cave [1963] Crim. L.R. 371, C.C.A.
- (24) R. v. Wilson and Marshall – Graham [1967] 2 Q.B. 406; [1967] 2 W.L.R. 1094; [1967] 1 All E.R. 797; 51 Cr. App. R. 194; 131 J.P. 267 111 Sol. Jo. 92
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- 11 M. & W. 483; 63 R.R. 664; 22 Digest (rep.) 29, 90.
- (30) Basto v. R. (1954) 91 C.L.R. 628.
- (31) Chan Wei Keung v. R. [1967] 2 A.C. 160; [1967] 2 W.L.R. 552; [1967] 1 All E.R. 948. Sol. Jo. 73; 51 Cr. App. R. 257.
- (32) R. v. Lee (1952) 104 Can. Crim. Cas. 400 (cited in CROSS, 4th edn., at p. 65, Footnote).
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- (35) Leslie Charles Richards (1967) 51 Cr. App R. 266.
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R. H. McKay, S.C., with B. Prasad, S.C., and Stanley A. Moore for Oswald Gobin.

R. H. McKay, S.C., with Robert Hanoman and Stanley A. Moore for Allen Peter Boniface Griffith.

G.H.R. Jackman, Assistant Director of Public Prosecutions, with M.L.R. Ganpasingh, Senior State Counsel (ag.), for the State.

HAYNES, C.: In the earliest days of judicial trials in criminal cases in the history of the criminal law of England, a ‘confession’ was a plea of guilt. As such, it was considered, at common law, the best and surest evidence and proof to quiet the judicial conscience and secure a good and firm conviction. In those days, there was no disciplined modern police force to investigate a crime and procure *prima facie* evidence of guilt, so the routine procedure once a suspect was held, was to seek to obtain a confession. The rack was occasionally employed to induce it, until the reign of Charles I; and it is reported that even the great LORD EDWARD COKE was prepared to wink at, if not justify, its use, and that the celebrated LORD BACON once did not hesitate, as Attorney-General, to superintend in person, the torture of an aged clergyman to make him confess to a crime. Gradually, however, this practice was discontinued, and the *modus operandi* changed to threats and other pressures, and to artful, overbearing, hostile, and intimidatory inquisitorial or compulsory examination of the prisoner, notably in the Court of Star Chamber. Down to the time of the Civil Wars, the interrogation of the prisoner on his arraignment was the most important part of the trial, and, more often than not, terminated in damaging admission or confession. Then, the only question for the trial judge to determine, was the relevancy of the admissions or confessions; if relevant, they would go to the jury without any consideration whatever as to whether or not the obtaining of them was improper or unfair. This procedural questioning of the prisoner to break him down to implicate himself

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continued under the Stuarts, on to the time of the “Glorious Revolution” of 1688.

By then, the tide had begun to turn. In the opinion of some judges this method of judicial proof was intellectually unfair and unprobative. And in a case reported as Case 998, Anonymous (1734) 88 E.R. 1548, CHIEF JUSTICE HOLT felt moved to say: “The confession of the party is evidence, but the worse sort of evidence.” A popular feeling of revulsion against the inquisitorial methods and barbarous sentences of the Court of Star Chamber was gradually aroused. It came to a head in the case of John Lilburn, (1637) 3 St. Tr. 1315, which brought about its abolition and the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. This was the genesis of the acceptance into the body of the common law, of the maxim *nemo tentur se ipsum acusare*. “No man shall be compelled to incriminate himself” – and this maxim in turn was invoked by the judiciary to initiate a powerful safeguard against improper extra-judicial self-incrimination. Originally, in trials for treason, counsel had been promulgating this maxim merely as a law of nature. In support of this we find in the case of The Attorney General v. Samuel Mico (1658) 145 E.R. 419, at p. 420 SERJEANT HARDRES submitting, *pro defendente* that: “Upon this ground, though the parties own confession of a crime be the clearest proof in the law, yet if such confession proceed from dread, or be extorted by any compulsion, it ought not to be received against him; ...” But much later around the middle of the eighteenth century, this law of nature became classified as a law of the land. So it was that in John Entick v. Nathan Carrington and Others (1765) 19 St Tr. 1030 at p. 1073 LORD CHIEF JUSTICE CAMDEN, in the judgment of the Court, was able to say that: “It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty would be both cruel and unjust... the innocent would be confounded with the guilty.”

I am relating in some detail, to the history of the development of the law on confessions for this reason: that law is better understood and its right application to these appeals facilitated, if we know its judicial forbears. And as the social and legal condition then extant have left their mark on the case law, they too must be considered. They are these: (i) social cleavages and the feudal survivals of the period resulted in offenders on charges of felony coming chiefly from the so-called “lower classes,” the majority of whom were poor, illiterate, pathetically ignorant, and characterised by what has been described as a “subordination, half-respectful, half-stupid, towards these in authority over them”; (ii) there was no right to testify on their own behalf or to be defended by counsel or to appeal against conviction; (iii) they had no means of knowing before the trial what the evidence against them was; or of procuring witnesses and evidence to support their cause; or facilities to see such witnesses who, even if available, could not testify on oath; (iv) the Crown could and often did, brief eminent jurors or leaders

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at the Bar to battle against the prisoner unaided; (v) the sentence for the commonest felonies (of murder, rape, robbery, larceny) was death or transportation; and (vi) even after legal assistance by counsel was allowed in cases of felony, it was at first limited aid; and it was not until the year 1836 that a full representation by counsel was allowed in all such cases. In these circumstances the odds in favour of a conviction must have been 99: 1, and that a prisoner may gamble upon a promise or half-promise of forbearance or favour, or relief of any kind, was not an unreasonable choice; and a suggested admission or confession acquiesced in under a threat, or hope of some favour, could appear in many cases to hold out even a faint ray of hope as a solvent of apparently insurmountable legal difficulties. In those days, undoubtedly, prisoners really needed the protection of the Courts. And for the next century – 1750-1852 – the judges bent over backwards to give it.

Thus, in R. v. Rudd (1775) 168 E.R. 160 at p. 161 LORD MANSFIELD, C.J. was able to truly say: “The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial.” And we read in R. v. Jacob Thompson (1783) 168 E.R. 248 at p. 249, that a judge at the Old Bailey told counsel: “It is almost impossible to be too careful upon this subject... I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject; ...” We see in this pronouncement, the germ of the modern principle. Then in R. v. Warickshall (1783) 168 E.R. 234-235, BARON EYRE again at the Old Bailey, used words regarded by some as stating the true and lawful basis of exclusion. His Lordship said:

“Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.”

But it was not sufficient to lay down a rule of exclusion, without adequate emphasis on the onus of proof; and this was clarified in R. v. Warringham (1851) 169 E.R. 575., at p. 576, on a trial for larceny, when an objection was taken to the admissibility of an oral confession. This conversation ensued:

PARKE B. – “It certainly does not appear that the confession was not made in consequence of an improper inducement...”

W. M. Best for the prosecution – “It does appear that the confession was

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made in consequence of such an inducement. If the evidence leaves that fact doubtful, the onus does not lie on the prosecution to prove the negative.”

PARKE B. – “Yes, it does. You are bound to satisfy me that the confession, which you seek to use in evidence against the prisoner, was not obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not.”

The confession was rejected, and PARKE B. noted: “I reject the evidence of admission, not being satisfied that it was voluntary.” I digress at this point to say that, in my view, it is the duty of the trial judge to do likewise; he should record that he has admitted the evidence because he is satisfied it is voluntary; or that he has rejected it, because he is not so satisfied.

R. v. Warringham was an important judgment. BARON PARKE’s ruling that the prosecution had to prove a negative, was eventually accepted in all common law jurisdictions, and has left marks on the case law on this subject. It demonstrably brought into clear focus these points: (i) that the prisoner did not have to prove any inducement at all, and might base his objection entirely on the evidence led by the prosecution in open court; (ii) that the proof had to be directed to “the confession you seek to use in evidence,” that is to say, if oral, to the words the prosecution alleges were spoken voluntarily; if a signed confession, to the document itself; and (iii) the Court made no effort to find out whether the prisoner was admitting or denying that he used the words alleged. I expect to demonstrate later the bearing of these points on the legal issues in these appeals.

By this time the modern law was either well established or nearly so. The wheel had turned a full circle, and its judicial application in the frequent rejection at trials of admissions and confessions, stimulated this rueful criticism from BARON PARKE himself in R. v. William Baldry (1852) 169 E.R 568 at p. 574, when he considered what objections had prevailed to prevent the reception of confessions in evidence, he agreed that: “... the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy.” By that time, however, some of the rigours of the penal laws had been eased by a series of statutes, full legal representation was available, and the Court of Crown Cases Reserved had been established in 1848 with ample jurisdiction to adjudicate on questions of law relating to the admissibility of evidence. Thereafter, although the law changed or developed but a little – if at all – judges could safely abandon the habit (acquired out of a sense of mercy) of seizing upon the slightest pretext to exclude a confession and so save a possible innocent prisoner from an unjust conviction or harsh punishment.

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Undoubtedly, by the end of the nineteenth century, the modern law was fully laid down, long before LORD SUMNER's classic formulation; for in R. v. Benjamin Scott (1856) 169 E.R. 909, at p. 914, the Court of Crown Cases Reserved (LORD CAMPBELL, C.J. ALDERSON B., WILLES. J., LORD COLERIDGE, C.J. and BRAMWELL, B.) through the Lord Chief Justice stated that:

“It is trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon.”

And in R. v. Thompson (1893) 17 Cox C.C. 641. the same tribunal (LORD COLERIDGE, C.J., HAWKINS, CAVE, DAY and WILLS, JJ.) adopted and applied BARON PARKE's ruling in R. v. Warringham (*supra*): CAVE, J., who read the judgment of the Court, said at p. 645:

“As Mr. Taylor says in his Law of Evidence Part 2, Chap. 15, sect. 872: ‘Before any confession can be received in evidence in a criminal case, it must be shown to have been voluntarily made, for, to adopt the somewhat inflated language of EYRE, C.B, “a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it”, and therefore it is rejected. The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen, addressed to the judge, who will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubts subsisting on this head, will reject the confession.’ The case cited for this position is R. v. Warringham (1851) 169 E.R. 575...”

Putting these two statements of the law together we have, in effect, the modern law so formulated twenty-one years later by LORD SUMNER.

I must, at this stage, remark on the procedural significance of the observation by CAVE, J. in R. v. Thompson (*supra*) that the evidence on the point of voluntariness, when led by the prosecution, “being in its nature preliminary is...addressed to the judge” (not to the jury). I would read these words to relate, on indictment, not only to evidence given on the *voir dire* but also any relevant evidence on the point, testified to in open court, before the stage is reached to tender the evidence

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for reception. I take the law to be that R. v. Thompson would require the judge to decide then, if needs be, on such evidence in the latter instance, whether he accepts it for the purpose of admissibility. It must be open to him to hold for good reason that he does not accept it, and reject the confession. Later, I shall endeavour to apply this proposition to certain questions arising on these appeals.

How this common law rule worked in the day to day practice of the Courts then might well have been explained rightly by O' CONNOR, J. in the High Court of Australia at p. 731 in The Attorney-General of New South Wales v. Patrick Martin (1909) 9 C.L.R. 713 at p. 731, His Honour said:

“It is well established that at common law the prosecution is bound to prove affirmatively that a confession is voluntary, and before it can be admitted there must always be evidence which *prima facie* shows that the confession was not induced by any of the means of inducement which the law prohibits. Generally speaking, where the circumstances afford in themselves no suggestion of any such inducement, and the confession has been made by the prisoner, apparently of his own free will, the onus is satisfied. But if there is any circumstance in the case which could be interpreted as pointing to an inducement, the Judge at the trial would properly insist upon the Crown clearing up the doubt before admitting the confession in evidence. There is no doubt whatever as to that being the principle which should decide a Judge in admitting a confession in a criminal trial. But difficulties often arise in the application of the principle to the facts of particular cases.”

I come now to the celebrated Ibrahim v. R. (1914) 24 Cox C.C. 174. The appellant, a private in the Indian Army, was convicted of the murder of a native officer. Shortly after a murder the commanding officer went to see him then in custody. He said: “Why have you done such a senseless act?” The appellant replied: “Some three or four days he has been abusing me, and without doubt I killed him.” At the trial evidence of this conversation was tendered. The appellant's objection rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. On the prosecution side was Major Baret's affirmative evidence that the prisoner was not subjected to any pressure of either fear or hope. There was no evidence to the contrary. The trial judge overruled the objection. The appeal to the Privy Council was disallowed. But in his advice LORD SUMNER said at p. 180:

“It has long been established as a positive rule of English Criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement,

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in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE. The burden of proof in the matter has been decided by high authority in recent times in R. v. Thompson (*supra*) ...”

LORD SUMNER’s formulation gave high recognition to the rule of common law long established by the older authorities cited earlier in this judgment.

Thereafter, from 1914 onwards, the common law courts mainly affirmed and applied this principle that proof of voluntariness was a condition precedent to the reception of an incriminatory admission or a confession. It was put sometimes in different ways, namely: that such evidence was inadmissible “without a proper foundation for it being laid.” – *per* CLARKE, J.A. in R. v. Read (1921) 62 D.L.R. 363 at p. 366; that “When a confession is tendered in evidence, its voluntary character must appear before it is admissible.” – *per* DIXON, EVATT and McTIERNAN, JJ., in Cornelius v. R. (1936) 55 C.L.R. 235 at p. 248; that it “... can only be admitted in evidence if it is ... a voluntary confession.” – *per* WILLIAMS, J. in McDermott v. R. (1948) 76 Crim. L.R. 501 at p. 516 and *per* PARKER, L.C.J. in Thomas Joseph Smith (1959) 43 Cr. App. R. 121 at p. 126; “... confessions have been held to be inadmissible unless they are free and voluntary.” – *per* LORD REID in Commissioner of Customs and Excise v. Harz and Another [1967] 2 W.L.R. 297 at p. 303; and finally, that “... evidence of certain confessions is not admissible as a matter of law.” – *per* LORD WIDGERY, C.J. in Alberto Isequilla (1975) 60 Cr. App. R. 52 at p. 54. And it is not irrelevant to remark now that in addition, during this post – Ibrahim period, in a number of judgments, the English judges laid down also the standard of proof of satisfaction for the judge, as proof beyond reasonable doubt: See R. v. Sartori, Gavin and Phillips [1961] Crim. L.R. 397, *per* EDMUND DAVIES, J. (at first instance); R. v. M. [1961] Crim. L.R. 824 C.C.A.; R. v. McLintock. [1962] Crim. L.R. 549 C.C.A.; R. v. Cave. [1963] Crim. L.R. 371 C.C.A.; Wilson and Marshall-Graham (1967) 51 Cr. App. R. 194; and Director of Public Prosecutions v. Ping Lin. [1975] 3 W.L.R. 419 at p. 437, *per* LORD HAILSHAM.

I have traced the historical development of the law of confessions in particular relation to those aspects of it relevant to the questions raised in these two appeals. What I have considered up to this stage is what I shall call the substantive law or rule relating to confessions. Generally, any admission made by a party to a legal proceeding was and is *prima facie* legally admissible to be put before the jury directly. But this common law rule was an anomaly. If the evidence was admissible only if proved voluntary, then a procedure had to be adopted for such proof. Hence, the *voir dire* was invoked. This was a preliminary examination of a witness by a judge. The witness was required to take an oath to answer truly any

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questions put to him. This oath was a different one from that taken by the witness in giving evidence before the common jury and it was known as the “*voir dire*.” Apparently it was originally used to determine whether a witness was competent to testify or not; for in the earliest times before the rules of evidence were clearly determined, the objection taken to admissibility were usually as to competence; and as the prisoner could not testify on oath, it was an examination of Crown witnesses only.

The procedure, when used to determine whether a confession was voluntary, came to be known as “a trial within a trial.” But in its origin, only witnesses for the Crown were examined and even after an accused person was allowed to testify on oath from 1898, apparently there was doubt as to whether he should be allowed to testify on the *voir dire* until in William Charles Cowell (1940) 27 Cr. App. R. 191. HUMPHREYS, J. ruled that he was entitled to do so, and this was recognised in the Privy Council in Sparks v. R. [1964] 2 W.L.R. 655. In this way, although the taking of evidence upon *voir dire* in confession cases was historically an examination of witnesses for the Crown only on the issue of voluntariness, a right developed to the accused after 1898, to testify and put in other evidence if he wished to do so. And, as in most, if not in all cases, it was impossible to take the evidence upon the *voir dire* without prejudice to the accused, it became – and still is – the practice to do so in the absence of the jury. Of course, there may be cases where the judge could properly decide the issue without holding a *voir dire*. For example, it must be open to counsel for the accused, when the prosecution is about to tender the evidence of an oral or written confession, to object to its admissibility on the ground that, on the evidence led in open court up to then, the evidence sought to be tendered was either clearly involuntary [as in R. v. Warringham (*supra*)] or was not proved to be voluntary [as in Sinclair v. R. (1946) 73 C.L.R. 3 16]. If an objection is taken in this form, the judge might either decide the issue on what he has heard already, or proceed to hold a *voir dire* in the absence of the jury, to probe into the matter more fully. It may be that the existence of such cases is the support for the observation of LORD JUSTICE EDMUND DAVIES in R. v. William Middleton (1974) 59 Cr. App. R. 18, at p. 22. that, whenever the admissibility of a confession is challenged, “in most cases a trial within a trial should ensue.”; and of LORD MORRIS in Director of Public Prosecutions v. Ping Lin [1975] 3 W.L.R. 419 at p. 433, that: “If an objection is made to the admission of evidence as to a statement made by an accused it will be for the judge to decide as to its admissibility. He will generally, in the absence of the jury, have to hear the testimony of witnesses in regard to the impugned evidence and in regard to the relevant surrounding circumstances.” Their Lordships did not say “in all cases”; they said “in most cases” and “generally”.

During this very post – Ibrahim era for some years there was inexplicable judicial confusion in relation to the classification of functions and the manner in which

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the jury were required to consider a confessional statement, or guilty admission ruled admissible by a trial judge, after, a *voir dire*. Juries were and had to be directed to consider whether this evidence was voluntary or not; and that, if they felt it was not, or were not satisfied that it was, to disregard it. In effect, its admissibility had to be investigated afresh, this time by the jury. Strange enough, in an old jury trial in the civil case of Bartlett v. Smith (1843) 152 E.R. 895 at p. 896, the right road to the correct approach had been pointed out plainly by BARON ALDERSON in these words: “Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not.” (Underscoring mine.) And in 1909 even before Ibrahim, in Sinclair v. R. (*supra*) at p. 326, RICH, J. had this to say:

“If the admissibility of the evidence depends upon the existence of the fact and the judge is not satisfied by the evidence given on the *voir dire* that it exists, he rejects the evidence. If he is so satisfied he admits it. But it does not follow from this that the evidence given before him on the *voir dire* on the question of whether the evidence should be admitted may not, in a proper case, be given again in its entirety as evidence in the trial, not of course for the purpose of inviting the jury to give a ruling on admissibility of evidence, but for the purpose of assisting them to consider whether, in their opinion, the evidence qualifies the weight of the evidence which the judge has admitted.” (Underscoring mine.)

Whether these weighty pronouncements were inadvertently over-looked or misread or disposed of as mis-statements of law, I cannot presume to say. But it took another judgment of the High Court of Australia (Basto v. R. (1954) 91 C.L.R. 628) and one in the Privy Council (Chan Wei Keung v. R. [1967] 2 W.L.R. 552) to re-direct the law onto the right course; the jury are not to disregard a confession or guilty admission if, in their view, it was improperly induced; but they are entitled to consider this factor in deciding what weight to give it. In other words, for them, involuntariness does not disqualify the evidence, but it might qualify its weight, and it would be a mis-direction to tell the jury otherwise.

Again, it is true to say that during this same period the judges developed firmly the discretionary exclusion rule in relation to this sort of evidence, as distinct from its exclusion as a matter of right, if it was proved to be involuntary or not proved to be voluntary. Perhaps, it might be more historically accurate to say that LORD SUMNER’S judgment in Ibrahim v. R. (*supra*) either originated this rule or gave it its initial prominent recognition. Be that as it may, there are two decisions of high authority that I adopt and would follow, which make it plain that, if objection is taken to a confession or guilty admission, as induced or ob-

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tained by some police inducement or impropriety, the judge's duty is not necessarily completed when he rules – if he does so rule – that the evidence is voluntary; for, in fit cases, he would have an additional duty, that is, to consider then whether he ought to exclude it on discretion.

In McDermott v. R. (1948) 76 C.L.R. 501, McDermott sought leave to appeal against his conviction by a jury for murder. At his trial evidence was adduced by the Crown of certain confessional statements made by him in reply to questions asked by the police after his arrest but prior to his being charged. The evidence of what took place at this interview was objected to but admitted by the trial judge. HERRON, J., who held that the statements were voluntarily made. His Honour further said that that did not end his function, because he had a discretion for the exercise of which he must make well-defined inquiries. But he ruled against such exclusion. DIXON, J. agreed such a discretion existed. That very learned judge said at p. 511:

“... it is important to distinguish between the imperative rules of law requiring the rejection of confessional statements unless made voluntarily and the so-called discretion of the court to exclude evidence of such statements if the manner in which they were obtained is considered to have been improper.”

Then, after referring to counsel's concession that his case could not be brought within the operation of the imperative common law rule of exclusion, DIXON, J. went on to say at pp. 512-513:

“The view that a judge presiding at a criminal trial possesses a discretion to exclude evidence of confessional statements is of comparatively recent growth. To some extent the course of its development is traced by LORD SUMNER in Ibrahim's case. [1914] A.C., at pp. 611-614.

But whatever may be the cause, there has arisen almost in our own time a practice in England of excluding confessional statements made to officers of police if it is considered upon a review of all the circumstances that they have been obtained in an improper manner. The abuse of the power of arrest by using the detention of an accused person as an occasion for securing from him evidence by admission is treated as an impropriety justifying the exclusion of the evidence. So is insistence upon questions or an attempt to break down or qualify the effect of an accused person's statement so far as it may be exculpatory. The practice of excluding statements so obtained is supported by the Court of Criminal Appeal in England which will quash convictions where evidence has been received which in the opinion of that Court has been obtained im-

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properly, that is, in some such manner.”

Finally, His Honour concluded at p. 513:

“It may be regarded as an extension of the common law rule excluding voluntary statements. In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused. The growth of rules of practice and their hardening so that they look like rules of law is a process that is not unfamiliar.”

And very recently the Court of Appeal in England considered this rule in R. v. William Middleton (*supra*). In that case, the appellant was convicted of handling stolen goods. At his trial the defence objected to the admission of an alleged oral confession. The Recorder was told that the objection would be based on a threat by a police officer that unless he confessed, a Mrs. Bentley, an acquaintance of his would be kept in custody and her children would have to go into care. The Recorder thereupon stated that such a threat would not render the confession inadmissible, and without hearing any evidence he ruled the confession admissible. So there was no “trial within a trial”. The Court of Appeal held he was wrong to do this. EDMUND DAVIES, L.J., in the judgment of the Court, said at p. 21:

“The customary “trial within a trial” was never conducted. Nobody is to be blamed for that though on reflection I dare say everyone concerned may now consider it would have been prudent to follow that customary course.”

Then, after pronouncing at p. 22 that “The categories of inducement are not closed,” His Lordship continued.

“Whenever the admissibility of a confession is challenged, it is wise that the presiding judge should, if the phrase may be allowed, keep his options open and in most cases a trial within a trial should ensue. If that customary course is followed, the judge has the advantage (if the accused alleging inducement or threat gives evidence, as he usually does) of seeing and hearing and judging the sort of person who is making allegations of threats or inducements. He can then form an impression of considerable value which, whatever be his ruling on the strict question of admissibility, may well afford a useful guide when he comes to

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discharge the yet further duty resting upon the Court, even where there is no doubt that the alleged confession was voluntary and, therefore, admissible. That is by no means necessarily the end of the matter, for it is not every voluntary confession that should go before a jury. To quote from Professor Cross on Evidence (3rd ed. p. 446), ‘Even though a confession was voluntary ... the judge has a discretion to reject it if he considers that it was obtained in circumstances which would render its reception unfair to the accused.’ A little later he writes of a confession being ‘liable to rejection at discretion because it was obtained in some other circumstances which would render its reception unfair to the accused.’” (Underscoring mine.)

Then His Lordship concluded:

“In the present case, having regard to the course that the trial took at its earliest stage, the learned judge ... wrongly ruled that... the confessions of both men were admissible. Furthermore, having so ruled without any evidence being called, he deprived himself of the opportunity of gathering material relevant to the exercise of his discretion even were his ruling correct.” (Underscoring mine.)

Finally, in my historical survey of this body of common law rules, I refer now to the judicial insistence on a ruling by the trial judge, when objection is taken to the voluntariness of a confession. If a *voir dire* is not held he must, where he can, rule on the evidence then before him, if one is held, he must rule on the evidence taken in the “trial within a trial”, including that of the accused, if any, whether or not he is satisfied that the confession was free and voluntary. In passing, I would record *de bene esse*, that with the fullest respect, I disagree with the opinion that the standard of proof demanded of the prosecution on the *voir dire* is proof on a balance of probability, as held in Canada in R. v. Lee (1952) 104 Can. Crim. Cas. 400 (cited in ‘Cross’, 4th Ed., at p. 65, footnote), and in the High Court of Australia in Wendo & Others v. R. (1964) 109 C.L.R. 559. The report in R. v. Lee is not available but I have read Wendo and Others v. R. I regret, timorously and humbly, having regard to the judicial eminence of DIXON, C.J., who presided, that I find the reasoning bare and unconvincing. To my mind the English view of proof beyond reasonable doubt is, as at present advised, the right one. In most cases, to admit a confession is conclusively to prove guilt and a step capable of resulting directly in a conviction should be taken only if the judge is sure it is justified. I return to the obligation to rule. In Francis and Murphy (1959) 43 Cr. App. R. 174, the Recorder, despite an objection, left all the evidence of promises of bail and of other inducements to the jury, without any ruling at all. The appeal against conviction was allowed. It was held that the prisoner had been wrongfully deprived of a ruling to which he was entitled. The Lord Chief Justice at p. 177 said:

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“... no departure should be made from what has always been the settled practice in these matters.”; in Leslie Charles Richards (1967) 51 Cr. App. R. 266, the judge held “the trial within a trial”, but at the end of it ruled that he would leave it to the jury to decide whether or not the appellant was induced to make the statement. His conviction was set aside also, LORD JUSTICE WINN saying that “the ‘trial within a trial’ which took place here was not satisfactorily conducted”: and in Kevin Neil Moore (1972) 56 Cr. App. R. 373, PAUL, J. properly began the ‘trial within a trial’, but it terminated abruptly and prematurely, when he indicated that the case the defence was setting up could not make the prisoner’s statement inadmissible, as a result of which, counsel for the defence did not pursue the matter any further. LORD JUSTICE MEGAW, in the judgment upsetting the jury’s verdict of guilty, said at p. 376: “It was the duty of the judge, the issue having been raised to give a ruling on it...” And a ruling involves on the part of the trial judge a conscious weighing-up and assessment of the relevant evidence, of the credibility of the witnesses who gave it, and a decision on the facts one way or the other. The traditional cases do not authorise any omission to do this for any reason whatever, when such objection is taken.

I have reached the end of my historical survey of those common law rules which related to the reception of evidence of confessions or guilty admissions, bearing on the legal questions raised. They are common law principles of some antiquity, but this Court is bound by them. Way back in 1852 in R. v. Baldry, after about one hundred years of development of the principles of exclusion, the majority’ of the judges in that case wondered whether it might not have been better to lay down a practice to leave it all to the jury to decide with proper directions. And in R. v. Harz [1966] 3 A11 E.R. 433 at p. 456, in the Court of Criminal Appeal, CANTLEY, J. suggested a more practical and sophisticated approach when he said, “... the interests of justice would be adequately served if the principle were simply to be that no admission should be receivable in evidence if it appeared from examination of the circumstances in which it was made that there was any realistic danger that it might be untrue.” But I am forced to concur with the observations of LORD MORRIS in Ping Lin [1975] 3 W.L.R. 419 at p. 439, that although the rule bears “all the marks of its origin at a time when the savage code of the eighteenth century was in full force”, and “the judiciary were therefore compelled to devise artificial rules designed to protect him” (the accused) “against dangers now avoided by other and more rational means”, nevertheless, “the rule has survived into the twentieth century, not only unmodified, but developed”, and “is far too firmly established to be modified except by the Legislature.” And these are the basic principles to be borne in mind and applied in the determination of these appeals.

The appellant, Oswald Gobin, was indicted for the murder of Harry Samsair. He was convicted for manslaughter and sentenced to four years’ imprisonment. At

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his trial, the case for the prosecution rested entirely on a written confession signed by the appellant on the said 8th May, 1974. It was taken by Detective Constable 7956 Keith Scipio. In the witness-box, Scipio swore that on that day around 3 p.m. he cautioned the appellant (in police custody since the night before), who expressed a wish to make a statement. He (Scipio) then wrote one at the appellant's dictation. No one had held out any threats, promises or inducements to him. It was read over to the appellant. He read it himself and signed his name to it. At this stage, his counsel, in the presence of the jury, objected to its admissibility on the ground that "The statement about to be tendered was not made by the accused or on the instructions of the accused. But due to threats of violence and actual violence he was forced to sign and write on that statement." Thereupon the trial judge said to the jury: "Members of the jury, the admissibility of this statement is a matter of fact for you, as the accused is saying that it is not his statement." Without more, he admitted the document in evidence.

In his summing-up on it, the trial judge said:

"When an accused person gives a statement to the police – one, or two, or many – those statements are put in evidence if those statements were given voluntarily by the accused person. Two things, it must be made by the accused person in the first place, and secondly it must be made voluntarily because you might have an accused person making a statement but it wasn't made voluntarily, you can't accept that, but in this case the accused person is saying that statement is not his statement, and he is further saying that he was forced to sign his name to that statement because of assaults done to him by Constable Scipio.

It is your duty, members of the jury, to consider whether or not the accused person made that statement, that is the first thing. If you find he didn't make the statement that is the end of the case. If you find he made the statement you must go further and find out if he made the statement voluntarily. If you find both, that he did make it and he did make it voluntarily then you have to do the third thing. Now, look at the statement and see if you can rely on the facts in the statement."

In effect, he left to the jury the questions of both the admissibility and the weight of the statement. It was submitted for the appellant, that the learned trial judge erred in two ways: One, was in omitting to hold a "trial within a trial", and the other, in leaving it to the jury to determine whether the statement was voluntary, and so evidence in the case. He urged that the conviction could not stand unless, apart from any question of the proviso, this Court felt bound by its earlier judgments to hold otherwise. Counsel for the State submitted that this Court was so bound. In taking the course not to hold a "trial within a trial", the learned trial

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judge, it was submitted by the State, rightly followed the decisions of this Court – The State v. Terrence Fowler (1970) 16 W.I.R. 452 (a majority judgment of a Court of three) and Dhannie Ramsingh [1973] G.L.R. 25 (a 3:2 judgment of a Court of five). In Fowler, (*supra*) a case of robbery, the defence objected to a statement as involuntary, and a *voir dire* opened. The prosecution led affirmative proof of the making of the statement freely and voluntarily. In cross-examination, it was put that the contents of it was composed mainly by a police corporal. Pile, and that a promise of favour was held out to him, as a result of which the appellant signed the statement. In examination-in-chief, he swore he signed it after he was told that if he did so, he would be free of the pending charge. However, under cross examination he said *inter alia*:

“When I signed the statement I did not know what I was signing to. Some of the things in that statement are the things I told Pile but not in the words Pile has written down, viz., about having a fight with a man who held me I did not make the statement marked ‘A’ to Corporal Pile. I am sure I did not make that statement.”

The trial judge terminated the *voir dire* there and then. He noted that the appellant was “not admitting that the statement marked ‘A8’ was made by him.” He ruled that “the issue is one for the jury”, and he admitted the statement in evidence. On appeal, the majority (LUCKHOO, C., and BOLLERS, C.J.) thought that the appellant, under cross-examination, had eventually recanted from his original assertion of signing the statement under an inducement, was relying only on his evidence that he did not make the statement, whereby he had withdrawn the allegation of voluntariness. In those circumstances, they held that the trial judge was not called upon to adjudicate on the evidence taken upon the *voir dire* in the absence of the jury on the admissibility of the statement, and had committed no irregularity. They dismissed the appeal. CUMMINGS, J. A. took a different view of the appellant’s evidence. He thought it remained to the end a case of signing the statement sought to be tendered under a promise of favour, so that the trial judge ought to have ruled upon the *voir dire* whether, on all the evidence including that of the accused, the prosecution had satisfied the onus on them. He would have allowed the appeal.

In Dhannie Ramsingh v. The State, (*supra*) a case of murder, objection was raised on the ground of threats and promises. The accused, in examination-in-chief upon the *voir dire* said he made the statement because of a threat that if he did not do so, his wife (who had also been detained) would not have been released and allowed to go home to attend to their baby. Under cross-examination he swore that parts of the statement referring to robbery and murder were not dictated by him, but he was forced to sign. He was asked to indicate in it what he had said and what he had not said, but the trial judge disallowed this. After further cross-

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examination, he said: “The statement is not mine and what is contained in it is not mine.” In re-examination he testified that the policeman had questioned him and got answers but while he was writing nothing was being said to him. At the close of the defence, the trial judge ruled and noted that the accused was saying it was not his statement; this, he said, was a question of fact for the jury and not for him to determine as a matter of law. Dhannie Ramsingh’s appeal was dismissed. The majority (LUCKHOO, C., BOLLERS, C.J.) held that the trial judge was right to deal with the matter in this way, LUCKHOO, C., concluded (as he did in Fowler), that the accused had abandoned his allegation that he had made a statement but had been induced to do so, and instead put forward that he had not made one, so that (as in Fowler) there was no cause for complaint. BOLLERS, C.J., held that the stand taken by the accused at the end of the day was that despite the inducements held out, he had said nothing and had not made a statement. PERSAUD, J.A., appeared to reason as the Chancellor did. CUMMINGS and CRANE, JJ. A., dissented. But it is not relevant at this stage to discuss their opinions.

I would read the majority judgments in Fowler (*supra*) and Dhannie Ramsingh (*supra*) as approving of, and laying down in relation to this question, two practice rules: (i) If, in objecting to a written statement, the accused says, “I did not make that statement,” no issue of voluntariness is raised, and a *voir dire* is not called for; and (ii) if the ground of objection is that he made it involuntarily, a *voir dire* must be held in the absence of the jury; but if, during the course of the evidence, or at the end of it, it becomes plain in the view of the trial judge that the accused is really saying, “I did not make that statement,” then he would be entitled in the first situation to stop the *voir dire* and in the second, to conclude it, without ruling upon the *voir dire* in the absence of the jury whether the statement is voluntary. And this is so even where the accused is saying it as a result of a threat or other unlawful inducement. For these propositions they relied mainly on R. v. Charles (1961) 3 W.I.R. 534; R. v. Farley (1961) 4 W.I.R. 63 (Decisions of the Federal Supreme Court); Williams v. Ramdeo (1966) 10 W.I.R. 397; and Dookeran and Herrera v. R. (1967) 11W.I.R. 1 (Decisions of the Court of Appeal of Trinidad and Tobago).

This Court had to consider, therefore, whether what the trial judge did here in Gobin’s (*supra*) case was justified by these authorities. Counsel for the State said it was. Counsel for the appellant had two answers to this: He submitted, first, that Fowler (*supra*) and Dhannie Ramsingh (*supra*) were wrongly decided and should be overruled; and, secondly, that, in any event, the ground of objection as stated by counsel brought the case within the correct – so he said – decision in Lindon Harper v. The State (1970) 16 W.I.R 353, which was also binding on the trial judge.

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In Harper's case objection was taken on the ground that the statement was obtained as a result of a police promise that "everything would be alright". In his examination-in-chief upon the *voir dire* he said the officer asked him to sign a statement already written out, and he did so because of that promise. Under cross-examination, he said: "What is in that statement never happened. I never gave that statement to Inspector Grimmond. I did not give that statement of my own free will. Inspector Grimmond did hold out a promise to me." The trial judge did not rule upon the *voir dire* whether the statement was free and voluntary. Instead he told the jury that the accused was saying it was not his statement and they would have to decide if it was. In his judgment, in which CUMMINGS, J.A., concurred, BOLLERS, C.J., interpreted his evidence on the whole to mean that the accused was saying that he did not tell the Inspector what was in it, but had signed the statement because of the promise or inducement held out to him; and that being so, the trial judge should have ruled on the issue of voluntariness upon the *voir dire*. PERSAUD, J.A., thought that on that view of the evidence the trial judge was not required to rule upon a *voir dire* as a trial judge was bound to do so only if the accused admitted making the statement. But, on a different ground, he joined in a unanimous decision to allow the appeal.

These very authorities were cited on both sides as applying to the appeal of Allan Boniface Griffith (*supra*). Griffith was indicted for simple larceny of a typewriter. He was convicted and sentenced to two years' imprisonment. At his trial, objection was taken to a written statement on the ground that force and violence were used to obtain it. Sergeant Ramji, who had taken the statement, upon the *voir dire* gave evidence to prove it a free and voluntary one. He was cross-examined by the appellant. It was put to the sergeant that he prepared a statement, beat the appellant to sign it and promised to let him see a doctor for attention only if he signed. The trial judge interrupted to ask the appellant if that was his real case, and when told it was, he concluded the *voir dire* said that was a question of fact for the jury, and admitted the statement. It is plain then that these two appeals involve a common question of law. Is the trial judge required to rule upon a *voir dire* on the admissibility of a written confessional statement when the objection of the accused is that he did not tell the police what is in it but was induced to sign it by violence or threats or a promise of favour or other inducement? It was submitted that Harper (*supra*) say 'Yes' to this question, and Fowler (*supra*) and Dhannie Ramsingh (*supra*) say 'No'. If Harper (*supra*) and Dhannie Ramsingh (*supra*) conflicted then Harper (*supra*) was overruled.

But counsel for the State submits that even if the law as laid down in Dhannie Ramsingh was wrong or doubtful, no sufficient reason was advanced to justify its re-consideration, and this Court should apply the principle of *stare decisis*. If it had been drawn to his attention, he might well have cited appositely, words in a certain passage from the speech of LORD DEVLIN in Jones v. Director of Public

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Prosecutions [1962] 1 All E.R. 569 at p. 605. Speaking then of this principle, His Lordship said:

“The principle does not apply only to good decisions; if it did, it would have neither value nor meaning. It is only if a decision is doubtful that the principle has to be invoked. It is a useful principle and based on an essential characteristic of our law, namely, that it is developed not merely for elegance and correctitude but for use in practice. If mistakes have been made, if the correct thing has not always been done, but if the result produced is a sensible one that has established itself in the practice of the law, let it be left alone.”

Counsel stressed the admitted need for certainty in the criminal law; that there was full argument and citation of authority; that it was a very recent decision; and that the Full Court of five had been assembled expressly to settle the law once and for all. He relied heavily on the majority opinion in Knulier v. Director of Public Prosecutions (1972) 56 Cr. App. R. 633, in which the House was asked to overrule Shaw v. Director of Public Prosecutions [1962] A.C. 220, a judgment of the House which decided that conspiracy to corrupt public morals was a crime. LORD REID, who had dissented in Shaw, (*ibid*) was still of the same opinion. But His Lordship nevertheless at p. 639 said:

“... it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decision of this house as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act. We were informed that there had been at least thirty and probably many more convictions of this new crime in the ten years which have elapsed since Shaw's (*ibid*) case was decided, and it does not appear that there has been manifest injustice ... I think that, however wrong or anomalous the decision may be, it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.” (Underscoring mine.)

LORD MORRIS, in the majority in Shaw, (*ibid*) still held it to be a right decision. But he also would not have overruled it, if he had thought it wrong. He said (*ibid*) at p. 651: “It is accepted that all relevant authorities were examined before this House came to its decision. There comes a stage when further disputation should cease.” (Underscoring mine.) And LORD SIMON expressed no opinion on Shaw, yet opposed its overrule. He felt it had not led to any injustice.

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Counsel cited also a neat passage from the speech of LORD PEARSON in Jones v. Secretary of State for Social Services [1972] A. C. 914 at p. 996 in which His Lordship did say that: “If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost.” And he urged also that for an overrule there should be full unanimity in this Court on the point of law involved. And there was not.

On the other hand, counsel for the appellant rested on pronouncements in such cases as John William Taylor (1950) 34 Cr. App. R. 138, and John Arthur Charles Gould (1968) 52 Cr. App. R. 152 that a Court of Appeal in criminal cases does not apply the doctrine of *stare decisis* with the same rigidity as in civil cases, as it has to deal with the liberty of the subject; in other words, that *stare decisis* should not be used to keep in prison a man whose conviction the court is convinced is a miscarriage of justice. He claimed to find support in the dissenting speech of LORD DIPLOCK in Knüller v. Director of Public Prosecutions (*supra*), p. 675 where His Lordship said “If the decision in Shaw’s case, [1962] A.C. 220 was wrong, as I am satisfied it was, should it nonetheless be followed, or ought it to be overruled? The courts should be the vigilant guardians of the liberty of the citizen it seems to me self-evident that this House should correct its mistake unless there are compelling reasons to the contrary.” After weighing these and other considerations, pro and con, I find I cannot agree that the principle of *stare decisis* should be applied to perpetuate an error on such a point of law as this, if error there is. The liberty of the citizen is involved. That the trial judge, before admitting a confessional statement, should himself determine if it is voluntary, is a safeguard of great antiquity and importance introduced mainly for the protection of innocent suspects. LORD SUMNER said it was as old as LORD HALE. To deprive an accused person wrongfully of this protection if and when he is entitled to it and needs it, is a manifest injustice. The interest of justice would demand that the erring judgment be superseded. To re-direct the common law on its correct course would be to promote certainty, not to defeat it. Admittedly Dhannie Ramsingh (*supra*) was fully argued, but in matters of a penal form, “a tribunal, even if of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject.” *per* The Lord Chancellor in Ridsdale v. Clifton & Others [1877] 2 P.D., at p. 307; even where the earlier judgment was “fully reasoned” *per* LORD DIPLOCK in Eaton Baker v. R. [1975] 3 W.L.R. 113, at p. 123; or is a very recent one, see Gideon Nkambule v. R. [1950] A.C. 379; or has been regarded as the common law for over a century, Button & Swain v. Director of Public Prosecutions [1966] A.C. 591. What is involved here is what LORD REID would have described as a question of legal principle and a broad issue of justice.

Then, there is the point unanimity. It arises in this way: In all the reported

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overruling judgments of the Full Court of Criminal Appeal cited at the hearing – John William Taylor (*supra*); John Arthur Gould (*supra*), R. v. Newsome and Browne (1970) 54 Cr. App. R. 485 – and I may add two other cases not cited – R. v. Medway [1976] 1 All E.R. 527 and R. v. Groom (The Times, February 24, 1976), the Full Court was unanimous that the law was wrongly laid down in the earlier cases. Not one was a majority judgment. Stress was laid on the precise language used in Taylor (*supra*) where the Lord Chief Justice at p. 142 said: “... if this Court found on reconsideration that, in the opinion of a Full Court assembled for that purpose, the law had been either misapplied or misunderstood and that as a result a man had been deprived of his liberty, it would be its bounden duty to reconsider the earlier case with a view to determining whether he had been properly convicted and in this case the Full Court of seven judges is unanimously of opinion that the case of Treanor” (1939) 27 Cr. App. R. 35) “was wrongly decided”; and in Newsome & Browne, (*supra*) at p. 491 WIDGERY, L.J., said “....we take the view that a court of five can, and indeed should, depart from an earlier direction... if satisfied that the earlier direction was wrong.” His Lordship did not add “or a majority of it”. Hence the argument that if we are not unanimous, the earlier judgments should stand. Assuming (without accepting) this to be the settled practice in the Court of Appeal (Criminal Division) in England, should it be followed here in this case? I think not, for these reasons: In the first place, whereas a judicial error perpetuated through *stare decisis* in the Court of Criminal Appeal can be corrected in the House of Lords, any error we decline to amend, remains an error until and unless Parliament intervenes; in the second place, other courts of final resort have not insisted on unanimity.

In The Bengal Immunity Co. Ltd, v. The State of Bihar and Others, [1955] 2 S.C.R. 603, the Supreme Court of India (a Bench of seven) by a majority (of 4:3) in a constitutional case reversed its earlier majority decision (4: 1) in The State of Bombay v. The United Motors (India) Ltd. [1953] S.C.R. 1069; in The Kesha v. Mills Co. Ltd. v. Commissioner of Income Tax [1965] 2 S.C.R. 908, at p. 922, that Court (a Bench of seven) had something to say bearing on the question of the need for unanimity. GAJENDRAGADKAR, C.J., reading the judgment of the Court, said that: “... before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified”.

Then in Eaton Baker and Anor, v. R. [1975] 3 W.L.R. 113, the Privy Council by a majority (4:1) overruled their earlier unanimous judgment in Maloney Gordon v. R. (1969) 13 W.I.R. 359. The Court of Appeal (Criminal Division), like its predecessor, is an intermediate court. We, like the Supreme Court of India, and the Privy Council, are a tribunal of final resort. And we, like them, need not, and should not fetter the exercise of our undoubted discretion to overrule our earlier judgments with any pre-condition of unanimity. Of course, it is essential that this

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power should be sparingly used. We should not lightly dissent from a previous pronouncement of this Court. Our power of review must be exercised with due care and caution. But it should not be confined within too rigidly fixed limits. We should not review a previous decision simply on the ground that another view of the law is possible or even reasonable. If we do this, the litigant public may be encouraged to think it is always worthwhile to take a chance with the highest court in the land, in the hope of procuring, perhaps with a differently constituted court, a departure, when otherwise they would not have done so. But, if bearing these and other relevant considerations in mind, unanimously or by a majority, this Full Court is satisfied fully that an earlier decision in a criminal cause or matter is plainly wrong and manifestly unjust, we should overrule it without hesitation.

I believe the situation is well-put in the apt and weighty words of GAJEN-DRAGADKAR, C. J., in Kesha v. Mills Co. Ltd. v. C.I.R (*supra*) at p. 992. The learned Chief Justice of India said then:

“It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:—What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.”

Here, the earlier judgments – Fowler and Dhannie Ramsingh (both *supra*) – are recent cases and the judicial opinions were divided, if not evenly balanced. If they are plainly wrong, in my judgment, the interests of justice would require their reversal. And while technically, this process could recur, it would be a practical unlikelihood. On a point of forensic practice, I would invite this court

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to direct that where in the future counsel proposes at the hearing of an appeal, to submit that a previous decision of this Court should be reconsidered and overruled, this should be stated in the notice of motion. This is done in England in appeals to the House of Lords to forewarn the tribunal.

I proceed to the crucial question whether or not Dhannie Ramsingh (*supra*) laid down the law wrongly. To understand that decision rightly, one must trace back from R. v. Charles (*supra*) and R. v. Farley (*supra*) cited earlier in this judgment. Both were decisions of the Federal Supreme Court in 1961. In each, the accused objected to the admissibility of a statement on the bare ground, "I did not make it," without any allegation of a threat or other form of inducement exercised at any stage whatever; in each, a *voir dire* was held; in each, the trial judge ruled upon it that the accused did make the statement and that it was free and voluntary; and in each, in the summing-up he left to the jury, only the issue of voluntariness. In each, an appeal was allowed on the ground that it was wrong to take away from the jury the question of fact whether the accused had made the statement or not. But in addition, the Court ruled that the objection raised did not challenge the voluntariness of the statement and so there was nothing for the judge to try in the absence of the jury. This latter ruling formed the basal ground for the two judgments of the Court of Appeal of Trinidad & Tobago in 1966: Williams v. Ramdeo and Ramdeo (*supra*) and Herrera and Dookeran v. R. (*supra*).

Williams v. Ramdeo and Ramdeo (*supra*) was an appeal from a summary acquittal. At the hearing counsel objected to a written statement as obtained through force and threats. A "trial within a trial" followed; and in his evidence upon it, the defendant swore that he never told the police what was in the statement sought to be put in, but he was beaten to sign "a piece of paper" (presumably the one it was written on) and did so. The magistrate refused to admit the statement and dismissed the charge. A strong Court (WOODING, C.J., McSHINE and FRASER, JJ. A.) allowed an appeal by the prosecution. FRASER, J. A., read the judgment of the Court. He said at p. 398: "Very much the same point arose in R. v. Farley (*supra*)." Although, unlike in that decision, there was here an allegation of an unlawful inducement to sign, R. v. Farley (*supra*) was applied to set aside the acquittal. And the Court said that in such a case at p. 398: "... the statement must be admitted." This judgment equated the duty of a trial judge when the objection is, "I did not make that statement" with his duty when it is: "The signature on it is, mine. I was beaten to affix it; but when I signed, it was just a piece of paper and I never told them what is in it."

In Herrera and Dookeran v. R. (*supra*) Herrera's objection was, "I never made the statement at all. The police put a paper before me. I did not know or get a chance to see what was written on it. I was beaten savagely to sign it." WOODING, C.J., in the judgment (at p. 3) said only this: "Both of these issues were left finally to

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the jury with proper and ample directions. It is unnecessary therefore to say more.” Dookeran’s objection was, “I was beaten and tricked into copying and signing it as a statement of my own.” Here also, no *voir dire* was held and the statement got admission. WOODING, C.J., said, again with rare judicial brevity at p. 5: “In effect, Dookeran was alleging that he never gave the police a statement, he merely copied a document as they required him to do. On the other hand, Inspector George was saying that the statement was Dookeran’s ... he actually wrote it himself. That issue, the judge quite rightly held, was not for him but for the jury to resolve: R. v. Farley (*supra*) and Williams v. Ramdeo and Ramdeo” (*supra*). Again, a similar equation was related. It seems plain that at least a majority of the judges of this Court accepted these judgments then as settling the law on this point correctly. For in R. v. Leslie da Silva Criminal Appeal No. 14/1967, at p. 5. LUCKHOO and PERSAUD, JJ.A., in a joint judgment said:

“Two situations can arise when statements alleged to have been made by a prisoner are sought to be put in evidence. Firstly, the prisoner may deny having made the statement, in which case the trial judge must leave it to the jury to find as a fact whether or not the statement was made and if it was, the weight to be placed on it. Secondly, the prisoner may admit making the statement, but may complain that he was compelled or induced to do so. In this situation the judge is required to try this issue in the absence of the jury. If he finds in favour of the prisoner, the statement is excluded, and that is an end of the matter; if he rules against the defence and he admits the statement in evidence then he must leave it to the jury to determine its probative value or effect which is a different question from its admissibility.” (Underscoring mine.)

Here, this Court confined the need for a *voir dire* to instances where an accused admits he told the police the facts he signed to. R. v. Charles (*supra*) was cited in support. This was the state of judicial thinking in the region when Harper’s (*supra*) case was argued. Of all these authorities only R. v. Farley (*supra*) was considered in that judgment. No mention was made of Williams v. Ramdeo and Ramdeo (*supra*) or of Herrera and Dookeran v. R. (*supra*) (the reports of which were not yet available) or of Leslie da Silva (*supra*). PERSAUD, J.A., in Harper (*supra*) at p. 358, after mentioning that the trial judge, at the end of the *voir dire* had ruled that “certain inducements may have been held out but as this went merely to the signature and accordingly, the issue should be left to the jury to decide as a question of fact,” went on to hold at p. 360 that “the judge was here correctly leaving the issue” to the jury; and that whether the statement was free and voluntary was “an issue which had not been raised, and if raised should have been determined by him.....” So we had here a reason supplied for the equation – the inducement is related to the signature and not to the confession above it.

In Fowler, (*supra*) BOLLERS, C.J., influenced by the two Trinidad cases, re-sited

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from the view he took in Harper and said at p. 462 “I find the circumstances here indistinguishable from the Trinidad cases of Herrera and Dookeran v. R. (*supra*) and Williams v. Ramdeo and Ramdeo.” (*supra*)

He went further and preferred another reason why the trial judge, in such a case, could not be expected to rule upon the *voir dire* as to voluntariness. The Chief Justice (p. 465) said: “The judge, having made a finding of fact that the statement is free and voluntary and admissible; cannot then leave it to the jury to say whether it is the statement of the accused or not, as that would involve two findings of fact on the same issue which may indeed turn out to be contradictory.” And LUCKHOO, C., supported this thinking in a passage which I cite in full at p. 458:

“How wrong would it have been if the trial judge had taken upon himself the liberty of ruling at the *voir dire*, on the admissibility of the statement as a matter of law on the ground that it was, or was not, free and voluntary, when the accused had assumed the stand that it was not his statement. This attitude negated the necessity for a judicial ruling in the absence of the jury, which could only arise if the statement was his, but the allegation was that it was not free and voluntary. So that for the judge to have assumed jurisdiction on such an issue would have been to deal with a matter which, on the evidence taken, did not call for judicial adjudication. Had the judge assumed such a jurisdiction and admitted the statement as being free and voluntary, this extraordinary situation would have arisen: He would have had to tell the jury that what weight, if any, they would wish to attach to the statement would be for them, but that on his ruling, the statement having been admitted, they were bound to give due consideration to it and determine its weight, probative value and effect; whereas, on the actual defence raised, the direction required was that if they accepted what was said by the defence or were in reasonable doubt on the matter, they would be entitled to reject the contents of the statement out of hand on the basis that it was not the appellant’s statement, without limiting their consideration only to its weight, value and effect as in the former situation. It could then be seen how improper it would be to take a step unwarranted by the evidence which might result in restricting the jury’s function by depriving them of the right of full and free consideration of purely factual evidence on the wrong assumption that it concerned a matter of law.”

Apparently both the Chancellor and the Chief Justice found support for this proposition in the judgment of the Privy Council in Chan Wei Keung v. R. (1967) 51 Cr. App. R. 257, of which I shall say more later in this judgment.

This was the law on the point in this appeal just before Dhannie Ramsingh (*supra*).

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But two members of this Court held then strong dissentient opinions. CUM-MINGS, J.A., in Fowler, had adjudged that the objection in that case, as it was held to do in Harper, raised an issue of voluntariness, to be determined by the trial judge upon a *voir dire* and with the utmost respect, that Williams v. Ramdeo and Ramdeo (*supra*) Herrera and Dookeran v. R. (*supra*) appeared to lay down the common law in error. And it was made clear in what CRANE, J. A. said in his judgment in Kirkpaul Sookdeo et al v. The State – November 30, 1972 – that he thought likewise. Further, many members of the criminal Bar in this State regarded Harper (*supra*) and Fowler (*supra*) as conflicting. Presumably for these reasons, in Dhannie Ramsingh (*supra*) a Full Court was assembled in a try to settle the law once and for all.

In his judgment in that case the learned CHANCELLOR LUCKHOO, said at p. 7:

“It is on the basis that a statement is ‘actually’ made that an enquiry is permitted in the absence of the jury to ascertain affirmatively whether it was ‘properly made’ or not... if in the course of this exercise it becomes apparent that the defence is no longer raising the question of want of voluntariness, but is setting up the defence that the accused was in no way responsible for the making of the statement, then the judge’s task would become simplified. He merely looks to see whether the prosecution has positively and sufficiently in law laid the foundation of ‘voluntariness’. If so satisfied, he admits the statement as one which was not improperly obtained and leaves the remaining question for the jury to decide whether indeed it was the statement of the accused or not”; and, later, he said at p. 10: “Inasmuch as ... the accused himself had virtually withdrawn and abandoned his original evidence as to want of voluntariness by substituting the allegation that he did not make the statement, there was nothing for the trial judge to really rule on.”

In the main, His Honour reasoned as he did in Fowler (*supra*). So did BOLLERS, C.J. He held that Williams v. Ramdeo and Ramdeo (*supra*) and Herrera and Dookeran v. R. (*supra*) were ‘dead against’ the main submission on behalf of the appellant; that these two decisions and R. v. Farley (*supra*) were correctly decided; and that “to hold otherwise would lead to utter confusion.” PERSAUD, J.A., reaffirmed his position in Harper. He agreed with BOLLERS, C.J. that the two Trinidad cases were rightly decided; and the only fresh observation he made was that (p. 4): “When a judge is called upon to investigate the admissibility of a statement, the clear implication is that the defence is accepting the authorship of the statement.” The majority judgment in Dhannie Ramsingh (*supra*) exposed no fresh judicial thinking. It was really a confirmation of Fowler (*supra*); and Fowler rested substantially on the earlier case from R. v. Farley (*supra*) to Leslie Da Silva

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(*supra*) and on the minority reasoning in Harper (*supra*).

In summary, as interpreted by majority judgments of this Court, the cases from R. v. Farley (*supra*) (1961) to Dhannie Ramsingh (*supra*) (1973), established that: (a) if the objection to a statement is that the accused made no oral confession at all but the police wrote one and made him sign it under compulsion or inducement, this is a challenge to the existence of a confession and not to its voluntariness (LUCKHOO, C., BOLLERS, C.J. and PERSAUD, J.A.); (b) as such, it raises no issue of voluntariness to be tried in the absence of the jury upon a *voir dire* (*ibid.*) because: (i) to object on the ground of involuntariness implies admission of the authorship of the statement, that is that he did confess (BOLLERS, C. J., and PERSAUD, J.A.); (ii) the inducement or compulsion is related to the signature only and not to the confession above it (PERSAUD, J.A.); and (iii) to rule upon a *voir dire* that the statement was made voluntarily might lead to contradictor)' findings of fact on the same issue as the jury might find it was not made at all (BOLLERS, C. J.); or to the untenable situation that, having found it was so made the trial judge would be bound to direct the jury that their only function would be to determine its weight and whether it is true, resulting in the accused being denied the opportunity of a jury finding he did not make it (LUCKHOO, C., and PERSAUD, J. A.); and (c) if it turns out after a *voir dire* is opened on a forced or induced signature to a dictated confession, for the same reasons, there would still be no duty to rule at all on the *voir dire* as to voluntariness (LUCKHOO, C., BOLLERS, C.J. and PERSAUD, J. A.), except if the prosecution's own proof of voluntariness thereat is, at the end, such as to require exclusion (LUCKHOO, C.).

Two basal propositions underlie the reasoning in Dhannie Ramsingh (*supra*) and its supporting cases. One is, that the objection in such instances does not raise an issue of or is not one as to voluntariness. In my judgment, plainly it does go to that issue and it does raise it; the other is, that unless such an objection is raised, there is no duty to hold a *voir dire* and to rule on it upon the admissibility of a written statement. In my considered judgment, put this way the statement of principle is too wide and in that absolute form can find no support in the authorities. And none earlier than Williams v. Ramdeo and Ramdeo (*supra*) in 1966 can be relied on to support these two propositions.

If a suspect in custody makes an oral confession to a police officer, it may or may not be reduced into writing. If it is not, then, at his trial the officer will only swear in the witness-box to what he heard the accused say; and the sole question of fact (apart from that of voluntariness) would be: Is the witness truthful when he says he heard the accused speak those words? If it is reduced into writing by the officer, the accused is always asked to sign it as true and correct. The reason is plain to detect. If it is unsigned, the document – if admissible at all – would have a limited probative value, if any. It would be just a written note or record made by

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the officer of what the suspect said. But if it is signed as true and correct, his signature below the statement makes the whole document, when put before the jury, on the face of it, a written admission of guilt by the accused. And it is the signature that makes it so. If the prosecution should move to lead evidence only of what the accused said without tendering the signed statement, it might well be open to the trial judge to refuse to admit it on the best evidence rule, or under his discretion. If he admits it, the jury would most likely regard this situation with much suspicion and discredit the evidence. To avoid this disadvantage, the prosecution, as a rule, would seek to put in the signed statement. In this way they set out to get, and get the benefit of, the signature of the accused admitting his guilt by the probative force of it. If this is so, then the signature must be voluntary. If the confession of an accused in writing must be voluntary, then the signature that makes it his must be voluntary also. For, when the prosecution puts in a signed statement, what they seek to rely on is not the words of oral confession spoken to the recording policeman; it is what is adopted as true and correct “in black-and-white” by the signature. The signature, therefore, must not be obtained in violation of the rule as formulated by LORD SUMNER over sixty years ago. BOLLERS, C.J., was clearly right in that part of his judgment in Harper when he ruled at p. 355 that if an accused said “that he signed the statement, but he had not said what appeared on the statement because of the promise or inducement held out to him, it was therefore the duty of the judge, having tried the issue on the *voir dire* to have ruled whether the statement was free and voluntary.”

I find some support for this approach in the judgment of the Privy Council in Sparks v. R., (1964) 1 All E.R. 727. Sparks was accused of indecently assaulting a little girl not quite four years old. He denied it. At his trial, the prosecution sought to put in evidence certain oral and written confessional statements. On objection, a *voir dire* was held. Sparks gave evidence. He said he had much to drink the night in question, on to the time he left a party; he had no knowledge or recollection whatever of what he did after on his way to his quarters; he was taken to the Police station the next morning; there, officers told him they had proof he did the act, and held out certain inducements to him to admit this guilt in a statement. As a result of all this, he signed a written confession; and thereafter he was permitted to telephone his wife, to whom he then made an oral admission. ABBOTT, C.J., admitted both the written and oral admissions on the basis of his acceptance of this evidence. Sparks appealed from his conviction by the Supreme Court of Bermuda. In the judgment of the Board in which these statements were held involuntary and inadmissible, LORD MORRIS, after referring to them, went on to say at p. 739:

“Their lordships consider that an acceptance of the appellant’s evidence must lead to the view that he signed the written statement and spoke the words above referred to because he was persuaded by the police (who

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must in the present case be regarded as persons in authority) that it could be proved that it was he who had assaulted the girl even though he himself had no knowledge or recollection of having done so, and because he was persuaded that in such state of affairs it would be better for him to sign a confession.” (Underscoring mine.)

I read their Lordships as relating the inducement, in the case of the oral admission to the ‘speaking’ of the words over the telephone, and in the case of the written one, to the ‘signing’ of it, and not to the ‘speaking’ of the words to the police officer reduced by him into writing. Their Lordships at p. 732, held that the trial judge had adopted the “correct and recognised procedure” in holding a trial within a trial in the absence of the jury, but that his ruling upon the evidence he acted on was wrong. The appeal was allowed. This passage from Spark’s case was not drawn to the attention of the court in Williams v. Ramdeo and Ramdeo (*supra*)

Then in Daken v. R. (1964) 7 W.I.R. 422, a Trinidad case, the appellant objected that a statement was concocted by two police officers who procured his signature to it by beating him up. In the absence of the jury the trial judge heard evidence “in support of the objection” and overruled it. On appeal, the admissibility of it was challenged on a different ground so that there was no need for any expression of judicial opinion in the Court of Appeal *per* WOODING, C. J., HYATALI and PHILLIPS, JJ.A., on what the trial judge did; but no adverse observation was transcribed in the judgment (*obiter*). And in R. v. Roberts (1970) Crim. L.R. 464, Roberts, a boy of 14, was detained on suspicion of murder and questioned by the police at a station in the absence of his mother. At his trial objection was taken to the admission of oral and written statements allegedly made by him on the ground of “oppression.” A “trial within a trial” was held. Roberts, in evidence on the *voir dire* said the statement was not his; he had made no oral confession at all, and though he signed the written statement, it was not dictated by him. He gave no evidence of any threat or other inducement. But it was submitted there was oppression in the exclusion of the parent. BRABIN, J., upon the *voir dire* ruled that both statements were voluntary and admissible and he saw no reason to exercise his discretion to exclude them. An appeal was dismissed. LORD CHIEF JUSTICE PARKER said the question was whether the statement was voluntary; that no doubt in the case of a child, stronger evidence was required to show it was voluntary if no parent was present; but the trial judge, who had the advantage of hearing the evidence and seeing the boy, had reached a conclusion there was no oppression and the Court could not interfere. Be it noted that the Court dealt with the matter in this manner in spite of the fact that Roberts denied he made any statement at all. R. v. Roberts was decided after Williams v. Ramdeo and Ramdeo (*supra*) and Herrera and Dookeran v. R., (*supra*) and was not cited in Fowler or Dhannie Ramsingh (both *supra*). If, as I think, what was said in Sparks v. R.

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(*supra*), the procedure adopted and unchallenged in Daken v. R. (*supra*) and the decision in R. v. Roberts, (*supra*) all tend to support a view of the law contrary to that laid down in Dhannie Ramsingh, (*supra*) we face the question whether we should abide by it, bearing in mind the observation of FRASER, J. A., in Campbell v. R. (1969) 14 W.I.R. 507 at p. 570, that, in certain respects, the law has developed differently in West Indian courts.

Counsel for the State referred to three English cases in further support of the judgments in Fowler and Dhannie Ramsingh, (both *supra*). The earliest was R. v. Baldwin (1932) 23 Cr. App. R. 62. The case for the Crown rested largely on a written statement to a police constable. Before it was tendered, the defence indicated that they wished to object to it and to call Baldwin as a witness on the issue. The grounds of objection were: No caution had been administered; the statement was obtained partly by cross-examination; and the circumstances in which it was taken amounted to a trap. At that stage the judge ruled he would not admit Baldwin's evidence on the issue of admissibility and that the statement was admissible. The Court of Criminal Appeal held that the ruling of HORRIDGE, J. was correct. The trial judge had made two rulings. As regards the admissibility of the statement, his ruling might be justified on the reasoning that none of these grounds could make the statement involuntary, although on any or all of them it could have been excluded on discretion. But he is reported at p. 62 to have said also: "your submission comes to this – does it not? – that in every case where a police officer gives evidence that a prisoner has been properly cautioned, his statement should be excluded by way of anticipation, because the prisoner is going to deny it and set up circumstances which impute its value. Clearly it is admissible." Counsel for the appellants submits that in this passage, 'to deny it' meant 'to deny the caution'; while counsel for the State submitted that 'to deny it' meant 'to deny the statement'. Whichever it is I do not find it easy to discover from this account exactly what HORRIDGE, J., had in mind and meant to say. But this much is plain – that, like R. v. Farley (*supra*) and unlike Dhannie Ramsingh (*supra*) and the other similar cases, there was in R. v. Baldwin (*supra*) no allegation of involuntariness to invoke the imperative common law rule of exclusion; for, as indicated, admissions made merely after no caution (where one should have been given), or under the pressure of police cross-examination, or as a result of a trap, are admissible unless excluded on discretion.

The next case is George Thomas Clark (1955) 39 Cr. App. R. 120. Clark appealed from a conviction on the ground that, at his trial, he was wrongly cross-examined on his previous convictions. A statement taken in writing by a detective constable and signed by him, in which he admitted he kept watch while the others committed the offence, was put in evidence by the prosecution. Clark's defence was that he was not involved in the matter at all. He swore in his defence that the chief inspector dictated to the constable what to write in the statement

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and he signed it as he was frightened. He did not say that any threat or inducement was made or held out to him. The trial judge permitted the cross-examination on the ground that this evidence amounted to an imputation on the character of the chief inspector. So that, on appeal, the legal point at issue was whether such cross-examination was permissible or not. The Court held it was, because what Clark did was not merely to allege for example, that a high-ranking police officer had induced him to make a confession by a promise of favour; it was an imputation of grave moral misconduct in manufacturing a false statement to secure a conviction. Counsel pointed out, quite rightly, that the report did not state that a “trial within a trial” was held to determine the admissibility of the statement on such an objection. He argued that none was held because, as LORD CHIEF JUSTICE GODDARD said at p. 123: “What he” (the appellant) “says is that.... the chief inspector... proceeded to dictate to the detective-constable what he was to write down, so that the statement was not the appellant’s statement at all, but the statement of the chief inspector...”. I disagree with this contention for these reasons: Assuming (without accepting) that no *voir dire* was held, this could be due to other reasons: there might have been no objection raised at all to the statement, and a ruling of admissibility on the evidence already given in open court; or, any objection might have been without more overruled on the ground that a statement made only because the maker felt “frightened” would not be for this reason inadmissible, although it could be excluded on discretion. And, furthermore, the Lord Chief Justice was not directing his mind, and so his language, to the question *voir dire* or no *voir dire* and had heard no arguments on the point. Consequently, it would be wrong to interpret what he said to mean no *voir dire* in such circumstances. The Lord Chief Justice was not dealing with that.

Then strong reliance was placed on an observation by SHAW, J. (now LORD JUSTICE SHAW) in R. v. Robson and Harris (1972) 1 W.L.R. 651, in a ruling on the admissibility of certain tape recordings. His Lordship said at p. 654:

“It is true that in determining whether an alleged confession is admissible or not the judge has the duty of deciding a contentious issue and he has to apply the same criteria as a jury would have to do; but this is an anomalous case deriving from its own special history and from considerations peculiar to confessions. It is perhaps worth noticing that, if in regard to an alleged confession the issue is not whether it was made voluntarily but whether it was made solely for the jury’s determination; the trial judge has no part to play except to sum the matter up to them.” (Underscoring mine.)

Admittedly, this judge had extensive experience at the criminal Bar and his positive statement must be treated with respect. But it must not be misread. What is not clear, however, is that it is intended to relate to a case where no confession is

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made at all but a written one is signed under compulsion. It would not be justifiable to assume that it does. For in such a case the issue is not merely, “whether it” (the statement) was made at all, it is, “whether he was forced by his signature to accept as true and correct a confession he did not make” – a clear issue of voluntariness.

As I see it, nothing decided or said in any of these judgments support Dhannie Ramsingh (*supra*). However, it is submitted that even if this is so, the common law on the question has developed differently in the Caribbean region (including Guyana) and that we would continue to concur in this development. In Australia Consolidate Press Ltd. v. Uren [1969] 1 A.C. 590 LORD MORRIS, speaking for the Privy Council, said at p. 641:

“There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is however far less marked in some branches of the law than in others.”

And while a contrary view was expressed by LORD HAILSHAM, when he said in Broome v. Cassell and Co. Ltd. [1972] 1 W.I.R. 645, at p. 666

“I view with dismay the doctrine that the common law should differ in different parts of the Commonwealth, which is the effect of the decision in Australian Consolidated Press Ltd. v. Uren [1969] 1. A.C. 590.....”

It is an historical fact that this has happened notably in Australia and Canada. But such happening must be based on compelling reason or application of principle. Can we find in the cases any such reason or principle?

We have been invited to decline to follow two unanimous judgments of the Court of Appeal of Trinidad & Tobago and to overrule a majority judgment of a full Bench of this Court. Judicial comity and the high respect we have for the immense experience and learning of the distinguished judges whose opinions are challenged would move us to do so, if at all with very great reluctance and only compulsively. And where we do disagree, we owe it to them to demonstrate why. In my respectful opinion, error crept into the law in these parts in Williams v. Ramdeo and Ramdeo (*supra*). Admittedly, the Bench there was prestigious in the Caribbean Commonwealth; but, nonetheless, I am convinced unshakably that it fell into error. This is due, perhaps, to the fact that the Court was unassisted by argument or citation of authority to consider fairly and comparatively a different

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view of the law, although it would be wrong to suppose the members of the Court to have been unaware of the principles laid down in the relevant decided cases. The error was a twofold one: In the first place, it lay in a misapplication of what was said in R. v. Farley (*supra*) to the legal issue in Williams v. Ramdeo and Ramdeo (*supra*). The facts in these two cases differed materially. We judges, must never lose sight of what has been said time and again in the highest tribunals that judicial utterances are made in the setting of the facts of the particular case, and words in a speech or in a judgment are not to be treated like a legislative enactment. Quinn v. Leathern [1901] A.C. 495 has an apt reference in point. There, the EARL of HALSBURY said at p. 506: "... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are found." We (the majority) find the reasoning in Williams v. Ramdeo and Ramdeo (*supra*) disappointingly bare but the judgement rested clearly on certain general observations in two passages in the judgment of ARCHER, J.A., in R. v. Farley (*supra*) at p. 65. One is: "But a statement cannot be successfully objected to merely because the prisoner intends to deny it when the time comes, (see R. v. Baldwin.)": and the other: "The judge treated the objection as one made on the ground that it was not free and voluntary. That was not the ground put forward by the appellant and there was nothing for the judge to try in the absence of the jury when the objection was made." Both passages had to be governed and qualified by the particular fact that no duress or inducement was alleged to have been exercised by the police in connection with it at any stage, whatever, between the time the appellant was detained and the time he signed the statement; unlike Williams v. Ramdeo and Ramdeo (*supra*), where there was such an allegation. The person in the best position to know is the alleged maker; and if he makes no accusation whatever of compulsion or inducement, as a matter of commonsense, the position might not be quite the same as when he does. [See R. v. Robert Fitton [1956] S.C.R. 958; Stuart v. R., (1959) 1 C.L.R. 1; and Dafeder v. State of Maharashtra [1970] 1 S.R. 551.] And to apply words written in the one context to the facts of another is judicially impermissible.

In the second place, error lay in the judicial thinking involved in the passage in Williams v. Ramdeo and Ramdeo (*supra*) where FRASER, J., said at p. 398: "In the case of an allegation by the person charged that he made no statement at all, the statement must be admitted and the allegation will fall to be considered along with the rest of the evidence in the case ..." Here, it is plain the court was purporting to lay down a general proposition, again, as supported by R. v. Farley (*supra*): see pp. 398-399. In my respectful opinion, assuming (without admitting) its correctness in its context, it has no authority as a general proposition. I would say it tends to place undue stress on the nature of the complaint made by

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the accused, and to overlook the relevance to the point of the express language of the basal principle recognised in the authorities cited in my historical survey, that a judge may allow evidence of an alleged confession to go before the jury only if he is satisfied that it was made voluntarily. In the formulation of the rules as to this onus from R. v. Warringham (1851) (*supra*), to Ibrahim v. R., (1914) (*supra*) and after, on to Ping Lin, (1975) (*supra*), it was never said by a single judge that the onus on the prosecution so to satisfy him arises only if objection is taken to the admissibility of the statement or if on such objections the making of the confession is admitted and compulsion or inducement is alleged. If this was the common law prior to the Caribbean decisions, how is it that no clear, binding passage or dictum in any case or authoritative text-book opinion has been cited in support? Obviously, because it is not.

I do not think it justifiable to read into LORD SUMNER's words any condition or qualification he did not himself introduce. In Ping Lin (*supra*) the judges of the Court of Appeal did just that. They actually introduced a modern qualification to the rule. On the ground that the word 'obtained' in LORD SUMNER's formulation in Ibrahim v. R. (*supra*) and in the introduction to the Judges' Rules [1964] 1 W.L.R. 152, was ambiguous and "might mean either intentionally or in fact obtained", they held that a subjective intention to extract a confession was an essential condition without which the exclusion rule was not attracted. The Law Lords held the intention of the person in authority was irrelevant... and LORD MORRIS said [1975] 3 W.L.R. 419, at p. 434. "Though it" (the rule) "was established in days long before an accused person could give evidence himself and in days when accused or convicted persons lacked many protections now available to them I do not think that a reconsideration or modification of the rule lies within the province of judicial decision." In addition to what LORD MORRIS said, it must not be forgotten that the judges made this rule for the protection of people who generally were illiterate and inarticulate, and, in cases of felony, could have no counsel to take objections on their behalf; so the judges had to 'look out' for them and would take the point themselves that they were not so satisfied as in R. v. Warringham (*supra*).

To my mind, the cases from the middle of the eighteenth century must be read to require a trial judge in every case where the prosecution seeks to put in a confession, to exclude it, whether objected to or not, and whatever be the nature of the objection (if any), unless the prosecution has led evidence to convince him beyond reasonable doubt of its voluntariness. And whether a *voir dire* must be held or not for this purpose, would depend upon all the circumstances of the case: there might be no need for it. We have it from EDMUND DAVIES, L.J. (as he then was), that it will be held "in most cases" (1974) 59 Cr. App. R. at p. 22; from LORD MORRIS that it will be held "generally" [1975] 3 W.L.R. 419 at p. 433; and from LORD HAILSHAM that it will be held "normally", *ibid*, at p. 442.

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I repeat the illustrations that, if the relevant evidence for the prosecution given in open court before the point is reached to tender the statement shows it to be involuntary or raises doubt about this or does not show it to be voluntary, then, objection or no objection, even without a *voir dire*, his duty would be without more to exclude it. A confession is only admissible if voluntary. The accused cannot consent to inadmissible evidence (expressly or impliedly by not objecting) being put before a jury in a criminal case. Again, there is authority that if the prosecution at such point has led credible evidence which, if believed, shows that the confession was voluntary and the accused or his counsel does not object at all, and there is no application by the defence that its admissibility should be decided upon a *voir dire* in the absence of the jury (where the prosecution's evidence could be tested by cross-examination), and the trial judge admits it without a *voir dire*, a Court of Criminal Appeal might not interfere on the ground that it could not be submitted sensibly on appeal that the statement, oral or written, was involuntary or not shown to be voluntary. See Fitton, Stuart and Dafedar v. The State of Maharashtra (*supra*); Basto v. R. (*supra*); R. v. Dallas, (1966) 10 W.I.R. 288, and R. v. Sutton (1967) 11 W.I.R. 236, two judgments of the Court of Appeal of Jamaica. But there is nothing in the old cases or in the recent ones in any other common law jurisdiction to the effect that the single circumstance of the accused's denial of it *ipso facto* must exclude the duty to hold a *voir dire* and rule upon it. Finally, the Court in Williams v. Ramdeo & Ramdeo (*supra*) treated the objection that the accused was beaten to sign the statement as one not involving a challenge to its voluntariness. In my firm conclusion it was; and here lay another fatal error in that judgment: a plain misinterpretation of the true nature of the objection.

Fowler (*supra*) and Dhannie Ramsingh (*supra*) were more reasoned decisions. The majority opinions sought to give juristic bases for the conclusion reached. If they are to be overruled, as the majority are convinced fully they should be, the errors in the reasoning must be demonstrated. It is intended in the concluding passages of this judgment to do so. These reasons were six in number:

(1) PERSAUD, J. A., in Dhannie Ramsingh (*supra*) stated his reliance on the views he expressed in Harper (*supra*); one was, that the inducement related only to the signature and not any admission over it. I can only say it must be plain – too plain – to find authority for, that this reasoning is untenable; the two things cannot be looked at apart. To do this would seem inconsistent with what LORD MORRIS said in Sparks v. R. (*supra*)

(2) BOLLERS, C.J. in Fowler (*supra*) at p. 465 and in Dhannie Ramsingh (*supra*) at p. 33 and PERSAUD, J.A., himself in the latter at p. 148 relied on a criticism which he had made in Harper (*supra*) at p. 359 – that the objection of an induced

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signature to a concocted statement would raise on *voir dire* two inconsistent issues, and a ‘double-barrelled’ defence. PERSAUD, J. A., treated it as if it meant: “I did not make any statement; but if I did, it was not voluntary;” he then proceeded to demonstrate (as he said) the absurdity and untenability of this position by reversing it to: “I made the statement involuntarily. But if it is voluntary, I did not make it.” His (then) Lordship found in this absurdity one of the reasons for holding that the objection was to be regarded as a bare denial of the ‘authorship’ of the statement, as in R. v. Farley (*supra*), as, in a criminal case (so he said) an accused could not be permitted to take up that stand. With all the respect due to these learned judges, it is plain, to my mind, that they misinterpreted the nature of the objection. It is, to use their nomenclature, a ‘single-barrelled’ objection, not a ‘double-barrelled’ one. It is, for reasons explained earlier, an objection as to voluntariness. To use terms familiar in civil proceedings, it is a single plea and not a plea with an inconsistent alternative. It is one defence to the confession and not two; one ground of objection, not two grounds.

(3) BOLLERS, C.J., in Fowler (*supra*) at p. 465 reasoned that if a *voir dire* was to be held and the statement admitted, this would imply a finding that the accused made it; and if the jury were therefore to be asked by the defence to find that the accused did not make it, this could result in inconsistent findings on the same question of fact. This, he thought, was an untenable situation to be permitted to happen. So, he said, to avoid it, no *voir dire* should be held. I hope the learned Chief Justice will forgive the observation that one answer to this is very obvious: if the point be sound, then a *voir dire* would be held rarely, if ever. Every instance of the admission of a statement as voluntary is likely to be contradicted. This is so as it is always open to the jury to find it involuntary on the same evidence (as possibly affecting its weight), so that there would then be inconsistent findings on the same issue of fact. The right constitutional position is, however, that normally in admitting a statement as voluntary, a trial judge does not, expressly or impliedly, make any finding of fact as to whether or not the accused ‘made’ it, that is to say, did tell the police what he signed to. What the prosecution seeks to do is to put in evidence a statement which, *prima facie*, was ‘made’ by the accused of his own free will and which, by his signature to it, he admits to be true and correct. The onus on them is to satisfy the trial judge beyond reasonable doubt that this admission was not involuntary, that is to say, that he signed it as true and correct voluntarily. And that is all that the trial judge investigates and decides, if he receives it. So that a later finding – if any – by the jury that he did not in fact tell the police what, by his signature, he admitted to be true and correct, would not be inconsistent with the finding of admissibility by the judge, in the way the learned Chief Justice reasoned. The judge would not have investigated whether he said so, but the jury would have done so.

(4) LUCKHOO, C., in Fowler (*supra*) at p. 458 found in a different alleged inconsis-

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tency, another reason for excluding a *voir dire* resting on a passage in the judgement of DIXON, C.J., in Basto v. The Queen (*supra*). In that case, an oral incriminatory statement was admitted upon a *voir dire* which, in open court, in his defence, the accused denied making. On appeal, it was contended that the trial judge should have directed the jury to disregard the statement if they thought it involuntary. The court rejected this submission. And DIXON, C.J., said at p. 640: "Once the evidence" (of confession) "is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. " This learned Chancellor apparently fastened on these words approved and applied in the Privy Council in Chan Wei Keung [1967] 2 W.L.R. 552, as imposing on the trial judge a duty even where the accused denies making the statement, to confine the jury's consideration to the question of its truth and weight only, in effect taking away from them the right to decide whether or not he did not make it; this, he indicated rightly, would be inconsistent with the duty to put the defence of an accused to the jury.

With very great respect, I think there is a flaw in this reasoning. There is no such duty on the trial judge. The learned Chancellor's view to the contrary inadvertently overlooked three considerations: (i) DIXON, C.J., was concerned only with emphasising that it was not the function of the jury to decide what was admissible as confessional evidence and what was not. (ii) In that case, in fact the trial judge had directed the jury at pp. 635-636 that, concerning the statement they had to consider two questions: first whether the accused said what was ascribed to him; and, second, if so, whether it was true; and at p. 641, DIXON, C.J. described this direction as a 'necessity', (iii) In Chan Wei Keung the approval by the Privy council of the passage in Basto (*supra*) was expressed in a case in which the accused did not deny making it. In other words, the direction to the jury in Basto, just cited, would be the proper one in such cases as these; and DIXON, C.J. did not mean, and the Privy Council did not approve of his words as meaning otherwise. In my judgment, to assign such consequence to what the Chief Justice said and to the application of what he said to the facts of the Privy Council case would be wholly unauthorised.

(5) The learned Chief Justice and PERSAUD, J. A., in Dhannie Ramsingh (*supra*) reasoned that an objection to a statement as involuntary implies an admission *per se* that the objector made it. LUCKHOO, C., disagreed; he said it was not necessarily so. In my view, it is not so at all. No extra-Caribbean authority or dictum or academic opinion whatever was cited in support of this view. And, to my mind, none could be found. Neither could it be rested on any principle one could think of. LORD SUMNER did not say so in Ibrahim *supra*. And none of the judges before him said so in any of the cases referred to in my historical survey from 1750 to 1914. And what they said does not carry such implication. For the two centuries prisoners have had the benefit of this protection, this qualification has

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been unheard of. If it were sound, this could hardly have been so.

(6) Finally, all of the majority in Fowler (*supra*), and Dhannie Ramsingh (*supra*), interpreted the evidence of the accused on the *voir dire* at the end of it, as involving the withdrawal or abandonment of every allegation of inducement, so that his case rested then only on his bare denial that he made any statement at all, such a bare denial, they held, brought each case within the decisions of R. v Charles (*supra*) and R. v. Farley (*supra*), that no ruling as to admissibility upon a *voir dire* had to be made. Assuming (without admitting) that these two cases were rightly decided on this point, I find the inference of withdrawal or abandonment plainly and wholly contradicted by the evidence. This was the conclusion also of CUMMINGS, J. A., (dissenting) in Fowler (*supra*) and of the same judge and CRANE, J. A., (both dissenting) in Dhannie Ramsingh (*supra*); and I am satisfied beyond all doubt that it is the correct conclusion of the fact on the evidence. In the premises, therefore, R. v. Charles (*supra*) and R. v. Farley (*supra*) would be inapplicable. That being so, the cases are indistinguishable from R. v. Harper (*supra*) which the majority of us held to have been decided rightly.

It follows from the preceding judicial analysis and reasoning and from the relevant citation of authority that, in my judgment, plainly both Fowler (*supra*) and Dhannie Ramsingh (*supra*) were wrongly decided. In each case the trial judge erred in ruling that the objection did not raise the issue of voluntariness, and in not ruling on all the evidence upon the *voir dire*, including the defence evidence of inducement, whether the statement was voluntary or not; in each case reliance was misguidedly placed on Williams v. Ramdeo and Ramdeo (*supra*) and Herrera and Dookeran v. R. (*supra*); in each case the majority opinion in Harper v. The State (*supra*) was erroneously distinguished or disregarded. The law they laid down was contrary to well-established common law rules; it may have worked manifest injustice in those cases; if allowed to continue to bind the judges, it will deprive possibly innocent accused persons unjustifiably of a practical safeguard of great antiquity; it would be a disservice to the common law not to put it right again. We must overrule them.

It follows from all of this then, that these two authorities could not justify the course taken by the trial judges at first instance in these two appeals and those convictions could not stand. In each case the objection raised challenged the voluntariness of the written statement, and a ruling after a “trial within a trial” was essential upon all the evidence including the evidence of the accused (if any) of any compulsion exercised by any police officer to induce him to sign it; in each case, the omission so to rule was a fatal irregularity; in each case, as a result, the confession was received in evidence although not duly shown to be voluntary: and in Gobin’s case, additionally, it was legally impermissible to leave it to the jury to determine whether or not it was voluntary and consequently to be consid-

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ered as evidence or not. Additionally, the Court deprived itself of the opportunity to learn facts relevant to determining whether or not to exclude the evidence on discretion, even if voluntary.

During the hearing, considerable time and learning was spent on submissions as to whether or not R. v. Charles (*supra*) and R. v. Farley (*supra*) were rightly decided in so far as they laid down – if they so did – that on a bare objection, “I did not make the statement,” a *voir dire* was not required to be held at all. For the State, it was submitted this was the right common law position. For the appellants, it was contended it was not; that in such case a *voir dire* should be held to determine two things, namely, (a) whether or not there is sufficient *prima facie* evidence to go to the jury that the accused did make the statement; and (b) if so, whether, in fact, it is shown by the prosecution to be free and voluntary beyond reasonable doubt. In my view, this point does not arise directly for decision on the facts of these appeals. I feel considerable reluctance to express a firm conclusion on a question that does not so arise and on which anything that is said would be *obiter* clearly. Furthermore, the point is expected to come up directly for determination in another appeal now pending and soon to be heard. Accordingly, I shall reserve for that occasion my conclusions on it, after listening then to any additional arguments counsel might wish to submit. For all these reasons, in each appeal, the conviction was set aside and an order of acquittal entered.

JHAPPAN, J.A.: I concur with the judgment of the learned Chancellor and with the reasons therefor.

BOLLERS, C.J.: In these two appeals, counsel for the appellants sought a review of the decisions of this Court in the cases of The State v. Dhannie Ram-singh and The State v. Fowler, which he claimed were wrongly decided and ought not to be followed. His submission was that the Court in these two decisions had misinterpreted what the common law was in regard to the admissibility of a confessional statement made by an accused person and the important point of the making of a confession. His argument ran that where the State seeks to tender a confessional statement made by an accused person which the accused denies making for the reason that he was forced into “making” it, the common law of England, which is applicable to this country under s. 3 of the *Evidence Act, Cap. 5:03*, dictates that a judge in these circumstances must decide whether there was *prima facie* evidence that the confession was in fact made by the accused, and if he feels there is sufficient evidence from which the jury might draw the inference that it was made by the accused person, then he must decide at a trial with in a trial whether the prosecution has established beyond reasonable doubt that the statement was voluntarily made.

In the appeals of Dhannie Ramsingh and Fowler, this Court decided by a majority

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decision that where an accused person objects to the admission of a statement on the ground that it is not his statement, in the sense that he was not the author of the statement, and had not made it, but was induced into signing the statement either by hope, promise or threat or that he was beaten into signing the statement, then there was no compulsion on the trial judge to embark on a *voir dire* to discover whether the accused had in fact made the statement, and whether it was a free and voluntary statement, but it was his duty to admit the statement and leave the issue of fact as to whether the accused had made the statement or not to be determined by the jury. It was also decided that an accused person could not make a “double-barrelled attack” on the admissibility of a statement which the prosecution alleged was made by him on the ground (a) that it was not his statement, and, if that failed, then (b) that it was not a free and voluntary statement. At the conclusion of the hearing of the appeals, I was satisfied that the appeals should be allowed and the convictions and sentences be set aside for reasons which will be revealed later in this judgment, and that it was juridically wrong and unnecessary to disturb the decisions of this Court which were handed down less than two years ago.

Having listened to arguments on both side for several days at the end of which I was more convinced than ever that the majority decisions in Dhannie Ram-singh and Fowler were correct, and that my judgment in these two matters was right, I am of the view that on the doctrine of *stare decisis* the decisions ought not to be disturbed, for even if wrong, it were better that the law be certain rather than perfect. Six centuries ago counsel was heard to say to a judge: “I think you will do as others have done in the same case, or else we do not know what the law is” (Y.B. 18 &19 Ed. III). And comparatively recently LORD WRIGHT, writing extra-judicially in 8 C.L.J. 121, observed that the modern English rule that the House of Lords is bound by its past decisions can only be changed by the act of the legislature.

My misfortune is that in the two present appeals, although notice of appeal was given in April 1975, it was not until January 1976 that the appeals came on for hearing so shortly after the departure from the Bench of my two learned colleagues who, along with me, formed the majority decisions in the cases now sought to be reviewed. In this judgment, therefore, I do not intend to repeat my analysis and observations of the authorities fully considered in Dhan-nie Ramsingh and Fowler, but to confine myself to (a) the question of the application of the doctrine of *stare decisis* and (b) making a few further observations on the authorities in support of my opinion.

With reference to the application of the doctrine of *stare decisis*, which is so strongly built into our jurisprudence, the point of commencement might be Young v. Bristol Aeroplane Co., Ltd. [1944] 2 All E.R. 293, in which the Court of

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Appeal in England held that it was bound by its own decisions subject only to four qualifications, three of which need not concern us here. The qualification that could be applicable here is that if a decision of the Court was given per *incuriam*, that is, in ignorance of statute or other binding authority, the Court is not bound by it. There is no question here of the decisions in respect of which a review is sought having been decided per *incuriam*, for it cannot be shown that any step in the reasoning on which the judgment were based were demonstrably wrong. For it could not be said of the judgment, "Here was a manifest slip or error." See Morrelle Ltd. v. Wakeling [1955] 1 All E.R 708, at p. 718. The judgments of both the majority and minority view agreed that where objection was taken to the admissibility of a statement made by an accused person on the ground that it was not a free and voluntary statement, a *voir dire* in the absence of the jury must be held by the trial judge in order to determine that issue. Where the two views clashed was, on the question when an accused person alleged that he was not the author of the statement, that is, he had not made the statement and was not responsible for the making of it but was induced into signing his name which appeared on the document either by hope, promise or threat or being beaten into signing it. Then, the view of the majority was that there was no compulsion on the trial judge to embark upon a trial within a trial as the issue was one of fact to be determined by the jury, but he should take preliminary evidence in the presence of the jury, to satisfy himself that, *prima facie*, the statement of the accused person was free and voluntary; whereas, the view of the minority was that a *voir dire* ought to be held by the trial judge in order to determine whether the statement was a free and voluntary statement, made by the accused person. The difference in the two opinions then was merely on the application of a point of procedure in a criminal case.

The House of Lords in England until 1966 had for many years considered itself bound by its own decisions. [Beamish v. Beamish (1861) 9 H.L. C. 274. London Street Tramways Co. v. London County Council [1898] A.C. 385]. In the former case LORD CAMPBELL justified the doctrine for the reason that it would be unconstitutional for the House to refuse to be bound by its own decisions as it would be arrogating to itself the right of altering the law and legislating by its own separate authority; whereas, LORD HALSBURY in the latter case justified the strict application of the rule on the ground that it made for certainty.

In Radcliffe v. Ribble Motor Services. [1939] 1 All E.R. 637, the House was of the view that the doctrine of common employment in the law of master and servant was not based on any proper principle of law at the time it was introduced into the common law in 1837, but one hundred years later it could not be overruled by the House otherwise than by the legislative action of Parliament because of the strong adherence to the doctrine of *stare decisis*. On the 26th July, 1966, the House of Lords announced an epoch-making declaration in the following terms:

"Their Lordships regard the use of precedent as an indispensable foun-

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dation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House.”

The comment of the learned author of *Dias on Jurisprudence* 3rd Edition, at p. 56, is that the wording of this statement suggests that the practical effect of the refusal of the House to bind itself is likely to be small. In a recent case the majority of the House in R. v. National Insurance Commissioner Ex Parte Hudson, [1972] 2 W.L.R. 210, held that the terms of the declaration should be applied sparingly and should only rarely be invoked in cases of the construction of statutes or other documents. It was LORD REID in that case who observed that, at the time of the practice statement by the House, there was a comparatively small number of reported decisions of the House which were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy, and that those decisions should be reconsidered as opportunity arose. It will thus be seen that in civil cases there has always been a strong adherence by the English courts to the doctrine of *stare decisis* so much so that Professor Goodhart in 1948 was prompted to write in 64 L.Q.R. 40. “The English doctrine of precedent is more rigid today than was in the past.” In criminal cases, however, long before the declaration made by the House of Lords, the doctrine was relaxed in extreme cases where the liberty of the subject was concerned and there was a likelihood of injustice being done. In the celebrated case of R. v. Taylor (1951) 34 Cr. App. R. 138, a Full Bench of seven judges of the Court of Criminal Appeal was unanimously prepared to review and overrule a decision made by that Court eleven years before and delivered by a Bench of three judges. That Court, speaking through CHIEF JUSTICE LORD GODDARD, laid down the law as follows (*ibid.*, at p. 142):

“I should just like to say one word about the reconsideration of a case by this Court. A Court of Appeal usually considers itself bound by its own decisions or by decisions of a Court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber; and, as

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is well known, the House of Lords also always considers itself bound by its own decisions. In civil matters, it is essential, in order to preserve the rule of *stare decisis*, that this should be so; but this Court has to deal with the liberty of the subject, and if this Court found on reconsideration that, in the opinion of a full Court assembled for that purpose, the law had been either misapplied or misunderstood and that as a result a man had been deprived of his liberty, it would be its bounden duty to reconsider the earlier case with a view to determining whether he had been properly convicted. The exceptions which apply in civil cases ought not to be applied in this case, and in this case the Full Court of seven judges is unanimously of the opinion that the case of Treanor (*supra*) was wrongly decided, for a reason which I will indicate in a moment.”

It follows that where the subject would be deprived of his liberty and the court is of the opinion that the law, that is, the substantive law as opposed to the adjective law, had been either mis-applied or misunderstood and the Full Court was unanimously of the opinion that the previous case was wrongly decided, then the Court would not consider itself bound by its earlier decision. In Dhannie Ramsingh and Fowler it cannot be said that the law had been misapplied or misunderstood; the dispute between the two points of view was one of the application of a point of procedure, as to whether in the circumstances of the admission of the statement a *voir dire* ought to have been held or not.

Kneller v. D.P.P. [1972] 2 All E.R. 898, decided by the House of Lords, is a criminal case and is dead on the point now being considered. In this case it was very strongly submitted by counsel for the appellant that the case of Shaw v. D.P.P. [1961] 2 All E.R. 446, in which the House had held by a majority decision that a conspiracy to corrupt public morals was a crime known to the law of England, was wrongly decided and should be reconsidered by the House. The House by another majority decision refused to review Shaw's case. LORD REID, who had dissented in Shaw's case and had held that there was no such crime known to the law of England and found no reason whatever to alter his opinion, yet maintained that on the doctrine of *stare decisis* the decision of the House should remain (notwithstanding the 1966 declaration by the House) and could only be altered by Parliament. The learned judge stated: ([1972] 2 All E.R. at p. 903.)

“I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no long regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good

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reason before we so act. We were informed that there had been at least 30 and probably many more convictions of this new crime in the ten years which have elapsed since Shaw's case was decided, and it does not appear that there has been manifest injustice or that any attempt has been made to widen the scope of the new crime. I do not regard our refusal to reconsider Shaw's case as in any way justifying any attempt to widen the scope of the decision and I would oppose any attempt to do so. But I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

The learned judge then gave vent to his strong feelings in the matter, which at this point I would observe concerned a point of substantive law and not merely procedure as in the present appeals, when he said *ibid.*, at p. 903:

"I hold that opinion the more strongly in this case by reason of the nature of the subject matter we are dealing with. I said in Shaw's case and I repeat that Parliament and Parliament alone is the proper authority to change the law with regard to the punishment of immoral acts. Rightly or wrongly the law was determined by the decision in Shaw's case. Any alteration of the law as so determined must in my view be left to Parliament."

LORD MORRIS OF BORTH-Y-GEST considered that Shaw's case had been correctly decided but even if it were not he would not be prepared to reconsider it as such course would not fall within the practice statement of the House in the 1996 Declaration. At p. 909 of the report he said:

"... It was urged that Shaw's case should be reconsidered. I reject this submission primarily because, in my view, Shaw's case was correctly decided. Even had I been of a different opinion, I would nevertheless consider it wholly inappropriate now to review the decision. Such a course would not, in my view, be warranted or desirable within the ambit of the statement made in this House on 26th July, 1996. That statement drew attention to the especial need for certainty as to the criminal law. It was clearly held in Shaw's case that there had been and that there continued to be as part of the criminal law of England the offence of conspiracy to corrupt public morals. The decision established that fact with certainty. If any person had previously had doubts as to this their doubts were removed. There are some who regret that there should be such an offence and who would wish to change the law: their course is to persuade Parliament to change it. Once this House in its judicial capacity was satisfied that the offence was known to and existed as part of the law it would neither have been proper nor would it have been within its

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judicial province to proclaim or to suggest that the law should be forgotten or ignored or that its force should be denied. The decision in Shaw's case was made nearly 11 years ago. We were told that in one period of four years since that time there had been over 30 prosecutions for conspiracy to corrupt public morals; we do not know how many in total there have been. Those prosecutions were for an offence which this House had authoritatively laid down to be a part of our criminal law. It is accepted that all relevant authorities were examined before this House came to its decision. There comes a stage when further disputation should cease."

LORD KILBRANDON and LORD SIMON of GLAISDALE on the principle of *stare decisis* were also not prepared to review Shaw's case, LORD DIPLOCK being the sole dissident. In the Knüller case the liberty of the subject was involved, but in view of the circumstance that there was no question of injustice, the House was not prepared to disturb the decision of the House in Shaw's case. In Dhannie Ramsingh and Fowler there was also no injustice done to the accused persons, for in both cases the accused persons had the benefit of a ruling as to whether the statement was free and voluntary though the judge did not rule on this issue on the *voir dire*.

My conclusion must be that it would be wrong for this Court, which is a Court of Record under Art. 83 of the Constitution, now so recently after the decisions in Dhannie Ramsingh and Fowler have been handed down, to review and reverse its own decisions where there has been no evidence whatsoever that any injustice has been done to any accused person, and I cannot register my protest too strongly. I would repeat what was said a century ago by the Lord Chancellors – that such a course does not make for certainty in the law which is so essential to the criminal law and would lead to the unfortunate result of legislation by the Court under its own separate authority. Where will it all end? Are we to have a review of every decision of the Court because we find ourselves in disagreement with it? This approach can only result in confusion and undoubtedly does not make for certainty in the criminal law. Again, it was LORD REID in Myers v. D.P.P. (1964) 48 Cr. App. R. 348 who, after observing that he never took a narrow view of the functions of the House of Lords as an appellate tribunal, expressed his point of view that the most powerful argument of those who support the strict doctrine of precedent is that, if it is relaxed, judges will be tempted to encroach on the proper field of the Legislature, and this offered a strong temptation to do that which should be resisted.

I turn my attention now to the question whether Dhannie Ramsingh and Fowler were correctly decided, and I positively refute the submission of counsel for the appellants that it is a principle of the English common law (which is the common law of Guyana) that where the prosecution seek to tender a confessional state-

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ment allegedly made by an accused person which the accused denies making for the reason that he was assaulted and forced into signing the statement, a judge in those circumstances must decide on the *voir dire* whether there is *prima facie* evidence that the confession was in fact made by the accused, and if he so decides, then he must go on to consider whether the prosecution has established beyond reasonable doubt that the statement was voluntarily made. In point of fact counsel went so far as to submit at one stage that whenever the prosecution sought to tender a statement in those circumstances, the judge at the trial within a trial should, first of all, decide whether the prosecution have established that the statement was in fact made by the accused person; if the answer is in the affirmative, then he must decide whether the prosecution has established beyond reasonable doubt that it was a free and voluntary statement. I emphatically reject that the aforesaid statement represents a true and correct exposition of the English common law. In not one of the cases cited by counsel for the appellants during the hearing of the arguments (which included the authorities cited in Dhannie Ramsingh and Fowler) was counsel able to put forward a case where the objection to the admission of the statement was based on the ground that the accused person had not made the statement, was a *voir dire* held by the trial judge to decide whether the prosecution had established (a) that the accused had made the statement; (b) that the statement was freely and voluntarily made. In all the cases cited it was clear that the accused person was not denying that he had made the statement but was alleging that he had made the statement as the result of some inducement held out to him by a person in authority and as a result the statement was not free and voluntary.

In order to establish the authenticity of what I said in Dhannie Ramsingh – that where an accused person objects to the admissibility of a statement on the ground that it is not a free and voluntary statement, implicit in the objection is an admission by him that he made the statement but he made it under an inducement or duress or compulsion – it may be necessary to consider briefly, as I do now, some of the numerous authorities which have engaged the attention of the Courts over the centuries.

In the early case of Scott (1856), I Dears, and B. 47, the principle upon which the exclusion of confessions is based was declared by LORD CAMPBELL, C.J. as follows at p. 58:

“It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon.”

In Ibrahim v. R. [1914-15] All E.R 874; (1914) 24 Cox C.C. 174, LORD SUMNER

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made his classic statement, which is invariably quoted in every case on the admissibility of confession and which can always bear repetition, that is, “It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE. “In the context of the circumstances in which that statement of the law was made, it is clear that LORD SUMNER was addressing his mind to a case where the accused was objecting to the admissibility of a statement which he was admitting having made, on the ground that it was not a free and voluntary statement. The appellant was a private in the Indian Army, and was convicted of the murder of an officer. Shortly after the murder the commanding officer went to see the appellant, who was in custody, and said to him: “Why have you done such a senseless act?” The appellant replied: “Some three or four days ago he was abusing me; without a doubt I killed him.” No threat or inducement was offered to the appellant before he made the statement. The trial judge admitted the statement as a free and voluntary statement and his ruling was upheld by the Privy Council. It is beyond dispute, reading both reports, that no *voir dire* was held in the matter and the Privy Council were of the view that the way the question was put to the appellant it tended to show that it did not convey a command or inducement to him. This then, was a case where the appellant was not denying that he made the statement, but was alleging that he did so, under an inducement which both the trial judge and the Privy Council held did not exist, in which case no question of the holding of a *voir dire* arose. LORD SUMNER in delivering the judgment of the Court, referred to certain authorities all of which indicate that where the objection to the admissibility of the statement is made on the ground that it is not a free and voluntary statement, the accused person is saying that he made the statement but he made it or it was obtained from him under duress or hope, promise or threat.

In R. v. Thompson (1893) 17 Cox C.C. 641, the prisoner was convicted for embezzling money belonging to a company which employed him. On being taxed with the crime by the chairman of the company, he said: “Yes, I took it.” and afterwards made out a list of the sums and with the help of his brother paid back part of the money. The chairman admitted that before receiving the confession he had said to the prisoner’s brother, “It will be the right thing for Marcellus (the prisoner) to make a statement” or “to make a clean breast of it”; but he also said that at the time of the confession no promise or threat was made to the prisoner with regard to his prosecution and there was no evidence that the chairman’s statement had, in fact, been communicated to the prisoner prior to his confession. It was held by the Court of Crown Cases Reserved that the confession was not admissible, and the conviction was quashed. CAVE, J., in his judgment emphasised that the material question is whether the confession has been obtained by the

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influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge who will require the prosecution to show affirmatively to his satisfaction that the statement was not made under the influence of improper inducement, and who in the event of any doubt subsisting on this head will reject the confession. Here, a *voir dire* was quite properly held because the accused person was not alleging that he had not made the statement but, on the contrary, was alleging he had done so under pressure from the chairman of the company.

In R. v. Baldry (1852) 5 Cox C.C. 523, a police constable went to the prisoner's home along with another constable and a medical practitioner and told the prisoner what he was charged with. The prisoner commenced to cry. The constable then told him that he need not say anything to incriminate himself but what he did say would be taken down and used in evidence against him. It was held that such words did not amount to any threat or promise to induce the prisoner to confess.

Thompson's and Baldry's cases, as well as the other earlier cases considered in Ibrahim, were decided before 1898, when up to that time an accused person could not give evidence in his defence, but none of the reports suggest that the accused persons were denying having made the statement. In Alice James (1909) 2 Cr. App. R. 319, where a confession was made by a prisoner two hours after she had been questioned by the police and had been cautioned, it was held by the presiding judge that there had been no inducement to confess. In this case a *voir dire* was not held. In Colpus, Boorman & White (1917) 12 Cr. App. Rep. 193, where the prisoners were invited to make a statement in writing and did so in a military court of inquiry, it was held that those statements were admissible in evidence in a civil court and the mere fact that the statements which contained admissions were made to a body in authority was no evidence of an inducement. Here again, the accused persons were admitting having made the statements but were alleging having made them under duress. In R. v. Cowell [1940] 2 All E.R. 599, objection was taken to the admissibility of a statement, the prisoner alleging that it was obtained from him by improper means and he was allowed to give evidence to that effect. The judge ruled that the statement was admissible and the prisoner was convicted. His application for leave to appeal was later dismissed by the Court of Criminal Appeal. The Court in its judgment emphasised the judge had told that the jury to disregard the whole statement if they thought that it had been obtained by unfair means, and concluded that the jury must have thought that what was said in the statement was freely said by the accused and was the truth.

The cases of Mills and Lemon (946) 32 Cr. App. R. 23; R. v. Cleary (1964) 48 Cr. App. R. 116; R. v. Zaveckas. [1970] 1 W.L.R. 516; R. v. Richards. [1967] W.L.R 653; Sparks v. R. [1964] 1 All E.R. 727; R. v. Northam [1968] 52 Cr. App. R. 97, were all cases concerned with the admissibility of confessions in which the ground

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of objection was that the respective statements were not free and voluntary, and in each case it is to be inferred that the appellant was saying that he had made the statement but made it under duress.

In Zaveckas the appellant asked a public officer the question, “If I make a confession would you give me bail now?” The police officer replied. “Yes,” whereupon the appellant made a written confession of guilt. After holding a *voir dire* the trial judge admitted the statement. The Court of Appeal allowed the appeal on the ground that the statement was made as a result of an inducement by a person in authority and that the conviction should be quashed. It made no difference that the appellant and not the police officer had raised the question of bail. In Northam a similar situation existed where the appellant suggested to a police officer that if he admitted complicity in another offence, he should be allowed to have it taken into consideration of his forthcoming trial in respect of an offence in which he had been placed on bail. The police officer said that he would have no objection to the appellant’s suggestion and the appellant made a confessional statement. The judge ruled the statement admissible but the Court of Appeal held that the confession should not have been admitted in evidence as it had been made as a result of an inducement by a person in authority and the conviction must be quashed.

In R. v. Moore (1972) 56 Cr. App R. 373 where, in the presence of police officers the father of the appellant who was subsequently convicted of the offence of arson, at the police station said to the appellant, “You had better make a statement and then we can go home,” the appellant then made a confession of guilt. Defending counsel objected to the admissibility of the confessional statement, but the judge without hearing evidence or holding a trial within a trial ruled that it was admissible. It was held by the Court of Appeal that it was the duty of the judge to hear evidence on that issue at a trial within a trial and then give his ruling on the admissibility on the evidence; as this had not been done the conviction must be quashed. The report shows that counsel addressed the trial judge pointing out the reason why the appellant’s statement ought to be excluded from the jury, and that was, the conduct of the father and what the father had said in the presence of the police officers which would make the appellant’s statement to the police involuntary and inadmissible. To my mind it was obvious that counsel was accepting that his client had made the confession but was submitting that he had done so under an inducement. The ground of objection was not as in Dhannie Ramsingh and Fowler – that the appellant had not made the statement, but had merely signed it and was not even aware of its contents.

It must be noted that the authorities stress the aspect of the effect of the inducement emanating from the person in authority on the mind of the prisoner which would cause the prisoner as an individual of average emotional experience to make a statement and confess. In Ibrahim where the commanding officer asked

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the questions, he said he felt sorry for the accused because he had killed the man, and the Privy Council treated the question as not conveying a command but merely an exclamation of dismay. That Court quoted in its judgment what was said in R. v. Warickshall (1783), 1 Leach 263, that is, “A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it,” and then went on to point out that when hope and fear were not in question, such statements were regularly admitted as relevant though with reluctance and subject to a strong warning as to weight. This must mean statements proved to have been made by the accused as the result of inducements which influenced his mind to make them.

In Colpus, Boorman and White, (*supra*) the Court made the point that when the appellants made their statements in the military court of inquiry they could not have the regulation in mind (which regulation made inadmissible any statements or confession in evidence against them in any subsequent trial before a military tribunal) so it could not be said that they were induced to make statements by anything said in the regulation. In Northam (1968) 52 Cr. App. R. 97, WINN, L.J. in the Court of Appeal cited the *dictum* of LORD REID in Commissioners of Customs and Excise v. Harz (1967) 51 Cr. App. R. 123, which talked about inducements being so vague that no reasonable man would be influenced by them but “one must remember that not all accused are reasonable men or women; they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side.”

In Isequilla (1974) 60 Cr. App. R. 52, it was held that a confession cannot be regarded as involuntary unless there has been an element of impropriety in the form of a threat, an inducement or oppressive conduct on the part of a person in authority which causes the accused person to make the statement. LORD WIDGERY, C. J., who delivered the judgment of the Court, cited Naniseni v. R. (a New Zealand case) [1971] N.Z.L.R. 269, where the principle is stated:

“What must appear, if a confession is to be held voluntary, is in our opinion no more and no less than that it has been made by the prisoner, his will in making it not being overborne by the will of some other person by means of some consideration such as has been mentioned above. Not that the considerations which we have enumerated are to be narrowly interpreted as constituting a necessarily exhaustive list. But the factor which is relied upon as having overborne, or as apt to overbear, the will of the prisoner, must be found in the will of some other person, by the exertion of which his confession is induced or is deemed by the law to have been induced. The will of some other person is essential; the involuntariness cannot be produced from within. Such considerations as fatigue, lack of sleep, emotional strain, or the consumption of alcohol,

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cannot be efficacious to deprive a confession of its quality of voluntariness, except, perhaps, so far as any of these may have been brought about or aggravated by some act or omission of other persons to the end that a confession should be made.”

The learned Chief Justice, after observing that the courts have been overgenerous in accepting an inducement for present purposes as something which would be unlikely to induce the average man, gave approval to the recent case of *Prager* (1972) 56 Cr. App. R. 151, where it was established that interrogation by police officers, if carried to the point of oppression may be held to have destroyed the will of the suspect who is being interrogated, and thus prevented a subsequent confession from being treated as a voluntary confession.

More recently, in *D.P.P. v. Ping Lin* [1975] 3 All E.R. 175, the House of Lords clarified the position that the intention of the person in authority who offers the inducement prior to one making of the confession is irrelevant; what matters is whether the confession or statement was procured by the express or implicit inducement. LORD SALMON in his judgment at p. 187 spoke of the duty of the judge of deciding whether he is satisfied that no person in authority has obtained the confession or statement, directly or indirectly, by engendering fear in the accused that he will be worse off if he makes no confession or statement or by exciting hope in the accused that he will be better off if he does make a confession or statement. LORD HAILSHAM in his judgment at p. 185 of the report stated: “The real question, as formulated by LORD SUMNER at first instance, is one of fact to be decided by the judge, normally in the absence of the jury, and, on appeal, whether the judge was entitled in law to come to the conclusion of fact in the context of all the facts as found by him on consideration of the whole of the evidence before him.”

It is worthy of note that in the *Ping Lin* case the ground of objection by the accused was that the statement was inadmissible as it was not a free and voluntary statement. The accused gave evidence on the *voir dire* but did not deny that he had made the statement. His evidence, which was considered by the judge to be a pack of lies, was that promises and threats, accompanied by violence, had been held out to him which had caused him to make the statement. If, therefore, the courts have stressed the aspect of the effect of the promises, or threats, or violence exercised or excited by the person in authority on the mind of the prisoner which induces or causes him to make the statement, how can this principle be applicable to a case where the accused person is saying what was done to him did not cause him to make a statement for he made no statement, it merely caused him to sign his name?

The subjective test of the effect of the inducement on the mind of the prisoner has

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been emphasised more and more by the courts and, in Australia, the High Court of Australia stressed that what matters for present purposes is the effect produced upon the prisoner. “It would be a lamentable thing,” the Court said, “if the police were not allowed to make inquiries, and if statements made by prisoners were excluded because of a shadowy notion that if the prisoner were left to themselves they would not have made them [*per* DARLING, J., R. v. Cook (1918) 34 T.L.R. 515, at p. 516]. A statement need not be spontaneous or volunteered in order to be voluntary. But, on the other hand, no doubt can be felt that interrogation may be made the means or occasion of imposing upon a suspected person such a mental and physical strain for so long a time that any statement he is thus caused to make should be attributed not to his own will, but to his inability further to endure the ordeal and his readiness to do anything to terminate it.”

It is true that in Lindon Harper v. The State (1971) 16 W.I.R. 353 at p. 355, I did say “in my view where an accused person admits that he has signed a statement, it must follow that he is adopting what is written...,” but in the State v. Fowler (1971) 16 W.I.R. 453, after explaining that I was saying that in relation to the particular circumstances of the case and after further reflection in Dhannie Ramsingh. I added: “But if he (accused person) goes on to say that he did not say what appears in his statement, then he is in effect rebutting *prima facie* evidence and objecting to the admission of the statement on the ground that it is not his statement.” There is no inconsistency between my judgment in Harper’s case and Fowler’s case. In the former the objection raised at the outset by the accused person was that he had been induced to make a statement because of a promise held out to him by a person in authority. This clearly called for a trial within a trial. In the course of his evidence on the *voir dire* the accused said that all he did was to sign the statement which had already been written out and he read it. He went on to explain that he did not give the statement of his own free will because the inspector held out a promise to him which induced him to fix his signature. Thus I held that when the accused signed the statement he was adopting it as his own and gave authenticity to the statement which he was asserting was not free and voluntary because of the promise held out to him. On the other hand, in the latter case the accused person was clearly asserting that he had not read over the statement and had made no statement, and further added that he was sure he had made no statement. Therein lies the distinction between the two cases. In Harper the accused said he had read over the statement and all he did was to sign because of the promise held out to him. There, he was adopting the statement as his own, whereas in the latter case the accused was denying categorically being the author of the statement.

The tape recording cases I find helpful on this point. In R. v. Stevenson et al [1971] 1 All E.R. 678, the prosecution sought to tender in evidence electronic tape recordings of human voices alleged to be conversation between the defen-

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dants and one of the witnesses for the prosecution. The defendants contended that the tape recordings had been fabricated. It was held that before the Court would admit them in evidence it had to be established that they were the original recordings. In order to decide this question, the learned judge embarked on a lengthy *voir dire* in the absence of the jury, but subsequently stated in his judgment at p. 680: "Nevertheless, as a general rule, it seems to me to be highly undesirable and indeed wrong for such an investigation to take place before the judge. If it is regarded as a general practice it would lead to the ludicrous situation that in every case where an accused person said that the prosecution evidence is fabricated the judge would be called on to usurp the function of the jury." In reaching this conclusion, the judge did not overlook the proposition that though it was for the judge to rule on admissibility, it is for the jury to decide on the truth or falsity of any piece of evidence.

R. v. Robinson & Harris [1972] 2 All E.R. 699, SHAW, J. put the matter of the admissibility of the tape recordings of conversations beyond dispute when he held that they were admissible if the prosecution established, *prima facie*, that they were original recordings. The learned judge in his judgment appreciated, in deciding on its admissibility which depended on the rule that the best evidence must be tendered or its absence accounted for before secondary evidence could be received, that the application of the rule in a trial by jury could give rise to difficulties in delimiting the function of the judge of deciding admissibility while at the same time avoiding any unnecessary or unwarranted incursion into matters which went to cogency and weight which were for the jury to consider and decide. He then pointed out that in the first stage when the question is solely of admissibility, that is, whether the evidence is competent to be considered by the jury, the judge would be usurping their functions if he purported to deal with not merely the primary issue of admissibility, but proceeded to deal with what was ultimately the issue of cogency. He then stated *ibid*, at p. 701: "My own view is that in considering that limited question the judge is required to do no more than to satisfy himself that a *prima facie* case of originality has been made out by evidence which defines and describes the provenance and history of the recording up to the moment of production in court. If that evidence appears to remain in tack after cross-examination it is not incumbent on him to hear and weigh other evidence which might controvert the *prima facie* case. To embark on such an inquiry seems to me to trespass on the ultimate function of the jury." Then comes the categorical statement of this learned judge which bears directly on the point under consideration ([1972] 2 All E.R. at p. 701):

"It is true that in determining whether an alleged confession is admissible or not the judge has the duty of deciding a contentious issue and he has to apply the same criteria as a jury would have to do; but this is an anomalous case deriving from its own special history and from consid-

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erations peculiar to confessions. It is perhaps worth noticing that if in regard to an alleged confession the question is not whether it is voluntary but whether it was made at all, that question is solely for the jury's determination; the trial judge has no part to play except to sum up the matter to them."

This *dictum* more or less confirms what I said in Fowler and Dhannie Ram-singh. In the former case, in rejecting the submission that an accused person could attack the statement on both grounds – (a) that the statement was not free and voluntary; (b) that the statement was not made by him at all – I said at p. 465: “The judge, having made a finding of fact that the statement is free and voluntary and admissible, cannot then leave it to the jury to say whether it is the statement of the accused or not, as that would involve two findings of fact on the same issue which may indeed turn out to be contradictory.” And in the latter case I said: “If, therefore, the fact of voluntariness is established when both the judge and the accused himself are saying that the statement is that of the accused (for this is implicit in the objection that the statement is not free and voluntary), with what logic can the judge in these circumstances leave it to the jury to say whether it is the statement of the accused or not?” The question of fact for the judge is collateral and irrelevant to the issues upon which the jury are to pass. The question may therefore be heard in the absence of the jury. (Cornelius v. R. (1936) 55 Crim. L.R. 235, at p. 248). If indeed confirmation were needed for this line of argument, one must surely find it in the case of R. v. Clark (1955) 39 Cr. App. R. 120, which I agree was principally concerned with the question whether the accused person could properly be cross-examined about his previous convictions where he attacked the police on the ground that a confessional statement which they sought to put in evidence against him at his trial was not his statement but was concocted by them. In this case there are important *dicta* by LORD GODDARD, L.C.J., who delivered the judgment of the Court, as to the position that obtains when an accused person alleges that having signed the caution at the head of a written statement of police inspector dictates to a constable what to write down in the body of the statement, and the accused then proceeds to sign the statement because he is frightened. The learned Chief Justice stated (1955) 39 Cr. App. R. (at p. 123:)

“The case arises because of an attack made by the appellant on the police with regard to a statement he had made and signed; and any judge who has had any experience on circuit or at the Central Criminal Court, as we all have, knows that one of the commonest happenings in the case of a prisoner who has made the fullest and most complete statement admitting his offence and signed it, is that, when he comes to trial, he repudiates the statement and generally says that it was extracted by some improper means. In this case the appellant does not say that the written

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statement was obtained from him by any threat nor by any inducement. What he says is that he was at the police station when the detective-constable started to write down the heading of the statement, which is a caution, and then the chief inspector, in whose room he had previously been, came into the room and proceeded to dictate to the detective-constable what he was to write down, so that the statement was not the appellant's statement at all, but the statement of the chief inspector, and the appellant says it was all untrue. That means that the chief inspector, for the purpose of getting a conviction against the appellant, not only manufactured a statement, but manufactured a statement which had not a word of truth, a sufficiently serious accusation against a high-ranking police officer of considerable standing.”

If the true legal position is that where an accused person says that it is not his statement as it did not emanate from him, he was merely coerced into signing the statement, it is incumbent on the trial judge to embark on a trial within a trial, why did not LORD GODDARD say that no *voir dire* was held and one ought to have been held? I can hardly imagine so eminent a judge as LORD GODDARD deliberately making a statement which would be calculated to mislead its readers. It was submitted at the hearing of the present appeal that LORD GODDARD was not addressing his mind specifically to this question and what he said was merely *obiter dicta*. My answer to that submission is that LORD GODDARD was accepting what both counsel for the Crown and counsel for the defence were taking for granted, that is, that where an accused person denies making a statement, that issue is one of weight and cogency for the jury to decide. Even if I am wrong in drawing this inference, it must not be forgotten that *obiter dicta* is an important source of law. It was LORD STERNDALE in Slack v. Leeds Industrial Co-operative Society, [1923] 1 Ch. 431, at p. 451, who distinguished between *dicta* which are “almost casual expressions of opinion” on a point extraneous to the case, and those which although not necessary for the decision of the case are “deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court.”

What LORD GODDARD said in Clark's case clearly fell within the latter category of opinion and points out that in England the usual case is for the prisoner to say that he made the statement as the result of an inducement brought about by improper means and it was seldom that he alleges that it is not his statement in the sense that he is not the author of the statement but signed it because he was afraid. Surely there must be a difference between the two situations! When an accused person says that he was taken to a police station and beaten into signing a confessional statement, as I see it, he is not relating the beating received by him to the making of the statement because he is saying that it is not his statement; he is relating the beating to the signing of the statement

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and at the same time rejecting being the author of the statement. How, I ask, can an accused person properly object to the admissibility of a statement on the ground that it is not a free and voluntary statement when his evidence on the *voir dire* in relation to the voluntariness of the statement will be that he made no statement, in the sense that he is not the author of the statement? There are two ways, it seems to me, in which it can be truly said that a statement is not that of an accused person *viz.*, (1) when he was induced to sign something that never emanated from him; and (2) when he was induced to sign something that he would not willingly have done had it not been for the inducement, and which cannot properly be said to have been adopted by him.

With reference to the civil cases which were cited and discussed during the arguments in this appeal, counsel for the State made the point, with which I agree, that the cases illustrate the kind of evidence required to found admissibility when this question arises, but if the objection does not go to the foundation of admissibility but to that of the general issue in the cause, the question cannot then be decided on the preliminary evidence. Counsel's submission was that when objection is taken to the admissibility of evidence, it must be based on the presence or absence of preliminary evidence which goes to the foundation of the challenged evidence; where, however, the objection is not an objection going to the foundation of admissibility but goes to the foundation of the issue in the general cause, then it is a question of fact for the jury.

In Corfield v. Parson (1833) 149 E.R. 593, a person, on being sent by the defendant, an indorser of a bill of exchange, to the plaintiff, the indorsee, to inquire as to the solvency of a prior indorser, went to the plaintiff's residence, and there a person in a dressing-gown, whom he had never seen before or since, asked him what his business was. It was held this was not sufficient evidence of identity to let in evidence of the conversation. LORD LYNDHURST, C.B. said at p. 594: "... the defendant, in the first instance, was bound to give reasonable evidence to satisfy the learned judge that this person was the plaintiff. It is said that the learned judge should have left the question of identity to the jury; I have never known a case where such a course was adopted: the grounds for the admissibility of evidence, rests with the judge; I therefore think that this evidence was properly rejected." And BAYLEY, B. said at p. 594: "... it did not appear *prima facie* that this person, at the plaintiff's house, was the plaintiff; if so, it might have been left with the whole case to the jury."

In Bartlett v. Smith (1843) 152 E.R. 895, it was made quite clear that the admissibility of evidence is a question of law for the judge, and, if its admissibility depends on certain facts, the judge should himself adjudicate upon such facts without submitting them to the jury, if any. LORD ABINGER, C.B. stated (*ibid*, at p. 896):

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“All questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence, and decide upon it without any reference to the jury. In all cases where an objection is made to the competency of witnesses, any evidence to show their incompetency must be received by the judge, and adjudicated on by him alone. ...The evidence tendered was for the purpose of showing that the bill ought not to be read at all; and if the undersheriff rejected it in the first instance, he ought not to have received it afterwards and submitted it to the jury.”

ALDERSON, B. stated (*ibid*, at p. 896):

“Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not.”

In Boyle v. Wiseman (1855) 156 E.R. 870, it was sought to prove the publication of a libel by giving secondary oral evidence of the contents of a letter alleged to contain it and to be written by the defendant. Counsel for the defence objected. His point was that the oral evidence sought to be led was not that of the original. He said he had the true original in court. So the question was: Which was the true original? BARON ALDERSON said (*ibid*, at p. 872):

“It is clear that the plaintiff was seeking to give secondary evidence of a matter that existed elsewhere. Where was that document which was the primary evidence, and without the non-production of which secondary evidence was altogether the inadmissible? The plaintiff’s case was that it was in France. The defendant’s case, that it was there in Court. Which is right? If the plaintiff’s case is right, he is entitled to give the secondary evidence. If the defendant is correct, the secondary evidence is inadmissible. Who then is to determine whether that document is to be received at all? Surely not the jury, for they are only to judge upon the evidence when it is received. It is the duty of the Judge, and he must determine whether it ought to be received; and if for that purpose it is necessary that he should determine a question of fact, he must determine that question, and the party against whom the Judge decides has his remedy by applying to the Court to correct the error, if the Judge has decided wrongly. The question of fact must be submitted, first, to the Judge, and afterwards to the Court.”

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The last sentence in this *dictum* does not mean that the question of fact must be submitted first to the judge and then to the jury. The “Court” there means the Court at Westminster where the verdicts at *Nisi Prius* were entered. In the same case PARKE, B. stated: “The Judge should hear the witnesses at length for the purpose of deciding whether the document tendered was the original; and if he is of the opinion that it is, that document alone must be read to the jury.”

These civil cases therefore illustrate the point made by counsel for the State that where the objection goes to the foundation of admissibility, that is a matter of law for the judge based on his findings of fact and it is only where the objection goes to the foundation of the issue in the general cause that the question goes directly to the jury as in the case where an accused person denies having made a confessional statement and objects to its admission on that ground. For example, in R. v. Spilsbury (1835) 173 E.R. 82, a statement made by a prisoner when he was drunk was received in evidence and it was left to the jury to place what weight they thought to be placed on it. [See also Gore v. Gibson (1845) 153 E.R. 260.] In Doe D. Jenkins v. Davies (1847) 10 Q.B. 314, it was held that it may be the duty of the Judge to decide a question of admissibility even though this may involve his deciding himself the same question as the jury will have to decide later; but this course was disapproved of by LORD PENZANCE in Hitchins v. Eardlen (1871), L.R. 2 p. and D. 248, and it is the opinion of “*Cross on Evidence*”, 4th Ed., p. 60, that the course taken by LORD PENZANCE may be preferable to that followed in Doe P. Jenkins v. Davies.

Stowe v. Querner (1870) L.R. 5 Ex. 155 places the matter in the correct perspective. In that case the plaintiff succeeded in a claim on an insurance policy which the defendant alleged had never been executed. The judge had allowed the plaintiff to give secondary evidence of the contents of the policy on the basis that the original had been lost and left the jury to decide the validity of the defendant’s contention that the policy had never existed. It was held that the course followed by the judge was the right one for, BRAMWELL, B. stated (*ibid.*, at p. 158):

“... where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, ... the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to shew that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy and leave the main question to the jury.”

Now to a reference to the authorities of Cornelius v. R. (1936) 55 C.L.R. 235, Basto v. R. (1954-1955) 91 C.L.R. 628, and Sinclair v. R. (1946) 73 C.L.R. 316, decided by the High Court of Australia. In Cornelius it was laid down that the law relating to the admissibility of confessions in the province of Victoria is based

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both on the common law of England and on statute, that is, s. 141 of the *Evidence Act, 1928 (Vict.)* which provided that, "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the Judge ... is of the opinion that the inducement was really calculated to cause an untrue admission of guilt to be made." It followed that when a confession is tendered in evidence, its voluntary character must, apart from s. 141, appear before it is admissible. In this case counsel for the prisoner informed the judge that the prisoner would give evidence that he had been induced to sign the statement by means of a threat. Counsel also objected that the confession was not voluntary, because it was obtained under such circumstances as might intimidate the prisoner. The judge actually considered that the questioning to which the prisoner had been subjected was of a very drastic and far-reaching kind and the methods by which the statement has been obtained might well have rendered it inadmissible in court, but felt there was nothing in the statute law or practice which would justify him in excluding it. Accordingly, he allowed the prosecution to open the confession to the jury and later admitted it in evidence without objection. The judge was not asked and did not take oral evidence upon the admissibility of the confession. Thus no *voir dire* in the absence of the jury was held. The circumstances in which the confession was obtained was fully gone into in the presence of the jury. The High Court of Australia, though stating that there had been a departure at the trial from the course prescribed by the common law for determining a question of admissibility of evidence, refused leave to appeal as it held there was no prejudice and injustice done to the accused. This case clearly illustrates the point that if the question of the admissibility of a confessional statement is dealt with by the judge in the presence of the jury (even though objection to its voluntary character has been taken) and the judge adjudicates on its admissibility, the Appellate Court will not interfere if there has been no prejudice and resulting injustice done to the accused person.

In *Sinclair v. R.* (*supra*), it was decided that a confession is not necessarily inadmissible as evidence at a criminal trial because it appears that the prisoner making it was at the time of unsound mind and, as a result of his mental condition, exposed to the liability of confusing the products of his disordered imagination or fancy with fact. "It may be conceded (however) that a confession may in fact be made by a person whose unsoundness of mind is such that no account ought to be taken of his self-incriminating statements for any evidentiary purpose as proof of the criminal acts alleged against him." [*per* DIXON, J. (as he then was), (1946), 73 C.L.R. 316 at p. 338.] In this case the prisoner was alleged to have made three confessions, two verbal and one in writing. Objection was taken to the admission of the confessions on the ground that they were not voluntary in the sense that they were made when the prisoner was of unsound mind. The first confession was made orally to a companion of the prisoner a few days after the alleged

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offence of murder; the second confession was also oral and made to the police some six months after the alleged offence; and the third confession was made in writing, composed by the prisoner and signed by him on the said date as the second confession. A *voir dire* was held in relation to the first and third confessions but evidence was not given on the *voir dire* as to the verbal confession made to the police. Though the Appellate Court approved of the course adopted by the trial judge of holding a *voir dire* in the absence of the jury in relation to the first and third confessional statements before admitting the statements, they did not hold that he was wrong in admitting the second statement without holding a *voir dire*. What is of great importance in this case to the present appeals, is that LATHAM, C.J., in his judgment at p. 319, stated that when the case was in the Court of Criminal Appeal, that Court had held that the statements were admissible and had declared in its judgment that “the contention that it is for the judge, and not the jury, to determine the authenticity of an alleged confession, hardly needs refutation,” but such contention was disclaimed by counsel for the applicant. There, the learned Chief Justice was by inference giving approval to the opinion of counsel for the applicant that the authenticity of a confession as a matter of proof, that is, whether the accused person made the statement or not, is for the jury to decide and not the trial judge. RICH, J., referred to the every-day occurrence in the criminal courts when a confession alleged to have been made by the prisoner and signed by him is tendered in evidence by the prosecution when he stated: [(1946) 73 C.L.R., at p. 326]

“It is almost common form for the document to be objected to on the ground that it is not voluntary and for the judge, then, in the absence of the jury, to hear evidence on the voir dire from the prisoner that he was forced to make the confession by brutal ill-treatment on the part of the police, and from the police in denial of this allegation. If the judge is not satisfied that the prisoner’s assertions are true, he admits the confession, and afterwards the prisoner, in the witness-box, or more commonly in a statement from the dock, repeats his allegation of ill-treatment to the jury, who, after having heard the denials on oath of the police officers, give it all the attention which, in their opinion, it deserves.”

In Basto (*supra*), a medical practitioner was indicted for administering poison to his child with intent to murder. The evidence revealed that when he was found in his flat, both the accused and the child appeared to be heavily under the influence of drugs. When his secretary first found the accused he was barely conscious and only made unintelligible mumblings to questions. To the doctor who went to attend him, the accused, would make no answer except to say that he would not tell him what had happened. The resident who saw him could get nothing from him except in reply to the repeated question as to what drug he had given the child; the accused, replied, “Morphia”. The wife of the accused then visited him

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in hospital and when she asked him what he had done with the child, he replied: "Oh she will be better off." Later a detective sergeant visited the accused at his bedside and without objection gave evidence of questions he had asked the accused and the answers, which were damaging admissions, that the accused had made. All this evidence was given in the presence of the jury without a *voir dire* being held. It was only after the police had again visited the accused about one week later and questioned him in an effort to get him to confirm what he had said one week earlier and to make a statement in writing that a *voir dire* was held by the judge (on objection being taken by counsel for the accused) to inquire whether the statement alleged to have been made by the accused on that occasion was free and voluntary. The accused subsequently in a statement from the dock denied having made any statement on that occasion, so the judge quite properly left it to the jury to say whether it was the statement of the accused or not. It must be made absolutely clear, however, that the original objection to the admission of the statement was not that the accused had not made the statement but that it was not a free and voluntary statement.

To sum it up, then, I am convinced that where the objection to the admissibility of a statement is made on the ground that it is not a free and voluntary statement, it is incumbent on the trial judge to embark on a trial within a trial in order to see whether the prosecution have proved beyond reasonable doubt that the statement is a free and voluntary statement and has not been obtained from the accused person by a person in authority by any improper means such as fear of prejudice, hope of advantage or threat or violence. But where the objection to its admission is taken on the ground that it was not the statement of the accused, in the sense that he is not the author of the statement, then that is an objection not going to its admissibility but one which goes to the foundation of the issue in the general cause; the statement after preliminary evidence as to its voluntariness is led by the prosecution should be admitted, and that issue of fact as to whether the accused person made the statement or not be left with the jury.

It will be remembered in Dhannie Ramsingh I made it abundantly clear that in my opinion, where an accused person objects to the admission of a statement on the ground that it is not his statement, a judge should always bear in mind LORD SUMNER'S *dictum* in Ibrahim v. R. (*supra*) and take some preliminary evidence (which, generally speaking, will be all one way from the prosecution) in the presence of the jury as to whether it is the statement of the accused, and, if so, whether it was freely and voluntarily made, before admitting the statement and leaving it to the jury to say whether in the circumstances it is in fact the statement of the accused person or not. But in deciding whether there is evidence fit to go to the jury or not that the statement is that of the accused and that it is a voluntary statement, there is no compulsion on the judge under the rules of procedure to hold a *voir dire*. I am fortified in this view by a statement appearing in a book

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written by a Canadian author and produced by counsel for the appellants, that is *Kaufman on The Admissibility of Confessions*, at p. 49, that the English practice suggests (unlike the Canadian practice) that only where objection is taken to the admissibility of an alleged confession must the learned judge hold a *voir dire*.

In the Gobin appeal, objection was taken to the admission of the statement because of threats of violence and actual violence used on the accused to force him to sign and write on the statement. Immediately after the objection was taken, the learned judge admitted the statement informing the jury that the admissibility of the statement was a matter of fact for them to decide as the appellant was saying it was not his statement. This direction was clearly wrong as admissibility of evidence is never a question for the jury but always for the judge. And the learned judge further erred when he took no preliminary evidence on the voluntariness of the statement in the presence of the jury and gave no ruling on the matter. This appeal must therefore be allowed and the conviction and sentence set aside.

In the Boniface Griffith appeal, the statement of the accused was objected to on the ground that force and violence were used to obtain the statement, and the learned judge quite properly embarked on a *voir dire* in the absence of the jury. However, during the course of the cross-examination of the first witness, a police officer who had taken the statement, the learned judge intervened to ask the appellant who was then in the dock if he was saying that the statement was prepared by the witness and he was beaten to sign it. The appellant then replied that that was exactly what had happened, and immediately after the learned judge brought the *voir dire* to an end, ruling that it was a question of fact for the jury whether or not the statement was that of the appellant. This procedure was clearly wrong, for the objection was based on the ground that force and violence were used in order to obtain the statement. It may very well have emerged, if the appellant had given evidence, that he was asserting that even though the statement was prepared by the witness and that he was beaten to sign it, he was adopting the statement as his own in the sense that he was the author of the statement; in which case, the learned judge should have heard all the evidence on the issue and then made a ruling on the voluntariness of the statement. The learned judge acted prematurely in this matter before getting it quite clearly from the appellant in the witness-box whether he was adopting the statement as his own or not. For these reasons I agree that this appeal must also be allowed and the conviction and sentence set aside.

CRANE, J.A.: I have had the advantage of reading in draft the judgment of R. H. LUCKHOO, J. A. I find that I am in agreement with it and would have been content merely to concur in his conclusions and reasons, they being substantially in accordance with those I hold on the present appeals, and those I have formerly expressed in the case of The State v. Dhannie Ramsingh (1973) 20 W.I.R. 138

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which must now, for all intents and purposes, be regarded as overruled. I have, however, decided to say a few words, if for no other purpose, than to emphasise in these consolidated appeals before us what I regard as an important bit of advice that fell from LORD MORRIS OF BORTH-Y-GEST in the House of Lords in the recently decided case of D.P.P. v. Ping Lin [1975] 3 All E.R. 175.

In suggesting how a trial judge should set about the task of applying VIS-COUNT SUMNER'S *dictum* on what has "long been established as a positive rule of English criminal law" on the admissibility of confession statements. LORD MORRIS offered this advice (*ibid*, at p. 177):

"The guidance given by LORD SUMNER'S words is in my view clear. From them the sense and the spirit of the rule can be readily comprehended. Particular words are merely the instruments chosen to convey meaning. For this purpose words are but servants. If by their use a clear meaning has been conveyed then their purpose has been achieved.

In the circumstances posed, a judge must decide whether the prosecution have shown that a statement was voluntary. His decision will generally be one of fact. ... What is a clear and straightforward rule need not be obscured by subtleties and complications. The rule is one which in a fair-minded way, can readily be applied by a judge once he has clearly ascertained the facts.

The task of the judge will be to apply the spirit and intendment of the rule. Without being anchored to any particular words he will consider whether the statement of an accused was brought about by some hope or fear held out or caused by someone who could be classed as a person in authority. The judge will be ruling on admissibility ..."

I think this salutary piece of advice from his Lordship seems to be very appropriate to both the cases under review, because I am afraid that from the very beginning, that is, from the time when this controversy about the admissibility of confession statements first began, judges have been indulging in too many fine semantic distinctions on words constituting the ground or grounds of challenge to the admissibility of confession statements. If we understand correctly the advice of LORD MORRIS to trial judges, it cannot be within the spirit and intendment of LORD SUMNER'S rule that a trial judge should consider himself as bound by any particular words or ruling in a previous decision of another judge at a trial within a trial. While it may be useful, he says, to look at such precedents it is well to remember they "merely record what the ruling of another judge has been in another case and in the particular circumstances of that case and on the basis of its own particular facts." What I understand LORD MORRIS clearly means is, that not because one judge has made a ruling on a *voir dire* upon a particular set

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of facts and circumstances, another must necessarily consider himself bound by it in apparently similar circumstances. Speaking for myself, I have not found any statement more befitting the ills of our situation than that of the learned Law Lord's. One is almost tempted to say he was reflecting on our particular situation as he was writing.

In R. v. Charles (1961) 3 W.I.R. 534, the Federal Supreme Court ruled that an objection to the admissibility of such a statement on the ground that an accused had not made it, raises no proper objection in law for attacking its admissibility; it merely raises an issue which must be tried by the jury. Although Charles' case was not cited, the ruling given in it was obviously applied in R. v. Farley (1962) 4 W.I.R. 63, and so once more, the nature of the ground of challenge was emphasised as the criterion to look for as indicating whether an accused is entitled first to have a ruling from the trial judge on the admissibility of his confession statement before leaving it to the jury's consideration. In Farley's case, at p. 65 G-J, ARCHER, J., in no uncertain manner in an oft-cited passage, considered that whether or not a trial within a trial should be held must depend on the ground or grounds of challenge taken by the accused to the admissibility of his confession statement. Accordingly, he was of the opinion that if the ground set up by the accused is that the statement was induced by force, fear or threats by some person in authority, i.e., if the voluntariness of the statement is being attacked, then and then only will the judge be obliged to hold a *voir dire*. *Per contra*, if the ground of challenge is on the bare ground that the statement is not his, or that he did not make the statement sought to be tendered, then, as the accused has not "set up" an attack on its voluntariness, there will be no need for the judge to hold a trial within a trial. But I respectfully ask, has this approach not placed too much emphasis on what the accused says, i.e., on particular words of his, rather than on the burden of proof which the prosecution has to discharge?

In neither of these appeals before us is there the bare ground of challenge that the accused has not made the statement or that the statement is not his. While it is true the appellant Oswald Gobin does say he did not make the statement, that it was not on his instructions, it is important to note that he also says that owing to threats of violence and actual violence, he was forced to sign and write on the statement. Clearly it seems to me, he is raising the issue that his statement was not voluntarily made. But notwithstanding his allegations of the actual violence, it is astonishing to see that the trial judge recorded the following ruling:

"9.40 a.m. Court tells jury the admissibility of the statement is a matter of fact for them as the accused is saying that it is not his statement.

This is the statement – tendered, admitted and marked 'C'. [Witness reads statement aloud.]"

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The ruling of the learned judge was plainly wrong. It savours of a misunderstanding of the functions of judge and jury. The admissibility of evidence is always a question for the trial judge and not the jury to decide on. I have, however, extracted the above passage principally to emphasise the erroneous teaching which I respectfully say I have all along been stressing has been responsible for the chaotic state of our law on confessions. The teaching has obviously emanated from the cases of Charles and Farley above-mentioned, and has been misleading trial judges all the while. It is that when an accused says either by way of an initial challenge to the admissibility or under examination or cross-examination on the *voir dire* that the confession statement is not his or that he did not make it, even though he is also alleging that he was beaten, forced or induced by a false representation to sign his name to the statement, then in that case the judges think there will be no duty on them to hold a *voir dire* to determine whether a confession statement has been freely and voluntarily made. This judicial approach may be clearly seen from what happened in The State v. Fowler (1970) 16 W.I.R., at p. 460 A-B. There, as the judgment of BOLLERS, C.J. indicates, the trial judge made the following note on his record immediately at the end of the cross-examination of the accused on the *voir dire*:

“At this stage it becomes clear that the accused is not admitting that the statement marked ‘A’ was made by him. Court rules that the issue is one for the jury.”

The above ruling was clearly wrong. The judge, in the words of LORD MORRIS in D.P.P v. Ping Lin (*supra*), was “anchoring himself to particular words”. It was not the appropriate ruling for the trial judge to give at a *voir dire*. As LORD MORRIS says (*supra*), “the judge will be ruling on admissibility ...” Admittedly, the issue whether or not the accused made the statement was for the jury to try, but the judge completely overlooked his duty to rule on voluntariness *vel non*. The *ratio* was, however, that once a judge understands an accused person to be saying that he did not make a statement, then that became a matter of fact for the jury to decide, no matter what the circumstances might be. It was astonishing to see that course was supported in the judgment of the Chancellor who considered it would have been wrong for the judge to have ruled on voluntariness *vel non* in the circumstances. What occurred in Fowler’s case (*supra*) occurred in Dhannie Ramsingh (*supra*) and again in Gobin’s case which we are now considering. From what the trial judge had learnt from the accused, he concluded, albeit wrongly, that the accused was denying the confession to be his statement. And having so told the jury without even the pretence of holding a *voir dire* he fed the confession statement to them and on more than one occasion in summing-up asked them to find whether it was freely and voluntarily given. [See pp. 61, 71, 72, 78, 88 and 92 of the record.]

In Dhannie Ramsingh’s case (*supra*), precisely the same approach was taken.

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When it was learnt that the accused was saying it was not his statement, the judge ruled as follows at the close of the *voir dire*:

“Court rules that what the accused in effect is saying is that this is not his statement and this being so is clearly a question of fact for the jury to decide and not a matter of law to be decided at a *voir dire*. Issue concluded but no ruling made as a matter of law.”

Jury returns at 2.18 p.m. Checked – all present.

“At this stage Court informed the jury that from the evidence taken in their absence, the Court has ruled that whether the accused made the statement sought to be tendered or not is a question of fact for them to determine.”

It is, however, instructive to note that this was not the approach of the English Court of Appeal when the self-same grounds of objection were raised to the admissibility of a confession statement on the *voir dire*. In R. v. Roberts (1970) 114 Sol. Jo. 413, the accused, a boy of 14, was charged with the murder of an elderly woman. He made a confession statement in the presence of three police officers when neither of his parents was present, though it was practicable for one of them to be. This contravened a Home Office circular which required the presence of a parent, guardian or some person who was not a police officer and was of the same sex. The accused was convicted and, on appeal, he raised the grounds that the confession statement was wrongly admitted in evidence because of noncompliance with the circular, that the method of obtaining the confession was basically unfair and in the circumstances, there was a presumption of oppression on him by the police officers, which rendered the statement inadmissible in law.

Dismissing the appeal from his conviction, LORD CHIEF JUSTICE PARKER (SACHS, L. J. and EVELEIGH, J. with him) said that at the trial the boy denied the confession completely by saying the statement was not his, and referring to the submission that there was a presumption of oppression by reason of non-observance of the circular, PARKER, C.J. held that the circular contained merely administrative directions to the police and in no sense would render inadmissible statements taken without compliance with it. The Judges’ Rules provided that a statement must not be obtained by oppression so as to render it involuntary and the question to be decided, he considered, was whether the confession was voluntary. On that score, BRABIN, J. (evidently on the *voir dire*) had the advantage of hearing the evidence and seeing the boy, and he had come to the conclusion there was no oppression and, further, there was no evidence that the boy’s mind was overborne or his free will sapped. There was no ground on which the Court of Appeal could interfere.

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The important point of comparison in Robert's appeal (*supra*) with the present appeals, is that it seems fairly certain from the brief report of it in the 'Solicitors' Journal', in the 'Times Newspaper' of May 4, 1970, and in the 'New Law Journal'. all of the same date, that when Roberts completely retracted his confession, just as many an accused is wont to do by saying "it was not his statement", which, I emphasise, are the identical set of words to which local trial judges are "anchored," BRABIN J.'s approach was not simply to brush aside those words, as our trial judges do, as a question of fact for the jury to decide. He considered himself obliged to rule on the matter of voluntariness in the same way as did DEVLIN, J. in similar circumstances in R. v. Roberts [1953] 2 All E.R. at p. 344 H, when objection going to the voluntary character of a confession statement was raised. The objection was that the accused could not have made, and did not make the statement.

Although the report of Roberts' case in 114 Sol. Jo. 413 is not as full as it might have been, from what LORD PARKER, C.J. indicated in his judgment, it is fairly certain that BRABIN, J. did rule on voluntariness before admitting the statement, he having concluded there was no evidence that oppression was exercised on Roberts. While the *ratio* of both Charles and Farley (*supra*) is to the effect that a challenge to admissibility on the ground that the accused did not make the confession statement is no ground for attacking the admissibility of it, that was not the approach of BRABIN, J. That judge obviously held that such a challenge did constitute a ground of attack, and bearing in mind that the onus of proof of voluntariness lay on the prosecution (a point overlooked in Charles and Farley), he conducted a *voir dire* to determine voluntariness *vel non*. In my view, the *ratio decidendi* of the local decisions cannot stand comparison with the principle in Roberts' case (*supra*) and must be overruled.

That the ground of challenge involves a question of fact for the jury to try should not relieve the trial judge of his function of determining whether a confession statement was free and voluntary. To do otherwise, would be to overlook the fundamental principle that the burden lies on the prosecution to prove the confession was free and voluntary. This is my opinion to which I will respectfully adhere, even though it differs from that expressed by BOLLERS, C.J. in Fowler's case (*supra*), *viz.*, that if the trial judge were to rule on the admissibility of the confession involving a question of fact whether the accused made it or whether it was his, that "would involve two findings of fact on the same issue which may indeed turn out to be contradictory." (*ibid.*, at p. 465 D).

The pattern in the case of the accused Boniface Griffith is more or less to the same effect. He alleges he had been pushed about, cuffed in the abdomen and as a result was induced to sign a confession statement that had been prepared beforehand by Sgt. Ranji, the investigating officer. From the record, it will be seen that just as soon as the judge determined from the cross-examination of Ranji that the ac-

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cused was asserting that Ranji had prepared the statement and had beaten him in the manner stated in order to get him to sign it, the judge questioned the accused and found out from him that – “that is exactly what happened.” The *voir dire* was then halted and the judge recorded: “Court rules that it is a question of fact for the jury whether or not the statement is that of the accused.” And in his summing-up he charged the jury on Griffith’s confession statement in the following manner in explanation of its admission:

“Members of the Jury, when this statement was sought to be tendered by the State Prosecutor the accused objected to this statement being tendered. I then proceeded to try that issue but during the course of the trial of this issue it came out that what the accused was saying was that he was beaten and forced to sign a statement which was not made nor prepared by him. What he is saying is that he was beaten and forced to sign a statement which was prepared by Sgt. Ranji which is something different from saying – ‘This is my statement but I was beaten and that induced me to make it.’ What he is now saying is that the statement is not his: that the statement was prepared by Sgt. Ranji and that Sgt. Ranji beat him and forced him to sign that statement but he was the author of that statement.”

What has again been obviously done above is the making of a semantic distinction between the case where the prosecution induces by force the signing of a prepared statement made by Sgt. Ranji (i.e. by someone other than the accused), and the inducing by force a statement made by the accused himself. In the one case, the trial judge is of the opinion it is a pure question of fact for the jury to decide and does not entitle him to a ruling on its voluntariness at a trial within a trial. In the other case, however, since the inducement by beating operated on the accused to make or sign his own confession, that fact would entitle him to a ruling on voluntariness. For my part, I consider the above distinction is wholly unwarranted because in both cases, i.e., whether Sgt. Ranji prepared the statement and beat the accused to sign it, or whether the accused was saying the statement was not his because Ranji beat him to make and sign it, the trial judge was concerned with the matter of voluntariness *vel non* and each would call for a ruling thereon. The making of such a distinction is precisely the point to which I adverted attention above, when I called in aid the passages I cited from the speech of LORD MORRIS in D.P.P. v. Ping Lin (*supra*). In the passage above, the learned trial judge is guilty of doing the exact thing that LORD MORRIS counselled against, being “anchored to particular words”, i.e., whether or not the accused said he made the statement. He thus obscured by semantics, “subtleties and complications” the rule as laid down by LORD SUMNER which is clear and straightforward for a judge to apply in a fair-minded way once he has ascertained the facts, “for underlying the basic rules about the admissibility of confessions is the need for fairness to an accused person.” If we look at the local decisions, we

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cannot fail to discern the germs of a fundamental error that have crept through all of them. The error is that no sooner does a trial judge get to understand, whether before or during the course of a *voir dire*, that the ground of objection to admissibility is that the accused is raising a question of fact, he invariably holds there is no obligation on him to conduct a *voir dire*, or if he is in the act of conducting one, he considers it is incumbent on him to stop it, recall the jury and have the confession statement read to the jury without a ruling on the matter of its voluntary character. That, as I see it, has been the approach trial judges have been taking to the admissibility of confession statements ever since the decision of The State v. Fowler (*supra*). But our trial judges may well claim that, after all, they are merely following precedent and are obliged to do so.

In Fowler (*supra* at p. 458 C), the learned Chancellor stated in no uncertain terms that “it would have been wrong for the trial judge to have taken upon himself the liberty of ruling on the admissibility of the confession as a matter of law on the ground that it was, or was not, free and voluntary when the accused had assumed the stand that it was not his statement,” while the learned Chief Justice in the same report, categorically concluded at p. 465 I that the judge was right in stopping the *voir dire* when he had ascertained from the accused that what he was alleging was the fact that it was not his statement and that he had not made it. But I ask: How can any judge be ever justified in calling a halt to a trial within a trial when he has not gathered sufficient material to enable him to rule the statement admissible as being freely and voluntarily given or not so given? I confess this passes my comprehension, and I must perforce conclude that the bare ascertainment by the judge that the ground of objection is one of fact for the jury to try can never justify his not conducting a *voir dire*, or halting one when it is in progress, unless he has gathered sufficient material to enable him to rule on voluntariness *vel non*. I need hardly stress it, but I say with sincere respect, it is trite law that the admission of a confession statement without a ruling is entirely wrong, even though that course has been sanctioned by a majority of this Court in Fowler’s and Dhannie Ramsingh’s cases, because it has neither principle nor authority to commend it. In R. v. Francis & Murphy. (1959) 43 Cr. App. R. at p. 176, LORD PARKER is reported to have said: “It is quite clear that the prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession.”

In my judgment in Dhannie Ramsingh’s case (*supra*) I stressed the unfairness of allowing his confession to be read to the jury without a ruling on admissibility from the trial judge. It was suggested in one of the judgments in that case, notwithstanding the fact the trial judge said he was not ruling on admissibility, he had impliedly ruled by admitting the statement subsequently. I could not accept that view as a ruling and gave my reasons for so saying. Admittedly, in these appeals both of the trial judges did not indicate they were not ruling on admissi-

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bility as did the judge in Dhannie Ramsingh's case. In Griffith's case, his confession statement was admitted in the same way as in Ramsingh's, i.e., after the voir dire was concluded, but I do not think that that could have been an implied ruling that Griffith's statement was voluntary either, though I think it might have been otherwise had the confession been admitted at the trial within a trial without a specific ruling.

As I understand it, in the case of all confession statements, the prosecution must first succeed in getting past the judge by obtaining a positive ruling from him on its admissibility before having it put before the jury for their deliberation. That was my view in Ramsingh's case, and I still think so. The injustice of not obtaining a ruling from the trial judge is to be observed from the direction to the jury in one of the cases in hand. At p. 43 of the record in Griffith's case, after misdirecting himself on his function on the admissibility of the confession, the judge said:

“Well, this is a question of fact for you. You will have to look at the evidence, look at the cross-examination and decide what weight you will put on this statement. If you accept what he is saying that he was beaten by Sgt. Ranji and that Sgt. Ranji prepared that statement and he just signed it because of the blows he had received from Sgt. Ranji, then you will discard what is written in that statement. A question entirely for you. If you come to the conclusion that the accused did give that statement then you will decide what weight you should put on that statement.”

In my view, the learned trial judge had set the jury a nigh impossible task to accomplish. How could any jury, no matter how reasonable and fair-minded one might expect them to be, do what was asked of them by the learned judge, that is to say, to discard from their minds the contents of the statement, i.e., the accused's admission that he sold the typewriter to a Mrs. Persaud? He was charged with stealing that typewriter and pleaded not guilty to having done so. Speaking entirely for myself, the trial judge should not have put the jury in the position of having to decide whether they should discharge themselves from giving a verdict if they later considered they had to discard the statement because that would have been the only right thing for them to do. Speaking entirely for myself, I think it was a foregone conclusion that their minds would, in that event, have been poisoned against him, thus making it extremely difficult, if not impossible, for them to discard his statement.

In Francis & Murphy (*supra*) LORD PARKER, alluding to a comparable situation which arose when the Recorder of Bristol decided to postpone his ruling on the admissibility of a confession on the *voir dire* until later on in the case said *inter alia* at p. 176:

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“If the course adopted in this case were adopted in all cases” (i.e., postponing the ruling) “something would come before the jury which the judge might at a later stage have to rule to be inadmissible. In the result, either the jury would be left with minds poisoned against the prisoner or they would have to be discharged and the trial started again. The court is of opinion that no departure should be made from what has always been the settled practice in these matters.”

It is for this reason that a judge’s and jury’s functions are separated and clearly defined, and why it was entirely wrong for the judge to have abdicated his function of deciding on the admissibility of the confession to the jury to perform. To tell the jury they were to discard the confession if they found the accused only signed because of the blows he received from Ranji was tantamount to telling them they were to discard it if they found the confession was not free and voluntary, a finding which was exclusively the province of the trial judge and which he ought to have made in the first place.

In conclusion, I will adopt as part of this judgment what has been said by R.H. LUCKHOO, J.A., albeit *obiter*, on the matter of the hearing and assessment by the trial judge of the evidence which should take place on the *voir dire*. It was suggested in the course of the argument before us, that in cases where there is no allegation that his confession has been induced by threats, force, fear or otherwise, but when there is only a bare challenge that he did not make the statement or that it was not his, the judge might conduct in the absence of the jury and informal inquiry without oath, as to what the accused means by what he says. I will confess that I formerly held this view, as the following excerpt from my judgment in Ramsingh’s case (*supra*) shows. However, I have been converted from it.

“I will own that I once expressed a contrary view to that which I now hold. It was the Kitty bank robbery case in which I expressed that view – the case of Kirpaul Sookdeo et al v. The State (Criminal Appeals Nos. 3, 5 & 4 of 1972, dated November 30, 1972). But this sometimes happens when a court or judge is not fully informed. In that case, having myself been misled by the *ratio* in Farley’s case (although it made no difference to my conclusions in the bank case), I drew this distinction: I considered it is not necessary for a trial judge to hold a *voir dire* and to rule on admissibility when it is clear that an accused person is challenging a confession on the ground that he did not make it, i.e., on the ground that it was fabricated because, that being essentially factual, is a matter for the jury to decide upon. I followed the decision in R. v. Farley. However, in the light of fuller argument and a review of all authorities, I am

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forced to abandon that view. At that time I considered following R. v. Farley and Campbell v. R., that unless an accused person specifically raises the issue of voluntariness, he is not entitled to have it considered by the judge on the point of admissibility. However, upon mature deliberation, it seems to me that view is entirely wrong. Whether an accused raised either proposition (i) or proposition (ii) in my analysis above, the facts and circumstances of his ground of challenge have got to be investigated by the trial judge at the ‘trial within a trial’, and a ruling given there, one way or the other, on the admissibility of his statement in evidence, simply because a mere challenge puts the prosecution to proof of the voluntary character of the statement.”

If I understand the judgment of my brother LUCKHOO, J. A. aright, I am in entire agreement with him and for the reasons he gave why the course proposed should not be countenanced. In the recently decided case of R. v. Middleton [1974] 2 All E.R. 1190, the learned Recorder at Burnley Crown Court, conducted an unsworn inquiry (i.e., not on the *voir dire*) in the jury’s absence, into an alleged confession statement. He, however, made a wrong ruling that it was necessary that the inducement should relate to the accused or his immediate family circle, and the fact that it related to an outsider, i.e., a woman whom he had known for some years, was immaterial and did not affect the question of its admissibility. In quashing the conviction of the accused the Court of Appeal (Criminal Division) made the following pronouncement after advising that a judge should “keep his options open, and in most cases a trial within a trial should ensue.” And having stressed the advantages of hearing and judging the sort of person who is making allegations of threats or inducements, that Court said *ibid*, at p. 1195, just as LORD PARKER observed in R. v. Roberts (*supra*) that BRABIN, J. had the advantage of hearing the evidence and seeing the boy, Roberts, and came to the conclusion there was no exercise of oppression by the police on him to confess, as alleged:

“In the present case, having regard to the course that the trial took at its earliest stage, the judge came to no decision on fact, but he made the assumption that the facts were as the accused asserted. He then wrongly ruled that, even making such assumption, the confessions of both men were admissible. Furthermore, having so ruled without any evidence being called, he deprived himself of the opportunity of gathering material relevant to the exercise of his discretion even were his ruling correct. In these circumstances, in our judgment the admissibility of these confessions was not established by the Crown and the recorder prematurely ruled that nothing that the defence alleged affected their admissibility. If he had proceeded to conduct a trial within a trial it might have been that he would have unimpeachably arrived at the same conclusion,

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but he did not. There is no doubt about the cogency and compelling quality of the confessions, there is no doubt that the Crown understandably attached importance to them, and it is impossible for us to say that, had those confessions been excluded, the appellant must nevertheless have been convicted. Accordingly this appeal against conviction is allowed and the conviction is quashed.”

Middleton's case (*supra*) illustrates the danger of conducting an informal inquiry, *sans* oath, *sans* evidence, and ruling without adequate material on the voluntariness of a confession statement. If I may respectfully say so, Middleton's case supports the view to which I have always adhered, *viz.*, that “in most cases” if not in all cases, a trial within a trial should be held. This leaves open the problem of defining the odd occasion when such a trial ought not to be held. LORD EDMUND DAVIES to whom the idea of conducting the trial within a trial “in most cases” is attributed did not furnish an example of this odd occasion, and neither did LORD MORRIS when he said in Ping Lin's case (*supra*) at p. 177 that the trial judge “will generally, in the absence of the jury, have to hear the testimony of witnesses in regard to the impugned evidence and in regard to the surrounding circumstances.” However, I can think of only one occasion when a *voir dire* should not have been, though it was in fact held, *viz.*, the local case of The State v. Donald & Fortune (1974) Crim. Apps. Nos. 91 & 92 of 1973, dated 5th June, 1974. In this case, the accused and others broke and entered the Blairmont Police Station in January, 1973, and stole a cannister containing \$843.00. Both accused made confession statements but no foundation whatever had been laid by the prosecution for their admission in evidence. There was no sufficient *prima facie* evidence that the confessions were freely and voluntarily given. In the case of each accused the procedure adopted by the trial judge followed the general pattern approved by this Court in Fowler's case (*supra*) and the following was recorded when the accused Donald's confession was admitted:

“No. 1 accused at this stage objects to the admissibility of the statement. No. 1 accused states in answer to the Court that he did not make any statement to the witness and that he did not sign any statement.

Statement tendered, admitted and marked Exhibit 'A'. Jury told it is a question of fact for them. (Statement read aloud in Court).

What was recorded in respect of the accused Fortune was substantially the same. Clearly, both confession statements ought to have been rejected on the ground of insufficiency of *prima facie* proof and the appeals of both accused were allowed on that ground. The above furnished yet another illustration of the habit, which I have tried to expose, peculiar to judges in the West Indies of “anchoring themselves to particular words” when they are considering the admissibility of confes-

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sion statements.

For myself, I should hope in every case of confession statements a *voir dire* will be held. However that may be, I cannot think any fair-minded judge ought ever to be satisfied when voluntariness is not directly disputed, by the bare assertion of a police witness who gives neither a background of facts, nor an outline of the circumstances in which the confession was taken by him from the accused but who simply asserts that no inducement was held out to the accused to make the confession statement by means of threats, force, fear or hope of advantage, and as a consequence the statement was free and voluntary. In my view, evidence ought to be led on oath on the *voir dire* and even if the accused may not wish to contradict it, yet it may be the trial judge will want to ask a question or two of his own before satisfying himself on its admissibility – questions which might be prejudicial to the accused if asked in the jury's presence. It is to avoid precisely this, that LORD MORRIS himself said in the above quotation that the judge should have regard to the testimony of witnesses "in regard to the surrounding circumstances." "All oral evidence must be given on oath." (See s. 64, *Evidence Act, Cap. 5:03.*)

But perhaps the especial point in the decision in Middleton's case (*supra*) which impresses me greatly is that, if the trial judge were to admit the statement as voluntary without taking evidence on the *voir dire*, he would thereby handicap himself by not allowing himself room to manoeuvre when observing the demeanour of witnesses whom he may himself question to determine whether, in fairness to the accused, he ought to admit the confession into evidence and this is quite apart from the fact that he may find it was voluntarily made. That advantage will be denied him if he does not conduct a *voir dire*.

I am decidedly of opinion that ever since Fowler's case (*supra*), the *ratio* of which was applied by the trial judge in Dhannie Ramsingh's case (*supra*), and by the trial judges in these two appeals before us, it has been wrongly held that there is no necessity for them to rule on the admissibility of a confession statement when they understand an accused to say it is not his statement or that he did not make it. I have shown that approach is, in LORD MORRIS'S view in D.P.P. v. Ping Lin (*supra*) only to "anchor oneself to particular words" in the application of LORD SUMNER'S *dictum*, and I respectfully agree. That is an erroneous view which must be corrected. I have always considered the cases of Fowler and Ramsingh, were wrongly decided; that there was never any sound legal doctrine decided by them, and that they would one day be overruled because the *ratio decidendi* in both of them is harmful to the spirit of a fair trial and repugnant to the proper administration of justice.

It is fitting, I think, to close by referring once again to the quotation in my judgment in Ramsingh's case which I extracted from Allen's Law *in the Making*, 5th

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Ed., pp. 272-275, where the learned author said:

“The isolated example which ‘alters or shakes a fundamental rule of the common law’ will itself soon fall to the ground and become neglected as a worthless ruin ... for all practical purposes, a precedent which ignores or misconceives a clear and positive rule of law is no precedent. ... If it be derived merely from a strained or fanciful interpretation, it may succeed in perpetuating an anomalous or, so to say, an eccentric doctrine; but if it offends against one of the axiomatic precepts of law or reason” (as does R. v. Farley) “it may maintain itself for a short and harassed existence, but the collective displeasure of the profession will kill it in the end; and usually the end will not be long in coming.”

How true has Sir Carleton Allen spoken, and how quickly has the Bar responded collectively to “kill” in the end a decision that has never really been satisfactory to it! Hardly have three years elapsed since Ramsingh’s case was decided and we have witnessed that the wisdom and the prophetic force of Allen’s words have come to pass! His prediction on this fundamental aspect of legal doctrine has come true.

One final word. It has been contended by state counsel that we ought not to disturb the decision in Ramsingh’s case because we ought to preserve *stare decisis* and maintain the principle of certainty in the law as sound and reliable legal doctrine. Furthermore, he contended, we have no power to overrule our previous decisions. At this juncture, I do not propose to enter into a general discussion on the controversial subject of *stare decisis* and the cases cited on the subject, viz., Jones v. Secretary of State [1972] 1 All E.R 145, and Knüller Ltd., v. D.P.P. [1972] 2 All E.R. 898, or of the need to maintain precedents that have been proven wrong and have worked injustice in our system. I consider it is sufficient to say that ever since 1972, when this Court became a court of final instance on the abolition of the Privy Council, we have settled that matter. We have, as a matter of legal policy worked out for ourselves in both civil and criminal cases a rule of practice based on the now prevailing Practice Direction of the House of Lords of the 26th July, 1966. That policy is, that we do not consider our authoritative role as exhausted by the application of the doctrine of *stare decisis* to our decisions. We consider our jurisdiction over previous decisions as a continuing one. If we think the principle in any previous decision ought to be reviewed in a subsequent case, because of an erroneous interpretation of law and for that reason it is working an injustice or is impracticable in its application, we consider ourselves free to reverse it. We have already adopted this approach in two civil matters – see Sarju v. Walker [1974] L.R.B.G. 320 and Seepersaud v. Port Mourant Ltd. (G.C.A. Civil Appeal No. 21/1971, dated 21st June, 1972) – in which the principle underlying judicial review by this Court has been explained by CHAN-

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CELLOR LUCKHOO as follows: “As I have said earlier, I am conscious that there was error in Abhiraj’s case” (i.e., in a previous case). “It is my view that this Court must not allow itself to perpetuate an error of which it has become aware and convinced and is in a position to rectify subsequently.” I understand the application of this principle to be the same in criminal cases such as now before us where some “broad issue of justice, public policy or question of legal principle” is involved and it is for the above reasons that I think the principles of *stare decisis* and certainty in the law must give way lest we perpetuate the error we have exposed in Ramsingh’s case (*supra*). The decision of Dhannie Ramsingh, (*supra*) as I predicted, is now “a worthless ruin”, and I am firmly of opinion that overruling it would promote rather than impair the certainty of the law.

These are my reasons for agreeing with the decisions the learned Chancellor gave on 31st March, 1976, allowing these appeals, and I, too, would therefore allow both appeals by quashing their convictions and sentences and discharging the accused persons.

R. H. LUCKHOO, J.A.: A restatement of the principles relating to the admissibility of confession statements will help in a consideration of the points which were well argued on both sides in these consolidated appeals. This Court has already allowed both appeals and set aside the convictions and sentences.

Professor Glanville Williams in his work *The Proof of Guilt* has drawn attention to the fact that experience has shown the danger of supposing that a confession, even if satisfactorily proved, was necessarily true. He noted it might be made to shield someone as in the Rattenbury case (1935) (unreported), and in some cases for no better reason than to put an end to police questioning. He adverted to the well-known case of Evans [1950] 1 All E.R. 610 which had aroused public interest. In the year 1949, Timothy John Evans was indicted for the murder of his wife and child and was tried for the murder of the child. At his trial he had withdrawn his confession and accused one Christie of being the murderer. Evans was convicted and paid the supreme penalty. In the year 1953 Christie was charged with the murder of at least six women whose bodies were found buried in the house and grounds where both he and Evans had lived. Christie confessed to the murders and he also confessed that he had murdered Evans’ wife, but denied having killed the daughter. These cases have served to emphasise the very grave danger inherent in a wrongful admission of a confession statement. The consequences can be disastrous if it turns out to be untrue.

The courts in England were acutely conscious of that danger from very early times, and stated the law quite clearly to be that a confession was not admissible in evidence at the trial of an accused person unless and until the prosecution had satisfied the judge by affirmative proof that it was free and voluntary. Judicial

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utterances well over a hundred years ago reveal the awareness of that danger. PARKE, B. said in R. v. Baldry (1852) 169 E.R. 568 at p. 574.

“... In order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession.”

CAVE, J., in his judgment, with which four other judges concurred, in the case of R. v. Thompson, [1893] 2 Q.B. 12, said:

By the law of England, to be admissible, a confession must be free and voluntary. ... If it flows from hope or fear excited by a person in authority, it is inadmissible. ... The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement... .”

He referred to R. v. Warringham [1851] 2 Den. p. 447 where PARKE, B. said (at p. 448) to counsel for the prosecution:

“You are bound to satisfy me that the confession which you seek to use in evidence against the prisoner was not obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not.”

CAVE, J., also referred to what was said by POLLOCK, C.B. in R. v. Baldry, and LORD COLERIDGE, C.J. in R. v. Fennell, [1881] 7 Q.B.D. 147, and said that those principles and reasons were well-founded, and maintained that the question to be asked was: Is it affirmatively proved that the confession was free and “voluntary? He noted:

“It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner’s guilt is otherwise clear and satisfactory, but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice.”

What was said in Thompson’s case (*supra*), was approved in Ibrahim v. R. [1914-15] All E.R Rep. 874, in which LORD SUMNER’S famous and oft-quoted pas-

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sage is at p. 877:

“It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE. The burden of proof in the matter has been decided by high authority in recent times in R. v. Thompson...”

LORD GODDARD, C.J. also referred to Thompson’s case with approval in Kuruma v. R. [1955] 1 All E.R. 236 at p. 240:

“It is right, however, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary and, therefore, one obtained by threats or promises held out by a person in authority is not to be admitted. It is only necessary to refer to R. v. Thompson, where the law was fully reviewed by the Court for Crown Cases Reserved.”

It was by virtue of the application of this long established position rule of English criminal law that the appeal was allowed in Sparks v. R. [1964] 1 All E.R. 727 in which LORD MORRIS of BORTH-Y-GEST applied the dictum of LORD SUMNER in Ibrahim’s case, and set out at p. 732 what he considered the correct and recognised procedure to be followed when the admissibility of a confession was objected to. He said:

“The learned judge adopted the correct and recognised procedure. In the absence of the jury he heard the evidence that either side wished to call. The police officers gave evidence. The appellant gave evidence and so did the appellant’s wife. It then became the duty and the responsibility of the learned judge himself to come to a conclusion. He ruled that the evidence was admissible. It is the correctness of that ruling that has been challenged.”

He emphasised later in his judgment this responsibility of the trial judge, a responsibility which, I feel, he must never shirk or abdicate. He is trained to recognise from a proved set of facts whether or not a confession is tainted with any of those factors which rob it of the quality of a free and voluntary confession. His skill in the application of legal principles to facts has given him that advantage over a lay jury in determining whether the confession was obtained by fear, by prejudice or

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by hope of advantage induced by a person in authority. LORD MORRIS referred to this function of the trial judge as an obligation, and went on to say (at p. 735):

“Unless it was shown to the satisfaction of the learned judge that the statements were voluntary (in the sense referred to by LORD SUMNER) he could not admit them. The appellant, was entitled to have the determination of the learned judge as to their admissibility

“The procedure to be followed when a question arises whether to admit a statement is well settled (see R. v. Francis, R. v. Murphy). If objection is made to admissibility it is for the judge to hear evidence in the absence of the jury and then to rule whether an alleged confession should or should not be admitted. He ought not to admit it if, on the view which he forms of the circumstances of the making of a confession, he does not consider that it was a voluntary one.”

The learned Law Lord was at pains to point out that this function of a trial judge could not be sidestepped. It was essential for him to hear evidence in the absence of the jury and he had to rule, because an accused person was entitled, in the first place, to have evidence excluded if, on the view of the facts accepted by the judge, it was not shown that the confession was legally admissible. These forthright statements of LORD MORRIS on what he called the correct and recognised procedure I recommend to those concerned in the trial of accused persons.

In Commissioners of Customs & Excise v. Harz and Anor. [1967] 1 All E.R. 177, the House of Lords treated an admission falling short of a full confession on the same basis as a full confession and approved of LORD SUMNER'S *dictum* in Ibrahim's case.

In Chan Wai-Keung v. R. [1967] 1 All E.R. 948, reference was made to Ibrahim's case and also to Sparks' case and LORD HODSON entertained no doubt that the question whether a confession was voluntary was to be determined by the judge on the *voir dire* in order to decide whether it was admissible or not and that at that stage the accused might give evidence himself as well as call witnesses.

Along similar lines was a general statement of BOLLERS, C.J., in The State v. Rakha Persaud (1971) 17 W.I.R., at p. 240:

“When objection is taken to the admissibility of a confession, it is the practice for the jury to be directed to withdraw, and after evidence concerning the confession has been given for the prosecution, the accused may give evidence on this point R. v. Cowell (1940) 27 Cr. App. R. 191.

In the recent case of Director of Public Prosecutions v. Ping Lin [1975] 3 All E.R.

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175, the *dicta* in Thompson's case and Ibrahim's case were applied and LORD MORRIS of BORTH-Y-GEST made certain general remarks at p. 177, with which I express my approval:

“The guidance given by LORD SUMNER’S words is in view, clear. From them the sense and the spirit of the rule can be readily comprehended. ...

What is a clear and straightforward rule need not be obscured by subtleties and complications. The rule is one which in a fair-minded way can readily be applied by a judge once he has clearly ascertained the facts.

“The task of the judge will be to apply the spirit and intendment of the rule. Without being anchored to any particular words he will consider whether the statement of an accused was brought by some hope or fear held out or caused by someone who could be classed as a person in authority.”

LORD SALMON drew attention to the fact that a confession was not admissible, unless the judge was satisfied by affirmative proof that it was free and voluntary, because to allow such evidence to go before the jury might seriously prejudice the accused. Hence, said he ‘the trial within a trial’. LORD HAILSHAM of ST. MARYLEBONE referred to ‘the now familiar trial within a trial.’

What has been set out above has been done with the object of showing the attitude of the courts over the years in regard to the principles concerning the admissibility of confession statements, the procedure to be followed on objection, the duty of the prosecutor and the burden of proof on him, and the function of the trial judge. The strict and careful observance of function and procedure is required for ensuring that the rule stated by LORD SUMNER will not be relegated to the category of a dead letter, but that its spirit and intendment will continue to influence the course and conduct of all trials in which life and liberty are at stake. As one writer has remarked, the rules of the criminal trial contain certain basic notions of fair play which should be adhered to, and that the rules of evidence, in particular the rules relating to confessions, help to maintain proper standards of prosecution and proper standards of police behaviour.

Thirty years ago, in Guyana, SIR JOHN VERITY, C.J., in R. v. Ramsook Rampersaud [1945] L.R.B.G. 67, gave effect to the spirit of that rule when he ruled out as inadmissible incriminating statements of the accused as they were obtained in circumstances which offended one’s sense of justice and fair play. He found that the policeman had concealed something of the circumstances in which the statements came to be made by the accused. He asserted it was their duty to reveal the facts frankly and freely.

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During the course of the arguments in these appeals, counsel on both sides have shown that they were both agreed that on objection taken by an accused to the admissibility of a confession on the ground that it was not free and voluntary the proper course was for the trial judge to try that issue on the *voir dire* in the absence of the jury and to rule thereon. Mr. Ganpatsingh has, however, maintained that if objection to a confession was on the ground that it was never made by the accused, the holding of a *voir dire* in the absence of the jury was unnecessary, as the trial judge could properly hear and rule on the preliminary evidence of the prosecution for its reception as being free and voluntary in the presence of the jury. My opinion on this for the purposes of these appeals is not necessary, but I feel I should express what, in my view, should be the proper course to be taken, and why that course should be taken. Because of the fact that no confession statement is admissible unless it is shown by the prosecution by affirmative proof to be a free and voluntary one. I am inclined to the view that, irrespective of the ground on which it is objected to, a hearing and assessment by the trial judge of the evidence relating to its admission ought to take place on the *voir dire* in the absence of the jury. If a trial judge is to perform his function of ruling on admissibility efficiently, and not merely to pay lip-service to a rule enshrined in the common law and fashioned to avoid the mischief of letting in cogent and compelling evidence obtained through improper police methods, he ought not to be satisfied with the usual routine manner in which the prosecution normally seeks to discharge its burden of proof. It is incumbent on the prosecution to lead evidence of the circumstances. See R. v. Ramsook Rampersaud (*supra*). The trial judge in his probing and assessment of the evidence adduced before him on the *voir dire* will be performing in the only proper manner what is his function alone so as to ensure that if he is eventually to let the jury hear of that confession it will be only after all the safeguards for its reception have been meticulously observed. Only in this way can the risk of conviction of an innocent person be considerably lessened, and a miscarriage of justice be averted. The trial of this preliminary issue in the presence of the jury might hinder a proper probe into the matter because of the possibility of something prejudicial to the accused being given in evidence, and which might well vitiate the trial.

In R. v. Middleton [1974] 2 All E.R. 1190 C.A. the accused objected to the admission of a confession on the ground that he had made it only because of a threat by the police that if he did not do so Mrs. B. (an acquaintance of the accused) would be kept in custody and her children would have to go into care. At the trial, the judge was informed, in the absence of the jury, of the circumstances in which it was alleged that the confession had been obtained. Without any evidence being called, the judge ruled that, even if the facts were as alleged, the confession was admissible since the threat by the police did not relate to the accused or his immediate family but to Mrs. B. I refer to this case for the very sound observations

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made by EDMUND DAVIES, L.J. (*ibid*, at p. 1195), as they drew attention to the advantages of a hearing on the *voir dire* in the absence of the jury:

“Whenever the admissibility of a confession is challenged, it is wise that the presiding judge should, if the phrase may be allowed, keep his options open, and in most cases a trial within a trial should ensue. If that customary course is followed, the judge has the advantage (if the accused alleging inducement or threat gives evidence, as he usually does) of seeing and hearing and judging the sort of person who is making allegations of threats or inducements. He can then form an impression of considerable value which, whatever be his ruling on the strict question of admissibility, may well afford a useful guide when he comes to discharge the yet further duty resting on the court, even where there is no doubt that the alleged confession was voluntary and, therefore, admissible. That is by no means necessarily the end of the matter, for it is not every voluntary confession that should go before a jury. To quote from Professor Cross ‘*Evidence*’, 3rd Edn., 1967, p 446:

‘Even though a confession was voluntary ...the judge has a discretion to reject it if he considers that it was obtained in circumstances which would render its reception unfair to the accused.’”

It is clear from that passage that the *voir dire* has the additional value of the opportunity afforded the presiding judge of gathering material relevant to the exercise of his discretion even were his ruling correct. Circumstances might emerge on the *voir dire* which revealed impropriety, unfairness or misuse of their position by persons in authority.

In Gobin’s case after the witness Scipio had testified to the effect that the statement which he was seeking to tender was made by the accused, in the sense that it was dictated by him to Scipio, who wrote it at his request, he went on to say that it was signed by the accused, and that neither he (Scipio) nor Inspector Prince had held out ‘any threats, promises or inducements to the accused to make the statement.’ The admission of the statement was objected to by counsel for the accused on the grounds, “that the statement about to be tendered was not made by the accused or on the instructions of the accused, but due to threats of violence and actual violence he was forced to sign and write on that statement.”

The trial judge there and then told the jury, “the admissibility of the statement is a matter of fact for you as the accused is saying that it is not his statement.”

The statement was then tendered, admitted and marked Exhibit ‘C’. The witness read the statement aloud. It was a confession statement. As a result of the error

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he had made in taking this course the trial judge's summing-up contained a number of misdirections on the law with respect to the admissibility of statements and a confusion of the respective functions of judge and jury. This Court had no option but to allow the appeal and quash the conviction.

The question posed was: Was the judge right in holding that, because an accused said that he had signed, under threats of violence a statement the contents of which he alleged he was not the author, and which were not dictated by him, the accused was saying that the document was not his statement?

With due respect for the opinions held by others, I answer that question in the negative. Such a challenge to the admissibility of a statement amounted to an assertion that an accused was putting forward the document as his own, and representing by virtue of his signature that he was acknowledging or adopting the contents to be his own, but that all of this was occasioned or brought about under the compulsion of threats. It is my view that the appending of his signature to the document was a conscious and intentional act which purported to signify the signatory's assent to what appeared above his signature. It is true that Gobin was alleging that his signature to the statement was obtained from him under threat. Nevertheless, his act in signing under duress, though performed unwillingly was intentional. This distinguishes this class of documents from that in which a person denied having had anything whatsoever to do with a document – a denial of contents, a denial of signature, in short a denial of the existence of such a document.

When a person puts his signature to a document, he knows what he is doing and that signature purports to adopt the contents as his. When he signs under threats, those threats do not destroy his will to sign. Those threats will, however, prevent the law from accepting a document signed in those circumstances as being a free and voluntary one. The use of threats is one of the ways in which the lawful wish of the signatory is overborne. Such a state of affairs is described by the phrase *coactus volui*.

The views I have expressed are those which are normally associated with the civil law where the execution of documents, such as contract documents, is challenged on the ground that a party executed under duress. On the subject of signing under duress, I have adopted the statements of law lucidly expressed in two cases, as I hold they can, with equal force, be applied to the situation which arose in Gobin, Allan Boniface Griffith, and other cases in which similar objections were raised.

In Lynch v Director of Public Prosecutions for Northern Ireland [1975] 1 All E.R. 913 H.L. the matter before the House of Lords was one of duress as a defence to a charge of murder and by a majority it was held that on a charge of murder it was

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open to a person accused as a principal in the second degree to plead duress, that is, that he had carried out the acts constituting the alleged offence under the threat of death or serious bodily injury as a defence to the charge. LORD WILBERFORCE had this to say, (*ibid*, at p. 926):

“*Coactus volui* sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime. One may note – and the comparison is satisfactory – that an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law; see the Privy Council case of Barton v. Armstrong and the judgments in the Supreme Court of New South Wales.”

LORD SIMON of GLAISDALE said (*ibid.*, at p. 938):

“Similarly with duress in the English law of contract. Duress again deflects, without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is *coactus volui* on his side. The contract is with *non est factum*. The contract procured by duress is therefore not void: it is voidable – at the discretion of the party subject to duress.”

In Barton v. Armstrong & Others [1975] 2 All E.R. P.C., the matter under consideration was whether a party entered into contract under duress. In a joint dissenting judgment, LORD WILBERFORCE and LORD SIMON of GLAISDALE said at p. 477:

“Thus, out of the various means by which consent may be obtained – advice, persuasion, influence, inducement, representation, commercial pressure – the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress – threat to life and limb – and it has arrived at the modern generalisation expressed by HOMES, J. – ‘subjected to an improper motive for action’ See Fairbanks v. Snow (1887) 13 NE 598.

An application of the above principles to Gobin’s case would show that Gobin had, by the nature of his challenge to the admission of the statement, made duress a live issue fit and proper to be left to the trial judge for him to determine and to rule on the *voir dire* in the absence of the jury whether the statement was free and

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voluntary. That necessary function the judge failed to perform, and this resulted in a miscarriage of justice.

In Allan Boniface Griffith, the witness Ramji testified that the statement of the accused which he was about to tender in evidence was a free and voluntary one. He said it was written by him at the request of the accused, read over to him who then said it was true and correct and signed it. The accused objected to the admissibility of the statement on the ground that force and violence were used in order to obtain the statement. It was a confession statement.

A *voir dire* was held in the absence of the jury. Ramji repeated on the *voir dire* that the statement made by the accused was free and voluntary, and that no one used any force or threats on the accused. Suggestions were made in cross-examination by the accused to the effect that the witness used threats and inducements in order to get him to sign the statement. In answer to a question put by the accused, the witness replied: "It is not true that I prepared the statement and after I had assaulted you and promised to send for a doctor that you agreed to sign the prepared statement."

Whereupon, the trial judge asked the accused if what he was saying was that the statement was prepared by the witness and that he was beaten to sign it.

"Accused states that is exactly what happened.

Court rules that it is a question of fact for jury whether or not the statement is that of the accused.

Voir dire concludes."

The statement was then tendered, and marked Exhibit 'C' at the continuation of the trial in the presence of the jury. Here again, the presiding judge had abdicated his function of determining and ruling on the *voir dire* whether or not the statement was admissible as being free and voluntary. He had brought the inquiry on the *voir dire* to an abrupt end, terminating the cross-examination and shutting out any evidence the accused might have wished to adduce in the absence of the jury. He had taken this course in the face of circumstances which compelled a full investigation by him. The result was a miscarriage of justice which necessitated the quashing of the conviction.

I would, but briefly, discuss some of the cases referred to during the hearing of these appeals, as I feel they might have influenced the course taken by the trial judges in the two appeals.

R v. Charles (1961) 3 W.I.R. 534 F.S.C.: In that case the objection to the admis-

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sion of the statement sought to be tendered was on the ground that the accused had not made it. The judge heard evidence in the absence of the jury and ruled that the accused had made the statement. In his summing-up he treated the statement as though it had never been challenged, and read to the jury certain passages from it which might be used as admissions by the appellant.

LEWIS, J., in delivering the judgment of the Federal Supreme Court said (*ibid.*, at p. 535:) "In our view, the procedure adopted by the trial judge and his treatment of the statement in his summing-up, amounted to the withdrawal from the jury of an important issue which was a proper one for them to try. An accused person is entitled to have all the evidence on the issues raised in the trial given in the presence of the jury."

There can be no doubt that an issue as to whether or not an accused person had made a statement is one of fact for the consideration of the jury, and a failure by the trial judge to leave that issue for them to determine, after he had first ruled on the evidence of voluntariness adduced by the prosecution, is indeed a serious irregularity affecting the validity of the trial. But if LEWIS, J., meant, as it would appear he did mean from the manner in which his judgment is worded, that the moment a confession statement was objected to on the ground that it was not made by the accused, a trial judge had no other function to perform in relation to that statement but to admit it without further ado, I must respectfully dissent. The primary function of the trial judge remained unaltered. He had to rule on its admissibility in keeping with that positive rule of criminal law. The only effect that the failure of an accused to challenge the statement on the ground that it was not free and voluntary could have was that it made the task of the prosecution easier in the discharge of its onus on voluntariness.

R. v. Farley (1961) 4 W.I.R. 63 F.S.C.: Along similar lines to R. v. Charles was R. v. Farley, the head note of which reads as follows:

"The applicant was convicted of larceny in a dwelling-house. The case for the prosecution depended in part on a statement which it was alleged the accused had given to the police. The applicant objected to the admission of a statement in evidence on the ground that he had not made it. The judge sent the jury away and heard evidence (including the evidence of the accused) in their absence. On the return of the jury, he informed them that he had ruled the statement admissible as a voluntary statement made by the applicant, and later, when he summed up, he left to the jury only the issue whether or not the statement was a voluntary statement.

"Held: (i) the question whether the accused had or had not made the

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statement was an issue of fact which the jury had to determine and the withdrawal of that issue from them was an irregularity affecting the validity of the trial;

(ii) the judge and jury must be present throughout the giving of evidence and every part of it upon which issues of fact are to be determined.”

During the course of the judgment, ARCHER, J. (as he then was) quite correctly stated that the trial judge was a tribunal of fact as well as law and that the question of voluntariness of a statement was one to be determined by him in the absence of the jury. Should the judge rule on this question in favour of its admission the accused enjoyed the right to cross-examine again the witnesses who had given evidence in the absence of the jury on the circumstances in which the statement was made and that it was for the jury to say whether they thought the statement was made at all. One could find no ground for challenging the correctness of the judgment to that point. But ARCHER, J., went on to say that a statement could not be successfully objected to merely because the prisoner intended to deny it when the time came, and he cited R. v. Baldwin (1932) 23 Cr. App. R. 62. He put his reasoning in this way:

“The judge treated the objection as one made on the ground that it was not free and voluntary. That was not the ground put forward by the applicant and there was nothing for the judge to try in the absence of the jury when the objection was made. It would have been different if the applicant, while only stating one ground had also relied on the other, but he persisted with the first ground and did not set-up the second ground.”

With respect, I cannot accept this to be the position when dealing with the admissibility of confession statements. ARCHER, J., was laying great stress on the nature of the grounds of objection by the accused to the admission of the statement. He was saying in effect that a judge’s function here was regulated by the ground or grounds on which the statement was being challenged by the accused. If challenged on the ground that it was his statement but was obtained by some threat or promise exercised or held out by a person in authority then the judge’s function arose, and was to be performed by him. But that if there was no challenge on the ground it was free and voluntary but only on the ground that it was not the statement of the accused, no function arose for the judge to perform in the absence of the jury. He must willy-nilly admit it. That reasoning offends against the very foundation of the law relating to the admission of confession statements. If ARCHER, J., was right, the celebrated and widely accepted authorities of R. v. Thompson [1881-4] All E.R 376 and Ibrahim v. R., [1914-15] All E.R 874, were wrong in their affirmation of the principles.

BOLLERS, C.J. correctly applied the principles in Lindon Harper v. The State

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(1970) 16 W.I.R 353, at p. 355:

“In my view the judge misinterpreted the evidence of the appellant on the issue and misunderstood what the appellant was saying. The appellant was admitting that he had signed the statement, and in my view where an accused person admits that he had signed a statement, it must follow that he is adopting what is written, but in these circumstances what the accused person would be saying is that although he signed a statement, it was not a free and voluntary statement because he had been induced to sign it because of the promise made to him.

... what he was saying was that he had signed the statement, but he had not said what appeared on the statement, because of the promise or inducement held out to him.”

This Court held in that case that it was the duty of the judge, having tried the issue on the *voir dire* to have ruled whether the statement was a free and voluntary one.

I accept as sound also what CUMMINGS, J.A. said in his dissenting judgment in The State v. Terrence Fowler. (1970) 16 W.I.R. 452 at p. 471:

“When a person signs a statement, he is *prima facie* deemed to have adopted it and thereby becomes the maker of it. ...

I am unable to appreciate the difference between adopting a statement under duress and dictating or writing it under duress. The issue of voluntaries is involved in all three operations. ...”

I do not share the view expressed by the learned Chancellor in Fowler’s case that the stand taken by the accused in maintaining that it was not his statement ‘negated the necessity for a judicial ruling in the absence of the jury, which could only arise if the statement was his, but the allegation was that it was not free and voluntary.’ A judicial ruling on admissibility (which normally means, in relation to confession statements, admissibility on whether it was free and voluntary) was an essential. It could not be dispensed with. The submissions of counsel for the appellant in that case as set out in the judgment of BOLLERS, C. J. (*ibid.*, at p. 460) were in keeping with the correct legal principles. He had rightly urged that it was incumbent on the judge to address his mind to the question before him, and a ruling on admissibility was a necessity.

As regards Williams v. Ramdeo & Ramdeo (1966) 10 W.I.R. 397, I agree with the interpretation of CUMMINGS, J.A. as to what were the issues before the Trinidad Court in regard to the admissibility of the challenged statement and that one of

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those issues was the signing of the challenged document under duress. The question of voluntariness was, therefore, specifically raised. Furthermore, the Court's judgment to the effect that where an accused alleged he made no statement at all, the statement must be admitted is contrary to well-established principles.

Herrera & Dookeran v. R. (1966) 11 W.I.R. 1, was along similar lines to Ramdeo's case (supra). Herrera's objections to the admission of the statement were two fold: (a) that the prisoner never made the statement at all; and (b) that a paper was produced to him which he was savagely beaten into signing without knowing or being allowed to know anything of its contents whatever. WOODING, C.J., said both of these issues were left finally to the jury with proper and ample directions, and that it was unnecessary for him to say any more. I dissent from the view that (b) was solely a jury issue and not one on which the judge had first to rule whether the statement should go in. The issue there was specifically raised as to signing under duress, and in keeping with the principles set out earlier it went directly to the root of the matter, namely, whether the document sought to be tendered was a free and voluntary one.

The trial judge in The State v. Dhannie Ramsingh, Criminal Appeal No. 48 of 1972, fell into error because he had lost sight of what his primary function was when challenge was made to the admission of the statement. The record of proceedings reveals the following: When the statement was about to be tendered counsel for the accused objected to its admissibility on the ground that it was not a free and voluntary statement as "it was induced by promises and threats used and/or directed to the accused who was coerced and or induced in making the said statement." A *voir dire* was held, in the course of which questions were put to the prosecution witnesses under cross-examination to suggest threats and inducements were used to obtain the statement. The accused testified on the *voir dire*. He said, among other things, that Sergeant McLean wanted him to give a statement while he was in custody; that he was hungry and not feeling well and had not slept the whole of the previous night; that he was disturbed about the little baby at home without having her mother with her. He also said McLean told him the baby would have to go where Basmattie had gone, which he understood McLean to be saying that the baby would have to die. He became fearful for the safety of the child and then "decided to make a statement for the safety of the baby. Sergeant Lovell told me that only when I give a statement, doesn't matter how short it was, only then would he release my wife to go and look after the baby. If had not been told this I would not have made any statement. I was afraid that if I had not made the statement then the baby might have indeed died. I made a statement then to Sergeant Lovell and he wrote down my statement and I signed it."

Under cross-examination he said he dictated certain parts of the statement to

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Lovell who wrote those parts, but that he never mentioned anything about any robbery or murder or being involved in either. He alleged that the parts of the statement concerning the robbery and the murder were written by Lovell, “not on my dictation and I was forced to sign these parts because I was afraid that if I had not done so then the baby would have died at home without its mother’s attention.”

The prosecutor wanted to know what parts of the statement the accused dictated and what he did not dictate. The judge upheld counsel’s objection and said the statement was not divisible. The accused under further cross-examination said: “The statement is not mine and what is contained in it is not mine.” In reexamination he said: “Lovell did not write down what I said and when he was writing I was saying nothing. When Lovell told me about not allowing my wife to go home to the baby unless I sign this was actually before he began to write, he asked me questions which I answered.”

At the conclusion of evidence of the accused on the *voir dire*, Lovell was called to testify on the *voir dire* and also Hinds, the latter giving as his expert opinion that the contents of the statement were in McLean’s handwriting and not in Lovell’s as the accused had alleged.

At the conclusion of the evidence on the *voir dire*, the judge ruled that what the accused in effect was saying was that, that was not his statement and that being so it was “clearly a question of fact for the jury to decide and not a matter of law to be decided at a *voir dire*. Issue concluded but no ruling made as a matter of law.” This was recorded and was repeated by the trial judge in his summing-up to the jury.

In the face of what transpired on the *voir dire* was the trial judge right? There was no issue that the signature on the statement was that of the accused. The evidence was to the effect that the accused was saying towards the end of the cross-examination and also in re-examination that the contents of the statement were not dictated by him. His evidence about signing the statement under duress was never retracted. It remained a vital issue, affecting the voluntariness of the statement on which it was the judge’s duty to rule on the *voir dire*. Any attempt (as was sought to be done by this Court on appeal) to justify what was done by the trial judge with any doctrine of ‘implied ruling’ would be of no avail, because what was expressly done by the judge negated any implication. In these matters there could be no room for implication. When an issue calls for a ruling, a ruling must be given, otherwise how would an appellate court know that the judge had addressed his mind to the material before him and exercised his function of ruling, whether rightly or, wrongly? For these reasons I find myself unable to support the judgments of the majority of

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this Court in Dhannie Ramsingh's appeal. The judge's failure to rule on voluntariness on the *voir dire* was in conflict with the established principles relating to the admission of confession statements. The accused was deprived of his substantial right of a ruling.

In keeping with the Practice Directions issued by the learned Chancellor at the conclusion of the hearing of the appeals, and for the reasons set out in this judgment which show that the judgments of this Court in Harper v. The State, (*supra*) on the one hand, and The State v. Fowler (*supra*) and The State v. Dhannie Ramsingh, (*supra*) on the other, cannot both stand, I would be prepared to follow Harper's case and to hold that the cases of Fowler and Dhannie Ramsingh ought not to be followed as they were wrongly decided.

KOWSHALL PERSAUD
Appellant
v.
THE STATE
Respondent

[Court of Appeal (Luckhoo, C., Persaud and Haynes, JJ. A.) April 29, May 16, 1975]

Criminal Law – Rape – Corroboration – Accused admits sexual intercourse with complainant – Plea of consent – Jury directed corroboration immaterial since accused admitted intercourse – Non-direction as to danger of accepting complainant’s uncorroborated testimony as to consent – Whether proviso may properly be applied.

Criminal Law – Rape – Consent vel non – Possibility exists that consent retracted – Whether intercourse after consent retracted constitutes rape – Honest belief that original consent still subsisted – Necessity for specific direction on mens rea.

Venita Simon aged fifteen, complained that on Christmas Day, 1973, she was violently sexually assaulted by the appellant on a beach on the Essequibo Coast, and that in the course of the ensuing struggle she bit his lips and scratched his neck as he stripped her naked and threatened to murder her should she shout.

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Intercourse was, however, disturbed by the voices of men approaching and Venita Simon thus managed her escape. She was later assisted by a man who gave her a shirt to cover up her nakedness and by a woman who gave her a half-slip to wear. On 30th December, the appellant was contacted at home. There, the police questioned him and took him to a doctor who issued a medical certificate after examining him and showing there were partially healed abrasions to the neck and on both upper and lower lips. The certificate said the abrasions were consistent with finger-nail scratches and human bites. The appellant explained that he and the complainant were friendly before Christmas Day and that she had agreed to have sexual intercourse with him on the beach where they both stripped and were in the act when voices were heard. He became afraid, picked up his clothing and ran off. At the assizes, the appellant was charged with and convicted of the offence of having carnal knowledge of Venita Simon without her consent, and the jury were directed that in this case corroboration of the complainant's story did not matter because the appellant had supplied the necessary corroborative evidence by admitting sexual intercourse with the complainant, and that the only question for them to consider was whether there was consent to the intercourse. If, however, Simon had originally agreed to intercourse but changed her mind, told him so, and he persisted with the act, then that was rape. However, the trial judge did not warn them, as he ought to have done, of the danger of accepting the uncorroborated testimony of the complainant as to consent, but left the matter simply for them to determine whether they believed her that she did not consent or the accused that she did consent. On appeal.

HELD: (1) (*per* E.V. LUCKHOO C.) In the circumstances of this case where the jury was being invited specifically to consider whether Simon might have consented originally and then changed her mind, the further question should have been specifically put, *viz.*, whether the accused might not have honestly considered that the original consent still subsisted. An omission to do so would be a very serious misdirection.

(2) (*per* PERSAUD and HAYNES JJ.A.) The trial judge fell into very grave error. The question of corroboration still mattered importantly. The jury should have been warned that in the eye of the common law it was considered dangerous to convict on the uncorroborated evidence of Venita Simon that she did not consent, that they ought not to accept and act upon such evidence, but that if after paying full attention to the warning they were satisfied of the truth of her evidence of the absence of consent, then they may legally convict.

(3) (*per* HAYNES J. A.) From the directions as worded, the jury were left, or might have been left, with understanding that, as the appellant had admitted intercourse, there was no danger or risk in convicting on her evidence alone that she did not consent; that they could approach that aspect merely as a question of

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Simon belief of or the accused without observing the necessary rule of prudence or without approaching the evidence with the special caution the common law-demanded, and that there was no real need to look for corroboration of the material facts bearing on the absence of consent before accepting the evidence of Venita Simon.

(4) (*per HAYNES J. A.*) The judge did not invite the jury to consider whether the injuries to the appellant's lips and neck which, according to the medical report, could have been caused by a woman's bite or scratch, could indeed have amounted to corroboration when such evidence was so capable; also to find whether the appellant's false explanation of his injuries to the police was capable of amounting to corroboration of the complainant's testimony.

(5) (*Per Curiam*) The appeal must be allowed because the independent evidence the jury was not so strong or so cogent or so convincing or so overwhelming as to satisfy one that, if an impeccable direction had been given, a reasonable jury would inevitably have reached the same conclusion.

Appeal allowed. Conviction and sentence set aside.

Editorial note: See report of the case at (1975) 27 W.I.R. 82.

Cases referred to:

- (1) R. v. Marks (1963] Crim. L. R. 370
- (2) R. v. Midwinter [1971] Crim. L. R. 647; 55 Cr. App. R. 523
- (3) D.P.P. v. Morgan [1976] A. C. 192; [1976] 2 W.L.R. 922; [1955] 2 All E.R. 347
- (4) D.P.P v. Smith [1961] AC. 290; [1960] 3 W.L.R. 546; [1960] 3 All E.R 161
- (5) R. v. Flattery (1874-77) 13 Cox C.C. 392
- (6) R. v. Thomas Lewis (1938) 26 Cr. App. R. 113
- (7) D.P.P. v. Kilbourne [1973] A. C. 729; [1973] 2 W.L.R. 254; [1973] 1 All E.R. 440
- (8) R. v. Trigg [1963] 1 W.L.R. 305; [1963] 1 All E.R. 490
- (9) D.P.P. v. Hester [1973] AC. 296; [1974] 3 W.L.R. 910; [1973] 3 All E. R. 1056
- (10) Boardman v. DPP [1975] A. C. 430; [1974] 3 W.L.R. 681; [1974] 3 All E.R. 887
- (11) Hargan v. R. (1919) 27 C.L.R. 13
- (12) R. v. Freebody (1935) 25 Cr. App. R. 69
- (13) R. v. Salman (1924) 18 Cr. App. R. 50
- (14) Chin Nang Hong v. Public Prosecutor [1964] 1 W.L.R. 1279
- (15) R. v. Bone [1968]1 W. L.R. 983; [1968] 2 All E. R. 644

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- (16) R. v. Henry Manning 1969 53 Cr. App. R. 150 (1968) 113 S.J. 12
- (17) R. v. Cratchley (1913) 9 Cr. App. R. 232
- (18) R. v. O'Reilly [1967] 2 Q.B. 722; [1967] 3 W.L.R. 191; [1967] 2 All E.R. 766
- (19) Thomas v. R. [1952] 4 D.L.R. 306; [1952] 2 S.C.R. 344
- (20) Hicks v. R. (1920-21) 28 C. L. R. 36
- (21) R. v. Sawyer (1959) 43 Cr. App. R. 187
- (22) R. v. Murray (1913) 30 T.L.R. 196; 9 Cr. App. R. 248
- (23) R. v. Gregg (1932) 102 L.J.K.B. 126; 24 Cr. App. R. 13
- (24) R. v. Shillingford, R. v. Vanderwall [1968] 1 W.L.R. 566; [1968] 2 All E.R. 200
- (25) D.P.P. v. Kilbourne [1972] 1 W.L.R. 1365; [1972] 3 All E.R. 545; 116 Sol. Jo. 800
- (26) R. v. Browne 55 Cr. App. R. 478 (1971) 115 Sol. Jo. 708;
- (27) Steele v. R. [1924] 4 D.L.R. 175; [1924] 1 W.W.R. 1146
- (28) Maxwell v. D.P.P. [1935] A. C. 309; [1934] All E.R. 168

Doodnauth Singh for the appellant.

W. G. Persaud, Assistant D.P.P. (ag.) for the State.

E. V. LUCKHOO, C.: Like PERSAUD J. A. I too have had an opportunity of reading the judgment of my brother HAYNES, and wish to concur fully in what appears in that judgment, amply supported as it is with high authorities of undoubted recognition. I would only refer to two further authorities on the question of the necessity for corroboration in a case of this kind.

In R. v. Marks [1963] Crim. L.R. 370, the appellant was convicted of unlawful sexual intercourse of girl of fifteen. The indictment alleged that he had intercourse with her in a period about six weeks before her sixteenth birthday. He admitted intercourse with her, but said it was after her sixteenth birthday. The girl was an unsatisfactory witness. The trial judge touched on the question of corroboration, but said that in the circumstances of the case that question did not arise owing to the appellant's admission. It was held, having regard to the nature of the case and the unsatisfactory character of some of the evidence, that it was of great importance that the jury should have been directed with regard to corroboration, and that it was not a case in which it would be right to apply the proviso to s. 4 of the *Criminal Appeals Act, UK, 1907*. The conviction was consequently quashed. I am inclined to agree with what was done here.

In R. v. Midwinter [1971] Crim. L.R. 647, the appellant was convicted of indecent assault. The victim in her evidence said that she was assaulted by a youth, whom she described but was not able to identify. A police officer gave evidence that the appellant made a statement apparently admitting the offence in detail. The

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appellant's defence was an alibi supported by two witnesses. He further stated that his statement was not true and was made when he was nervous and anxious to leave the police station. The judge gave no direction on corroboration but said: "And so the most vital issue which you must determine is: Was the youth who committed that indecent assault and whose description I have read to you as given (by the assaulted person) this defendant?" On appeal, the prosecution had submitted that no direction on corroboration was necessary since the victim had not identified the appellant and the case against him turned on his own statement. The Court, however, having regard to the direction given as to whether the description given by the victim fitted the appellant, considered that it was vital that there should have been added the warning that corroboration of the victim's evidence of the description she had given was required.

In the case before us the summing-up contains many disturbing features. My learned brothers have dealt with several aspects of importance. I would like to look at one matter in particular where the trial judge told the jury this: "So if you find as he said she agreed on the public road and then afterwards she changed her mind before she met the seadam or when he went on her, and she communicated that to him and he still went through with the act, well, that is rape." In my view, it was not proper, in the circumstances of this case, to give such a direction. Such a conclusion on the evidence savoured of speculation. In any event, it would have been necessary to say further to the jury that if they believed Simon had consented originally up to the stage when the appellant went over her on the beach, then that so seriously affected her credibility as to leave no room for a conviction, as her evidence was that she was pulled by her hair, her mouth was stopped, and she was dragged to the seaside. In other words, once the jury believed that she went willingly to the seadam for the purpose of intercourse with the appellant, in the circumstances of the case there should have been a direction for an acquittal. Even if there was evidence that something or other did happen when the appellant was over her on the beach, which made her feel that she did not want to have intercourse any longer and she communicated that fact in some way or another and the accused went through with the act of having intercourse with her, the jury could not have been invited to come to the conclusion that the appellant was guilty of rape without the necessary direction that they would have to consider whether the appellant honestly believed that the consent originally given was still subsisting.

This matter has been recently dealt with by the House of Lords in the recent case of D.P.P. v. Morgan [1975] 2 All E. R. 347 on the 1st May of this year. At the moment I only have extracts of the majority judgment as appears in the "Times Newspaper" of the 3rd May. The question which concerned the House was: Whether in rape the defendant could properly be convicted notwithstanding that he in fact believed that the woman consented, if such belief was not based on

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reasonable grounds. The answer was by a majority, in the negative. LORD HAILSHAM is reported to have said (“Times Newspaper”, 3rd May, 1975):

“*Mens rea* means ‘guilty or criminal mind’, and if the mental element in rape was not knowledge but intent, then to insist that a belief must be reasonable to excuse was to insist that either the accused was to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, could convict him if it were honest but not rational. That would be insisting on an objective element in the definition of intent – a course his Lordship was reluctant to adopt after the unhappy experience of the House over the decision in D.P.P. v. Smith [1961] AC. 290.”

This aspect of looking at the state of mind of an accused person where his defence is that he honestly believed he had the consent of the victim, although the victim in fact did not give her consent, is one which has been remarked upon before. In R. v. Flattery (1874-77) 13 Cox’s Crim. Law Cases 388 at 392. DENMAN, J. (as he was then) said: “There is one case where a woman does not consent to the act of connection and yet the man may not be guilty of rape, that is, where the resistance is so slight and her behaviour such that the man may *bona fide* believe that she is consenting.” Even if, therefore, there was in this case evidence from which it could have been inferred that Simon might have given her consent and then later retracted that consent, the jury should nevertheless have been instructed that if they were to conclude the appellant *bona fide* believed that she was consenting to the act, based on her original consent, then they should acquit him.

It is true that the trial judge in this case told the jury that they must be satisfied with every aspect of the essential ingredients in the case for the prosecution, which would mean they would have to be satisfied that the prosecution’s case had negated consent. But where the jury was being invited specifically to consider whether Simon might have consented originally and then changed her mind, the further question should have been specifically put. *viz.*, whether the accused might not have honestly considered that the original consent still subsisted. An omission to do so would, in my view, be a very serious misdirection.

I agree with the conclusions reached by my brothers that this appeal should be allowed and the conviction and sentence set aside: I also agree that this is not a fit case for utilization of the proviso.

PERSAUD, J. A.: I have had an opportunity of reading beforehand the judgment of my learned brother HAYNES, J. A., and I agree with his reasons for allowing this appeal and quashing the conviction. The principles governing

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cases of this kind and relating to the judge's directions to the jury have often been repeated both in legal textbooks and in judgments; but ever so often it seems that the application of those principles causes some amount of difficulty. It is accepted at common law that in cases involving sexual assault juries may convict on the uncorroborated testimony of the virtual complainant (the evidence of children is put on another plane, and dealt with in a slightly different manner) if they are satisfied that the complainant is a witness of truth. But for a number of reasons, which it is not now necessary to examine, it has come to be recognised that in such cases, juries should be told that there are dangers in convicting on the uncorroborated testimony of a complainant, but that they are free to do so if they are satisfied as to the veracity of the witness.

I subscribe to the view that there is no sacrosanct or magic formula to be used in so directing the jury, so long as their attention is drawn to the danger which exists in the acceptance of the uncorroborated testimony of a complainant and the risk of doing so is exposed to them. It is also necessary that a judge should tell a jury what corroborative evidence is, that is, independent evidence which means evidence, apart from the evidence of the complainant, going to support the complainant's evidence on two material aspects, *viz.*, that the offence has been committed and that it was the accused who committed it. "Corroborative evidence must be evidence proceeding from a quarter independent of (the accomplice) and tending to implicate the accused and must corroborate the (accomplice's) evidence in a material particular." [*per* HEWART. L.C.J., in R. v. Thomas Lewis (1938) 26 Cr. App. R. at p. 113]. "The word "corroboration" says LORD HAILSHAM in D.P.P. v. Kilbourne [1973] 1 All E.R. 440 at p. 447, "is not a technical term of art, but a dictionary word bearing its ordinary meaning: since it is slightly unusual in common speech the actual word need not be used, and in fact it may be better not to use it. Where it is used it needs to be explained." And. I may add, when an explanation is attempted, it should be in language that a panel of lay jurors will readily grasp, no learned disquisition of the law is really necessary. LORD HAILSHAM in the Kilbourne case used that kind of language that some may prefer. He described this kind of evidence as evidence 'confirming the disputed items in the case.'

The knob of this case was consent or no consent, for the accused admitted having had sexual intercourse with the complainant, but he contended that she consented. In his directions to the jury, the judge told them that they must look for corroboration in cases such as this was. By his language, he showed that he had at the forefront of his mind the necessity for the jury to find corroboration before they could convict.

Now, as I have remarked before, there must be corroboration both of the sexual assault, and also of the allegation of the prosecutrix that it was the accused who

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assaulted her without her consent. There was ample corroboration of sexual intercourse coming from the defence itself; but if there was consent, there was no offence. So the jury should have been told that they must also look for corroboration as to her allegation of no consent. But in the way the directions were put, the jury might well have thought that if there was corroboration as to the sexual intercourse, they need look no further, for the judge said:

“... but corroboration does not matter in this case because he is saying there is corroboration from his evidence that there was sexual intercourse. The only question you have to consider is the question of consent. Was there consent?”

Having said this, the learned judge did not refer to corroboration again. He ought to have gone on to warn the jury of the danger of accepting the uncorroborated testimony of the complainant as to consent, but that if notwithstanding that warning, and bearing it in mind all the time, they were of the opinion that she was a witness of truth, then they were at liberty to accept her evidence and to act upon it. As it was, the jury might have been left with the impression either that the evidence as to sexual intercourse having been corroborated, there was no need for further corroboration on the other issue, or that if the complainant's evidence on the first issue was corroborated then it followed that her evidence on the second issue was automatically corroborated. Neither proposition is acceptable to the common law. I am of the view, therefore, that there was a lacuna in the summing-up one which could not be bridged – with the result that we quashed the conviction and sentence.

Learned counsel has invited this Court to exercise its powers under the proviso. There were two circumstances that might very well have been regarded as matters of corroboration. These were the injury to the accused's lip – which the complainant alleged she inflicted by biting in the course of resisting the accused – and scratches, and the fact that the accused sought to procure a witness for the State to give a false explanation for those injuries. But the judge did not attract the jury's attention to these matters, and we have no means of knowing if the jury bore them in mind at all, or what use they made of them. The authorities are clear that where there is no warning by the judge as to the danger of convicting on uncorroborated evidence (when such a direction is required), the proviso will not be invoked unless there exists corroborative evidence of such a convincing, cogent and irresistible character that the jury, if they had received the proper direction, must have come to the same conclusion, that is, that the accused was guilty. [See R. v. Lewis (1933) 26 Cr. App. R. 110] R. v. Trigg (1963) 47 Cr. App. R. 94. was a case of a sexual offence, and the only issue was one of that of the identity of the offender. No warning was given with regard to corroboration. The Crown conceded that there had been no warning as regards corroboration, but sought to

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argue that the warning was less essential in that case where the only issue was one of identity than in a case where other issues arose, and argued for the application of the proviso. It was conceded by the defence that there was material in the evidence which the jury, on a proper direction, could have accepted as corroborative of the victim's evidence. The Court of Criminal Appeal declined to apply the proviso saying (*ibid.*, at p. 101):

“In principle this court feels that cases where no warning as to corroboration is given where it should have been should, broadly speaking, not be made the subject of the proviso to s. 4. There are cases where the evidence has been such that this court has felt it possible to apply the proviso, but those cases, in the view of this court, must be regarded more as exceptional than as in any sense a regular matter.

Having anxiously considered this case, and realising that these girls did give very positive evidence, which the jury accepted after only twenty minutes, nonetheless this court does not feel it safe to let this conviction stand, and accordingly this appeal will be allowed.”

Similarly, in the instant case, I am of the view that this is not a fit case in which the proviso ought to have been applied, as I am far removed from the view that the facts in this case were convincing, cogent and irresistible, and that there was no consent.

HAYNES, J. A.: This appeal was against conviction and sentence upon an indictment on a count of rape of a young girl, in the county of Essequibo, on the 25th day of December, 1973. This Court allowed the appeal and entered judgment of acquittal of the appellant on the 29th April, 1975. As the decision was regarded as involving an important question of principle and practice in the administration of the criminal law, it was announced then that our reasons for allowing the appeal would be reduced into writing and read this day. I proceed now to deliver mine.

The case for the prosecution was that on Christmas Day, 1973, around 6.30 p.m. the complainant, Venita Simon, then 15 years old or 15 plus was walking along a dam dividing the village of Columbia from that of Aberdeen, both on the Essequibo Coast. The appellant, then unknown to her, forcibly held on to her, tried to stifle her cries, dragged her to a beach nearby and threw her down on the sand. He “burst off” her jacket and brassiere, and took off her pants and panties. He then without her consent, and with threats to kill her if she resisted, forced her to submit to sexual intercourse. She was struggling impotently all the time. She scratched him on the neck and bit him on the lip. During the sexual intercourse she heard a voice shouting, “Weh dem dey, weh dem dey!” The appellant then

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told her that two boys were coming for her. He held her hand and took her “more into the bush.” He threatened to kill her if she shouted. She fought him and ran away. She was then naked. She ran to a man who handed her a shirt to put on. A woman came up and gave her a half slip to wear. She spent the night at this woman’s home. Next day, dressed in clothing supplied by this good lady – Kemrajie Deonarine – she returned to her own home at the village of Cotton Tree, between 8 a.m. and 9 a.m. Then she told her mother. Zena Simon, “what happened” Mother and daughter then made a report at the Anna Regina police station the same day. At about 4 p.m., that day, Detective Constable 6657 Deodat Samsundar, Zena Simon, Venita Simon and others went to the scene of the alleged crime. Constable Samsundar searched in a certain area, presumably indicated by Venita, but nothing was found to be taken away. Around 6.45 p.m. Venita was escorted to Suddie Hospital and examined by Dr. M. Y. Bacchus. A medical certificate signed by Dr. Bacchus was admitted in evidence. It disclosed that she was not virgo intacta on the 25th December, 1973, and that she had only a superficial abrasion on her right ankle.

Police investigations continued. On the 30th December, 1973, Constable Samsundar went to the home of the appellant at Columbia. He saw the appellant there. He observed on him then “a partial abrasion on his lips and scratches around the neck.” The constable told the appellant of his suspicion that the appellant had raped Venita Simon and gave the usual caution. The appellant said, “Mackra pee pon am.” The constable did not explain what he understood that remark to mean. The appellant was taken to the police station, where, on the 31st January, 1974, he made a statement in writing. It was not objected to and read as follows:

“Officer the night Tuesday 25th December, 1973, around half past seven me see the girl at Aberdeen dam and me hold she and carry she ah the waterside and me sex she, whilst sexing me hear ah noise and me pick up me pants and shirt and me left she de, well me gone home until ah you come foo me, me can married the girl.”

Later the same day the appellant was examined at the Suddie Hospital by Dr. Bacchus. His medical report disclosed on the appellant then: “(1) partially healed abrasions of both lips upper and lower: (2) partially healed abrasion of the neck. Could have been caused by nail, bite, by injury with wood” Dr. Bacchus did not testify. At his trial, by cross-examination and in his statement from the dock, the appellant raised the defence of consent. In substance he said he and the complainant were friends before the 25th December, 1973. On that day he was standing on the road opposite his house when he saw her, they spoke and she asked him to go along with her; they held hands; he asked her to have sexual intercourse and she agreed; at a point on the beach they both removed all clothing and had inter-

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course; during the act he heard shouts of, “Weh dem dey, weh dem dey!” Venita told him to run; he picked up his clothes and ran off. He said, “The bite wha dem say me get is a day before de thing happen,” and at the suggestion of Constable Samsundar he agreed to marry the complainant. The constable had denied this under cross-examination.

So at the end of all the evidence the only and crucial issue was, consent or no consent. She averred she was threatened and forcibly overcome. He stated she was a consenting party all the way. This judgment proceeds at this stage to discuss the relevant law or practice, and thereafter to examine the summing-up so as to demonstrate that the conviction of this appellant was a miscarriage of justice.

In this state of the evidence, how was the trial judge to charge the jury? In three recent cases in the House of Lords highly authoritative pronouncements were made bearing upon this question, historically and pragmatically. It is proposed to refer to passages in the opinions of some of the law lords, as in my judgment a judicial study thereof should result profitably in a pellucid grasp of the need for proper directions under the common law, and when and how such directions should be given.

In D.P.P. v. Hester [1972] 3 W.L.R. 910, LORD MORRIS said (at p. 913):

“The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can readily be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood. It must, therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based. So it has come about that certain statutory enactments impose the necessity in some instances of having more than one witness before there can be a conviction. So also has it come about that in other instances the courts have given guidance in terms which have become rules. Included in such cases are those in which charges of sexual offences are made. It has long been recognised that juries should in such cases be told that there are dangers in convicting on the uncorroborated testimony of a complainant though they may convict if they are satisfied that the testi-

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mony is true. As this is no mere idle process it follows that there are no set words which must be adopted to express the warning.”

And then he continued (p. 914):

“All the rules which have been evolved are in accord with the central principle of our criminal law that a person should only be convicted of a crime if those in whose hands decision rests are sure that guilt has been established. In England it has not been laid down that such certainty ought never to be reached in dependence upon the testimony of but one witness. It has, however, been recognised that the risk or danger of a wrong decision being reached is greater in certain circumstances than in others. It is where those circumstances exist that rules based upon experience, wisdom and common sense have been introduced.”

Then LORD DIPLOCK said (*ibid.*, at p. 927):

“...The rule adopted in legal systems based upon the civil law that an accused could not be convicted on the testimony of a single witness never took root in the common law. The only exception was in the case of perjury – a crime which was originally punished in the Court of Star Chamber, whose procedure prior to its abolition was influenced by the civil law. Apart from statute and with this one exception inherited from the practice of the Star Chamber, ever since trial by jury assumed its modern form it has always been open to juries to convict an accused of any offence upon the unsupported testimony of a single witness. But common sense, the mother of the common law, suggests that there are certain categories of witnesses whose testimony as to particular matters may well be unreliable either because they may have some interest of their own to serve by telling a false story, or through defect of intellect or understanding or, as in the case of those alleging sexual acts committed on them by others, because experience shows the danger that fantasy may supplant or supplement genuine recollection. For brevity I will hereafter refer to evidence of this kind as ‘suspect’ evidence and the witnesses who give it as ‘suspect’ witnesses.”

LORD DIPLOCK continued, *ibid.*:

“At common law the risk of unreliability was dealt with in different ways according to its cause. The more draconian way was to classify the witness as incompetent to give evidence in the proceedings at all. Until the *Evidence Act 1843*, persons who had a proprietary or pecuniary interest in the outcome of civil or criminal proceedings were incompetent wit-

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nesses in those proceedings. So in civil proceedings were the parties and their spouses until the *Evidence Act 1851*, and the incompetence of the accused to give evidence in criminal proceedings against him continued until it was at last removed by the *Criminal Evidence Act 1898*. Persons incapable of understanding the nature of an oath, whether because of infancy or because of defect of intelligence, were also incompetent at common law to testify in civil and criminal proceedings alike. The only statutory inroad upon this disability is that which is now contained in s. 38 (1) of the *Children and Young Persons Act 1938*.

But a witness whose evidence upon a particular matter might be expected to be of doubtful reliability for reasons which did not bring him within the category of an incompetent witness was always admissible at common law. It was for the jury to determine what credence they attached to it. In law they were entitled to base their verdict upon it, and upon it alone, if they were satisfied of its truth. But in criminal cases, for the protection of the accused it became the practice of judges in the second quarter of the 19th century to warn the jury of the danger of convicting upon such testimony unless it was corroborated by evidence from other source.”

Then, finally (*ibid.*, at p. 928) the Law Lord said:

“Accomplices form the commonest category of witnesses whose evidence in criminal cases became subject to the common law requirement of a warning to the jury as to the danger of convicting upon it unless it was confirmed by evidence from some other source, and most of the reported cases are about the evidence of accomplices. But a similar rule of practice at common law grew up as to the evidence of two other categories of witnesses whose reliability either generally or as to particular matters was liable to be suspect for other reasons. These were children who, though old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect; and persons, regardless of their age, who claim to have been victims of a sexual offence.

The danger sought to be obviated by the common law rule in each of these three categories of witnesses is that the story told by the witness to the jury may be inaccurate for reasons not applicable to other competent witnesses, whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy, as in the case of children and some complainants in cases of sexual offences. What is looked for under

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the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged.”

In D.P.P. v. Kilbourne [1973] 1 All E. R. 440, LORD HAILSHAM supported these statements of LORD MORRIS and LORD DIPLOCK. He said (p. 446):

“... In Scottish law, it seems, some corroboration is necessary in every criminal case. In contrast, by the English common law, the evidence of one competent witness is enough to support a verdict whether in civil or criminal proceedings except in cases of perjury [of *Hawkins and Foster, Crown Cases* (3rd Edn. 1809) c. 3, 58, p. 233]. This is still the general rule, but there are now two main classes of exception to it. In the first place, there are a number of statutory exceptions.”

He continued, (*ibid.*, at p. 447):

“But side by side with the statutory exceptions is the rule of practice now under discussion by which judges have in fact warned juries in certain classes of case that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless that evidence is corroborated in a material particular implicating the accused, or confirming the disputed items in the case. The earliest of these classes to be recognised was probably the evidence of accomplices ‘approving’ for the Crown, no doubt, partly because at that time the accused could not give evidence on his own behalf and was therefore peculiarly vulnerable to invented allegations by persons guilty of the same offence. By now the recognised categories also include children who give evidence under oath, the alleged victims, whether adults or children, in cases of sexual assault, and persons of admittedly bad character. I do not regard these categories as closed.”

And, finally LORD HAILSHAM said (*ibid.*, at p. 454):

“... This prompts me to point out that although the warning must be given in every appropriate case, the dangers to be guarded against may be quite different. Thus the evidence of accomplices is dangerous because it maybe perjured. The evidence of Lady Wishfort complaining of rape may be dangerous because it may be indulging in undiluted sexual fantasy. A Mrs. Frail making the same allegation may need corroboration because of the danger that she does not wish to admit the consensual intercourse of which she is ashamed. In another case the danger may be one of honestly mistaken identity as when the conviction of the

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accused depends on an identification by a single uncorroborated witness to whom he was previously unknown. These matters should, in suitable cases, be explored when the nature and degree of danger is being discussed, as suggested in R. v. Price [1968] 2 All E. R. at 285.”

And in Boardman v. Director of Public Prosecutions [1974] 3 All E.R. 887, attention is drawn to two important observations of LORD HAILSHAM. First of all, in relation to the facts of that case, where the accused was charged on two counts of buggery on Said (a boy of 16) and on Hamidi (a boy of 17), both of whom testified on oath, and were said to corroborate each other, the then Lord Chancellor said (p. 901):

“... The trial judge’s direction to the jury was only attacked on the one ground I have described. He correctly stated the burden of proof, the relative functions of judge and jury, the necessity of examining each count separately, and rightly appreciated that both Said and Hamidi fell into the class of witness whose evidence requires a warning to the jury regarding the danger of convicting without corroboration, both boys being sexual complainants though each was too old to be treated as a child.”

And, secondly, as to the need for and nature of corroborative evidence, he said (*ibid.*, at p. 907):

“... When a jury is satisfied beyond doubt that a given witness is telling the truth, they can, after a suitable warning, convict without corroboration. What I said in Kilbourne [1973] 1 All E.R. at 453 was not that to give or require corroboration a witness must be believed without doubt. What I said, and what I meant, was that unless a witness’ evidence was intrinsically credible he could neither afford corroboration, nor be thought to require it. In such cases, the witness’ evidence is rejected before the question of corroboration arises. Of course, a conviction in such a case can sometimes result if, notwithstanding the unreliable testimony, the independent evidence is strong enough. But this is because the independent evidence has proved the case independently of the unreliable witness, and not because the unreliable witness is corroborated.”

If we analyse these passages, we will find warrant for those several propositions reflecting the approach of, and certain rules established by, the common law pertinent to the character of the summing-up called for in the present case:

(1) The common law would regard it as unwise or unsafe to found a settled conclusion of guilt on the testimony of Venita Simon, the complainant, alone, be-

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cause of the possible motives of self-interest or of self-exculpation on account of the danger that she might not wish to admit the consensual intercourse of which she might be ashamed, so the jury should be warned of such danger.

(2) The common law treats such a case somewhat differently from ordinary nonsexual offences. It takes the view that the risks of danger of a wrong decision is greater in this type of case than in others, if rested on the evidence of the complainant alone. So that the trial judge would be wrong to present the case to the jury as merely a straight and uncomplicated question of belief of the complainant. on the one hand, or the appellant, on the other – something more is needed. This different judicial approach is well put in the Australia case of Hargan v. R. (1919) 27 C.L.R. 13. Hargan was tried for a sexual offence on a girl 14 1/2 years old. The trial judge told the jury:

“It has been said that the evidence of the girl herself is uncorroborated. It is my duty to tell you that corroboration is unnecessary; that is, if you believe the girl’s evidence, it is not necessary to have corroboration. This case resolves itself into a question of fact. It is for you to say whether you believe the story of the girl or that of the accused. ... If you believe the girl’s story, then you must find the accused guilty. If you believe the accused, you must find a verdict of acquittal.”

In the High Court, this orthodox judicial approach was condemned unreservedly. BARTON, J. said (*ibid.*, at p. 17): “To my mind this was putting the case to the jury in a very unsatisfactory shape. It was put to them more than once that it was a mere matter between two oaths.” And ISSAACS, J. said (*ibid.*, at p. 23): “That is treating this class of case exactly as other classes of criminal prosecutions are treated,” and later (1919) 27 C.L.R. 13 at pp. 24-25):

“... it is beyond doubt the deliberate and repeated opinion of a long array of eminent English Judges that, in sexual cases, such a caution as I have alluded to should be given. It is over and above the ordinary caution as to reasonable doubt. It is over and above the usual references to the particular facts of the case. These are common to all criminal cases. It is a recognition of the justice and fairness to the accused in that class of cases, that the jury should be warned – not in specific or set form of words, but in effect warned – that though corroboration is not strictly essential, it is necessary, to scrutinize with very special care the evidence of the prosecutrix before accepting it so as to condemn the accused.

.... It is a question not of strict law, but of justice. There was no such warning given. The jury were left simply to decide between the evidence of the prosecutrix and the evidence of the accused. ... without observing

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a necessary rule of prudence, that is, to subject it to specially careful scrutiny and examination. This, undoubtedly, amounted to a miscarriage of justice...”

So that the case could not rightly be put to the jury as a mere simple question: ‘Do you believe Venita Simon that she did not consent or the accused that she did?’ without the proper warning in terms or effect.

(3) The question of the need or duty to look for corroboration of the evidence of Venita Simon would arise only if the jury thought her evidence showing that she did not consent otherwise credible, that is, believable. If they regarded it as intrinsically unacceptable, then, in the absence of independent proof of guilt, an acquittal must follow. If, on the other hand, they conceived her evidence believable, then, before deciding whether or not to accept it, they should look for corroboration. If they did find corroboration, then the common law judges would say they could convict safely. But if they did not, then they were entitled still to accept her evidence and convict, once they appreciated and considered fully and fairly that, as LORD CHIEF JUSTICE HEWART put it in John Henry Freebody (1936) 25 Cr. App. R. 69, at p. 71, “in the eye of the law such a course is not safe.”

(4) Assuming Venita Simon’s evidence to be credible then the corroboration to be looked for must be independent evidence, direct or circumstantial, confirming or tending to confirm that she did not consent but either was physically overcome or submitted to the sexual intercourse, in fear of bodily injury. LORD HAILSHAM in Kilbourne (above) (at p. 447) referred to this as evidence “confirming the disputed items in the case”. A few case references illustrate his meaning.

Arthur Salman (1925) 18 Cr. App. R. 50 involved an indictment for rape. The defence was consent. The trial judge gave no directions on corroboration. Counsel for the appellant submitted that corroboration had to be directed to that portion of the prosecutrix’s story which the prisoner challenged, to the issue of consent. AVORY, J. (p. 51) asked counsel for the Crown two significant questions (1) “Where was the warning here?” and (2) “Is there any independent evidence here inconsistent with consent?” And, after upholding the appellant’s contention, the Court ruled (pp. 51-52): “There was only one issue in this case: consent or no consent. Other than that of the prosecutrix, there was no evidence which was inconsistent with consent upon her part.”

Chiu Nang Hong v. Public Prosecutor [1964] 1 W.L.R. 1279, was an appeal from a conviction for rape, on a defence of consent. There was no corroborative evidence. The appeal was allowed. LORD REID giving the advice of the Judicial Committee, said (p. 1284): “The crucial question was whether the complainant consented, and the risk of convicting on her own evidence alone was clear. Some

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corroborative evidence was most desirable, that is to say, some evidence, coming from a source independent of her, which tended to show that she did not consent of her own free will.”

In Regina v. Bone [1968] 1 W.L.R. 963, the appellant and one Hadley broke into a public house and stole cash and goods. In a statement to the police he admitted the burglary, but stated that he did it because Hadley had threatened him with a knife. Hadley pleaded guilty and testified for the prosecution. He said he had no knife and had made no threat. The defence was acting in concert under duress. The trial judge told the jury that as the appellant had admitted the crime there was no call for the usual directions as to corroboration. LORD PARKER, L. C. J., reading the judgment of the Court, said (p. 985): “The chairman should have directed the jury along the usual lines in regard to this matter of duress. In other words, he should have told the jury that they must approach with great care the evidence that Hadley had given that he had not had a knife and had not threatened the appellant, and given a usual warning in regard to corroboration.”

More recently, in R. v. Henry and Manning (1969) 53 Cr. App. R. 150, a case of rape in which Henry pleaded consent. SALMAN, L. J. (as he then was) in the judgment of the Court, said (*ibid.*, at p. 154): “It does not matter whether the issue is consent or no consent or whether the issue is identification or anything else. There is still a duty to use language which will in plain terms convey a warning of the kind I have described.” And so the trial judge had to give the jury the usual warning that it was dangerous to convict on the uncorroborated evidence of Venita Simon that she did not consent to sexual intercourse with him.

(5) There are no set words to be used to express the warning. As was said in Charles Cratchley (1914) 9 Cr. App. R. 232, through the Lord Chief Justice (p. 235): “It is not necessary that the judge should use the actual words ‘warn’ or ‘caution’; if from his conduct of the case, this court is of the opinion that the jury were in fact warned or cautioned, it would not interfere.” It was put this way in John Joseph O’Reilly (1967) 51 Cr. App. R. 345, at p. 349, by SALMON, L.J.: “But the rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words and incantation has to be used and, if not used, the summing-up is faulty and the conviction must be quashed. The law, as this court understands it, is that there should be a solemn warning given to the jury in terms which a jury can understand, to safeguard the accused.” Or, to use SALMON, L. J.’s typical description, “There is no magic formula or mumbo jumbo required in a direction relating to corroboration. What the judge has to do is to use clear and simple language that will, without doubt, convey to the jury that, in cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone.”

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(6) Since the corroborative evidence must confirm or tend to confirm the truth of Venita Simon's story that she did not consent, then any independent evidence which was equally consistent with its truth as with its falsity could not amount to the corroboration needed. This principle was well put in the words of CARTWRIGHT, C.J.C., in Thomas v. R., [1952] 2 S.C.R. 344, a case of rape with a defence of consent. Reading the judgment of the Supreme Court of Canada, the Chief Justice of Canada said (p. 354):

“... to enable the jury to deal with this question it was essential that it be made plain to them (i) that corroboration could be found only in evidence independent of the testimony of the complainant and of such a character that it tended to show that her story on the vital question of consent was true, and (ii) that facts, though independently established, could not amount to corroboration if, in the view of the jury, they were equally consistent with the truth as with the falsity of her story on this point.”

These are the common law rules that the trial judge had to bear in mind for the proper guidance of the jury in his summing-up. But it is clear from the record that, unfortunately, in his charge to them there was grave misdirection which resulted in a miscarriage of justice.

Let us examine the relevant directions. He told the jury:

“... Before I go on let me give you one important aspect of this case. In all cases of this nature it is easy for a woman to say a man indecently assaulted her or raped her. The man might have no defence whatsoever. So, the law in its wisdom says that in practice you must look for corroboration.”

Clearly, the trial judge had the usual warning or caution in mind. He did not use the word ‘warn’ or ‘caution’ or ‘dangerous’. But, bearing in mind the authorities referred to earlier on this point, it might be contended with some force that what was said was sufficient to impress the jury that they ought not to convict unless they found corroboration. Charles Cratchley, O’ Reilly and Henry and Manning (*supra*) are all cases where the Court of Criminal Appeal held that this rule of prudence was satisfied although neither the word ‘warn’ nor ‘caution’ was used. Judicial minds might differ on the question whether the words used here were sufficient, up to that point, but having regard to what the trial judge erroneously told the jury later, it is unnecessary to rule on this aspect. This judgment therefore assumes, without deciding it, that this direction was then sufficient in a general way.

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The trial judge adequately explained to the jury what corroboration meant. Then he referred to the statement the appellant gave the police and to his statement from the dock, after which he told the jury: "If you believe the statement of the accused to the police and the statement from the dock that can amount to corroboration that there was intercourse between himself and the woman." There was no misdirection here. Corroboration must, in a case of this kind, tend to establish two facts: (i) that sexual intercourse took place between Venita Simon and the appellant, and (ii) that she did not consent. The statements to the police and from the dock admittedly satisfied one. But that still left the question of the second requirement, so the trial judge then said: "The question is: Was there consent or not?" He proceeded, then, to discuss the 'bits of evidence' they had to consider in determining this question of consent or no consent. But then after concluding his analysis of the evidence bearing on the question of consent as he saw it, the trial judge told the jury:

"Now, I told you also what she told the mother is not corroboration but corroboration does not matter in this case because he is saying there is corroboration from his evidence that there was sexual intercourse. The only question you have to consider is the question of consent. Was there consent?"

Here, regrettably, the trial judge fell into very grave error. And nothing he said thereafter corrected it. In accordance with well established authorities, a number of which have been cited earlier, the question of corroboration still mattered importantly. The jury should have been warned at this point, in terms or effect, that in the eye of the common law it was considered really dangerous to convict on the uncorroborated evidence of Venita Simon that she did not consent; that they ought not to accept and act upon such evidence, but that if, after paying full attention to the warning, they were satisfied of the truth of her evidence of the absence of consent, then they may legally convict. Instead, the direction of the trial judge was so worded that the jury were left, or might have been left, with the understanding that, as the appellant had admitted intercourse, there was no danger or risk in convicting on her evidence alone that she did not consent; that they could approach this aspect merely as a question of belief of Venita Simon or the accused without observing the necessary rule of prudence, or without approaching the evidence with the special caution the common law demanded, and that there was no real need to look for corroboration of the material facts bearing on the absence of consent before accepting the evidence of Venita Simon. None of these things were explained to the jury in the way they ought to have been. It might be appropriate to describe this situation in the language used by the Lord Chief Justice in John Henry Freebody (1936) 25 Cr. App. R. 69, at p. 71: "The judge ... somehow by an oversight omitted to give to the jury any warning such as is required in

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cases of this kind as to the temper in which they should approach the evidence and to the effect that, though they were entitled to convict on the uncorroborated evidence of the prosecutrix, in the eye of the law such a course is not safe.”

Incontestably, the trial judge’s direction on this point was a departure from an established practice designed to protect a man, possibly innocent, and a miscarriage of justice will occur unless this Court can say positively that even if there had been a correct direction, a reasonable jury would inevitably have arrived at the same conclusion of guilt. In Hargan v. R. (1919) 27 C.L.R. 13, in reference to a situation almost akin to this, BARTON, J. said (*ibid.*, at p. 21):

“... Was there a miscarriage of justice? Well, when the summing-up conveys to the jury that which may be legally done without its being qualified by that warning which would deter them, except upon weighing the evidence with the utmost care, from taking what is technically the legal course – it seems to me that if the person is convicted in the absence of that guidance there is a miscarriage of justice.”

[See also Hicks v. R. (1920-21) 28 C.L.R. 36, *per* ISAACS and RICH, JJ., at p. 44, and Leonard Derek Trigg (1963) 47 Cr. App. R. 94, *per* ASHWORTH, J., at p. 100, to the same effect.]

This Court, therefore, had to ask itself: Is this a case fit for the application of the proviso? Counsel for the State said it was. And counsel for the appellant contended it was not. The authorities on this question are numerous.

In John Clifford Walter Sawyer (1959) 43 Cr. App. R. 187, at p. 191, the Lord Chief Justice said; “It is undoubtedly true that if there is in fact corroboration, the failure to give the warning may not necessarily mean that the conviction must be quashed.” And in Leonard Derek Trigg (*supra*), where the Court found such a failure, ASHWORTH, J. said *ibid.*, at p. 100): “In these circumstances the only way in which this conviction can be upheld is by the application of the proviso to s. 4 (1) of the *Criminal Appeal Act, 1907*, because the absence of a direction on corroboration, as the cases already cited show *is prima facie* fatal to the conviction.” It appears, therefore, that in such cases, where there is substantial evidence that could have been accepted as corroborative, a difficult question might arise as to whether or not there was no substantial miscarriage of justice. So I had to apply my mind to the questions – (1) Was there in fact corroboration? and (2) If there was, was there any possibility of injustice done? And to help my determination of those questions, I considered the appellate approach in several of those cases.

Edward Murray (1913) 9 Cr. App. R. 248, was a case of indecent assault of a girl

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of 5 1/2 years, who gave unsworn evidence, so that corroboration was required as a matter of law. The judge did not tell the jury this. He told them only that her evidence “must be accepted with very great caution.” There was circumstantial corroborative evidence and also direct evidence of a woman who identified the appellant as the person who was in company with the girl shortly before the time of the assault. The proviso was applied. The Court expressed its conviction that the finding of guilt was not based on the child’s evidence alone.

The case of R. v. Gregg (1932) 24 Cr. App. R. 13, is referred to sometimes as the most striking example of the application of the proviso in cases of this type. The appellant was convicted of indecent assault of a girl seven years old. She testified on oath identifying him. Another girl, aged nine, testified as an eyewitness of the offence. She also identified the appellant. There was medical evidence from the prosecution and the defence that the appellant was suffering from gonorrhoea at the time, of the assault. Shortly after the girl showed symptoms of the disease. The LORD CHIEF JUSTICE HEWART said (p. 17): “It is perfectly true that when one reads the summing-up there is no express direction given to the jury on the important matter of corroboration. That is undoubtedly a blemish, but the important question is, was there in fact corroboration?” Then, after referring to certain authorities, he concluded thus (p. 18): “In our opinion, this case comes within the decision in the case of Murray (*supra*) and we are satisfied that although this direction was undoubtedly defective, no injustice has been done.”

I pause here to observe that in Murray and Gregg there was substantial independent evidence proving the offence, apart from that of the complainant.

Continuing with the authorities, the next case looked at was Thomas Lewis (1938) 26 Cr. App. R. 113. Here, the proviso was not applied. It was a case of receiving. Two of the thieves testified for the prosecution. There was corroborative evidence. But the Lord Chief Justice, reading the judgment of the Court, said (*ibid.*, at p. 133): “... This Court has held more than once that, although the Judge omits to give proper direction, or any direction, nevertheless where corroborative evidence exists in the case and is of such a convincing, cogent and irresistible character that it is apparent that the jury, if they had had a proper direction, must inevitably have come to the same conclusion, the omission is not fatal;...” Then he concluded (*ibid.*, at p. 114): in these words:

“... That there was corroborative evidence is manifest, proceeding from the lips of the appellant himself. One might even go further, and say that there was strong corroborative evidence, which the jury might well have thought sufficient corroboration of the evidence of Sansun and Wassail [the two accomplices who pleaded guilty to the theft and testified for the prosecution.] But that is not enough. The question is, was there cor-

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roborative evidence so cogent and convincing that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion? In the opinion of this Court, the evidence in this case was not so strong as to entitle us to say that the jury must inevitably have come to the same conclusion if they had been properly directed.”

And in John Clifford Sawyer (above), the proviso was not applied. Sawyer was charged with indecent assault of a boy of nine. Another boy of the same age was the witness to the victim being left in company with the appellant Sawyer. The trial judge told the jury that in view of the way the case had gone, there was no need to direct them on questions of law and corroboration. The Court held he was wrong. He should have given the usual warning as to danger in respect of the victim, as well as of the corroborating evidence of the other boy. The Lord Chief Justice said (1959) 43 Cr. App. R. 187 at p. 191): “... the court feels that it would be wrong to apply the proviso, there having been no warning given to the jury in regard to the evidence of either Andrew or Michael.”

In Leonard Derek Trigg (*supra*), the appellant was convicted for the rape of a young woman. She had gone off for a ride on his motor-cycle leaving two friends of hers behind. She said he raped her after reaching a certain point. The three girls identified him at a parade. His defence was an alibi. The summing-up contained no warning with regard to corroboration. ASHWORTH, J., reading the judgment of the Court, said (*ibid.*, at pp. 101-102):

“In principle this court feels that cases where no warning as to corroboration is given where it should have been, should, broadly speaking, not be made the subject of the proviso to s. 4. There are cases where the evidence has been such that this court has felt it possible to apply the proviso, but those cases, in the view of this court, must be regarded more as exceptional than as in any sense a regular matter.

Having anxiously considered this case, and realising that these girls did give very positive evidence, which the jury accepted after only twenty minutes, nonetheless this court does not feel it safe to let this conviction stand,....”

John O'Reilly (*supra*), was an appeal from a conviction for attempted rape of a young woman. Both the complainant and a man who came to her rescue identified the appellant. The trial judge did not in the usual terms warn the jury that it would be dangerous to convict on her evidence alone. There was scientific evidence which was overwhelming and sufficient by itself to identify the appellant as the attacker. The Court of Appeal accepted that, even though there was evi-

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dence capable of providing corroboration, the direction and warning should still be given. But SALMON, L.J. said (p. 350): "... if there was any fault in this summing-up – which this Court confesses that it is quite unable to detect – this Court would without hesitation have come to the conclusion that this is one of those exceptional cases in which the proviso should be applied since there is no possibility of any miscarriage of justice."

Again, in R. v. Shillingford and R. v. Vanderwall [1968] 1 W.L.R. 566, charges of rape and aiding and abetting rape, the proviso was applied because, as SALMON, L.J. said (p. 571): "... there was about as strong corroboration as it is possible to imagine of the girl's story,..." And in R. v. Henry and Manning (*supra*), on the charge of rape, Henry pleaded consent. The trial judge told the jury that it was not a case for a direction as regards the need for corroboration. The Court held that this was a wrong direction. Nonetheless, the proviso was applied because the Court found in the evidence "three pieces of formidable corroboration of the girl's evidence," and SALMON, L.J. said (p. 155): "The Court, looking at the case realistically as it is bound to do, finds that there is no real possibility that, however impeccably the jury had been directed on the issue of corroboration, the jury could in the very special circumstances here have come to any conclusion except that at which they arrived."

In R. v. Kilbourne (1972) 56 Cr. App. R. 828, at p. 839, LAWTON, L.J. said:

"There having been a misdirection about corroboration, what is the result? There was ample other evidence coming from oral statements which the appellant was alleged to have made to the police officers which was capable of being corroboration, if the jury accepted it, but there was an issue at the trial as to whether the appellant had said what he was alleged to have said. We do not know whether the jury accepted the evidence of the police officers. If we had known, or could have found out that they did, we should have had no hesitation in applying the proviso to s. 2 (1) of the *Criminal Appeal Act 1968*."

In Hicks v. The King (above), KNOX C.J., reading the judgment of himself. GAVAN DUFFY, RICH and STARKE, JJ., in the High Court of Australia, in relation to the application of the proviso, put their view of the true principle this way (p. 47):

"... It must be remembered that what the Court looks to in such a case is not simply whether there was corroborative evidence on which the jury might have acted if it were left to them as such, but whether the Court should assume, having regard to the whole circumstances, that they did their duty in considering how far they should give credence to the principal evidence in view of the corroborative evidence also."

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Finally, there is the pronouncement of CAIRNS, L. J. in Daniel William Brown (1971) 55 Cr. App. R. 478, at p. 483, “that for the proviso to be applied, there must be an overwhelming case against the accused.” These cases show that the pivotal factor is the credibility and probative strength of the independent evidence, whether it provides, *per se*, proof of guilt or corroborative support simpliciter, the Court regarding the matter as a reasonable jury would.

What was the independent evidence here possibly capable of corroborating the complainant’s story that the appellant, a stranger to her, dragged her from a public way to the beach, threw her to the ground, stripped her, and raped her; that she fought him and escaped running naked into the arms, so to speak, of an approaching man, for safety? Doris Persaud, who lived about 20-25 rods from the beach, heard certain shouts. But those were never sufficiently linked in evidence with Venita Simon. Both she and Deonarine saw Venita Simon naked on the beach around 7.30 p.m., but did not see her run up to any man and heard no complaint from her then and there or later. Speaking for myself at this point, I find the complainant’s silence then a perturbing feature of the case for the State. Surely, somebody (of the 12 or 15 persons on the beach) must have asked her how she came to be naked then and there? And anyhow one would expect that she herself then, on the spot, would wish to explain her embarrassing nudity to these good Samaritans. Her explanation as to why she did not complain to Deokinanan on to the next morning – that she believed this kind lady and appellant related – to my mind, is a difficult one in that she testified she never knew either person before and no reason for such belief appears on the record. Further, there was no evidence from them (or from Venita Simon) of any search then for Venita’s clothing, though on her own evidence, Venita could have had no reason to feel sure they could not be found that night on the beach. And a search was not made for them until 4 p.m. the next day by Constable Samsundar.

This constable, on the 30th December, 1973, observed injuries on the appellant’s lips and neck of a kind that could have been caused by a woman biting and scratching him in the way the complainant said she did, and Dr. Bacchus’ medical report supported this. Plainly, this evidence was capable of being corroboration, and it would have been for the jury, under a proper direction, to find whether in fact it did corroborate the complainant’s evidence of resistance or was consistent with consent. Also, there was the evidence of Ramdai Deokinanan, of a certain conversation between the appellant and herself on the 27th December, 1973. If the jury could find, reasonably, that this was an effort by the appellant to provide a false explanation of his injuries to the police, this, also, could be corroborative – see Steele v. R., [1924] 4 D.L.R. 175 – its credibility and weight being matters for the jury. But the trial judge did not put this evidence to them as relevant to the issue of consent. In fact, he did not refer to it at all. So that, it could be the jury did

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not address their minds particularly to the evidence of Deokinanan on the issue of consent. If the jury had been effectively warned, they may have approached both the evidence of the complainant and the independent evidence with a sense of caution. As was explained in Leonard Derek Trigg (above), where there was substantial independent identification of the appellant (*ibid.*, at p. 101):

“...A jury that receives a warning in regard to corroboration must in the nature of things approach the complainant’s evidence with a sense of caution. It follows from the warning, and indeed is the object of warning, ... and if the jury had been warned that it was dangerous for them to act on her evidence unless there was corroboration, it may well be that their approach to the evidence of the other two girls, cogent as it was, would have been imbued with that air of caution implanted by the warning.”

In my judgment, the independent evidence before the jury here was not so strong or so cogent or so convincing or so overwhelming as to satisfy me that, if an impeccable direction had been given, a reasonable jury would inevitably have reached the same conclusion.

As the Lord Chancellor said, in his opinion in the House of Lords in Maxwell v. Director of Public Prosecutions (1934) 24 Cr App. R. 152, at p. 176:

“... the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the proviso to s. 4 of the *Criminal Appeal Act, 1907*, and refusing to quash a conviction.”

For those reasons, the conviction could not be allowed to stand, and the appellant stands acquitted.

Appeal allowed. Conviction and sentence set aside.

SANCHARIE
Plaintiff

v.

SHABEER KHAN & MOTILALL
Defendants

[High Court (Mitchell, J.) March 11, February 22, March 3, 30, 1971; January 31, 1974; April 30, 1975]

Negligence – Causation – Road under repair – Parked truck in area of repair work – Bus swerving from truck and overturning – Whether accident inevitable.

Limitation of action – Disability by reason of minority – Effect of disability – Period of limitation does not begin to run until after disability – Limitation Ordinance, Cap. 26, ss. 8 and 12 (1) (now Limitation Act, Cap. 7:02) – Rules of the Supreme Court O. 14 r. 11(1).

On 28th April, 1965, the plaintiff, an infant, was a passenger in a bus owned by the first-named defendant and driven by the second-named defendant as servant and/or agent of the first-named defendant when she sustained injuries.

A portion of the road on which the bus was travelling was under repair and sand was being discharged from a parked truck on the western side of the road. The repairs were to the surface and traffic was permitted to and did pass on the eastern side of the road. There were drums about three (3) feet apart on about thirty (30)

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rods of road indicating that it was being repaired and a man on the road signaling the path vehicles ought to follow.

The bus was proceeding along about the middle portion of the eastern portion of the road and as it was passing the truck, it swerved to the right and in doing so toppled, with consequential damage to the plaintiff.

The plaintiff, by her guardian and next friend Bhagaratty, on 26th March, 1969 filed an action against the defendants for damages. The defendants asserted that the accident was not caused by negligence on their part but was attributable to inevitable accident. In furtherance of their defence, the defendants argued that the action was statute-barred.

HELD: (1) That even though the road was under repairs, there is no evidence from which it could be said that the area was interfered with to the extent to make it probable that subsidence of soil took place under the weight of the bus.

(2) If the second-named defendant had not swerved when he was passing the parked truck, he would not have deviated from the normal path of the road and to such extent as to cause the bus to topple. The accident, was not attributable to inevitable accident, as the second-named defendant could have prevented the accident by the exercise of ordinary care and caution.

(3) It was the driving of the second-named defendant and no other factor in those circumstances which was responsible for the “toppling” of the bus with consequent injury to the plaintiff.

(4) An infant who has a cause of action is not obliged to wait until the age of majority to bring the action, but the disability by reason of minority continues and the period of limitation does not begin to run until that disability is removed by the coming of age.

Judgment for the plaintiff in the sum of \$4,414.25 against both defendants, jointly and severally with costs to the plaintiff to be taxed.

Judgment for the plaintiff

Cases referred to:

- (1) “The Marpesia” (1872) L. R. 4 P. C. 212
 - (2) The Cotton’s Case (1591) 1 Leonard 211
 - (3) Chandler v. Vilett (1670) 2 Wms. Saunid. 117
- J. O. F. Haynes, S.C. and Nelson – Williams for the plaintiff.

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A. S. Manraj, S.C. for defendants.

MITCHELL, J.: The hearing and judgment of this matter has been protracted for reasons over which this Court has no control.

The plaintiff's claim against the defendants jointly and severally is for damages in excess of five hundred dollars (\$500.00) for negligence by the defendants in the driving and management of motor bus No. BP 286 at Johanna Cecilia, Essequibo Coast in the county of Essequibo, Guyana, on 28th April, 1965, whereby the plaintiff suffered loss and injury.

The plaintiff alleged that on 28th April, 1965, she was a passenger in the motor bus BP 286 which was owned by Shabeer Khan, the first-named defendant and driven by the second-named defendant, Motilall, who was a servant and/or agent of the first-named defendant, on the Johanna Cecilia public road, Essequibo when, by reason of the negligence of the second-named defendant, the said motor bus BP 286 overturned and as a result the infant-plaintiff was injured and was hospitalised for over two months.

The particulars of negligence, of injury and of special damage are set out in the statement of claim.

The defendants in their statement of defence admitted paragraph two (2) of the plaintiffs statement-of-claim that is, that on the 28th day of April, 1965, the infant-plaintiff was a passenger in motor bus No. BP 286 owned by the first-named defendant and driven by the second-named defendant, as a servant and/or agent of the first-named defendant on the Johanna Cecilia Public Road, Essequibo.

The defendants asserted that the accident was not caused by the negligence of the second-named defendant but was attributable to inevitable accident. The defendants also contended that the plaintiff's cause of action was statute-barred and relied on the provisions of the *Limitation Ordinance, Cap. 26*, (now *Limitation Act, Cap 7:02*) as amended.

Sancharie in her evidence told of having joined the bus BP 286 on 28th April, 1965. She then travelled from Richmond to Suddie. The bus was then driven by Motilall, second-named defendant and then owned by Shabeer Khan, first-named defendant.

About 1.30 p.m. she rejoined the said bus on her return journey to Richmond. On the Johanna Cecilia public road the bus toppled over and ended up in a trench. She was one of several passengers in the bus.

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She was sitting on the right hand side of the bus and the bus ended up in the trench on the right hand side of the road. The bus was travelling on the said right hand side of the road. There was a truck discharging sand. The truck was parked on the left hand side of the road, facing the direction in which the bus was going and the truck driver was near to the truck. She saw the truck driver raise his hand. The bus did not stop or slow down.

There was no other vehicle ahead or nearby, apart from the parked truck. Then the bus toppled over. The bus and the truck according to Sancharie, were not on the same side, nor did the bus collide with anything. There was no other vehicle going in the opposite direction.

Repair work was being conducted on the road where the parked truck was, and men were working at the time on the side of the road where the truck was.

Just before the bus toppled over, it swerved to the right but she did not see anything coming from which the bus could have swerved.

She became unconscious after the bus toppled over and regained consciousness in the Suddie hospital where she spent three (3) days. She was then taken to the St. Joseph's Mercy Hospital, where she spent three (3) months and ten (10) days.

At the Suddie hospital, she felt pain in her back and right hand. Her right leg was bandaged. Dr. George attended her at the St. Joseph's Mercy Hospital. She had pains for about four weeks.

When she came out of the St. Joseph's Mercy Hospital, she walked with the aid of a stick. She no longer uses a stick but at the time of giving her evidence still felt pain. Her leg pained and became swollen when she walked long distances.

Under cross-examination Sancharie said that only one side of the road was available to vehicular traffic and only one vehicle at a time could have passed. There was no one regulating the flow of traffic on that portion of road. The bus had stopped when it toppled over, and it toppled over right away.

Janack Singh, who gave evidence on behalf of the plaintiff, said that on 28th April, 1965 at about 12.30 p.m. he was standing on the public road at Johanna Cecilia, waiting for transportation to take him to Bounty Hall, Essequibo. One "Uvam", identified as Udeo Persaud, was with him.

He saw a bus proceeding along the Johanna Cecilia public road. There was a parked truck from which sand was being discharged. As the bus was about to pass the truck, the truck man raised his hand and made a sign for the bus to stop.

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The bus did not stop. Another bus came from behind. As the first bus tried to pass the truck it toppled on the right side with the four wheels in the air. When the bus toppled over there was no other vehicle passing or trying to pass.

Janack Singh said that he was about twenty rods from the bus when this happened, on the same side of the road as that on which the bus toppled.

Under cross-examination Janack Singh said that he saw the bus pull to the eastern side of the road and the parapet cut away, that is crumbled. He said further that it was after the bus had toppled that he went and saw the earth “cut away” on the parapet.

Mr. Honnett Searwar, a surgeon, gave evidence. He did not examine Sancharie personally at anytime, but he gave a medical certificate as a result of an extract from her medical record. He just recorded what was written on the record which was under the care of Dr. John George, who was out of Guyana. Mr. Searwar said that from his experience as a surgeon it takes about twelve to sixteen weeks for the femur or thigh bone to knit.

Ivor Morrison, also, gave evidence on behalf of the plaintiff. He said that on 28th April, 1965, about 1.00 p.m., he was travelling in a car from Suddie to Dartmouth. There was a bus travelling about twenty feet in front of the car. There were some workmen on the Johanna Cecelia public road and whilst the bus was passing the workmen it toppled on the side.

He said further that there was somebody standing and giving a signal on the eastern side of the road.

Udeo Persaud said that on 28th April, 1965, about 1 p.m. to 2 p.m. he was standing on the Johanna Cecilia public road waiting for transportation. He saw a bus coming. The road was then being repaired. The bus toppled over.

Bhagaratty, father of the plaintiff, Sancharie, told of having seen the plaintiff at the Suddie hospital and of having paid the costs of her medical expenses resulting from the injuries which she received as a consequence of the accident when she was a passenger of the bus.

The second-named defendant, Motilall, said that on 28th April, 1965, he was employed by Shabeer Khan, the first-named defendant, as the chauffeur and mechanic to drive motor bus BP 286 and on that day about 1.45 p.m. he was driving the said bus from Adventure to Charity.

When he reached the Johanna Cecilia public road which runs from north to south, the road was under repairs and sand was being dumped on the western side of the

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road. Traffic passed on the eastern side of the road and there was a man regulating traffic at both ends of this area of road. There were drums about three feet apart or about thirty rods of road to indicate it was being repaired.

When he reached this section of the road, also, he saw a sign indicating "Go" and so he started to drive on the eastern side at about ten miles per hour. Sand was on the surface of the road. When he reached about eighteen rods on the sand he saw a sand truck coming towards him in the opposite direction on the western side and he was on the eastern side. There was a lantern-post in front of him and he could not pass. He stopped the bus, according to him, about six feet from the eastern edge of the Road. There is parapet of about six feet and then a trench. He stopped the bus at the edge of the road where the road and the parapet met. The bus started to lean gradually to the eastern side. The passengers from the left side then went over to the right side of the bus and it toppled over.

I find as a fact that at the material time on 28th April, 1965, Sancharie was a passenger in the bus BP 286 owned by the first-named defendant, Shabeer Khan, and driven by the second-named defendant, Motilall, as servant and/or agent of the first-named defendant.

I find as a fact that at the material time on 28th April, 1965, the bus BP 286 in which the plaintiff was a passenger, was proceeding along the Johanna Cecilia public road.

I find as a fact that while the bus BP 286 was proceeding along the Johanna Cecilia public road with the plaintiff as a passenger it toppled over.

I find as a fact that the area of the Johanna Cecilia public road where the bus BP 286 toppled over was under repairs.

I find, however, that the repairs were probably being done to the surface of the road and that traffic was able to proceed at least on the eastern side of the area of road which was under repairs.

On the totality of the evidence, I find it probable or more probable than not and I prefer to believe that there was a parked truck on that public road and that sand was being discharged from that truck which was parked.

I find that it is probable or more probable and I prefer to believe that the bus BP 286 driven by the defendant attempted to pass the sand truck which was stationary at the time and not in its path, and in attempting to do so, it had to swerve to the right and in doing so it toppled over.

I find it probable or more probable and I prefer to believe that there was no ve-

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hicle going in an opposite direction to the bus when it was proceeding along that area of road where it toppled.

I find it probable or more probable and I prefer to believe, also, that the bus did not stop immediately prior to its toppling over. In this context, I appreciate the evidence of Sancharie and the discrepancy in her evidence when she said under cross-examination that the bus was being driven and in motion when it toppled over and later when she said that the bus had stopped when it toppled over.

However, the totality of the evidence, as reflected in the testimony of Janack Singh, Ivor Morrison, Udeo Persaud, and even of the second-named defendant himself makes it probable, or more probable in the exercise of my jury mind on the evidence, that the bus did not stop immediately before it toppled over.

I find as a fact that vehicular traffic had proceeded ahead of the bus BP 286 driven by the second-named defendant and that such traffic had passed over the said area of road on which the bus BP 286 was travelling without toppling over. The second-named defendant in his testimony had, also, said that there was a vehicle in front of him and that vehicle in front of him had already passed out of the thirty rod area when according to him, he saw the truck coming in the opposite direction. I have indicated before that I do not believe that a truck was coming in the opposite direction to that in which the bus was going.

I find it probable and I prefer to believe on the totality of the evidence that the bus BP 286 driven by the second-named defendant was proceeding along about the middle portion of the eastern (or right hand) portion of the road and then it swerved and it toppled over and ended, according to Ivor Morrison, in a drain on the right (or eastern) side of the road.

I find that the area of road on which the bus BP 286 was travelling at the time was wide enough to permit it to travel without toppling over.

I find that even though the road in the area was under repairs, there is no evidence from which I could reasonably find that it is probable that that area was interfered with to the extent to make it probable that subsidence of the soil could have taken place by the mere weight of the bus. Rather, the evidence negatives this by the fact that other vehicles, including a bus had passed over this same area of road, ahead of the said bus BP 286 driven by the second-named defendant, and there was no suggestion of the earth subsiding or any evidence of fact that this was so. Moreover, the totality of the evidence suggests that the bus being driven by the second-named defendant was permitted, and, by virtue of the drums placed on the road and the signal from a man on the road, directed to travel along the path which it did on the eastern side of the road. The inference to be drawn from the facts which I find is that it was reasonably safer for vehicles including the bus

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BP 286 to travel on that eastern side of the road and they would not impede or interfere with the workmen in the process of doing so.

To my mind then, the bus must have deviated from the normal road surface towards an area on the eastern side of the road which made it possible for it to topple in the manner in which it did, and moreover, in a manner which caused it to end up in a drain on the eastern side of the road.

To my mind that is the inference which must be reasonably drawn even from the circumstances as told by the second-named defendant, Motilall, himself when he said that he had stopped the bus about six feet from the eastern edge of the road and that there was a parapet which was about six feet wide, then a trench, that he stopped the bus at the edge of the road where the road and the parapet met, that he stopped the bus because the lantern post was in his way, that he was travelling in a line of traffic, more than one vehicle, that a bus was in front of him and another bus and a line of cars were behind him. I find on the totality of the evidence, that if the defendant driver, Motilall, did not swerve when he was passing the parked truck, he would not have deviated from the normal path of the road and to such an extent as to cause the bus to topple into the drain on the eastern side of the road. I find that it was the driving of the defendant and no other factor in those circumstances which was responsible for the “toppling” of the bus with the consequent injury to the plaintiff.

The defendants in their defence asserted that the said accident was not caused by the negligence of the second-named defendant, but was attributable to inevitable accident; that the second-named defendant, in order to avoid a collision applied his brakes and swerved to his right and in doing so, a portion of the eastern side of the road broke away and the said bus toppled over.

Inevitable accident, as defined by Sir Frederick Pollock in his book on Torts, is an accident “not avoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take” and it was reiterated in the case of “The Marpesia” (1872) L.R. 4 P.C. 212 at page 220 where it is stated “an inevitable accident in point of law is this: *viz.*, that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution ... etc...”

Applying that to the facts of this case as I find them, I have come to the conclusion that the second-named defendant, Motilall, did swerve to his right (or to the eastern side of the road.) I find that he did not swerve to avoid an oncoming truck which had forced its way through onto the area of limited traffic, because no truck in fact did so. The second-named defendant did swerve but I prefer to believe that he did so in the process of passing a parked truck. I rejected the idea of the roadway subsiding under the weight of the bus as being

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improbable in the circumstances of this case. Other vehicular traffic including a bus had passed over that same area of road ahead of the bus driven by the defendant and there is no evidence that that surface of the road was interfered with. It is a reasonable inference that if that were so, and, or, if the surface of the road was in the process of being interfered with, that vehicular traffic would have been prevented from traversing that area as happened on the western (or left hand) side of the road by the placing of the drums and by the person who was regulating the traffic on the road at the time.

On the totality of the evidence I find and prefer to believe that it is improbable in the circumstances of this case that the passengers inside the bus could have wholly caused the bus to topple. The evidence of the defendant himself excludes a collision between the bus which he was driving and the alleged truck and I find that there was no such collision. The defendant said that he stopped the bus then the bus leaned gradually. After the bus started to lean on the eastern side the passengers in the bus screamed and passengers from the left side went over to the right side of the bus. Then the bus toppled over. Sancharie said that she could not say whether persons on the left hand side of the bus went over to the right hand side of the bus when it stopped. Assuming that passengers from the left hand side did go over to the right hand side of the bus, this was the probable result of the leaning of the bus and they themselves were not the cause of the leaning of the bus and did not set in motion the circumstances which led to and resulted in its toppling over.

In the circumstances of this case, I find that the defendant driver, Motilall, was under a legal duty of care to so drive his motor bus BP 286; that by his acts or omissions, he did not cause damage or injury to other users of the road, including those persons who may be using the road and who may be in his own vehicle as Sancharie was.

I find that in the circumstances of this case, the second-named defendant, Motilall, committed a breach of that legal duty of care which was cast on him when in the course of his driving the bus he swerved while he was passing the parked truck and deviated to such an extent so as cause the bus to topple into the drain on the eastern side of the road with consequential damage and injury to Sancharie.

In the circumstances of this case as I find them, the defendant was negligent. I do not think that the accident was not avoidable by any such precaution as the defendant driver doing such an act then and there could be expected to take. I am not of the view that the defendant could not possibly have prevented the accident by the exercise of ordinary care and caution.

Accordingly, the defence of inevitable accident would fail and in the light of my previous finding that the defendant, Motilall, committed a breach of legal duty of

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care cast on him with consequential damage and injury to the plaintiff, I find that he is liable to the plaintiff in negligence.

In arriving at my conclusion, I considered my findings of fact in relation to various decided cases submitted by both plaintiff and defendants, and I was satisfied on the balance of probability that negligence on the part of the defendant was proved.

In furtherance of their defence, the defendants pleaded the *Limitation Ordinance, Cap. 26, s. 8* (now *Limitation Act, Cap. 7:02*)

Section 8 of the then *Cap. 26* stated:

“Every action and suit for any illegal or excessive levy, injury to property, whether movable or immovable, assault, battery, wounding, or false imprisonment, and every other action or suit in which damages may be recovered (save and except for libel or slander) shall be brought within three years next after the cause of action or suit has arisen.”

The defendants also referred to s. 12 (1) of the said *Limitation Ordinance, Cap. 26*. That section stated:

“With respect to the terms of Limitation provided by this Ordinance for actions or suit if, at the time of the right of action or suit accruing, the defendant is absent without ever having been in the Colony, or without ever having had an attorney or agent to represent him therein, or if by reason of the minority, or coverture or insanity of the plaintiff or of the defendant, or if, by reason of any Ordinance in force in the Colony forbidding actions or suits in certain circumstances either party is disabled from bringing or defending the action or suit, the period of limitation of the action or suit shall begin to run in every such case from the time when that absence from the Colony or that disability has ceased.” (Underscoring mine).

In 1970 when the plaintiff actually gave evidence in this matter she was twenty years old and still under the age of majority.

When the accident occurred on 28th April, 1965, she was under the age of majority and when the action was filed on 26th March, 1969 she was under the age of majority.

It follows, therefore, that all the incidents giving rise to this action being heard before the court occurred during the time when the plaintiff was under the age of majority and thus “disabled from bringing the action”. She had to bring the

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action by her guardian and next friend Bhagaratty.

It clearly emerges from the said s. 12 (1) that “minority”, (at that time being under the age of twenty-one years) is a “disability” which could prevent the “minor”, himself or herself from bringing or defending the action or suit and in such a case the period of limitation of the action or suit shall begin to run only from the time when that disability has ceased. The disability as such in this case then had not ceased when the plaintiff initiated the action because the plaintiff at the time of filing the writ and at the time of the actual hearing of the action was still under the age of the then majority.

Order 14 rule 11 (1) of the Rules of the Guyana Supreme Court merely states that an infant “may sue by a next friend or defend by a guardian *ad litem*.” Order 14 rule 11 merely, to my mind, provides the procedure or vehicle whereby if an infant under disability is desirous of suing or defending an action he or she may do so, but does not remove the disability. The disability persists until the age of majority is reached. The procedure for allowing the infant to sue and be sued is permissive only and whatever is done is done for the benefit of a “minor” who is still under disability.

In the words of the learned authors of *Halsbury’s Laws of England*, (third edition, volume), Volume 24, at p. 293 para. 581 on the effect of disability:

“If on the date when any right of action accrued for which a period of limitation is prescribed by the *Limitation Act*, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years or in certain cases three years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation...”

Continuing, the learned authors stated very significantly at p. 294 of the same paragraph:

“The statutory provision as to disability is a savings clause and of itself imposes no disability, and a plaintiff to whom it applies may while he is under a disability, bring his action in the same way as if the statutory provision had not been passed and may do so within the statutory period after the determination of the disability.”

The infant who has a cause of action as in this case is not obliged to wait until she is of age to bring the action. She can bring the action and if she does, she must comply with the rules of procedure for an infant to bring such an action, by having a next friend and guardian *ad litem*, but her disability continues and the

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period of limitation does not begin to run until that disability as to her minority is removed by her coming of age.

At para. 663 p. 514 of Volume 21, third edition of *Halsbury's Laws of England*, it is stated under the heading "Prescription and Limitation of Actions":

"An infant has certain privileges as regards lapse of time, in the case of acquisition of rights by prescription and as respects the limitation of the period during which actions may be brought for the recovery of real or personal property or for damages for personal injury. Notwithstanding, however, these special limitation provisions, an infant may bring an action by his next friend at any time before attaining full age, either within, or subsequently to, the period within which he could have brought it, if he had been of full age when the cause of action accrued."

The Cottons Case (1591) 1 Leonard 211 at p. 215; and Chandler v. Vilett (1670) 2 Wms. Saunid. 117 at pp. 120, 121 (a), 121 (b) are illuminating. I, therefore, cannot accept the arguments and the proposition advanced that the plaintiff's case was affected by the *Limitation Ordinance*.

Accordingly, on the facts and having regard to the law invoked and applicable to this case, I must find in favour of the plaintiff.

On the question of the quantum of damages, the plaintiff stated that at the time of the first hearing she was 20 years old and the accident was about six years before that. She was thus about fourteen years old at the time of the accident. As to the special damages, I accept that the plaintiff through her father incurred expenses for hospital fees amounting to \$554.50, also, boarding and lodging amounting to \$240.00, medicine and nourishment amounting to \$89.75 and loss of clothing amounting to \$30.00.

In arriving at a figure as to assessment of general damages I gave consideration to (a) the injuries suffered by the plaintiff and the impairment of her functional capacity, particularly with respect to the fractured right femur before she made such recovery as she had done; (b) the possible physical disabilities (if any) which she will have to bear; (c) the pain and suffering which she had to endure; (d) the possible loss of amenities of which she had been deprived, and (e) the possible loss of pecuniary prospects of employment.

I would not quantify the damages separately under each head, but having considered the separate heads of assessment as they are applicable to this case, I would award the total sum of 3,500.00 under these heads.

There will therefore be judgment for the plaintiff in the total sum of \$4,414.25

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against both defendants, jointly and severally with costs to the plaintiff to be taxed.

Judgment for the plaintiff.

Solicitors:

R.D. Eleazer for plaintiff

M.A.A. Mc Doom for defendants.

GEORGE FLEMMINGS
Plaintiff

v.

ROBERT CHEONG

and

T. GEDDES GRANT (GUYANA) LTD.
Defendants

[High Court (Massiah, J.) April 16, 18, May 10, 15, August 7, 1975]

Trespass – Defence of property – Whether trespass justified in defence of one’s property – Reasonable force – Reasonable man test.

Defence of property – Unreasonable force – Trespass ab initio – Whether maxim ex turpi causa non oritur actio applicable.

Damages – Trespass ab initio – Assessment of damages.

Damages – Mitigation – Whether unlawful act of plaintiff can properly be used to reduce the real damages.

The plaintiff, along with other men, stole cartons of milk from a van which was in the custody and control of the first defendant, driver-salesman of the second defendant, and rode off. The milk and the van belonged to the second defendant.

The plaintiff and the other men were seen stealing the articles by the first defendant who gave chase after them in the van. In order to prevent the plaintiff from escaping with the milk, the first defendant struck him down with the van, as a result of which the plaintiff was injured. The plaintiff brought an action against

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the defendants claiming damages for personal injuries.

HELD: (1) Where a man's property or property in his custody and control is wrongfully taken away from him, he has a right to use force to retake his property but this right must be exercised reasonably.

(2) The force used to defend or retake property must be commensurate with the degree of the wrongdoer's violence or resistance and the broad test is one of reasonableness in all the circumstances.

(3) The infliction of grave injury in defence of or to retake property is forbidden unless the wrongdoer's resistance brings the rule of self-defence into play.

(4) In determining reasonableness the test is whether there is such real and imminent danger to his property such that he was entitled to act and whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger. Cope v. Sharpe (No. 2) [1912] 1 K.B. 496 applied.

(5) The first defendant's conduct in striking down the plaintiff was deliberate rather than accidental and in the circumstances of this case, was more force than was reasonably necessary to recover the milk.

(6) As the first defendant used more force than was reasonably necessary he must be viewed as a trespasser *ab initio* and damages should flow for all the harm caused; in the assessment of damages the position must be regarded as if he had no authority at all to use force.

(7) There is no general rule that a man cannot sue for an injury suffered at a time when he was a wrongdoer; he is not disabled from recovering by reason of being himself a wrongdoer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction.

(8) The plaintiff's wrongful act was in no way connected with the harm suffered as part of the same transaction, therefore the principle *ex turpi causa non oritur actio* did not affect his claim.

(9) There was no justification to mitigate the damages, as the damages awarded were actual and compensatory and the provocation afforded by the plaintiff's conduct should not reduce real damages. The position may have been different if punitive or exemplary damages were awarded. Layne v. Holloway [1967] 3 All E.R. 129 and Fortin v. Katapodis (1962) 108 C.L.R. 177 applied.

Judgment for the plaintiff

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- (1) Sarch v. Blackburn (1830) C. & P. 297
- (2) Bird v. Holbrook (1828) 4 Bing. 628
- (3) Blades v. Higgs & Anor (1861) 10 C. B. 713
- (4) Whatford v. Carry (1960) C.L.Y. 3258 (Times. Oct 29th 1960)
- (5) Webb v. Beavan (1844) 6 Man and G. 1055
- (6) R. v. Milton (1827) 1 Mood & M. 107
- (7) Devoe v. Long (1951) D.L.R. 203
- (8) Graham v. Green (1862) 10 N.B.R. 330
- (9) Sultan v. Guyana Graphic Ltd. 1356/69 Dem. 19/70
- (10) Cope v. Sharpe (No. 2) [1912] 1 K.B. 496
- (11) Dean v. Hogg (1834) 10 Bing. 345
- (12) Holmes v. Bagge (1853) 1 E. & B. 782
- (13) Robert v. Tayler (1845) 1 C.B. 117
- (14) The Six Carpenters (1610) 77 E.R. 695
- (15) Hegarty v. Shine (1878) 14 COX C. C. 145
- (16) Fivaz v. Nicholas (1846) 135 E.R. 1042
- (17) Cornillac v. St. Louis (1965) 7 W.I.R. 491
- (18) Yarde & Subryan v. Mc Watt [1968] L.R.B.G. 472
- (19) Alladat Khan v. Bhairoo & De Castro (1970) 17 W.I.R. 192
- (20) Parasram v. Kirpalani Bros. Civil Appeal No. 59/1969, 11/70
- (21) Mulready v. Bell [1953] 2 Q.B. 117; [1953] 3 W.L.R. 100; [1953] 2 All E.R. 215.
- (22) Layne v. Holloway [1968] 1 Q.B. 379; [1967] 3 W.L.R. 1003; 111 S.J. 655; [1967] 3 All E.R. 129
- (23) Fontin v. Katapodis (1962) 108 C.L.R. 177

A.F.R. Bishop for the plaintiff.

M.G. Fitzpatrick for the defendants.

MASSIAH, J.: On 10th October, 1969, the first defendant parked a van outside his home in Princess Street, Wortmanville, Georgetown. The van belonged to the second defendant. The first defendant was working with the second defendant as a driver-salesman. Inside the van were a variety of articles including cartons of Lactogen (a popular brand of desiccated milk) belonging to the second defendant.

From the verandah of his home the first defendant said he saw a number of men stealing cartons from the van and that one of those men was the plaintiff. The first defendant's evidence is that he ran out of his home and reached a passageway leading to the road whereupon the men mounted cycles and towed away their companions in crime. The plaintiff was the last of the men to ride away; he was riding a lady's cycle and was towing in front of him on the fork of the cycle a man

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who was holding a carton of Lactogen on the handlebar of the machine.

The plaintiff rode east in Princess Street and turned north in Haley Street. The first defendant ran to the junction of Princess and Haley Streets and saw the plaintiff turning west into Norton Street. The first defendant said that he then ran to his van and obviously in pursuit of the plaintiff he drove west in Princess Street, then north in Hardina Street and finally turned east into Norton Street. The plaintiff and the first defendant were then approaching each other in Norton Street, the plaintiff from the east and the first defendant from the west. I accepted all that evidence. The first defendant's quick thinking and presence of mind had resulted in a desired confrontation with the plaintiff; he must have reasoned that he might not achieve this if he drove directly behind the plaintiff; he chose instead to try to head him off.

As the parties approached each other the cycle and van collided. As a result the plaintiff was injured. It was in those circumstances that the plaintiff launched this action claiming damages for personal injuries he sustained in the collision. Each party gave a different version as to how the collision occurred. The plaintiff alleged in his Statement of Claim that the first defendant deliberately struck him down. The defendants denied this; they claimed that the collision occurred wholly or partly because of the plaintiff's negligent riding.

There were two main issues that I was required to determine. First, whether or not the plaintiff had stolen any article from the van and was escaping with it when the collision occurred and secondly, whether the collision was an accident or the result of a deliberate act on the first defendant's part.

So far as the first issue is concerned I was satisfied that the plaintiff had stolen a carton of Lactogen from the van. I reached that conclusion for a number of reasons. First of all, the men were seen removing cartons from the van at about 11:30 a.m. when it must have been clear and bright. During cross-examination the plaintiff said that "it was a sunny day." Also, the men seemed to have been in full view of the first defendant who was observing them from his home; he ran towards them and reached a passageway leading to the road where his van was parked when the men began riding away. The last man to ride away was identified as the plaintiff by the first defendant. To my mind, it is reasonable to say in those circumstances that the first defendant had a good opportunity to see that last man.

But it does not end there. There immediately followed a chase; the first defendant kept the plaintiff in view and saw when he turned north into Haley Street and west into Norton Street. Soon afterwards the first defendant took up the chase again, this time in his van. So it is not as if the thief had disappeared from

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sight and was alleged to have been seen by the first defendant several days or weeks thereafter; on the contrary, the theft, the chase and the collision appeared to have happened not only in broad daylight, but in quick succession and the first defendant appeared to have been keeping his eyes on the last man whom at least he must have thought he had a good chance to apprehend, because his evidence was that the other men had ridden away ahead of the plaintiff.

There was also to be considered the circumstance that the first defendant showed P.C. Bissessar a carton of milk lying on the road at the scene of the collision. The first defendant had removed it from its original position and placed it behind the van. It is true that Bissessar said that it was a carton of Carnation milk, as distinct from Lactogen as the first defendant alleged, but Bissessar may well have been mistaken about the brand. I accepted, however, that he was shown the carton and that he initialled it and took it to the police station. How did the carton of milk happen to be lying on the road at the scene of the collision in which the plaintiff had just been involved and at the time when he was lying injured right there? Its presence there at that time tends to confirm the first defendant's evidence on this aspect of the matter. Lastly, neither the first defendant's nor Bissessar's evidence on these particular aspects was destroyed or substantially affected during cross-examination by counsel for the plaintiff.

I did not accept the plaintiff's evidence that he did not steal the milk. He said that there was a carton on the handlebar of the cycle he was riding but that the carton was being held by another man to whom the cycle belonged and who had given him a lift on the condition that he, the plaintiff, would tow the man. He said that he thought he saw the word "Carnation" on the carton, but he professed himself innocent claiming neither to have stolen the carton by himself alone nor with others. But he gave his evidence on this aspect of the matter with obvious diffidence and not with the certitude that inspires belief, faltering out his answers and almost whispering at times, in direct contrast to his manner when testifying on other aspects – for then he was more assertive, his assurance bordering almost on aplomb. Further reference will be made to this presently.

The plaintiff testified that he had asked his companion for a lift on his cycle after he had "recognised him by seeing his face" for he had known this man before and used to greet him when they met. Yet he insisted that if he saw the man again he would not be able to recognise him. That made little sense to me. Again, the plaintiff testified that at the time of the collision he was employed on a ship and was returning to work after lunch. But he told the magistrate during his trial for larceny of the milk that a friend had told him that the captain wished to see him and that he was in Norton Street (presumably on his way to the captain) when he met the man who gave him a lift on his cycle. He thus gave different reasons for his presence in Norton Street. No explanation was offered for this apparent in-

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consistency.

On the whole I found it extremely difficult to accept the plaintiff's evidence on this aspect of the matter; on the other hand, I felt convinced that the first defendant was speaking the truth. I was satisfied, therefore, that the plaintiff had stolen the carton of milk and was escaping with it when the collision occurred.

But how did the collision occur? As was to be expected the parties gave different versions. The plaintiff testified that the first defendant deliberately ran him down. His evidence on this issue is as follows:

“The van was going at about 30 to 35 miles per hour. The van slowed down and came across the road in a south-easterly direction towards me. I thought the van driver wanted to park the van so I swerved to the north to allow him to do so. The van then swerved east towards me. I then stopped the cycle and went on a bridge on the northern side of the road. The van then came slowly on to the northern parapet and then accelerated and struck me down while I was still on the bridge.”

The first defendant denied that. His evidence was that the plaintiff appeared to have lost control of his cycle and rode into the van. He said as follows:

“The plaintiff was pedalling quickly and looking back east in Norton Street. The man who was being towed was looking west in my direction. The plaintiff who was looking east looked back quickly in my direction. I was then on the northern side of Norton Street. The plaintiff appeared to lose control of the cycle. The cycle wobbled and came across to the northern side of the road and struck the van on its front, right side.”

I accepted the plaintiff's evidence generally on this aspect of the matter. While testifying about the collision he appeared to be sure of himself and he never hesitated for a moment. He was altogether much more impressive in relation to this aspect than he was on the aspect of larceny, if slightly aggressive.

But what fortified my judgment that the plaintiff was speaking the truth was the testimony of Clinton Wilson who supported him. Wilson appeared to be an independent witness and this was not challenged by the defence. Indeed, he said he got to know the plaintiff through the collision and this remained uncontroverted. His version as to how the collision occurred was substantially the same as the plaintiff's and showed that the first defendant had deliberately struck down the plaintiff with his van. The relevant portion of his evidence given during examination-in-chief reads thus:

“When it swung into Norton Street the van was on the northern side of

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the road. The van was travelling east in Norton Street and crossed to the southern side. Ahead of me and going west in Norton Street were the plaintiff and another man on a cycle. The van was going towards the plaintiff and the man who then swerved from the southern side of the road to the northern side.

When the plaintiff and the man reached the northern side of the road the van left the southern side and swerved north towards them. The plaintiff and the man then went on the northern parapet.

The van then accelerated and hit the cycle which the plaintiff and the other man were riding.”

I was impressed with Wilson’s demeanour and his narration of the events was straightforward. He left me with no doubt that he had seen how the collision occurred and was speaking the truth. Indeed, he explained that it was he who removed the plaintiff from in front of the van after the collision (this was not disputed) and the positions that he said the plaintiff, the plaintiff’s companion and the cycle occupied after the collision were substantially the same as those given by the first defendant, that is to say, the plaintiff was somewhat to the front of the van while his companion and the cycle were under the van. But I accepted not only that he was there after the collision but even before it occurred.

Wilson, a cycle mechanic by trade, appeared to be a man of good character. “I have never been convicted of any criminal offence whatever. In my line of business I have to associate with all sorts of people, even criminals” he testified, but he was quick to explain that they were not his friends. It is not without interest to note that it was never suggested to him that he was the plaintiff’s friend or even his acquaintance. His testimony was in no way weekended during cross-examination and I had no hesitation in accepting and believing it.

The first defendant’s demeanour could not sustain comparison with Wilson’s, for although the first defendant was clear and convincing when testifying about the theft of the milk, he was hesitant, wavering, apparently confused and equally restless when speaking of the collision.

I accepted Wilson’s evidence that the plaintiff was riding on the southern side of the road. I found it difficult to believe that the plaintiff’s cycle, as the first defendant claimed, “wobbled and came across to the northern side of the road and struck the van”; this happened, according to the first defendant, although he swerved to the north to avoid the collision. During cross-examination the first defendant testified somewhat differently declaring that the plaintiff wobbled and then made a sharp swerved to the north. But it all seemed so very improbable. I

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did not accept it. And perhaps it should be made clear that I did not accept the first defendant's evidence that the plaintiff was riding in the centre of the road; I preferred to accept, as I said earlier, Wilson's evidence that he was riding on the southern side of the road.

I did not believe the first defendant's evidence on this aspect for another reason. He testified, as I pointed out earlier, that the plaintiff had looked back east as he rode west and then looked west again and then he appeared to lose control of the cycle, wobbled and went across the road and collided with the van. Implicit in that evidence, to my mind, is that the cause of the collision was to some degree attributable to the fact that the plaintiff was looking now to the east and then to the west although the proximate cause was the wobbling across the road. But despite this the first defendant admitted that he did not tell the Police that the plaintiff was looking back, and when asked he could not give any reason why he did not tell them. It is exceedingly strange that he omitted this causal explanation for the wobbling and eventual collision.

My own view is that he did not tell the Police about that because it was an invention for the purposes of this trial. Indeed P.C. Bissessar to whom the first defendant spoke at the scene of the collision testified as follows during examination-in-chief:

“The plaintiff appeared to be dazed. I spoke to the No. 1 defendant in the plaintiff's presence. The No. 1 defendant told me that the plaintiff and another person took a carton of milk from the van and escaped with it on the cycle. He said he chased them and while travelling east in Norton Street he saw the plaintiff and the other person who were riding a cycle with the carton west in Norton Street.

The No. 1 defendant said that on seeing him the plaintiff and the man swung into the van.”

Surely one would have expected the first defendant to explain to P.C. Bissessar there and then at the scene of the collision when he could not have forgotten how it occurred that the plaintiff was alternately looking back and in front as he rode and had lost control of the cycle and collided with the van?

Another reason why I did not believe the first defendant's evidence on this aspect is that he said that he had no plan to stop the plaintiff as he fled. “I was prepared to let the plaintiff pass me without interrupting him” he declared during cross-examination. There is almost a touch of surrealism in the first defendant pursuing the plaintiff without any plan to stop him as if he considered the chase to be an aimless and futile excursion. If there was no intention of stopping him then

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why pursue the plaintiff at all, unless the first defendant was then overcome by a sense of agitation that forbade constructive thought; but even this he did not say. It is true that he said during examination-in-chief that he was hoping to see a policeman or someone else to help him to apprehend the plaintiff, but he appeared never to have sought any aid or to have shouted or done anything at all to draw attention to the plaintiff when they were in Norton Street. I found all of this to be quite enigmatic and unconvincing.

The truth of the matter seems to be that the first defendant intended to stop the plaintiff at all costs in order to recover the milk, and he succeeded in doing so. The following portion of his evidence given during cross-examination is enlightening:

“I felt that whoever stole the articles from the van should not escape. I felt that I was entitled to stop any such person.”

He had earlier unburdened himself in the following words:

“I was in pursuit of the men. I intended that they should not escape. I did not intend to stop the van and come out and hold the plaintiff and the other man.”

If he did not intend to leave the van then how was he to carry out his intention to apprehend the plaintiff unless he used the van to stop him? For the foregoing reasons I was completely satisfied that the first defendant was not speaking the truth on this issue. I preferred to accept the evidence of the plaintiff and Clinton Wilson and I was left in no doubt that the first defendant had deliberately struck down the plaintiff in order to prevent him from escaping with the milk.

The legal position.

Holding as I did that the first defendant’s act was deliberate as distinct from accidental I considered that the tort he committed, if any, was trespass rather than negligence. But could an act of trespass in the circumstances of this matter be justified?

It may be useful to begin by considering the position where a person is merely defending his property against a trespasser. In our jurisprudence great store is set on a citizen’s right to preserve and defend his own property; it can be taken from him only within the narrow limits of certain clearly defined statutory and constitutional provisions. And he can certainly use force to prevent a wrongdoer from interfering with it provided the means he employs to achieve this end are reasonable in all the circumstances of the particular case. TINDAL, C.J. put it this way

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in Sarch v. Blackburn (1830) C. and P. 297, at p. 300:

“If a man puts a dog in a garden, walled all round, and a wrong-doer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that which was brought upon him by his own act. The difficulty is in saying, whether, in the particular place, the means adopted by the defendant were sufficient.”

However, the use of excessive force is forbidden. In Bird v. Holbrook (1828) 4 Bing. 628 the court held that the defendant acted unreasonably in setting spring guns in his garden to protect his property while specifically refusing to display a notice to this effect. An innocent trespasser who was wounded when the guns were discharged succeeded in an action against the defendant. BEST, C.J. said as follows, p. 641:

“I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said ‘If I give notice, I shall not catch him.’ He intended, therefore, that the gun should be discharged...”

He concluded his judgment in these words, p. 643:

“... it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity, and the sanctions of religion. It would be, indeed, a subject of regret, if a party were not liable in damages, who, instead of giving notice of the employment of a destructive engine, or removing it, at least, during the day, expressed a resolution to withhold notice, lest by affording it, he should fail to entrap his victim.”

The test here is whether or not the defendant’s use of force is reasonable. Thus in *Winfield on Tort* a work of acknowledged authority that has gone through several editions the view is expressed at p. 45 of the 7th edition that:

“The popular idea that a burglar may be shot at sight or that a trespasser must always take premises as he finds them goes beyond what the law allows. The broad test here, as elsewhere in private defence, is reasonableness.”

And in Professor Street’s *The Law of Torts* (5th edition) the following views are

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expressed at p. 80:

“As the law does not value interests in property quite so highly as those in the person, the use of force in defence of the former is, then, harder to justify than in the case of self-defence. Thus it has been held unjustified to pull away a ladder on which the plaintiff was standing, although he was a trespasser on the land of the defendant... Indeed, unless the plaintiff resists his expulsion so as to bring the rules of self-defence into play, force likely to cause death or serious bodily harm will not be justifiable in defence of property.”

In Blades v. Higgs and Another (1861) 10 C.B. 713 reference was made at p. 715 to the following paragraph in *Coke’s Commentary on the Statute of Gloucester*, 2 Inst. 316:

“There is also another diversity between an appeal of mayhem, or an action of trespass for wounding, or mannas of life and member, and an action of trespass of assault and battery for a man in defence or for the preservation of his possession of land or goods; for, in that case, he may justify an assault and battery; but he cannot justify either mayheming or wounding or mannas of life and member; and so note a diversity between the defence of his person and the defence of his possession or goods.”

But what is the legal position where a man’s property or property in his custody and control, as in the instant matter, has actually been taken from him? Can he use force to recover it? It seems to me that the answer should be in the affirmative, for if you can use force to defend your property before it is taken from you then you should be permitted, in the event that it is taken from you, to use equivalent force to take it back. The common law recognises a person’s right to retake his goods by force, if necessary, but this right must also be exercised reasonably. In *Street (supra)* the position is succinctly explained as follows, p. 83:

“It is a defence to trespass that reasonable force was being used to re-take chattels which were being wrongfully withheld from the defendant.”

At pp. 537 – 538 of *Winfield (supra)* under the heading “Retaking of goods” there appears the following statement:

“If A’s goods are wrongfully in B’s possession or control, there is no need for A to go to the expense of litigation to recover them. He can retake them, peaceably if he can, and in any event with no more force than is commensurate with the violence of B’s resistance... It should be

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carefully noted that, while maiming or wounding are not justifiable for simple recaption of property, yet they may well become justifiable for another reason: self-defence.”

At p. 538 (*op. cit.*) the learned author refers (at footnote 53 a) to the case of Whatford v. Carry [1960] C.L.Y. 3258, (see also The Times, October 29th, 1960) a criminal matter in which the Divisional Court (LORD PARKER, C.J., ASHWORTH and ELWES, JJ.) held that the respondent who sought by force to recover his bow and arrows from the appellants who had taken them from him was not guilty of assault. It appears that the respondent pushed the first appellant into a drain, kicked another on his leg and pushed the third into a hedge. But he inflicted no grave injury on any of them in his effort to repossess his property. His acts were clearly those of a reasonable man. (For a full statement of the law and facts in this matter see Tony Weir’s *A Case book on Tort*, p. 282.).

Blackstone considered that property could be retaken but “without force or terror.” The public peace, he asserted, was “a superior consideration to any one man’s private property.” See his *Commentaries* Book 3, p. 4. Here the emphasis, once again, is on reasonableness – “force and terror” are excluded. The same principle is stated in *Salmond on the Law of Torts* (11th Edition) where the following views are expressed at p. 217 under the caption “Recaption of Chattels”:

“Any person entitled to the possession of a chattel may retake the chattel either peaceable or by the use of reasonable force from any person who has wrongfully taken or detained it from him. Such a re-taking, even though forcible, is neither a civil injury nor a criminal offence. As to the amount of force which is permissible ... the defence and recaption of chattels is presumably governed by the same rules as the ejectment of trespassers upon land.”

And in relation to the ejectment of trespassers the author states, at p. 376, that:

“It is lawful for any occupier of land ... to use a reasonable degree of force in order to prevent a trespasser from entering or to eject him after entry.”

In the discussion on the remedies available for trespass to goods there appears the following paragraph at p. 757 of *Halsbury’s Laws* (3rd edition) Vol. 38:

“1244. Self-help. If one person wrongfully seizes the goods of another, the owner may resist the seizure and may use such force as is reasonably necessary; if the goods are wrongfully removed or are in the wrongful possession of someone else, the owner may retake them and may use

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force if necessary, and may enter on the land of the wrongdoer for the purpose of recovering the goods.”

Later, in relation to the defences available to a person sued for trespass to the person there appears the following paragraph at p. 763:

“1261. Retaking goods. The owner of goods which are wrongfully in the possession of another person who refuses to deliver them up on request may retake the goods by force, so long as he uses no more force than is reasonably necessary.”

Those statements in *Halsbury’s Laws* rest on the authority of cases like Blades v. Higgs and Another, Webb v. Beavan (1844) 6 Man, and G. 1055 (at p. 1056) and R. v. Milton (1827) 1 Mood and M. 107. (The report of R. v. Milton suggests that the sole question that was considered therein was whether or not more force than was necessary was employed to recover a warrant that had been handed by an excise officer to the defendant whose house had just been searched on the authority of the warrant. The defendant was charged with assaulting the officer, but it is clear that the officer had first assaulted the defendant in an effort to retake the warrant. Since the warrant had been handed to the defendant it appears that he was lawfully in possession of it and it seems wrong for that reason for the excise officer to have used force to recover it, but this aspect appears not to have been agitated at the trial.)

In Blades v. Higgs the plaintiff sued the defendants for assault; the allegation was that the defendants, the servants of the owner of some rabbits, had beaten the plaintiff in order to recover the rabbits from him. The plaintiff admitted that he had wrongfully taken the rabbits but contended that the defendants had no right to assault him in order to retake them, even if they used no more force than was necessary. The court held that the assault was justified; the defendants, they felt, were fully entitled to use reasonable force to recover their master’s property. At p. 719 ERLE, C.J., said as follows:

“If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and retake the chattels; and we think there is no substantial distinction between that case and the present; for, if the defendants were the owners of the chattels, and entitled to the possession of them and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession and the plaintiff’s wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the

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owner.”

(The second part of that statement was criticised in Devoe v. Long [1951] D.L.R. 203 HARRISON, J. at pp. 217 – 219) in that it suggests that property can be forcibly retaken even from a person whose possession was originally lawful. The Appeal Division of the New Brunswick Supreme Court where Devoe’s case was heard preferred to be guided by the opinion expressed to the contrary in *Clerk and Lindsell on Torts* – see the 12th edition, para. 456, p. 242). See also the Canadian case of Graham v. Green (1862) 10 N.B.R. 330 which is discussed at p. 137 of *Wright’s Cases on the Law of Torts* (4th edition).

The legal position in the United States of America appears to be the same as the English common law position. In Volume 6 of the *Corpus Juris Secundum* under the heading “Recaption of property – property stolen or wrongfully taken” there appears the following paragraph at p 822:

“The owner of personal property may retake it by force from one who has wrongfully deprived him of its possession, if he can do so without unreasonably or excessively wounding the wrongdoer or resorting to the use of a dangerous weapon.”

See also pp. 998 and 1002 of Volume 87 under the headings “Force in asserting title” and “Force in exercising right”, respectively.

In my view the principles to be extracted from those authoritative sources which I have no reason to controvert or desire to depart from are as follows:

1. A person may use reasonable force in defence of his property.
2. A person may use reasonable force to retake his property from a wrongdoer whose possession was unlawful from the inception.
3. The infliction of grave injury in defence of or retake property is forbidden unless the wrongdoer’s resistance brings the rules of self-defence into play.
4. The force used to defend or retake property must be commensurate with the degree of the wrongdoer’s violence or resistance.
5. The broad test is one of reasonableness in all the circumstances.

It must be emphasised that the position changes, of course, if the owner is violently attacked by a wrongdoer while protecting or retaking property from him

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for in such a case the owner may use whatever measure of force is necessary to protect himself, but even here, as is well-known, the force must be commensurate with the violence of the attack. I can see no reason why a man in defending his property or in recovering it should be permitted to use more force than he is allowed in defence of his person. The test of reasonableness in relation to the recaption of property is, therefore, to my mind, a sensible one.

The reasonableness or otherwise of the first defendant's acts.

To the layman it may seem incongruous that the law affords protection even to a thief, in the sense that you must not use more force than is necessary to protect or recover your property from him. Some prefer the Latin tag *molliter manus imposuit* but the principle, however articulated, is that you can help yourself provided you behave like a reasonable man. For me the reasonable man has always been a somewhat elusive figure, nor should this be surprising for his behaviour is an abstract conception varying from situation to situation. To some he is “the man on the Clapham omnibus”, for others he lacks “the courage of Achilles, the wisdom of Ulysses and the strength of Hercules.” A North American writer saw him as the man who “pushes the lawn mower in his shirt sleeves” after having fetched the magazines home. In Sultan v. Guyana Graphic Ltd. (1356/69, Demerara; 19/70) GONSALVES-SABOLA, J. disdainingly those traditional importations to which we have been habituated and generally eschewing eclecticism sought out the reasonable man on Guyanese soil rather than on alien shores and found him to be, p. 7:

“the ordinary working man in the crowd on Bourda Green who hears out the speakers then agrees or disagrees with what they have said.”

It is doubtful whether there can even be a precise or universal formulation of the concept of reasonableness – the whole thing is so impalpable – but the common, conceptual thread that runs through the fabric of those collective opinions is that the reasonable man is an ordinary person and not a man possessed of consummate wisdom and perception, but neither is he a wild and reckless fool. He is, in GONSALVES-SABOLA, J.'s happy phrase, a man who first “hears out the speakers then agrees or disagrees ...” There is expected of him, I would think, at least an awareness of the validity of a sense of duty and responsibility towards others. In the preservation or recaption of his property he would take only such steps as are necessary for this end, avoiding conduct that is at once rash and intemperate.

I had to ask myself whether, judged by those standards, the first defendant's conduct was reasonable. I approve of the test laid down by BUCKLEY, L.J. in Cope v. Sharpe (No. 2) [1912] 1 K.B. 496; he said at p. 504:

“The test is whether there was such real and imminent danger to his

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property as that he was entitled to act and whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger.”

To my mind, the first defendant’s conduct in the circumstances of this case was unreasonable. The steps he took are certainly not those that the ordinary, discriminating Guyanese working man in the crowd on Bourda Green would have taken. It must be remembered that when the first defendant turned east into Norton Street and saw the plaintiff they were some distance from each other. Why did the first defendant not then leave the van, raise a hue and cry and try to apprehend the plaintiff? His evidence on this aspect given during cross-examination is as follows:

“When I first saw the plaintiff and the man they were about thirty yards from me. I could then have stopped the van but I cannot remember whether I considered to do so.”

In my view he should have done so. It is true that he later said that he did not recognise the plaintiff when he was thirty yards from him, but at least, so he said, he saw the carton of Lactogen on the cycle from a distance of thirty yards. It is not unreasonable to think that he must have thought that it was the plaintiff who was riding that cycle. Why then did he not stop his van and try to hold or hit the plaintiff as he rode towards him or push him off the cycle or try to trip him up? These are steps that a reasonable man would have taken; they constitute the kind of force that to my mind was reasonably necessary in the circumstances. The situation did not call for the infliction of grave injury. But the first defendant specifically said:

“I did not intend to stop the van and come out and hold the plaintiff...”

Reasonable measures, it appears, did not commend themselves to him.

But what was the plaintiff actually doing all the while? He was riding away with the carton of milk; it is not as if he were then in the act of committing a felony of force against the first defendant or resisting his efforts to retake the milk. One must bear in mind that the owner’s violence must be commensurate with the degree of the wrongdoer’s resistance. But the plaintiff was offering no resistance. On the contrary, he was trying desperately to escape. Indeed, the plaintiff’s evidence (which I accepted) is that he was actually standing on a bridge when the van hit him. Wilson saw him on the northern parapet. There was therefore really no need for the great degree of force that the first defendant employed. Even the fleeing felon is entitled to protection; what is granted is the right to use reasonable force not a licence to the phrenetic for revenge.

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Again, the very use of a motor-van as a weapon in those circumstances was unreasonable. No one who drives a motor vehicle can fail to appreciate that he is in charge of a lethal machine or be unaware of the carnage that its reckless use has been causing in Guyana over the years. The reasonable man would have had in his contemplation the grave injury that it could cause. Indeed, the plaintiff was fortunate to have escaped with his life although he suffered rather severe injuries with wasting of all the muscles of the upper limb, from the shoulder to the fingers.

I was unable to persuade myself that the use of a motor vehicle in the circumstances of this matter was justifiable. I entertained no doubt that the first defendant used much more force than was reasonably necessary to recover the milk. I considered therefore that the plaintiff had established his claim for trespass.

Was the first defendant justified in using force at all in the light of the fact that he was not the owner of the milk?

The first defendant was clearly not the owner of the milk; it was merely in his custody and control. The milk really belonged to the second defendant, T. Geddes Grant (Guyana) Limited, the employers of the first defendant. Could the first defendant therefore have justifiably used force to recover the milk? It seems that he could.

As I have already pointed out anyone “entitled to the possession of a chattel may retake it... by the use of reasonable force.” See *Salmond (supra)* at p. 217. It is beyond question that the first defendant was entitled to the possession of the milk; it was lawfully in his custody and control and was unlawfully taken out of his possession. In *Blades v. Higgs* where the defendants retook their master’s property ERLE, J. said at p. 719: “we consider the servants here the same as the master.”

It seems to me that the first defendant was sufficiently in possession of the milk to justify using force to prevent it from being taken by any wrongdoer and to recover it if so taken. (See *Dean v. Hogg* (1834) 10 Bing. 345 (at pp. 350 – 352). *Holmes v. Bagge* (1853) 1 E. and B. 782 (at p. 787) and *Roberts v. Tayler* (1845) 1 C.B. 117 (at pp. 126 – 127) – these cases deal with the expulsion of alleged intruders and the question of the defendants’ possession (if any) is discussed therein.)

Trespass *ab initio*.

Although the first defendant was entitled to use reasonable force to recover the milk I have already expressed the opinion that he went beyond the pail of reason-

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ableness and used more force than was indeed necessary. The result of this is that he must be viewed as a trespasser from the very beginning and in the assessment of damages the position must be regarded as if he had no authority at all to use force. This concept is explained as follows in *Winfield (supra)* p. 383:

“Where trespasses are justified or excused by the law, as distinct from any permission given by the person injured, a doctrine inherited from the technicalities of the older law is applicable – trespass *ab initio*. It covers all kinds of trespass, whether to land, to goods or to the person, and it may be thus stated. If one who is entitled by law to do an act abuses his authority to do it, he is said to be a trespasser *ab initio*; his act is reckoned as unlawful from the very beginning, however innocent his conduct may have been up to the moment of the abuse.”

See the well-known case of The Six Carpenters (1610) 77 E.R. 695.

My view, therefore, is that the first defendant was a trespasser *ab initio* and that damages should flow for all the harm he caused.

Ex turpi causa non oritur actio

Although it is clear that the first defendant used more force than was reasonably necessary could the plaintiff nevertheless have maintained this action bearing in mind that he had just committed the offence of larceny when the first defendant knocked him down? In other words does the maxim *ex turpi causa non oritur actio* apply to the plaintiff's case? I do not think it does. The reason for the rule, as I understand it, is that it is against public policy to permit a wrongdoer to ground his action in his own immoral or illegal act. So in Hegarty v. Shine (1878) 14 Cox C.C. 145 the Court of Appeal of Ireland held that the plaintiff could not properly sue the defendant for infecting her with a venereal disease because she had herself consented to what in those days was considered to be the immoral act of extramarital sexual intercourse with him – see pp. 147 – 148, 151 and 152. Courts of Justice, the court held, do not exist to provide remedies “for the consequences of immoral acts.”

Similarly in the field of contract I would think that a prostitute cannot sue for the services she renders nor can an accomplice in larceny sue on an agreement that the goods shall be equally divided. In such cases the wrongful act would be the foundation of the plaintiffs claim. In Fivaz v. Nicholas (1846) 135 English Reports 1042, it was decided that one of two parties to an agreement to suppress a prosecution for a felony could not maintain an action against the other for an injury arising out of the transaction in which they were both illegally engaged. At p. 1047 TINDAL, C.J. said that the plaintiff must fail because in order to

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succeed he would have had to “put in the very front of his declaration the illegal agreement to which he had been a party.” This was clearly impermissible.

But that is not to say that a wrongdoer cannot sue for injury he suffers. The learned author of *Salmond* (*supra*) writes thus at p. 42:

“There is no general rule that a man cannot sue for an injury suffered at a time when he was a wrongdoer. If the law were otherwise a trespasser on land could be maltreated with impunity. Although there seems to be no English authority on the point the law is probably as stated by Pollock: a plaintiff is not ‘disabled from recovering by reason of being himself a wrongdoer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction’.”

I agree with that view and would adopt it. In *Hegarty v. Shine* the so-called immoral act of sexual intercourse was not only *the fons et origo* of the plaintiffs claim but its very basis and foundation. You could not separate the act of sexual intercourse from the venereal disease of which the plaintiff complained. But here the matter is not rooted in any base cause at all; the plaintiffs rights rest not on some immoral contract or unlawful venture but rather on the fact that the defendant used more force than he was entitled to do under the prevailing circumstances. It could rest on nothing else. It is in the protection that the common law affords him that the strength of the plaintiff’s case resides. His wrongful act could never have been part and parcel of his case.

If I may say with respect I think it was the same conception that caused PALLES, C.B., to say in *Hegarty v. Shine* when considering the principle under discussion, at p. 151:

“... but there are many actions in tort to which it is undeniable that this principle cannot apply; for instance, if a prisoner in custody attempts to escape and the officer in whose custody he is in recapturing him unnecessarily inflicts upon him a serious wound, an action will lie against the officer, although the act of the prisoner was an illegal one.”

I agree with that opinion. The position here is the same. The plaintiff’s wrongful act, to borrow words from *Salmond*, was in no way “connected with the harm suffered by him as part of the same transaction.” On the whole I considered, therefore, that the principal *ex turpi causa non oritur actio* did not affect the plaintiff’s claim.

Damages

The plaintiff was admitted to the Georgetown Hospital on 10th October, 1969.

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There he was seen by Mr. Punraj Singh, a surgeon, who found that he had suffered a lacerated wound at the top of the skull one and a half inches long and another at the back of the skull, one inch long. Mr. Singh's certificate (Exhibit A) shows that the wounds healed slowly but satisfactorily and that the plaintiff was discharged from hospital on 1st December, 1969. He suffered no fractures.

He did, however, suffer some injury to the left brachial plexus which the surgeon said is a collection of nerves running from the neck down to the shoulder. Mr. Singh saw the plaintiff on the morning when he testified (18th April, 1975) nearly six years after he was knocked down and found that:

“His movements in the neck have decreased. There is wasting of all the muscles of the left upper limb, from the shoulder right down to the fingers. The plaintiff cannot properly make a cuff with his left hand. The grip of his left hand is weak. Movements of the left elbow have decreased as well as movements of the left shoulder. When the plaintiff now moves his left hand there are spasmodic contractions which would hinder him in using his hand.”

He expressed the view that the plaintiff's condition is now static and that he would hardly improve, and he assessed his disability at 30 *per centum*. The plaintiff now works as a security guard and appears to be getting on well.

In computing the damages reminded myself of the several matters required to be considered in relation thereto on the authority of the well-known Trinidadian case of Cornillac v. St. Louis (1965) 7 W.I.R. 491 (at pp. 492 – 493) which was approved and followed by the Court of Appeal in Yarde and Subryan v. Mc Watt [1968] L.R.B.G. 472 and Alladat Khan v. Bhairoo and De Castro (1970) 17 W.I.R. 192, at pp. 202-203. I reflected also on the desire for judicial uniformity in awarding damages expressed in Parasram v. Kirpalani Brothers (Civil Appeal 59/1969, 11/70, pp. 4 – 6) (See also Mulready v. Bell [1953] 2 Q.B. 117) and I assessed the plaintiff's damages at \$1,000.00.

It has sometimes been contended that damages should be mitigated in circumstances where the plaintiff has himself first committed an unlawful act. This was the view taken by the judge at first instance in Layne v. Holloway [1967] 3 All E.R. 129 where the plaintiff, a man of sixty-four, challenged the twenty-three year old defendant to fight. There was no love lost between them and the plaintiff immediately hit his younger opponent. Mortified no doubt by the plaintiff's audacious challenge which his assault aggravated, the defendant in turn cuffed the plaintiff in his eye severely injuring it. In an action for personal injuries brought by the plaintiff the trial judge took the plaintiff's conduct into account and awarded him less damages than he would have done if the plaintiff had not struck the first

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blow.

The Court of Appeal held that that approach was wrong. The award, they felt, should not have been reduced by reason of the provocation afforded by the plaintiff's conduct and they accordingly increased it. In doing so they followed the Australian case of Fontin v. Katapodis (1962) 108 C.L.R. 177. LORD DENNING with customary conciseness summarised the position as follows, at p. 132:

“I think that the Australian High Court should be our guide. The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation; but not to reduce the real damages.”

I followed those cases and did not mitigate the damages, for the kind of damages I awarded was that described by Mc TIERNAN, J., in Fontin v. Katapodis (at p. 183) as “actual and compensatory damages.” The position may well have been different if I had awarded punitive or exemplary damages.

Since there was no legal justification to mitigate the damages which I had assessed at \$1,000 I entered judgment for the plaintiff in that sum and granted him costs in the sum of \$800.

Judgment for the plaintiff with costs.

SOOKRAJ EVANS
Appellant

v.

THE STATE
Respondent

[Court of Appeal (E.V. Luckhoo, C. Persaud and Haynes, JJ. A.) June 17, 18 and October 20, 1975.]

Criminal Evidence – Murder – Direct evidence unavailable – Circumstantial proof of guilt – Standard of proof – Necessity of special direction to jury on standard of proof – Cumulative directions showing guilt only reasonable hypothesis or expla-

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nations of facts – Whether jury adequately directed.

Judicial Precedent – Stare decisis – Guyana’s jurisdictional freedom and constitutional judicial duty to decide differently from House of Lords – When exercised.

Criminal Law – Previous inconsistent statement – Prosecution witness not deemed adverse – Judge questions witness – Answers not prejudicial to accused – Whether discretion judicially exercised in ordering witness’ statement to be produced for judge’s inspection – Evidence Act, Cap. 5:03, ss. 79 (1), (2) and 80 (2).

The prosecution led circumstantial evidence of the following nature:

- (1) The deceased and the appellant left the deceased’s premises on June 7, 1972 in a boat belonging to the deceased propelled by the deceased’s “Seagull” engine, and the deceased was carrying his Mossberg 12-bore shotgun.
- (2) The deceased was shot and killed and it was not an accident. The more probable dates of the shooting would have been June 7, 8, 9 or 10.
- (3) On the morning of June 8, the appellant was seen in the Abary Creek in a boat which had been seen on previous occasions moored at the deceased’s landing; he was alone, and he said that the deceased had gone further up the creek.
- (4) About 1 a.m. on June 9, he was seen at Fern Village with certain articles, one of which was a 12-bore Mossberg shotgun. The boat was light blue in colour, and was being driven by a “Seagull” engine.
- (5) The “Seagull” engine belonging to the deceased was fished out of the Berbice River either on June 9 or 10.
- (6) Certain articles, the property of the deceased were found in the possession of the appellant when he was arrested.
- (7) Those articles had not been taken by the deceased when he and the appellant had set out on the morning of June 7, but there were signs that the deceased’s house had been broken into between June 7 and 17, and those articles were found to be missing.
- (8) At Indabo Creek on June 19 a search party found a human skeleton the skull of which was separated from the body and under its rib-cage, a wrist-watch strapped to a piece of bone by means of a shirt and dentures

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in the skull. The skeleton was identified as the deceased, Alfred Rodrigues.

An autopsy revealed the presence of pellet holes at the back of the skull and the fact that death could have been caused by the discharge of a shotgun sometime between June 7 and 10, the inference being that the deceased had been shot in the head from behind. The evidence being circumstantial, the point which was argued on appeal was whether the trial judge gave the jury adequate and appropriate directions on the approach to evidence of such a nature. Having directed that the burden lies on the prosecution to prove guilt beyond reasonable doubt, he went on to say that they were entitled to draw an inference, from the facts in favour of the State if it was “stronger” than one that can be drawn in favour of the defence. The point for consideration was whether further or special directions on circumstantial evidence were still necessary, notwithstanding a general direction on the standard of proof had already been given, namely, that it was proof beyond reasonable doubt.

HELD: (1) (*per* PERSAUD, J. A.) That whatever formula is used in directing juries on circumstantial evidence, it amounts to no more than telling them the prosecution must prove the guilt of the prisoner beyond reasonable doubt, for if a reasonable hypothesis arises from the evidence which the jury accepts as being consistent with the prisoners innocence, the prosecution will not have satisfied the degree of proof required to bring home the guilt of the prisoner.

(2) That there is no need to give any further or special direction to that portion of the summing-up, as in the subsequent passages, the judge left the matter in no doubt, *viz.*, that the jury must examine the evidence narrowly, and must be sure of the appellants’ guilt before convicting him.

(3) (*per* HAYNES, J.A.) That the Guyana Court of Appeal should act on the principle that although for obvious reasons it will be predisposed to accept and normally will accept a judgment of the House of Lords on a point of English common law as correct and as our law, it has jurisdictional freedom and a constitutional judicial duty to hold differently, if we are convinced fully on just grounds that the principle or rule laid down in it or the declaration of what is not the common law, is misconceived and wrong.

(4) That in cases of circumstantial evidence, it would be at least desirable, and certainly helpful, to tell juries that to be satisfied of the guilt of an accused beyond reasonable doubt, they must be sure that his guilt is the only reasonable explanation of the true facts.

(5) That even if a special direction is not compulsory, the summing-up on the

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whole was quite adequate and it is impossible to hold that the verdict was unreasonable and could not be supported having regard to the evidence.

(6) That the cumulative effect of the judge's directions was to make it plain that guilt had to be the only reasonable hypothesis or explanation of the facts accepted as true which is what a special direction really means.

**Appeal dismissed.
Conviction and Sentence affirmed.**

Cases referred to:

- (1) R. v. Taylor *et al* (1928) 21 Cr. App. R. 20.
- (2) Dos Santos v. Approo (1970) 17 W.I.R. 215.
- (3) R. v. Comba [1938] S.C.R. (Cdn.) 396.
- (4) Mc Greevy v. D.P.P. [1973] 1 All E.R. 503; 57 Cr. App. R. 424.
- (5) R. v. Hodge (1838) 2 Lew 227.
- (6) Teper v. R. [1952] A.C. 480; [1952] 2 All E.R. 447; [1952] 2 T.L.R. 162; 116 J.P. 502; 96 Sol. Jo. 493; 70 S.A.L.J. 82; 68 L.Q.R. 433, P.C.
- (7) R. v. Duesharm [1956] 1 D.L.R. 732; 113 Can. Cr. Cas. 1.
- (8) Canadian Abridgment 3 Abr. Can. (2nd) 834.
- (9) Mc Leod v. R. [1933] S.C.R. (Cdn.) 688; 18 Can. Abr. 276
- (10) Plomp v. R. (1963) 110 C.L.R. 234.
- (11) Martin v. Osborne (1936) 55 C.L.R. 375.
- (12) Peacock v. R. (1912) 13 C.L.R. 619.
- (13) R. v. Smith (1915) Notable British Trial Series 270.
- (14) McLean v. R. [1933] S.C.R. (Cdn.) 688.
- (15) Lizotte v. R. [1951] 2 D.L.R. 754.
- (16) Boucher v. R. [1955] S.C.R. (Cdn.) 16.
- (17) R. v. Cook (1914) 18 D.L.R. 706.
- (18) R. v. Macchione [1937] 1 D.L.R. 593.
- (19) O'Leary v. R. (1946) 73 C.L.R. 566.
- (20) Hanumant v. The State of Madhya Pradesh [1952] 4 S.C.R. (Ind.) 94
Palvinder Kaur v. The State or Punjab [1953] 4 S.C.R. (Ind.) 94.
- (22) R. v. Clarice Elliot (1952) 6 J.L.R. 173.
- (23) R. v. Burns and Holgale (1967) 11 W.I.R. 110.
- (24) R. v. Saman and Others (1970) 15 W.I.R. 35.
- (25) R. v. Tawell (1845) 2 Car. & Kir. 309, n.
- (26) R. v. Nina Vassileva (1911) 6 Cr. App. R. 228.
- (27) R. v. Onufrejczyk [1955] 2 W.L.R. 273; [1955] 1 All E.R. 247; [1955] 1 Q.B. 388; [1955] Crim. L.R. 158; 39 Cr. App. R. 1; 99 Sol. Jo. 97; 71 L.Q.R. 168; 219 L.T. 69
- (28) Johnson v. R. (1966) 10 W.I.R. 402.
- (29) D.P.P. v. Smith [1961] A.C. 290; [1960] 3 W.L.R. 546; [1960] 3 All E.R.

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- 161; 124 J.P. 473; 104 Sol. Jo. 683; 44 Cr. App. R. 261; 230 L.T. 135; reversing *subnom.* R. v. Smith [1960] 3 W.L.R. 92; [1960] 2 All E.R. 450; 104 Sol. Jo. 510; 229 L.R. 323, C.C.A.
- (30) Peter Persaud and Others v. Pln. Versailles & Schoon Ord., Ltd. (1971), 17 W.I.R. 107
- (31) Robins v. National Trust Co., Ltd [1927] All E.R. 73; 96 L.J.P.C. 84; 137 L.T 1; 43 T.L.R. 243; 71 Sol. Jo. 158, P.C.; 30 Digest (Repl.) 222, 655.
- (32) Reading v. Attorney General [1951] A.C. 507; [1951] 1 All E.R. 617; [1951] 1 T.L.R. 480; 95 Sol. Jo. 155; 67 L.Q.R. 284, H.L.; 34 Digest (Repl.) 149, 1028.
- (33) R. v. Seaton (1933) 52 N.Z.L.R. 548.
- (34) Russell v. Russell [1924] A.C. 687
- (35) Piro v. W. Foster & Co., Ltd. (1943-44) 68 C.L.R. 313.
- (36) Parker v. R. (1962) 111 C.L.R. 610.
- (37) Uren v. Australian Consolidated Press, Ltd. (unreported) High Court of Australia.
- (38) Rookes v. Barnard [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367; 108 Sol. Jo. 93; 1 Lloyd's Rep. 28.
- (39) Australian Consolidated Press, Ltd. v. Uren [1969] 1 A.C. 590; [1967] 3 W.L.R. 1388; [1967] 3 All E.R. 523; 111 Sol. Jo. 741, P.C.
- (40) Waghorn v. Waghorn (1941) 65 C.L.R. 289.
- (41) R. v. Storgoff [1945] 3 D.L.R. 673.
- (42) Ares. v. Venner [1970] S.C.R. 608.
- (43) Myers v. D.P.P. [1965] A.C. 1001; [1964] 3 W.L.R. 145; [1964] 2 All E.R. 881; 128 J.P. 481; 1083 Sol. Jo. 519; 48 Cr. App. R. 348; 27 M.L.R. 606; 80 L.Q.R. 457.
- (44) Hardy v. Motor Insurers Bureau [1964] 3 W.L.R. 433; [1964] 2 All E.R. 742; [1964] 2 Q.B. 745; 108 Sol. Jo. 422; 1 Lloyd's Rep. 397; 27 M.L.R. 717; 81 L.Q.R. 7.
- (45) R. v. Lord Cochrane and Others (1814).
- (46) R. v. Dickman (1910) 74 J.P. 449; 26 T.L.R. 640; 7 Cr. App. R. 135 C.C.A.
- (47) R. v. Broome (1910) Aylesbury Autumn Assizes.
- (48) R. v. Nash (1911) 6 Cr. App. R. 225.
- (49) R. v. Robertson (1914) 9 Cr. App. R. 189.
- (50) R. v. Tumahole Bereng and Others [1949] A.C. 253.

G.M. Farnum S.C., for the appellant.

W.G. Persaud, Senior State Counsel, for the State.

LUCKHOO, C.: There is no merit in this appeal. I have read the judgments of PERSAUD and HAYNES, J.J.A., and would support their conclusion. In the

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result, this appeal will be dismissed and the conviction and the sentence affirmed.

PERSAUD, J.A.: The appellant was convicted for the murder of one Alfred Rodrigues between the 7th and 17th June, 1972. He appeals to this court on three main grounds, *viz.*:

- (1) That the verdict was unsafe having regard to the evidence.
- (2) That the directions of the trial judge to the jury were incorrect and/or insufficient in the circumstances.
- (3) That the examination by the judge of one of the witnesses called on behalf of the prosecution – Radica Evans, sister of the appellant was improper and prejudicial to the appellant's case.

The case for the prosecution was based entirely on circumstantial evidence. It is therefore necessary to point out certain features of that evidence, to examine the relevant portions of the judge's summing-up, and to refer to the examination of the witness, Radica Evans, in that order.

I will begin a summary of the evidence by referring to the discovery of a human skeleton by a police search party in June, 1972. On the west bank of the Abary River, some 47 miles from the point where it leaves the public road south wards, is a branch creek called the Indabo Creek. About one and a half miles up the Indabo Creek, and about 50 rods due south and from the right bank of that creek and across a swamp, was a mango tree. In that vicinity on the 19th June, the search party found a large bird cage, a large knife, and the skeleton of a human being. The rib-cage and skull of the skeleton were disjointed from the body; the lower portion of the body was clothed in a pair of dark-coloured trousers; and the feet in a pair of black and white yachting boots. There was a shirt on the ground under the rib-cage, and near to that was found one Seiko wrist-watch apparently strapped around a piece of bone. The examination of the skull disclosed several holes at the back, and several pieces of metal were discovered in the skull. These pieces of metal were later recognised as pellets from a gun. The theory based on that discovery was that the person had been shot in the head from behind. By reason of the identification of the shirt, the watch, and the dentures in the skull, it was established that the skeleton was that of the deceased Alfred Rodrigues. Evidence was also given that the hunting knife and the bird cage belonged to him. The questions then that remained to be answered were: How did the deceased meet his death, and at whose hands? Or was it an accident as has been suggested by the cross-examination of certain of the witnesses in the court below?

The post mortem examination on the remains disclosed that there were three

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fractures in the posterior aspect of the skull over the occipital bone, two to the right, and one to the left of the mid-line. Each of the two larger holes was in the shape of the figure 8, and appeared to have been entered by more than one pellet. The doctor concluded that the wounds on the skull could have been caused by pellets and that death was due to fracture of the skull with laceration and haemorrhage of the brain; and having taken local weather conditions and other circumstances into consideration, he expressed the opinion that death could have occurred between the 7th and 14th of June but more probably on the 7th, 8th, 9th or 10th of June. It is of some importance to bear these dates in mind having regard to the evidence as to when the deceased was last seen alive, and when the appellant was seen subsequent thereto.

On 5th June, Malcolm Rodrigues had taken the appellant and the deceased from Georgetown to the Abary Bridge. On 6th June, the two men were seen together at the home of the deceased repairing an outboard motor engine belonging to the deceased, and on 7th June, the two men were seen leaving the premises of the deceased together in a boat with bird cages and the deceased's gun going up the Abary Creek. From all accounts, this was the last time the deceased was seen alive, but on the morning of the next day, that is, the 8th June, a witness, Satyadera Sharma Maraj, the brother-in-law of the appellant, saw the appellant at his (Maraj's) father-in-law's place. Maraj asked him for Rodrigues, and the appellant replied that Rodrigues had gone further up the creek. Later that same day Maraj saw the appellant in a small boat. They had a conversation after which the appellant left. They met again at the witness' home later that afternoon; the witness went out and when he returned the appellant was no longer there. When Maraj saw the appellant on the 8th, the appellant was then in what the witness described as a blue sculling-boat, a boat which he claimed he had previously seen tied up in the creek opposite the home of the deceased. This witness, Maraj, among others, visited the home of the deceased on 17th June, and saw signs which led him to believe that no one appeared to have dwelt there for some time. They also found the back door open, and on entering the house discovered impressions as though attempts had been made to get into a room in the house. The room which the deceased had occupied was then examined and it was discovered that a canister, the deceased's Mossberg shotgun, compass and a hunting knife were all missing. The indications were that, having left his home on the morning of the 7th in company with the appellant, the deceased did not return home up to the 17th at least.

In June, 1972, there was a canal called Ross Field Canal, which connected the Abary Creek from its right bank with the Berbice River on its left bank. The evidence is that it was possible for one to get from the Abary Creek to the Berbice River by boat by using this canal, and in fact, that the appellant had done so on previous occasions. That canal is about five to six miles long. Apparently the

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canal takes its name from a place called Ross Field, which is on the west bank of the Berbice River, and which divides Ross Field from another place called Fern, also on the west bank of the Berbice River. At about 1 a.m. on the 9th June, the appellant was seen at Fern in a light blue boat powered by a “Seagull” engine. He had with him a Mossberg shotgun, water-bottle, a bag, which was described as a “soldier bag”, a large hunting-knife, and a hunting-light. The appellant seemed to have had some difficulties with the boat because of the rough waters, and he was assisted to moor the boat by one Theodore Wallace. Upon being asked by Wallace the reason for his being on the river at that hour of the night the appellant said that he was a soldier and that Mr. Burnham had sent him to kill meat for Carifesta. He was advised not to travel because of the condition of the river and was taken to a house where he was seen by two other witnesses called by the State. These witnesses had known him before and they were quite sure that he was the person they saw with the boat; that he was alone; that he carried the articles mentioned above; and that he returned to the boat with those articles including the Mossberg shot-gun – started the engine and went in an easterly direction. All the witnesses who deposed as to the ownership of the gun by the deceased, described the gun as a 12-bore Mossberg shotgun; while some described it as a bolt-action gun, one witness described it as a pump-action gun.

At about 10 a.m. on 9th or 10th June, one George Felix, a fisherman from Islington, East Bank, Berbice, who went to fish in the Berbice River, went to collect his catch on the western side of the river, only to find snarled in his seine, a small boat – a ballahoo – and also a “Seagull” engine. This witness could not remember the colour of the boat, and it would appear that the boat was not tendered in evidence, but the engine was; and it was positively identified as the deceased’s property by Malcolm Rodrigues, in whose father’s house the deceased had been living in June, 1972 and who also identified, among other things, a water-bottle, and what has been described as a spying glass, both of which were found in the possession of the appellant, on the 20th June, as being the property of the deceased.

When the appellant was apprehended by the police he made a statement in writing in which he recounted his movements from 5th June to the 8th June. In that statement he said *inter alia*, (referring to the deceased as Alfred):

“... Alfred lend me and Satyadeo his blue boat with a Sea Gull engine and the two of us went to my father home where both of us sleep during the night and about 7 o’clock the next Wednesday 7th June, 1972, me carry back Alfred speed boat. Me met Edward Ross and Alfred at home Edward Ross then left with his boat and me took another boat name “Water Dog” which belongs to me, Antonio Bianchani and Richard Finemassah and me returned to my father home leaving Alfred alone at

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his home. Me sleep the Wednesday night home and the next day Thursday 8th June, 1972, me left home in "Water Dog" and paddle to Ross Field and me sink the boat at Ross Field and me walk to the Berbice River and Edward Shepherd called 'Brother' take me across the Berbice river to Gangoo creek in his boat and me walk from there and catch a M.W.H. lorry which was being driven by an East Indian whose name I do not know and me went to Vryheid road then I went to the home of me girl friend Swarsattie and remain there until the police came and arrest me and they found me in possession with two haversacks, a water flask, a compass and a spying glass which were given to me by one Ridley at Skull Point Mazaruni sometimes during this year 1972."

He concluded his statement by denying shooting the deceased and denying ever being in Fern Village with the boat, the gun and other articles. That then, in brief, was the case for the State. When called upon by the court to lead a defence, the accused said: "I am advised that the State has not made out a case against me."

The main ground of appeal advanced by the appellant before this court is that there was no evidence whatever to connect the accused with the crime. In developing that argument, learned counsel submitted that there was no evidence that the appellant was within miles of the deceased when the latter had died, and that the evidence relating to the appellant's visit to Fern Village in the early hours of the 9th June, was prejudicial as the deceased may very well have been alive at that time, and that the verdict was unsafe in that the evidence was insufficient to support the conviction.

As I have already commented, the entire case against the appellant was based on circumstantial evidence. Circumstantial evidence has been described in some cases as often the best evidence. In R. v. Taylor, et al (1928) 21 Cr. App. R. 20, HEWART, L.C.J., is reported as having said (p. 21):

"... circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

And dealing with the same subject in Dos Santos v. Approo (1970) 17 W.I.R. 215, LUCKHOO, C., said (p. 220):

"The facts and circumstances may raise a presumption so strong that guilt almost necessarily follows, or the probabilities may vary to the point where the presumption is so light or rash that it attracts very little weight or validity. Therefore before the existence of the fact sought to be proved

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can be properly inferred, it must not only arise naturally from what is proved so that it can be taken for granted, but nothing must appear to diminish its efficacy, such as co-existing circumstances which so weaken or destroy the inference that it loses or tends to lose the significance which it might originally convey.”

And in the same case CUMMINGS, J.A., expressed his opinion thus (at p. 228 *ibid.*):

“The value of circumstantial evidence depends upon its incompatibility with any inference other than that which proves the allegation made. It is impossible to draw the line and say where conjecture ends and proof begins. The court should be able to conclude that the accused is guilty of the allegation so that no other reasonable explanation emerges from the fact proved: the fact inferred must be incapable of explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove.”

In referring to cases which rest solely on circumstantial evidence, DUFF, C.J., in R. v. Comba (1938) S.C.R. 396 said in the Supreme Court of Canada (at p. 397):

“In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion that that the accused is the guilty person.”

The evidence in this case, in my opinion, points clearly to the conclusion that the deceased was murdered by shooting; for had he been shot accidentally as he placed the gun on the ground, as was being suggested by the defence – even though faintly – the gun and the boat and the engine would, in all probability have been found in the Indabo Creek whereas in fact the engine was found in the Berbice River where the appellant was seen on the 9th June, and where he in his statement, admitted that he was on the 8th June. The question is: Did the State lead enough evidence to prove that it must have been the appellant, and no one else, who had killed the deceased? When all the circumstances are taken into consideration with the doctor’s evidence as to the possible time of death, it was inevitable, in my judgment, that upon a proper direction the jury should have arrived at the verdict to which they came.

The prosecution was able to establish the following matters:

(1) That the deceased and the appellant left the deceased’s premises on the 7th

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June, in a boat belonging to the deceased propelled by the deceased's 'Seagull' engine and the deceased was carrying his Mossberg 12 – bore gun.

(2) That the deceased was shot and killed and that it was not an accident. That the more probable dates of the shooting would have been the 7th, 8th, 9th, or 10th June.

(3) That on the morning of the 8th June, the appellant was seen in the Abary Creek in a boat which had been seen on previous occasions moored at the deceased's landing; he was alone, and he said that the deceased had gone further up the creek.

(4) At about 1 a.m. on the 9th June, he was seen at Fern Village with certain articles, one of which was a 12-bore Mossberg gun. The boat was light blue in colour, and was being driven by a "Seagull" engine.

(5) The "Seagull" engine belonging to the deceased was fished out of the Berbice River either on the 9th or 10th June.

(6) Certain articles, the property of the deceased were found in the possession of the appellant when he was arrested.

(7) Those articles had not been taken by the deceased when he and the appellant had set out on the morning of the 7th June, but there were signs that the deceased's house had been broken into between the 7th and 17th June, and those articles were found to be missing.

In the absence of any satisfactory explanation by the appellant, the facts set out above pointed the finger of guilt to the accused with unerring aim. This then takes me to the second point raised by the appellant, and that is, whether the learned trial judge gave the jury adequate directions as to their approach to circumstantial evidence.

In the course of his summing-up, the learned judge referred to the fact that the case was based on circumstantial evidence, and, as far as I could ascertain, gave the jury the following directions on separate occasions. He commenced by saying:

"In this case, since it is based on circumstantial evidence the State would ask you to draw several inferences. What is the law as regards the drawing of inferences? If you have a series of facts from which you must draw an inference and the inference you can draw is stronger for the State, then you have to draw it for the State. If from those facts the inference you can draw is stronger for the accused you must draw it for

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the accused. But then, you have an intermediate position where the inference is equally strong for the State and for the accused person; in such a case the law compels you to draw that inference in favour of the accused person for this simple reason: If you are in that state then the State has not satisfied you beyond reasonable doubt on any aspect then you have to give that doubt in preference to the accused person. Therefore, if you find that at any time in this case the inferences which you can draw are equally strong – for the accused and for the State – you are bound to draw the inference in favour of the accused.”

And in other parts of the summing-up there appear the following passages:

“The burden on the State in a case based on circumstantial evidence is a very great burden. That is why you have to go through the case very carefully. Remember I told the accused at election time that he need not say anything. And that is because it is the duty of the State to satisfy you that he is guilty. He has not to say anything at all. He has made a statement and in his statement he is saying in brief, “The State has not made out a case against me.” That is his defence. It is for the State to satisfy you of this offence.

Mr. Foreman and members of the jury, as I told you and as counsel for the State has told you and counsel for the accused, the case to connect the accused with any unlawful act to the cause of death of Rodrigues is based on circumstantial evidence. You would therefore have to look at all the evidence and see if the only conclusion you can come to is that Alfred Rodrigues met his death by the hands of the accused; and they must leave no ground for reasonable doubt. The evidence must be cogent and compelling; it must convince you that nothing else other than the murder can be from the facts accounted for.

If you come to the conclusion that he died by an accidental discharge of the gun, then that is the end of the case because if he died by the accidental discharge of the gun then no one is responsible, you have to acquit the accused.

Here we may have to go through the evidence very closely because the State has put forward to you certain circumstances and they are asking you from these circumstances to come to the conclusion that the only thing that happened is that the accused killed him. You see, though circumstantial evidence is sometimes conclusive it must be examined very narrowly because a person can create circumstances to incriminate another person and when we come to the case of the witnesses from Fern

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you will have to examine the evidence very closely.

Remember what I told you about circumstantial evidence. Sometimes circumstantial evidence can be conclusive but if you are in any doubt whatever on any of the ingredients; if you are not sure, then you are to acquit the accused.”

In formulating his submission learned counsel referred to Mc Greevy v. D.P.P. (1973) 57 Cr. App. R. 424, and urged that even though in that case the House of Lords held that it would be undesirable to lay it down as a rule that a direction to a jury in cases where circumstantial evidence is the basis of the case for the prosecution must be given in special form, there may be circumstantial evidence of such a nature as to render such a direction necessary. Counsel was referring, I think, to the directions given by ALDERSON, B., in R. v. Hodge. (1838) 2 Lew. 227, where that learned judge said that before the jury could find the prisoner guilty they must be satisfied, “not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was guilty.” The matter was put thus by LORD NORMAND in Teper v. R. [1952] A.C. 480, at p. 498:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.”

In the Mc Greevy case (*supra*) LORD MORRIS OF BORTH-Y-GEST expressed the view (with which four other Law Lords agreed) that the form of any particular direction stems from the general requirement that proof must be established beyond a reasonable doubt and that the form in which this general requirement is emphasised to the jury is best left to the discretion of the judge without his being tied down by some new rule which would be likely to have the effect that a stereotyped form of words would be deemed necessary. LORD MORRIS said (p. 436 *ibid.*):

“In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is the conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept, various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that, if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could

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not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence, they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that, if a fact which they accept is inconsistent with guilt or may be so, they could not say that they were satisfied of guilt beyond all reasonable doubt.”,

The concept that the rule regarding circumstantial evidence was quite distinct from the rule as to reasonable doubt and that a judge should separate his direction when dealing with each rule gained some degree of support from the *dictum* of PICKUP, C.J.O., in R. v. Duesharm [1956] 1 D.L.R. 732 who seemed to think that if the judge did not, there was a danger of the two principles being confused in the minds of the jury. In the *Canadian Abridgement*, 3 Abr. Can. (2nd) at p. 834, it is stated that R. v. Comba (*supra*) was applied. Perhaps this was so in the court of first instance whose report is not at hand, but it does not seem that the point was canvassed in the Supreme Court. Be that as it may, in another Canadian case of McLeod v. R. [1933] S.C.R. 688 HARRISON, J. repudiated any binding rule of law which said that where that where the evidence was purely circumstantial, the jury should be charged that they must find the evidence not only consistent with the guilt of the accused, but inconsistent with any other finding.

The Australian Courts seem to take up the same position as LORD MORRIS of BORTH-Y-GEST did in McGreevy (*supra*) for in Plomp v. R. (1963) 110 C.L.R. 234, counsel for the applicant referred to the Canadian case of R. v. Duesharm (*supra*) and submitted that the trial judge had not dealt with facts on which the defence that there was another rational hypothesis, consistent with innocence, was based. MENZIES, J., rejecting the submission that there should be separate directions, one dealing with the burden of proof where the case is based on circumstantial evidence, and the other, dealing with the burden of proof beyond reasonable doubt, held that that contention was unsound “for the giving of the particular direction stems from the more general requirement that guilt must be established beyond reasonable doubt.” DIXON, C.J. said (*ibid* at p. 242): “All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond a reasonable doubt of the commission of the crime charged.” And the learned Chief Justice quoted from Martin v. Osborne (1936) 55 C.L.R., at p. 375, to effect that:

“If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculcation of an

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accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations are in general, not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant, is rigidly excluded. But the class of acts and occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed.”

And in the earlier case of Peacock v. the King (1912) 13 C.L.R., at p. 651 where the evidence led by the prosecution was purely circumstantial, BARTON, J. expressed himself thus:

“But when the case is undoubtedly capable of the inference of guilt, albeit some other inference or theory be possible, it is for the jury, properly directed, and for them alone, to say not merely whether it carries a strong probability of guilt, but whether the inference exists actually and clearly, and so completely overcomes all other inferences or hypotheses, as to leave no reasonable doubt of guilt in their minds. The presumption in favour of innocence would in that event have been overcome by a stronger presumption raised against it by the evidence.”

And GRIFFITH, C.J. said that it was the practice of judges “to tell the jury that, if there is any reasonable hypothesis consistent with the innocence of the prisoner, it is their duty to acquit.” (*ibid.*, at p. 630.)

In my judgment, whatever formula is used, it amounts to no more than telling the jury that the prosecution must prove the guilt of the prisoner beyond a reasonable doubt, for if a reasonable hypothesis arises from the evidence which the jury accepts as being consistent with the prisoner’s innocence, the prosecution will not have satisfied the degree of proof required to bring home the guilt of the prisoner. I prefer the Australian line of cases on the point, and am of the view that where the case for the prosecution is based exclusively on circumstantial evidence, a judge is not required to direct the jury as if there were two separate rules, or two

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different standards of proof: one,” the general direction of proof beyond reasonable doubt, and another and separate rule relating to the drawing of inferences which are equally supportable by the circumstantial evidence in favour of the prisoner. But this does not relieve the judge from the duty of reminding the jury that the case is based on circumstantial evidence; that even though such evidence can be conclusive evidence of guilt, they must scrutinise it with great care, and make sure that before they can draw an inference of guilt, they must be satisfied that they are no other inferences in favour of the prisoner that they can equally and reasonably draw, for if that is the situation, then the prosecution will not have discharged the burden of proving the prisoner guilty beyond a reasonable doubt. No set formula need be used, as long as these vital matters are brought to the attention of the jury, and of course, the manner in which the directions are given must depend upon the circumstances of the case, as was said by LORD MORRIS of BORTH-Y-GEST in McGreevy (*supra*).

This then takes me back to the summing-up in this case: Had the passage first quoted in this judgment stood alone, then I might have found some difficulty to hold the view that the directions were adequate. Every element that goes towards establishing the commission of an offence must be proved beyond reasonable doubt, and telling a jury to draw an inference in favour of the State if it is ‘stronger’ than one that can be drawn in favour of the defence, may, I suspect, be taken by the jury to mean that if the scales (to use the time-honoured allegory) tipped ever so slightly in favour of the prosecution, then that is a point to be scored on the prosecution’s side. But my understanding of the situation is that the scale must go as far down as to leave no reasonable doubt in the minds of the jury. But there is no need to give any further consideration to that portion of the summing-up, as in the subsequent passages, the learned judge left the matter in no doubt, that is, that the jury must examine the evidence narrowly, and must be sure of the guilt of the appellant before convicting him of the offence with which he was charged. He told them that if they thought the deceased had died accidentally, they must discharge the appellant and he directed them to look at the evidence “and see if the only conclusion you can come to is that Alfred Rodrigues met his death by the hand of the accused; and they (*sic*) must leave no ground for reasonable doubt. The evidence must be cogent and compelling; it must convince you that nothing else other than the murder can be from facts accounted for.” I can therefore see no merit in this submission.

One Radica Evans, the sister of the appellant was called by the State. Presumably she had given evidence at the preliminary enquiry (this is not clear), but she certainly had made a statement to the police. Neither her depositions nor her statement was put in evidence, and when called, she admitted making a statement to the police, but disclaimed all recollection of what she had said in that statement, and said further that what she had signed to was not what she had told the

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police; she even deposed that the policeman who had taken the statement from her, had forced her to sign it, but admitted that she had signed ‘six places on the paper.’ There could hardly be any doubt that she proved an entirely unsatisfactory and unco-operative witness from the prosecution’s point of view. The learned judge seemed to have formed an unfavourable impression of the witness, for he examined her on the statement notwithstanding that counsel for the appellant objected to this course, on the ground that the witness had said nothing unfavourable to the prosecution, that the statement could only be used to contradict her, and that the use of the statement by the judge was improper and would only lead to the prejudice of the defence, in that the jury might have believed that at the trial she was unwilling to repeat incriminations against the appellant which she had made in the statement. In answer to counsel’s repetition of the submission in this court, State Counsel has submitted that in tendering the statement to the court, the prosecution purported to have acted under s. 79 (2) of the *Evidence Act (Cap. 5:03)*, that no injustice had been occasioned, and that the judge did not refer even once to the evidence of Radica Evans in his summing-up.

To understand sub-s. (2) of s. 79, sub-s. (1) must also be set down. The whole section provides as follows:

“(1) A witness under cross-examination may be asked whether he has made any former statement relative to the subject matter of the cause or matter and inconsistent with this present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if he does not distinctly admit that he had made that statement, proof may be given that he did in fact make it.

(2) The same course may be taken with a witness upon his examination-in-chief, if the judge is of opinion that he is adverse to the party by whom he was called, or that his memory is in good faith at fault, and permits the question.”

There is nothing on the record to show that the judge was of the view that the witness was adverse to the State, though no doubt she was. But he looked at the statement, and then proceeded to question her. Perhaps he was purporting to act within his powers under s. 80 (2) of the Act which provides as follows:

“80. (2) The judge may, at any time during the hearing or trial, require the document to be produced for his inspection, and may thereupon make any use of it for the purposes of the hearing or trial he thinks fit.”

The answers she gave indicated that the witness had indeed made a statement in writing to the police, but even though she admitted her signature, she seemed

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unprepared to admit to the contents of the statement. I can see no legal objection, having regard to the provisions of s. 79 (2) of the Act, to the examination of the witness, but it seems that the judge must first deem the witness adverse, or must have formed the opinion that the witness' memory is at fault, and leave it to counsel to examine the witness. Subsection (2) of s. 80 does appear to give the judge a wide discretion as to the use to which he may put the statement, but he must exercise that discretion judicially. I am of the opinion that he did not do so in this case. But, in my view, the answers which the learned judge obtained as a result of his questioning the witness did not in any way prejudice the appellant's case; and, further, as has been already pointed out, the judge made no reference to Radica Evans in his summing-up.

This would serve to dispose of this appeal, save to observe that, in my opinion, this was a case of very strong circumstantial evidence against the appellant which, if believed by the jury, could only have resulted in one verdict, that is, Guilty. In the result, it is my judgment that the appeal should be dismissed, and the conviction and sentence affirmed.

HAYNES, J. A.: At the trial of the appellant, the proof tendered was wholly circumstantial. The concept of proof by circumstantial evidence is a simple one. A jury should have no difficulty in understanding it. MR. JUSTICE SCRUTTON in his charge to the jury in George Joseph Smith – “The Brides in the Bath” murder trial (1915) – in his opening remarks said [*Notable British Trials Series ‘Trial of George Joseph Smith’,* 1949 Ed., edited by Eric R. Watson LL. B., at p. 270]:

“... Now, gentlemen, circumstantial evidence is a long word. There was a gentleman in one of Moliere's Comedies who began his education late in life, and when he got to the distinctions between prose and poetry, he found he had been talking prose all his life without knowing it. Circumstantial evidence is a long word, but you, gentlemen, have been acting on circumstantial evidence all your lives, very likely without knowing it. Circumstantial evidence means simply this, that having no direct evidence of a fact, you infer it from the evidence of other facts surrounding it, a process which all of us go through every day of our lives.”

First of all, the jury have to decide what facts they accept as proved. This involves the credibility of the witnesses testifying to those facts, usually an exercise in belief or disbelief by the jury. Then comes the next step – drawing conclusions from them. This is a different exercise. It is a deductive process, involving the weighing of the probative value of the facts and the probabilities in the light of human experience. Sometimes a little commonsense is all that is needed to reach the right conclusion, which stands out obviously. At other times, it calls for more

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insight and selectiveness. The question for the juror to ask himself is: “Is guilt the only reasonable explanation of these facts?” If it is not, then guilt is not proved beyond reasonable doubt. “Reasonable doubt” exists if in the evidence there is a reasonable explanation of the facts, other than guilt. If there is not, then there is no reasonable doubt.

In Mc Greevy v. Director of Public Prosecutions [1973] 1 All E. R. 503, McGreevy was convicted of murder on purely circumstantial evidence. His appeal to the Court of Criminal Appeal was dismissed. But that Court certified this point of law for appeal to the House of Lords (p. 505):

“Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion.”

This “special direction” was the one BARON ALDERSON gave a jury in 1838 [R. v. Hodge 2 Lew. C.C., at p. 228]. The trial judge had not given this direction. The House of Lords dismissed the appeal. It was held unanimously that there was no such existing rule of common law and the House refused to lay down a new one to that effect.

In this case also, the trial judge did not give that special direction. The question arises whether this omission was a misdirection and, if so, was sufficient to warrant setting aside the conviction. Against the affirmative view in Mc Greevy’s case. In favour of it is the contrary opinion of the Supreme Court of Canada in The King v. Comba [1938] S.C.R. 396, at p. 397 – that there is such a long-settled rule of common law. Indeed, in R. v. Duesharm, [1956] 1 D.L.R. (2d) 732 C.A., the Ontario Court of Appeal set aside a conviction for murder on circumstantial evidence, for failure to give that specific direction. Undoubtedly, that is the law in Canada. [See also McLean v. The King [1933] S.C.R. 688; Lizotte v. The King [1951] 2 D.L.R. 754; Boucher v. The Queen, [1955] S.C.R. 16 – all decisions of the Supreme Court of Canada], The thinking of the Canadian judges is revealed in citations from the cases. GRAHAM, J. A. in the Nova Scotia Court of Appeal in R. v. Cook (1914) 18 D.L.R. 706 (C.A.) at p. 717, after citing this direction of BARON ALDERSON, said:

“Since this is the law, a jury called to pass upon a case wherein the

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evidence is wholly circumstantial should be informed of the rule as a part of the law of the case. The ordinary charge upon the law of reasonable doubt is considered to be ineffectual to convey to the minds of the jury a clear conception of this exaction of the law when a conviction is sought upon circumstantial evidence alone.”

Then there was the explanation in the judgment of MAC DONALD J. A. in the British Columbia Court of Appeal in R. v. Macchione, [1937] 1 D.L.R. 593, at p. 599, that: “... otherwise the jury may not have all the assistance to which they are entitled.” RAND, J. in Boucher v. The King (*supra*), at p. 22 said:

“... The purpose of the rule is that the jury should be made alive to the possibility that the material facts might be given a rational explanation other than that of items plotting the course of guilty action. I think it should have been given, and I cannot say that the charge as a whole supplied its omission.”

And, finally there are these words of PICKUP, C.J. in Duesharm (*supra*), at p. 733):

“Where the Crown’s case is dependent entirely upon circumstantial evidence the jury should be plainly told that they must not convict unless all the circumstances are not only consistent with the guilt of the accused but inconsistent with any rational conclusion other than guilt. This principle of law is quite distinct from the rule as to giving an accused the benefit of a reasonable doubt and the two principles must not be confused. A trial judge should separate his direction as to circumstantial evidence from his direction as to reasonable doubt for otherwise, he might lead the jury to believe that it is proper to convict on circumstantial evidence so long as they do not convict on suspicion or anything falling short of proof beyond a reasonable doubt.”

These citations clarify the judicial thinking underlying the Canadian position. And I doubt substantially that McGreevy would lead to a change of judicial opinion there. But what is the position in other Commonwealth jurisdictions?

The opinion in Australia is somewhat different. Apparently, it is the practice of the judges there, whether they are bound to do it or not, to give this special direction. [See Peacock v. R. (1912) 13 C.L.R. 619, per GRIFFITH C.J., at p. 630, and MENZIES, J., in Plomp v. The Queen (1963) 110 C.L.R. 234, at p. 252.] But it does not appear that any Australian appellate court has ever upset a conviction for an omission to give it, at least, in any reported judgment. In O’Leary v. The King (1946) 73 C.L.R. 566, the question arose directly for consideration. O’Leary

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was convicted for murder on purely circumstantial evidence. The trial judge gave only the general direction regarding proof beyond reasonable doubt. An appeal to the Full Court of the Supreme Court of South Australia was dismissed. The point as to the failure to give the special direction was not taken. But it was, on an application for special leave to appeal to the High Court. Dr. Louat, for the applicant criticised the summing-up, *inter alia*, for the omission of this specific direction. The majority of the Court thought that its omission involved no grave or substantial miscarriage of justice, for which only, leave could have been granted. But the reason for thinking so is not disclosed. Albeit, the Canadian viewpoint found support in the minority judgement of MC TIERNAN, J., who said (p. 579):

“... Regarding the summing up generally, I think that Dr. Louat’s criticism of it is in substance correct. ... I do not agree that the defects were cured by the direction as to the onus on the Crown to prove guilty beyond reasonable doubt. I think that a jury would use the direction regarding circumstantial evidence to determine whether or not the Crown made out its case beyond reasonable doubt. This direction about circumstantial evidence was fundamental. I think that the defect in this direction constituted a substantial miscarriage of justice.”

But the Canadian rule that the giving of the special direction was a principle of law separate and distinct from the rule as to reasonable doubt was rejected by MENZIES, J. in Plomp (*supra*) when he said (p. 252):

“... It was argued, however, that this direction is something separate and distinct and must be kept separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt. Notwithstanding that the applicant’s counsel did find some authority to support their contention – R. v. Duesharm (1955) 113 Can. Cr. Cas. 1 – that contention is unsound for the giving of the particular direction stems from the more general requirement that guilt must be established beyond reasonable doubt.”

In two judgments the Supreme Appellate Court of India referred to BARON ALDERSON’S directions in Hodge’s case (*supra*) as a “warning” and a test to determine an appeal from a conviction based on circumstantial evidence. [See Hanumant v. The State of Madhya Pradesh [1952] 3 S.C.R. 1091, and Palvinder Kaur v. The State of Punjab [1953] 4 S.C.R. 94.]. And in the Caribbean Commonwealth, I find that in R. v. Clarice Elliott. (1952) 6 J.L.R. 173, at 175 [referred to in (1967) 11 W.I.R. 116], the then Jamaica Court of Appeal approved of this special direction as the proper “rule” to be applied to cases which depend solely on circumstantial evidence. And in R. v. Burns & Holgate (1967) 11 W.I.R. 110, the Court of Appeal of Jamaica [DUFFUS, P., WAD-DINGTON. J.A. and

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ECCLESTON J.A. (ag.)] where the trial judge had given this direction, said (p. 117):” ... we are satisfied that the directions given by the learned judge on circumstantial evidence set out the law correctly (Underscoring mine.). So here we have this specific direction referred to as a “rule” and a “law”.

And here in Guyana in R. v. Saman & Others (1970) 15 W.I.R. 35, the learned Chancellor (LUCKHOO, C.), after stating that the case against two of the appellants turned on circumstantial evidence, went on to say (p. 41): “... this in itself called for certain directions in law.” And later: “... It was required to bring home to them that the cohesion of any such circumstance in the evidence and the rest of the chain of circumstances of which it forms a part, is fundamental,...”. Finally, “... the jury should have been warned that before drawing the guilt of the accused from circumstantial evidence they should be sure that there were no co-existing circumstances which would weaken or destroy their inference.” Here, the learned Chancellor appears to me to be applying what he regarded as a general principle applicable to circumstantial evidence to the particular case before the Court.

The position in England “the home of the common law”, as LORD MORRIS described it, if there was any doubt about it before, was settled by the House of Lords’ decision in Mc Greevy v. D.P.P. (*supra*) – that there is not and never was any such legal requirement for this special direction to be given; that although it might be a proper direction to give in certain circumstances, the House was not prepared to make a new rule to that effect, with the consequence that the failure to give it would be a non-direction amounting to a misdirection. That is not to say that English judges and lawyers did not address juries in the same or similar terms or to that effect. Hodge’s case (*supra*) was in 1838. And in R. v. Tawell, at the Aylesbury Spring Assizes, 1845 (referred to in Wills on ‘*Circumstantial Evidence*’ 1912, at p. 330), BARON PARKE directed a jury:

“... Direct evidence of persons who saw the fact, if that proof is offered upon the testimony of men whose veracity you have no reason to doubt is the best proof; but, on the other hand, it is equally true with regard to circumstantial evidence, that the circumstances may often be so clearly proved, so closely connected with it, or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eyewitnesses ... The point for you to consider is, whether, attending to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that he has been guilty of the offence.”

And in R. v. Nina Vassileva (1911) 6 Cr. App. R. 228, the Lord Chief Justice said (p. 233): “The point of view from which such questions must be regarded is – are there other alternatives consistent with this evidence which do not necessarily point to guilt?” In the “Brides in the Bath” case, Mr. Bodkin, for the Crown, told

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the jury (p. 74):” ... if you feel that this series of coincidences is not absolutely and beyond all reasonable doubt inconsistent with the prisoner’s innocence of the death of Beatrice Mundy you will find him not guilty; Marshall Hall, for the defence, in his speech submitted [p. 264]: “The other verdict open to you is one of not guilty, which would mean that you doubt whether his guilt has been proved. If you find affirmatively, it means that each and all of you on your oaths present that there is no other reasonable, probable explanation of the case except that the prisoner murdered the woman.” And in R. v. Michael Onufrejczyk, where the summing-up of OLIVER J. contained this passage [(1955) 39 Cr. App. R. 1, at p. 5]:

“...I want you to apply your minds to that set of circumstances and decide for yourselves whether in the light of these facts, and many more to which I shall have to draw your attention, you can say you are satisfied that no rational hypothesis except that he is dead, dead by violence, is open. If you are driven to that conclusion, that would be a verdict of murder; but if you think that would be going too far and that you could not safely say that no rational explanation of his death except murder could be conceived, why then it will mean you have a doubt about it and you will acquit him.”

The Lord Chief Justice said that this direction was “as ample and as fair to the accused as it is possible to conceive.” But painstaking research has failed to uncover to my attention any reported English decision or *dictum* or text book statement treating Hodge’s case (*supra*) as laying down a principle of law or compulsive rule of practice to be observed by a trial judge in his summing-up.

The Canadian judges treat Hodge’s case (*supra*) as setting out a “law” in relation to circumstantial evidence, to be explained to the jury as a part of the judicial directions of law applicable to the case. But LORD MORRIS said that “Hodge’s case (*supra*) was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence is circumstantial.” The Canadian judges find justification for making such a direction compulsive in the thinking that jurors need to be assisted in that way to ensure that after finding the facts, they give due attention to the possibility, on the evidence of the existence of a reasonable innocent explanation of these facts; or, put another way, to the presence or not of coexisting circumstances capable of weakening or destroying an inference of guilt. LORD MORRIS took the view that a reasonable jury could be trusted to do this without such a compulsory special direction. It was open to the House legitimately to lay down then and there, if they felt that the fair administration of criminal justice called for this, such a rule of practice of such compulsive power as to amount to a rule of law, which, if not faithfully followed will stamp a sum-

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ming-up as defective. But they did not. The Australian judges generally follow a practice of giving the special direction, and underlying the judgments referred to of the Appellate Courts in India, Jamaica and Guyana is the notion that this special direction represents a “rule” or a ‘law’, or that circumstantial evidence calls for certain particular legal directions. Now that the House of Lords has authoritatively decided on the subject, must this court whatever its own views might be, accept their judgment as declaratory of the law in Guyana? The relevant statutory provisions are:

(1) *Evidence Act, Cap. 5:03, s. 4*

“Subject to this Act and to any other written law for the time being in force, the rules and principles of the common law relating to evidence, shall so far as they are applicable to the circumstances of Guyana, be in force therein.”

(2) *Criminal Law (Offences) Act, Cap. 8:01, s. 3*

“Subject to the provisions of this Act and of any other statute for the time being in force all the rules and principles of the common law relating to indictable offences and other criminal matters shall, as far as they are applicable to the circumstances of Guyana, be in force therein.”

(3) *Criminal Law (Procedure) Act, Cap. 10:01, s. 16*

“Subject to this Act and of any other statute for the time being in force, the practice and procedure of the Court shall be, as near as possible, the same as the practice and procedure for the time being in force in criminal causes and matters in the High Court of Justice, and the courts of assize created by commission of oyer and terminer and of gaol delivery in England.”

The clear effect of these provisions is that a criminal trial on indictment in this State is required by law to be conducted in accordance with the practice and procedure of a trial in England; questions of the admissibility and relevance of evidence led are to be determined according to the rules and principles of the common law of England, and any question relating to any indictable offence and any other matter arising out of, in relation to, and in the course of such a trial, is to be determined similarly. In short, on any of these matters, the English common law rule or practice is the binding rule or practice in Guyana, except (a) where a statutory enactment or rule provides differently; or (b) such rule or practice cannot be applied properly to local conditions. Mc Greevy’s case (*supra*) went to the

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House of Lords on a point of common law rule or practice: whether it was a legal requirement of a valid summing-up, in a case of circumstantial evidence, to give the special direction. The House said, “No”. Is it open to this Court, if that is our own view, to say, “Yes?”

The answer would be in the negative if this Court adopts the view of the Court of Appeal of Trinidad and Tobago in Johnson v. R., (1966) 10 W.I.R. 402. In that judgment, a strong Bench (WOODING, C. J., PHILLIPS and FRASER, JJ. A.) on an appeal from a conviction for murder, had to consider the controversial House of Lords’ judgment in D.P.P. v. Smith [1961] AC. 290. That case went to the House on one question: What was the proper direction to give a jury in regard to the necessary intent to be proved in cases of murder and also in cases under s. 18 of the *Offences Against The Person Act, 1861*? In the view of LORD KILMUIR, L.C. with which all of their Lordship concurred, the purely subjective test proposed by the Court of Criminal Appeal was wrong; the objective test was the right one. The Court of Appeal of Trinidad and Tobago, in the course of their judgment in which they set out to advise trial judges on the proper direction to give juries on this question of intent, accepted D.P.P. v. Smith as the “prevailing law” of that island. WOODING, C.J., explained the reason (p. 415) thus:

“In view of the provisions of s. 3 of the *Offences Against the Person Ordinance* and of s. 12 of the *Supreme Court of Judicature Act* which incorporates as part of our law, the common law of England, and since any decision of the House of Lords must be regarded as the prevailing law and, in so far as it interprets it, the common law of England, we must, whatever our own view, accept its judgment in Smith as declaratory of the law here.”

This opinion – that where the common law of England is a part of the law of an independent Commonwealth territory a decision of the House of Lords on a point of common law must be accepted by the courts of the latter without question as the common law of England and hence their law – had the judicial support of CUMMINGS, J. A., in Peter Persaud & Others v. Versailles & Schoon Ord. Ltd., (1971) 17 W.I.R. 107. The question there was whether the law of “unjust enrichment” applied here. The learned Justice of Appeal said: “I have grave doubt as to whether the law of unjust enrichment is a part of the law of Guyana (p. 125). He cited VISCOUNT DUNEDIN’S statement in the Privy Council in Robins v. National Trust Co. Ltd. [1927] All E.R. 73, at p. 76, that the House of Lords was “the supreme tribunal to settle English law”; he referred to s. 3 of the then *Civil Law of British Guiana Ordinance, Cap. 2* – “The common law of the Colony shall be the common law of England,” then to LORD PORTER’S statement in Reading v. Attorney General [1957] 1 All E.R., at p. 619: “... I am content for the purposes of this case to accept the view that it (the law of enrichment) forms no part of the

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law of England” and then CUMMINGS, J. A. said (p. 127):

“LORD PORTER’S judgment with which the Lord Chancellor, VIS-COUNT JOWITT, agreed, must be regarded as a declaration of the House of Lords as to the state of the common law of England with respect of the doctrine of unjust enrichment and is consequently binding on this court.”

He concluded with these words (p. 127):

“I disagree with my learned brothers that since the Independence Constitution of 1966, this court is free to determine the common law of Guyana without reference to the proviso of the Ordinance ...”

But let us look further afield to see what stand other Commonwealth judicial minds have taken on this important topic. In The King v. Seaton (1933) 52 N.Z.L.R. 548, we find MYERS, C.J. pronouncing on “the duty of obedience to the decision of the House of Lords by which our Courts are bound” (p. 557); REED, J., stating what was said in Russell v. Russell [1924] A.C. 687, a celebrated judgment of the House of Lords, was “binding on this Court” (p. 568); and MC GREGOR, J., speaking of “our plain duty in the present case to obey the rule rescribed by the House of Lords in Russell v. Russell.” It is a fair inference to draw that English law must then have been a part of the Law of New Zealand, thus equating the position as to the authority of a House of Lords’ decision as a judicial precedent with that of this State.

In Australia the same judicial effect, though not with such expressed humility and judicial subservience, was assigned to a House of Lords’ judgment on a point of English law, prior to 1962. This is reflected in the judgments delivered in the High Court in Piro v. W. Foster Co. Ltd. (1943-1944) 68 C.L.R. 313. All the judges LATHAM, C.J., RICH, STARKE, MCTIERNAN and WILLIAMS JJ.) stressed that the High Court was not technically bound by a decision of the House of Lords; but determined that generally it should and would follow all rulings of , that tribunal on points of law common to both countries. In particular, the Chief Justice pointed out (p. 320) that, “The House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring that law.” And WILLIAMS, J., put the position thus (p. 341): “A decision of the House of Lords is a decision of the highest judicial tribunal of the Empire.” And, “It is the invariable practice for the Australian courts, including this Court to follow a decision of the House of Lords as of course, without attempting to examine its correctness,...” But after the controversial D.P.P. v. Smith [1961] A.C. 290, the High Court reversed this stand. We find that in Parker v.

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The Queen (1962) 111 C.L.R. 610, SIR OWEN DIXON, C.J., speaking for the whole Court, said of this decision of the House (p. 632-633):

“..I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our opinions and cases decided here, but having carefully studied Smith’s case [1961] A.C. 290, I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I shall not discuss the case. There has been enough discussion and, perhaps I may add, explanation, to make it unnecessary to go over the ground once more. I do not think that this present case really involves any of the so-called presumptions but I do think that the summing-up drew the topic into the matter even if somewhat unnecessarily and therefore if I left it on one side some misunderstanding might arise. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think Smith’s case should not be used as authority in Australia at all.

I am authorized by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph.”

And so it happened that in Uren v. Australian Consolidated Press Ltd. (unreported) the High Court unanimously disagreed with and decided contrary to the House of Lords’ judgment on exemplary damages for libel in Rookes v. Barnard [1964] 1 All E.R. 367. This decision reached the Privy Council [see Australian Consolidated Press Ltd. v. Uren [1967] 3 All E.R. 523] and was not disturbed. LORD MORRIS indicated that in the circumstances of the case (p. 538) – “... it became a question for the High Court to decide whether the decision in Rookes v. Barnard (*supra*) compelled a change in what was a well-settled judicial approach in the law of libel in Australia.” As narrated in the judgment of RICH, J. in Waghorn v. Waghorn [1941] 65 C.L.R. 289, at p. 293, “the States forming the Commonwealth are governed by common law, modified by statute”. So it is that Australian Consolidated Ltd. v. Uren is high authority that where the common law of England is part of the law of an independent territory, even though the House of Lords is, in England, the final authority to lay down what the English common law is, the highest Court of such independent territory is not bound always to accept and follow the House of Lords as declaratory of their law, without examining its correctness.

In Canada, we read that in R. v. Storgoff [1945] 3 D.L.R. 673, RINFRET, C.J.C.

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expressed the opinion that (p 684):

“... the Supreme Court of Canada is now the Court of last resort in criminal matters; and although, of course, former decisions of the Privy Council, or decisions of the House of Lords, in criminal causes or matters, are entitled to the greatest weight, it can no longer be said, as was affirmed... in Robins v. National Trust Co. [1927] 2 D.L.R., at p. 100, A.C. at p. 519, that the House of Lords, being ‘the supreme tribunal to settle English law... the Colonial Court which is bound by English law is bound to follow it’.”

And in Ares v. Venner [1970] S.C.R. 608, the Supreme Court took a strong independent line. The plaintiff, Ares, sued Dr. Venner for negligence. He tendered in evidence notes made by nurses who attended him in hospital but were not called as witnesses. The evidence was admitted, despite objection, and judgment was given for the plaintiff. The Court of Appeal of Alberta ordered a new trial on the ground that the notes were inadmissible as hearsay, on the authority of the majority judgment of the House of Lords in Myers v. The Director of Public Prosecutions. [1965] A.C. 1001. But the Supreme Court allowed the appeal from this order and restored the judgment at trial. That Court, adopting, the minority judgment in Myers, held the evidence admissible at common law as an exception to the hearsay rule. All the judges in the House of Lords and of the Supreme Court of Canada were unanimous that, as the common law stood at the trial stage in both cases, evidence of this kind was hearsay and that to receive it in evidence would involve an extension of the common law exceptions to the hearsay rule. The majority in Myers in (LORDS REID, MORRIS and HODSON) held only Parliament could do this; while the minority (LORDS DONOVAN and PEARCE) supported a judicial extension by the House itself. It was this latter viewpoint that prevailed in Ares v. Venner (*supra*). The Supreme Court of Canada itself judicially extended the common law exceptions to the hearsay rule in opposition to the House of Lords’ decision that to do so judicially was impermissible.

And it is significant to observe that in Johnson v. R. (*supra*), the Court of Appeal of Trinidad and Tobago in fact did advise trial judges to direct juries on the subjective test and not along the lines of LORD KILMUIR’S objective one in D.P.P. v. Smith (*supra*), in spite of the Court’s acceptance of it as the law of Trinidad and Tobago, WOODING, C.J., after referring to “a hurricane of criticism in England itself of that judgment, and its repudiation by every member of the Bench of the High Court of Australia, referred to its restriction by LORD DENNING (who had concurred in the judgment) within very narrow limits, to the facts of the case. He cited (p. 415) from the judgment of the Master of the Rolls in Hardy v. Motor Insurers Bureau, [1964] 2 All E.R. 742 at p. 745, this passage:

“All that Smith’s case decided, as a matter of binding authority, was that

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the judge's direction to the jury... was correct. ... the passage which has been most criticised is prefaced by the words "in such a case as the present."

Then WOODING, C.J. continued:

"We are enheartened by this assurance. Although we entertain doubts as to whether the broad terms of the judgment can be so restricted, we are encouraged to think that later judicial interpretation may distinguish them so as to make them properly applicable only to such facts as were then in issue."

And then:

"We come then to the advice we give. And we give it fully conscious though we are of the prevailing law as established by Smith. But notwithstanding Smith, some judges in England continue to direct juries in subjective terms: see *Smith and Hogan on Criminal Law* at p. 194. They recognise, as all our judges should, that it is not an abstraction who stands in the dock. The accused is on trial. And it is his alleged act and his alleged intent that the jury are sworn to inquire into so as to reach their verdict."

Here, the Court exercised a judicial freedom not to apply the objective principle settled in the judgment of the House because a strong consensus of academic disapproval, high judicial effort to distinguish, and some judicial disregard created a real likelihood that the House itself might later minimalise its application by a restrictive interpretation. The important thing, however, is that without waiting for this to happen, the Court advised the judges to direct juries on the subjective principle.

In the light of these judicial attitudes, I would move that this Court should act on the principle that, although for obvious reasons it will be predisposed to accept and normally will accept, a judgment of the House of Lords on a point of English common law as correct and as our law (unless, of course, the exceptions apply), it has a jurisdictional freedom and a constitutional judicial duty to hold differently, if we are convinced fully on just grounds that the principle or rule laid down in it or the declaration of what is not the common law, is misconceived and wrong. If this position is accepted, the next question would be: Is McGreevy wrong? I think this depends on the correct judicial evaluation of Hodge's case, and its historical aftermath (if any). There is nothing in the accredited legal sources to prove that prior to 1838 any such rule existed.

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In Hodge's case [1838] 2 Lew. C.C. 228], the prisoner was charged with murder. The case was one of circumstantial evidence altogether. The murdered woman, who was also robbed, was returning from market with money in her pocket; but how much or of what particular description was unknown. The prisoner was well acquainted with her, and had been seen near the lane in which the murder was committed, very shortly before. There were four other persons together in the same lane about the same time. The prisoner was seen some hours after, some miles from the spot, burying money which corresponded generally as to amount with that of which the deceased was robbed. On these facts there was a distinct possibility that one or the other of these four other men might have murdered her. So that, to obtain a conviction, the Crown had to destroy such an hypothesis completely. In those circumstances BARON ALDERSON gave the jury the famous direction referred to afterwards and in this judgment as the "special direction", no doubt to focus their attention on the need to be satisfied that the evidence was inconsistent with the guilt of any of them. In this setting, LORD MORRIS, in my view, was right to say that (p. 508): "... there is no indication that the learned judge was newly laying down a requirement for a summing-up in cases where the evidence is circumstantial nor that he was himself employing words so as to comply with an already existing legal requirement."

Further, there is no indication in the books that it had ever become the practice of English judges, in cases of circumstantial evidence, to direct the jury in those or similar words; or even, if this practice did exist to some extent, that it ever did become so well-established as to amount to a mandatory one or a rule of law. And, as has been mentioned earlier, there appears to be no reported appellate judgment to that effect. In my opinion, those are compelling reasons to justify the proposition in McGreevy that Hodge's case did not lay down or apply any rule of law, and that no such rule existed in 1973 when Mc Greevy was put on trial.

Strictly speaking, subject to what is said below, that would be declaratory of the state of our common law when the appellant was put on trial. Accordingly the failure to give this special direction to the jury then would be no misdirection. If, however, a common law rule or practice had developed differently in Guyana and it could be said that there was then a well-settled compulsory practice or rule here to give the special direction in terms or effect, this would raise the question of the possible application of Australian Consolidated Press Ltd. v. Uren (*supra*) to authorise this exercise of a judicial choice by this Court as to whether or not McGreevy compelled a change. If there was not, then there would still remain the question whether this Court can and should, as the Supreme Court of Canada did in Ares v. Venner (*supra*) itself judicially lay down a new common law rule, making the special direction mandatory although the House of Lords refused to do so. Admittedly, while uniformity is desirable, the common law might develop differently in different parts of the Commonwealth. And, as LORD MORRIS

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said in Australian Consolidated Press Ltd. v. Uren, at p. 536: "... in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling." These are difficult questions, as to which, on the summing-up here, it is not necessary to endeavour to reach any concluded opinion for this reason.' In addition to the orthodox charge to convict only on proof beyond reasonable doubt, the trial judge gave certain other directions set out in the judgment of my brother PERSAUD. I agree that all these directions cumulatively made it plain that guilt had to be the only reasonable hypothesis or explanation of the facts accepted as true. And this is what the "special direction" really means. So the jury were, in any event, adequately directed on circumstantial proof of guilt.

Without setting out now to lay down the law, I would advise that in cases of circumstantial evidence, it would be at least desirable, and certainly helpful, to tell juries that to be satisfied of the guilt of an accused beyond reasonable doubt, they must be sure that his guilt is the only reasonable explanation of the true facts; that (even where the defence is an alibi or a mere denial of such facts) they should address their minds to the question whether, on the evidence there is, or may be, a reasonable innocent explanation of the apparently damaging testimony; and that if that is so, then the case is not proved beyond reasonable doubt and an acquittal must follow. For even if a special direction is not compulsory, there may well be cases where the evidence is such that this Court might feel that, in that case, failure to give such a direction was a misdirection. But in this case, I find the summing-up on the whole quite adequate.

But counsel for the appellant contended strongly that the verdict was not justified on the evidence. He put it that the proof for the State was wholly consistent with the innocence of the appellant. I agree with my brother PERSAUD that, in the circumstances of this case, this submission is untenable. I wish merely, in addition, to remark that the submission overlooked two aspects of the matter which this appellate tribunal must regard. The first is this: the verdict of the jury imports that they accepted the main circumstantial facts on which the State relied and found that the appellant's denials of them were false. This meant that those facts remained unexplained. In cases of circumstantial evidence, no explanation of proved incriminating facts or a false one can be a very powerful consideration to strengthen an inference of guilt which a credible explanation might have weakened or destroyed.

LORD ELLENBOROUGH once told an assize jury in R. v. Cochrane & Others (1814), [Wills on "*The Principles of Circumstantial Evidence*", 6th Ed., 1912, pp. 305-306]:

"... no person accused of crime is bound to offer any explanation of his conduct, or of circumstances of suspicion which attach to him; but nev-

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ertheless, if he refuses to do so where a strong *prima facie* case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.”

In two oft-cited cases of murder, the disastrous effect of false stories told at the outset, when the police were making enquiries has received striking illustration. “In R. v. Dickman (1910) 74 V.P. 449, tried before LORD COLERIDGE, J., at the Newcastle Summer Assizes, 1910, the prisoner denied that he had travelled in a carriage at the head of the train – in which the deceased man was murdered – asserting that after he left the booking office he had not seen the man again, and declaring that he travelled in a carriage at the rear of the train. Both assertions were demonstrated to be false. In R. v. Broome tried at Aylesbury before BUCKNILL, J., at the Autumn Assizes 1910, for the murder of an old woman at Slough, the prisoner had made a very detailed statement, in answer to inquiries, asserting that he was in London the whole of the day when the murder was committed. That was shown to be false, and it was shown conclusively that he was at Slough for some hours on that day and in the immediate neighbourhood of her house. It is impossible in either case to read through the evidence without feeling the gravity of this element” and the decisive part it must have played in their conviction. [Wills on “*The Principles of Circumstantial Evidence*” 6th Ed. 1912, pp. 100-101.] The appeals of Mary Ann Nash (1911) 6 Cr. App. R. 225 and Frederick Albert Robertson (1914) 9 Cr. App. R. 189 – both cases of false explanations – also illustrate this point. And more recently in Tumahole Bereng & Others [1949] A.C. 253, LORD MACDERMOTT, in the Privy Council said (p. 270): “It is, of course, correct to say that these circumstances – the failure to give evidence or the giving of false evidence – may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him.”

Then – and this is the second aspect – it was submitted that some other person might have come upon and killed him or his death might have been suicidal or accidental. But, unlike R. v. Hodge (*supra*), there was nothing in the evidence to support or suggest any of these hypotheses. In Mary Ann Nash (*supra*), the appellant was convicted for the murder of her illegitimate child. She had been trying for some time to get rid of it. On the morning of June 27, she left the home of a Mrs. Stagg with the child saying she was going to the house of a Mrs. Hillier; the child was then in perfect health. She arrived home without the child and said she had left it with Mrs. Hillier, which was false; she later packed up the child’s clothes and said she had sent them to her; and later told neighbours the child was

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ill. All this was untrue. Much later the child's body was found in a well near which the appellant had to pass on her way from Mrs. Stagg's home. She did not testify. Rayner Goddard (afterwards LORD GODDARD, C.J.) on her behalf submitted the appellant may have given the child away to gypsies. In the judgment of the Court, the Lord Chief Justice said (p. 228):

“... But the facts which were proved called for an explanation, and beyond the admittedly untrue statements, none was forthcoming. Mr. Goddard suggests that the evidence is consistent with the child having been given to gypsies or such like people, but the jury cannot assume such a hypothesis without evidence.”

Maybe there was a theoretical possibility that this happened. But nothing in the evidence supported or suggested this. The legal approach is well put in Peacock v. The King (1912) 13 C.L.R. 619, in the judgment of O'CONNOR, J. At p. 661, His Honour said:

“... It is, I think, necessary for the purposes of this case to add that an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence.”

And, later, at p. 662:

“In drawing an inference of guilt, or in declining to draw it, the jury must act upon the facts established in evidence, and if the only inference that can reasonably be drawn from those facts is that of the prisoner's guilt, it is their duty to draw it. They cannot evade the discharge of that duty because of the existence of some fanciful supposition or possibility not reasonably to be inferred from the facts proved.”

Sometimes it may be necessary for the accused to give evidence to make a possible innocent explanation plausible. If, in this case, the appellant on oath or even in an unsworn statement had admitted the prosecution's main facts and had offered a credible explanation of them, consistent with his innocence, his position in this appeal might have been stronger. But in answer to the incriminating main facts of the prosecution's case, as set out by my brother PER-SAUD, and presumably accepted by the jury, there was nothing on the defence side but false denials. In those circumstances, it is, in my view, impossible to hold that the verdict was unreasonable and could not be supported having regard to the evidence. Accordingly, I agree that this appeal should be dismissed.

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**Appeal dismissed.
Conviction and sentence affirmed.**

ALFRED KELLMAN
Appellant

v.

THE STATE
Respondent

[Court of Appeal (E. V. Luckhoo, C., Persaud and Haynes, JJ.A.) April 23,
May 2, June 9, 1975]

Criminal evidence – Corroboration – Successive carnal knowledge of two children complainants of tender years – Each eye-witness to offence involving the other – Both testified implicating the appellant with the crimes charged – Whether each corroborative of other’s testimony.

Criminal evidence – Corroboration – Sexual offences – Jury not warned to be cautious before convicting on uncorroborated evidence of children of tender years – Whether non-direction fatal to conviction.

Criminal evidence – Distressed condition of complainant observed by mother four hours after alleged crime – Weight of such corroborative evidence – Test to be applied.

The appellant was charged and found guilty on a two-count indictment with having unlawful carnal knowledge of his two step-children, Carol and Barbara Cambridge, aged 9 and 11 years respectively. Mary Kellman, the children’s mother was not home at the time, but on her return, some four hours later, observed that Barbara was in a distressed condition and related this to the jury. Each child was an eye-witness to the offence involving the other and at the assizes both gave sworn testimony implicating the appellant. The medical evidence was of no help and there were no external signs of injury whatever to the children. The trial judge did not however, warn the jury that it is dangerous or unsafe to convict on either count on the uncorroborated evidence of children of tender years; he never used the word ‘warn’ or ‘caution’ or told them of any danger or risk in convicting if they did not find corroboration, although he did explain that corroboration is always looked for as a matter of practice even though it is not required as a matter

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of law in sexual cases. The jury were however told that the independent eye-witness evidence of each child, if believed, was capable of amounting to corroboration, and that they could consider the offences as proved if they believed what the children said about the appellant. On appeal, it was contended on behalf of the appellant, that the cumulative effect of the judge's directions did not amount to a sufficient warning to the jury, that it was unsafe to convict on either count on the uncorroborated evidence of children of tender years.

HELD: (1) (*per* HAYNES, J. A.) That the jury were not in terms or effect warned, as they ought to have been in a sexual offence on children of tender years, that they should be cautious before convicting the appellant on uncorroborated evidence. This *prima facie* would be fatal to the conviction unless there has been no substantial miscarriage of justice.

(2) That the crucial question is whether the State has in relation to each count, such substantive corroboration apart from the evidence of the other child, that the court feels sure that if a proper warning had been given, a reasonable jury would inevitably have convicted the appellant.

(3) That the only other bit of evidence which could possibly be corroborative is that of Mary Kellman, the children's mother, about Barbara's distressed condition but it was not entitled to much weight as it was not observed until some four hours after the alleged assault.

(4) (*per curiam*) That the conviction and sentence must be set aside and a new trial ordered.

R. v. Redpath (1962) 46 Cr. App. R. 319 applied.

Editorial note: This case is reported in (1975) 26 W.I.R. 438.

**Conviction and sentence set aside.
New trial ordered.**

Cases referred to:

- (1) R. v. Pitts (1913) 8 Cr. App. R. 126.
- (2) R. v. Dossi (1919) 13 Cr. App. R. 158.
- (3) Kendall v. The Queen (1962) S.C.R. (Cdn.) 469.
- (4) D.P.P. v. Hester [1972] 3 W.L.R. 910; [1973] A.C. 296; 116 Sol. Jo. 966; [1972] 3 All E.R. 1056; 57 Cr. App. R. 212; (1973) Crim. L.R. 43, H.L.
- (5) D.P.P. v. Kilbourne [1973] A.C. 729; [1973] 2 W.L.R. 254; [1973] 1 All E.R. 440; 117 Sol. Jo. 144; 57 Cr. App. R. 381, (1973) Crim. L.R. 235, H.L.

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- (6) Hargan v. The King (1919) 27 C.L.R. 13.
- (7) R. v. Cleal [1942] 1 All E.R. 203
- (8) R. v. Campbell [1956] 2 Q.B. 432, [1956] 3 W.L.R. 219; [1956] 2 All E.R. 272; [1956] 40 Cr. App. R. 95; 120 J.P. 359; 100 Sol. Jo. 454, C.C.A.
- (9) R. v. Sawyer (1959) 43 Cr. App. R. 189 C.C.A.
- (10) Chiu Nang Hong v. Public Prosecutor [1964] 1 W.L.R. 1279; 108 Sol. Jo. 818, P.C.
- (11) R. v. Cratchley (1914) 9 Cr. App. R. 232.
- (12) R. v. Warren (1920) 14 Cr. App. R. 4.
- (13) R. v. O'Reilly (1967) 51 Cr. App. R. 345; [1967] 2 Q.B. 722; [1967] 3 W.L.R. 191; 131 J.P. 370; 111 Sol. Jo. 314; [1967] 2 All E.R. 766.
- (14) Boardman v. D.P.P [1974] 3 All E.R. 887; 139 J.P. 52; 60 Cr. App. R. 165; *sub nom* D.P.P. v. Boardman [1974], [1975] AC. 430; [1974] 3 W.L.R. 681; 118 Sol. Jo. 809, H.L.
- (15) R. v. Trigg [1963] 1 W.L.R. 305; [1963] 1 All E.R. 490; (1963) 47 Cr. App. R. 94; 127 J.P. 257; 107 Sol. Jo. 136, C.C.A.
- (16) Mraz v. The Queen (1955) 93 C.L.R. 493.
- (17) R. v. Gregg (1934) 24 Cr. App. R. 13.
- (18) R. v. Mitchell (1952) 36 Cr. App. R. 79.
- (19) R. v. Lindo (1969) 14 W.I.R. 7.
- (20) R. v. Zielinski (1950) 34 Cr. App. R. 193; (1950) W.N. 494; 66 T.L.R. (Pt 2) 956; 114 J.P. 571; [1950] 2 All E.R. 114 n; 49 L.G.R. 45, C.C.A.
- (21) R. v. Redpath (1962) 46 Cr. App. R. 319; (1962) 106 Sol. Jo. 412.
- (22) R. v. Knight [1966] 1 W.L.R. 230; [1966] 1 All E.R. 647; (1966) 50 Cr. App. R. 122; 130 J.P. 187; 110 Sol. Jo. 71;
- (23) R. v. Wilson (1974) 58 Cr. App. R. 304, C.C.A.
- (24) Moorov v. HM Advocate (1930) J.C. 74.
- (25) R. v. Manser (1934) 25 Cr. App. R. 18.
- (26) R. v. Lewis (1938) 26 Cr. App. R. 11.
- (27) R. v. Gammon (1959) 43 Cr. App. R. 155; 123 J.P. 410, C.C.A.

C.B. Sheppard for the appellant.

G.H.R. Jackman, Deputy Director of Public Prosecutions (ag.), for the State.

HAYNES, J. A. (delivered the first judgment at the request of E.V. Luckhoo, C.): The case for the prosecution was that on Saturday, 15th January 1972, between 12 noon and 1p.m., the appellant had unlawful carnal knowledge first with Carol Cambridge, then nine years old, and after this with Barbara Cambridge, her sister, then 11 years. Their mother, Mary Kellman, the lawful wife of the appellant, was out. According to the evidence, each child was an eye-witness to the offence involving the other. The medical evidence was neutral. There were no external signs of injury whatever. The appellant admitted that he was at home

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with these two step-children between noon and 12.40 p.m., but he swore he did nothing to either of them during this time or at all. Consequently, the State had to prove: (i) that the sexual acts occurred; and (ii) that the appellant was the man involved. He was unrepresented by counsel and the jury found him guilty on both counts of the indictments. At the time of the trial Barbara was 13 and Carol was 11; both gave sworn evidence. So corroboration was not required as a matter of strict law, but it was obligatory on the trial judge as a matter of law, to warn the jury in terms or effect, that in the eye of the law it was dangerous or unsafe to convict on either count on the uncorroborated evidence of Carol, or Barbara for two reasons: firstly, because the charges were sexual offences; and, secondly, as each girl was regarded by the common law as a child 'of tender years'.

What he told the jury is as follows:

“In most cases, members of the jury, corroboration is not required as a normal matter of course, but in sexual offences such as this, although corroboration is not required as a matter of law, it is always looked for as a matter of practice.”

And:

“It seems to me that if you accept the evidence of these two girls, their independent evidence as to what they saw in relation to each other maybe considered as corroboration. Is there any better corroboration than the actual eye-witnesses to the crime?”

Again:

“... if you accept and believe ... that they are witnesses of truth, however young they may be, and they are not speaking from information given to them by someone else, or as suggested by the accused, that this is a complete frame-up because of a previous quarrel with his wife, that they were coached by her to say this terrible thing against him to put him in trouble, then you may well consider that this offence has been proved to your satisfaction. You have to be satisfied as to the truth of those two girls' testimony.”

Finally:

“If you are satisfied find that those two little girls, as young as they may be – and it is a wicked thing to do such a thing – even if you accept that what they are saying is true ... you may properly convict him.”

The questions involved in this appeal are: Do these directions cumulatively amount

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to a sufficient warning? If not, is it a fit case for the application of the proviso? The authorities show that where the complainant of a sexual offence is a child of tender years, the common law is very exacting in dictating a certain approach to the determination of the truth on the evidence. And from time to time judges have been at pains to explain the reasons why.

In William Pitts (1913) 8 Cr. App. R. 126, a case of indecent assault on a little girl of ten, RIDLEY, J. said (p. 128):

“In this case the prosecutrix ...was a child of very tender years, and although a jury may act on her uncorroborated evidence, it is always wise for the judge to address same caution to the jury as to the possibility of such a young child having a mistaken recollection of what had happened.”

And in Severo Dossi (1919) 13 Cr. App. R. 158, an indictment for indecent assault of an eleven-year-old girl, ATKIN, J. referring to the judge’s directions to the jury, said (p. 161):

“The law is stated as the authorities which I have cited, laid it down, and caution to the jury is framed in careful words. But the Deputy Chairman went on to say in reference to the question of corroboration: ‘It does seem to me that it is infinitely less dangerous to act on the uncorroborated testimony of little children who allege that they have been indecently assaulted than to act on the uncorroborated testimony of older people who allege that they have been assaulted, and I will tell you why. I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make a charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail. But with regard to small children there is less incentive for them to make up a false story about a particular man in a matter of this sort than there often is in the case of an older woman. Children are less likely to suggest a wrong man when there is a right man, and they are less likely to be open to the purposes of blackmail than older people.’ We think those were dangerous remarks to make to the jury. No doubt, the considerations which the Deputy-Chairman had in his mind were perfectly sensible. But, on the other hand, small children are possibly more under the influence of third persons – sometimes their parents – than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories.”

Then in Arthur James Kendall v. Her Majesty The Queen [1962] S.C.R. (Cdn.)

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469, JUDSON, J., reading the judgment of the Supreme Court of Canada, put the reasons thus (p. 473): “The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: (1) His capacity of observation. (2) His capacity of recollection. (3) His capacity to understand questions put and frame intelligent answers. (4) His moral responsibility. (*Wigmore on ‘Evidence’*, 3rd Ed., para. 506).”

In D.P.P. v. Hester [1972] 3 W.L.R. 910, LORD MORRIS of BORTH-Y-GEST, referring to the reasons for the rule, said (p. 914): “Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood.” And LORD DIPLOCK (p. 929) spoke of “... children who, though old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect;” and in D.P.P. v. Kilbourne [1973] All E.R. 440, LORD HAILSHAM, in his opinion (p. 454) pronounced that, “When a small boy relates a sexual incident implicating a given man he may be indulging in fantasy.”

And so it was for these reasons, put in different ways by eminent judges, that the jury in this present case had to receive a special warning as to the need to look for corroboration before accepting the stories of Barbara and Carol, as they were of tender years, as to what each said he did to her.

In Hargan v. The King (1919) 27 C.L.R. 13, an indictment for unlawful carnal knowledge of a girl 14 1/2 years old, BARTON, J., in his judgment said (pp. 19-20):

“There is no doubt that in general, a jury properly directed, could act upon the evidence of one person against another, but in such cases as this, they ought to be told that the uncorroborated evidence of the young person solely testifying to the commission of the crime upon her person is not by itself a very safe basis on which to rest a conviction. It is the whole case of the side having the *onus probandi*, and while it is not essential that there should be evidence corroborating it, the jury should be warned against accepting it unless after the most careful scrutiny. This girl was only fourteen and a half years of age and the jury ought to have had their attention directed to the danger of acting on evidence like this where there is no corroboration. It is not enough to tell them, however truly, that corroboration is not necessary in law. In determining cases of this nature, where there is a very young person of a kind whose statements one would generally expect in the ordinary course of affairs

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to be made more convincing by circumstances or other persons, the jury ought to be told that, while they may act upon it as a matter of law, they should hesitate long before acting upon it in the absence of corroboration. Exception is not taken on the ground that corroboration is necessary, but on the ground of failure in such a case as this, to warn or caution a jury against acting, probably to the utter ruin of a person accused, upon evidence which is uncorroborated, unless they are convinced, after close consideration, that it is in itself sufficient. For my part I think that, in order to convince, it should be very cogent indeed.”

In R. v. Cleal [1942] 1 All E.R. 203, I believe HILBERY, J. put the position pointedly, in a case of indecent assault of a boy often when he said (p. 206) that the jury must be made to understand what such a warning properly given should convey, namely, that they would be entitled to return a verdict of guilty only if the boy’s evidence carried such conviction to their minds that they were prepared to take the responsibility of convicting notwithstanding the warning.

And much later in Hester (above), LORD MORRIS (p. 920) referred to the importance of directing a jury that the evidence of children must be examined with special care. The need for such special care was manifest, said His Lordship, “where vital issues fall to be determined only on the evidence of children.”

As the trial judge here indicated, there was evidence capable of being corroboration – the evidence of each girl that she saw the offence committed on the other. But as each was of tender years, LORD HAILSHAM’s warning was applicable doubly, that is to say, the jury had to examine with special care, not only the evidence needing corroborating, but the corroborating evidence itself also. In Forbes Mc Arthur Campbell (1956) 40 Cr. App. R. 95, LORD GODDARD put it this way (p. 102): “The sworn evidence of a child need not, as a matter of law, be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult.” This rule was applied in John Clifford Walter Sawyer (1959) 43 Cr. App. R. 187, and approved of by LORD MORRIS is in Hester (*supra*), at p. 918. And even where the young child is intelligent and of impressive demeanour in the witness-box, the jury, before accepting her evidence, must address their minds to the warning and bear in mind the risk of doing so if they find it is uncorroborated. This is the principle underlying decisions such as Chiu Nang Hong v. Public Prosecutor [1964] 1 W.L.R. 1279, P.C.

Bearing in mind these judicial utterances, I return to the judge’s directions to

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consider their sufficiency. He never used the word ‘warn’ or ‘caution’, or told them of any ‘danger’ or ‘risk’ in convicting if they did not find corroboration. He never told them to examine the evidence of Carol and Barbara ‘with special care’ or ‘with great care or caution’ or even just ‘with care’ or ‘with caution’. And he never pointed out that, apart from theirs, there was no substantial independent corroborative evidence, direct or circumstantial. But a summing-up which does not give the warning in the orthodox language, or use the terms just mentioned, might be held sufficient, if, in effect, the jury are directed that they must not or ought not to convict unless they find and accept corroborative evidence.

In Charles Cratchley (1914) 9 Cr. App. R. 232, the appellant was convicted of an assault with intent to commit sodomy. The only evidence against him was that of Albert Smith, aged thirteen, the complainant, and William Smith, aged ten. The latter testified that the appellant told him to watch and warn him if anyone came near. For the appellant, it was stressed that no warning as required had been given to the jury. But the trial judge had warned them that their verdict must depend entirely on whether they believed both boys. The appeal was dismissed. ISAACS, L.C.J., said (p. 235):

“... in our view, there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not, that a warning should be given to the jury as to acting on the evidence of boys of this age – twelve and under ten – who are concerned in such an offence. It is not necessary that the judge should use the actual words ‘warn’ or ‘caution’. If from his conduct of the case this Court is of opinion that the jury were in fact warned or cautioned, it would not interfere. It is plain that in this case the jury were told that they must be very careful in considering the evidence, and must not find the appellant guilty unless they were quite satisfied that they could accept the boys’ evidence ... and it is impossible in these circumstances for us to say that there has been any miscarriage of justice. The appeal therefore fails.”

And in Harold Warren (1920) 14 Cr. App. R. 4, where the appellant was convicted of sodomy with a boy of thirteen, DARLING, J., reading the judgment of the Court said (pp. 5-6):

“The conviction is attacked on the ground that it depended upon the evidence of an accomplice which was uncorroborated. The accomplice was a boy of thirteen, and whether or not the boy was an accomplice in

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the sense that he could be charged with the offence, we think that the judge ought to have warned the jury against acting on the evidence of an accomplice, and also a warning should have been given to them against acting on the evidence of a boy of that age. Nevertheless, if from the conduct of the case this Court is of opinion that the jury were in fact warned or cautioned, it will not interfere.”

In John Joseph O'Reilly (1967) 51 Cr. App. R. 345, the appellant was convicted of attempted rape. The issue was identity. Both the complainant, Mrs. Reid, and a Mr. Lake who came to her rescue, identified the appellant as the attacker. There was also scientific evidence positively proving that on the clothes the appellant admittedly wore on the night in question there were found strands of fabric or cloth identical with fiber from Mrs. Reid's clothing. The expert said it could have got there only from close bodily contact with Mrs. Reid. The appellant contended that the judge did not give the jury the usual warning. SALMON, L.J. (as he then was), reading the judgment of the Court said (pp. 347-348):

“In the course of his summing-up ... the learned Deputy Chairman told the jury that, if the case had stopped at the direct evidence of Mrs. Reid and Mr. Lake ... he would have warned them that it was dangerous to convict. ... He asked the jury to consider the case on the basis that none of that direct evidence had been given, that it had been a very dark night, and that no one could have seen who Mrs. Reid's attacker was, and he asked them to consider the scientific evidence alone ... and he said to them that it might be, and it was entirely a matter for them, that the scientific evidence, looked at by itself, might carry conviction to their minds....

Undoubtedly, it is the rule that in sexual cases the jury must be warned of the danger of convicting without corroboration.”

Then the Lord Justice continued (p. 349):

“Accordingly, the warning must obviously be given (1) where there is no evidence of corroboration, and (2) where there is evidence capable of corroborating the complaint, but which the jury might conclude does not amount to corroboration...

It may perhaps seem strange that where evidence is called which, if accepted, indisputably must amount to corroboration, it is, according to the present state of the law, always necessary to tell the jury how dangerous it would have been to convict if there had been no such evidence. That, however, is what was decided in Trigg (1963) 47 Cr. App. R. 94 ...

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The law as this court understands it, is that there should be a solemn warning given to the jury, in terms which a jury can understand, to safeguard the accused.

In this case the learned Deputy Chairman gave such a warning, although he never used the magic word ‘corroboration’...”

And then he concluded (pp. 349-350):

“In the view of this court, this summing-up is impeccable. If one looks at the substance of what the Deputy Chairman said, he clearly told the jury that it would be wholly unsafe to convict on the evidence of Mrs. Reid alone ... It would be reducing the law to a farce if because the word ‘corroboration’ was not used, it should be said that there is some vice in a summing-up of that kind.”

Of these three cases, perhaps Cratchley is nearest to the case on hand; but I find it distinguishable on two grounds, namely, (i) in Cratchley the trial judge did tell the jury to be ‘very careful’ in considering evidence of the young boys; here, there was no such direction; and (ii) in Cratchley there was a single count and the trial judge told the jury that to convict on it, they had to believe both of these boys, which meant, they were not to convict on the evidence of the complainant alone, whereas here, there were two counts and the direction that to convict they had to believe both girls could not surely convey to the jury that to convict on each count they had to believe and accept the evidence of both girls. It was capable of meaning only, that to convict on each count they had to believe the girl involved. And so Cratchley cannot support the contention of the State on appeal.

O’Reilly is a vastly different case. In my judgment, to tell the jury only that although corroboration is not required as a matter of law it is always looked for as a matter of practice, is not pointed enough. It does not tell them what to do if they do not find corroboration or what they ought not to do. It does not make them realise clearly that in the eye of the law it is unsafe to convict unless corroboration is found. It is no longer a matter of mere practice so to do, for, as LORD REID stated in Kilbourne (above) (p. 455): “By what has now become a rule of law the trial judge was bound to warn the jury of the great danger of accepting the unsupported evidence” (of girls of eleven and thirteen years of age), “and to advise them that they should look for corroboration, before convicting ...” And, further, to tell them that if they believed the girls “as young as they are”, they could properly convict, is only to tell them they might believe the girls although they were very young. This could not impress the jury with the need to examine the evidence of each complainant with the special care which LORD MORRIS spoke of in the Hester case for the reasons mentioned. And, finally, none of this would have told

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them that, where, as here, the corroborative evidence relied on was that of another child accuser, although the latter evidence is technically corroborative as it is support from another witness, it is in itself evidence whose credibility and acceptability needed to be considered with the same special care. As LORD HAILSHAM said in Boardman v. D.P.P. [1974] 3 All E.R. 887, at p. 907: "Unless a witness's evidence was intrinsically credible it could neither afford corroboration nor be thought to require it." And it is this quality of the credibility of young children that the common law judges felt distrustful of. The evidence of Barbara corroborated Carol, and *vice versa*, but the quality of the corroboration was another matter. In the eye of the common law, such evidence should not be accepted as corroborative evidence except after very careful scrutiny.

For all these reasons I would hold on the evidence, the directions and the authorities, that the jury were not in terms or effect, warned as they ought to have been, this being a sexual offence on a child of tender years. This, *prima facie* would be fatal to the conviction unless there has been no substantial miscarriage of justice. [See Leonard Derek Trigg (1963) 47 Cr. App. R. 94.] The State must satisfy this court that this is so. As was said by FULLAGAR, J., in Mraz v. the Queen (1955) 93 C.L.R. 493, at p. 514:

"It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read in the light of the long tradition of the English criminal law, that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellants may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

The State relied heavily on Gregg (1934) 24 Cr. App. R. 13 and Mitchell (1952) 36 Cr. App. R. 79. Gregg has been referred to as 'exceptional' in Trigg (above), and there was substantial corroborative evidence apart from the eye-witness testimony of another child. In Mitchell also, there was 'ample' corroboration apart from the evidence of the two little girls. If, here, there is no such confirmatory evidence, then Sawyer (1959) 43 Cr. App. R. 187 and R. v. Lindo (1969) 14 W.I.R. 7 would be applicable to exclude the proviso. In Sawyer the appellant was convicted of indecent assault on a boy of nine. At the trial, the only issue was of identity. The boy alleged to have been assaulted was playing with another boy,

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aged nine, on a golf course and was approached by a man who came up on a bicycle. While the other boy went off to look for a pen, the complainant who remained was indecently assaulted. Both boys gave evidence on oath and identified the appellant as the man who had come up to them. There was no other corroboration. In his summing-up the Deputy Chairman gave no warning to the jury. PARKER, L.C.J., said (p. 190):

“The court has considered whether this is a case in which the proviso to section 4 of the *Criminal Appeal Act, 1907*, should be applied. It is said, and the court accepts it, that these little boys clearly created a very good impression – in fact, the jury convicted in five minutes – but here is a case where there was no direction given at all on the danger of acting on the evidence of these small children. It is undoubtedly true that if there is in fact corroboration, the failure to give the warning may not necessarily mean that the conviction must be quashed. There are a number of cases, of which Gregg (1932) 24 Cr. App. R. 13 perhaps is the most striking, where the proviso was applied, although there had been no direction in regard to the uncorroborated evidence of a small child who had not been sworn, in which case, corroboration was necessary by statute. All the same, in the present case, the court feels that it would be wrong to apply the proviso, there having been no warning given to the jury in regard to the evidence of either Andrew or Michael. Accordingly, this appeal is allowed and the conviction quashed.”

And in R. v. Lindo (*supra*), a decision of the Court of Appeal of Barbados, the appellant, Anthony Lindo, was indicted for the murder of Fitzgerald Evelyn, and was convicted of manslaughter. The case for the Crown was that the appellant threw two stones at Evelyn; that one of them struck Evelyn on his head, and that this blow caused his death. The Crown relied, apart from the medical evidence, almost completely on the sworn testimony of two young children, aged twelve and ten respectively. No warning on corroboration was given to the jury. The conviction was set aside and a new trial was ordered. WILLIAMS, J., in the judgment of the court said (p. 7):

“The warning not having been given, the appellant must succeed on the first ground unless this is a case in which the proviso should be applied...”

“We have considered this matter very carefully and have reached the conclusion that this is not a case in which the proviso can be applied. Even though R. v. Campbell makes it clear that the sworn evidence of one child can be corroborated by the sworn evidence of another child, yet it is likewise made very clear that the warning of danger must be

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given in relation to the testimony of each of the children. Here there was no warning at all and there is no evidence of substance which confirmed that these two young children were speaking the truth.”

Accordingly, the crucial question is: Has the State here satisfied this Court that there was before the jury in fact, in relation to each count in which the appellant was convicted, such substantial corroboration, apart from the evidence of the other child, that we feel sure that if any proper warning had been given, a reasonable jury would inevitably have convicted the appellant? The only other bit of evidence which could possibly be corroborative is that of Mary Kellman, the children’s mother, as regards the condition in which she found Barbara – then 11 years old – when she (Mary) returned home at 4 o’clock that Saturday afternoon.

Mary Kellman said that Barbara was lying on the bed with her feet pulled up in a “crouched up” position looking “sickly, half-dead and exhausted.” Barbara said her step-father had sex with her and then she complained of a headache. Was this such evidence of a “distressed condition” as amounted to corroboration?

In Zielinski (1950) 34 Cr. App. R. 193, the appellant was a traveller selling bandages. He called on the complainant, aged 73, in the course of his business. She alleged he put his fingers in her private parts. He was charged with indecent assault. His defence was, during the admitted visit he did her nothing. Her son testified that a few minutes after the appellant left, he found his mother in a shocking state, frightened and ashamed. GODDARD, L.C.J., (p. 197) said “that was circumstantial evidence which confirmed the evidence of Mrs. Greaves in a material particular and was therefore evidence upon which the jury were fully entitled to act.” Then in Redpath (1962) 46 Cr. App. R. 319, the appellant was convicted of indecent assault of a girl of nine. The prosecution’s case was that while she and two friends were playing on a moor one afternoon, he pulled her to the ground and committed the act. A Mr. Hall testified that he was nearby, saw Redpath walk towards the child and later return and drive off in a car. Immediately after, unobserved by her, he saw the little girl emerge from the moor. At that time she was terribly white, her eyes were very round, she appeared on the brink of tears and she burst into tears. Mr. Hall took her home. Her mother said she arrived there trembling. The Court ruled that her distressed condition when she was unaware of being observed, “was very strong evidence, if accepted by the jury, of the little girl’s story.”

In Knight (1966) 50 Cr. App. R. 122, also a case of indecent assault of a little girl, aged seven, the Crown proved that the appellant took the child into a public lavatory and assaulted her nastily. Her father testified that he came upon the appellant and the child walking together and then the appellant walked away. The child seemed frightened, was shaking and had her hands over her private

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parts. The appellant said he was never there. PARKER, L.C.J, in the judgment of the Court (at p. 126) said, “If the jury believed the father and found that the appellant was telling a lie, it was certainly very cogent evidence amounting to corroboration.”

Finally, in Tom Wilson (1974) 58 Cr. App. R. 304, Wilson was convicted of incest with his daughter. A welfare worker testified that soon after the time of the alleged act (said to be consented to under threat of sticking a knife in the mother of the complainant), the latter telephoned her and showed signs of stress. She was almost unintelligible then. A little later the complainant arrived at the worker’s place. She looked very upset, worried and unhappy and made a complaint. The trial judge directed the jury that they “might, not must consider that as corroboration.” The appellant had denied threats or intercourse. The Court, without expressly ruling if this evidence could be corroboration, held that a proper warning was not given in relation to it and quashed the conviction.

Looking at those cases, I am not prepared to hold that the evidence of Mary Kellman was incapable of amounting to corroboration, if believed, especially as the appellant admitted that Barbara was lying in bed looking ill and had complained of a headache; and that when he had come home at noon, she had appeared in good health, happy and normal. As LORD PARKER said in Redpath (*supra*) (p. 321), “the distressed condition of a complainant is quite clearly capable of amounting to corroboration.” The question is, if it was, how weighty was it?

In Redpath the Lord Chief Justice said (p. 321):

“... in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother’s evidence as to the girl’s condition may, in law, be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to that evidence, because it is all part and parcel of the complainant. The girl making the complaint might well put on an act and simulate distress.”

And in Knight (*supra*) he remarked (p. 125) that “the distress shown by a complainant must not be over-emphasised in the sense that juries should be warned that except in special circumstances, little weight ought to be given to that evidence. And in Tom Wilson (*supra*) EDMUND DAVIES, L.J. put it this way (p. 311): “... unless there are very special circumstances (such as those in Redpath (*supra*) where the child had no reason to think she was being observed the distressed condition of a complainant may simply fail to implicate the accused in the

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offence charged.”

In the light of those judicial utterances, I do not feel that this evidence of Mary Kellman would be entitled to much weight, if any, as corroborative. Her condition was not observed until approximately four hours after the alleged assault, the appellant did not lie about his whereabouts at the relevant times; there was no evidence that she was unaware of being observed; her appearance then might reasonably be regarded as part and parcel of her complaint; Barbara was not crying; she did not look ashamed or frightened; and her condition was wholly consistent with some other cause. In short, there were no very special circumstances here to attract substantial weight to this evidence as corroboration and invite the use of the proviso. Bearing in mind the observations of ASHWORTH, J. in Leonard Derek Trigg (1963) 47 Cr. App. R. 94, that the application of the proviso in such cases “must be regarded more as exceptional than as in any sense a regular matter,” the conclusion is unavoidable that the State has not satisfied the onus of justifying its exercise. The conviction must therefore be set aside, but in the circumstances of the case, a new trial should be ordered.

PERSAUD, J. A.: This appeal is concerned with the age-old question of corroboration, with particular reference to the evidence of children, both of whom were sworn, and each of whose evidence sought to corroborate the evidence of the other that each was subjected to an indecent assault by the appellant. The children were Barbara, age 13 years, and Carol, age 11 years. As each was sworn, there was, as a matter of law, no need for corroboration. But it has always been recognised that in sexual offences, a jury should be told that even though they are free to act on the uncorroborated evidence of the victim, accepting it as true, it would be dangerous to convict on such evidence, and they should examine the other evidence in an endeavour to ascertain whether there is in fact corroboration. Further, if there is no evidence capable of being corroborative, the judge should so tell the jury. A judge is required in law to give a jury further directions where the corroborative evidence comes from the mouth of a child, sworn or unsworn; but I will deal with this when I come to the directions in this case. I am, for the present, dealing with corroboration, and the *ratio* behind the need for it. This has been reiterated time and again by different judges in a variety of language. In D.P.P. v. Kilbourne (1973) 1 All E.R., p. 456, LORD REID said:

“There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter, the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.”

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And LORD HAILSHAM quoted *in extenso* from the judgment of LORD BLACKBURN in Moorov v. HM Advocate (*ibid*, at p. 451) where that Learned Lord said [(1930) J.C. at p. 74]:

“I agree with your Lordship in the chair that the greatest caution is necessary in applying the rule that the evidence of a single witness to a particular offence may be held to be corroborated by the evidence of another single witness to a similar offence. That such a rule may apply in certain cases admits of no doubt, but it is, I think, difficult, if not hopeless, to attempt to define within precise limits the classes of cases, or the circumstances, in which it should be applied. I agree with your Lordship that there must be a close similarity between the nature of the two offences to each of which only one witness speaks, before the evidence of the one witness can be taken as corroborating the evidence of the other. I also agree that there must be some connection between the two offences in the matter of time. I have already committed myself to the view that such corroboration is competent in the case of offences against young girls – M'Donald. That appears to me to be in a class of case isolated from all others in one respect at any rate, *viz.*, that a child of tender age is not only liable to be easily influenced by an adult, but is herself in the eyes of the law incapable of giving any consent to, encouragement of, the offence which is committed against her. If what the child says did happen, then a crime has been committed, and the fact that the child is telling a true story may be corroborated by the proved truthfulness of the child on other incidental matters, and by the fact that another child, also proved to be truthful, has had a similar experience at the hands of the same man.”

I must also point out that, contrary to what was thought to be the law in the Manser's case [(1934) 25 Cr. App. R. 18] *viz.*, that there can be no corroboration of a witness's testimony by the evidence of another witness who himself needs to be corroborated, the position now is that there can be what has been described as mutual corroboration. This latter view was expressed by LORD MORRIS in D.P.P. v. Hester [1972] 3 All E.R., at p. 1065, and agreed by LORD SIMON on in D.P.P. v. Kilbourne (*ibid*, at p. 463; In D.P.P. v. Hester LORD MORRIS dealt with the matter in these words (*ibid*, at p. 1065):

“The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent person is lessened, if conviction is based on the testimony of more than one acceptable witness. Corroborative evidence in the sense of some other material evidence in support implicat-

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ing the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed, would be to rule it out because of its essential nature and indeed, because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible, but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence. All of this emphasises the importance of directing a jury that the evidence of children must be examined with special care. The need for such care is manifest where vital issues fall to be determined only on the evidence of children.”

And LORD PEARSON expressed the view that the accused should not be allowed to escape conviction on the basis of the supposed rule of law excluding mutual corroboration. [See *ibid*, at p. 1070]

Applying those principles to the instant case, it must be that Carol’s evidence could have been corroboration of Barbara’s, and *vice versa* even though each witness in turn required corroboration to render a conviction safe. “All of this,” says LORD MORRIS in Hester’s case (*ibid*, at p. 1065,) “emphasises the importance of directing a jury that the evidence of children must be examined with special care. The need for such special care is manifest where vital issues fall to be determined only on the evidence of children.”

I must now examine the directions given to the jury by the learned judge in the instant case which are as follows:

“In most cases, members of the jury, corroboration is not required as a normal matter of course, but in sexual offences such as this, although corroboration is not required as a matter of law, it is always looked for as a matter of practice.

It is my function as judge of the law to point out to you the evidence capable in law, of being regarded as corroboration and it is your then function to decide whether or not such evidence does in fact amount to corroboration.

Is there any corroboration in this matter, members of the jury? It seems to me, that if you accept the evidence of these two girls, their independent evidence as to what they saw in relation to each other, may be considered as corroboration. Is there any better corroboration than the ac-

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tual eye-witnesses to the crime?

... if you accept and believe ... that they are witnesses of truth, however young they be, and they are not speaking from information given to them by someone else, or, as suggested by the accused, that this is a complete frame-up because of a previous quarrel with his wife, that they were coached by her to say this terrible thing against him to put him in trouble, then you may well consider that this offence has been proved to your satisfaction. You have to be satisfied as to the truth of those two girls' testimony.

He is saying, 'This is a terrible allegation that you are making against me – a shocking thing to say a stepfather would do to children. You are only doing this because this wicked wife of mine brought these two children to say that I interfered with them and all because of a quarrel.'

If you are satisfied that these two little girls, as young as they may be – and it is a wicked thing to do such a thing – even if you accept that what they are saying is true and you are not sure about penetration you may properly convict him. This is how I see it. It is not quite an easy case but you will do your best."

Were these directions sufficient to alert the minds of the jury in this case, not only that they should look for corroboration, but that as the case turned exclusively upon the evidence of the two children, they should approach their evidence with caution, notwithstanding that each could corroborate the other? In my view, judicial opinion is clear that where the evidence of children is concerned, especially where there is no other independent testimony, the trial judge should attract the minds of the jury as to the manner in which they must consider the evidence of children. It is not necessary for a judge to use any special formula. As was said by ISAACS, L.C.J., in Charles Cratchley (1914) 9 Cr. App. R. 235: "It is not necessary that the judge should use the actual words 'warn' or 'caution'; if from his conduct of the case this court is of opinion that the jury were in fact warned or cautioned, it would not interfere." But having told them about the danger of convicting without corroboration, the judge should go on to tell them that if they are searching for corroboration in either child's testimony, sworn or unsworn, they should carry out that search with caution. As has been pointed out earlier in D.P.P. v. Hester (*supra*), LORD MORRIS used the term 'special care'; he also spoke of 'adequate guidance and warning'. The matter was put thus by GODDARD, L.C.J., in the Campbell case [(1956) 40 Cr. App. R. at p. 102]:

"The sworn evidence of a child need not, as a matter of law, be corroborated, but a jury should be warned, not that they must find corroboration,

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but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence, though a particularly careful warning should in that case be given.”

There are several reasons why the evidence of a young child should be looked at with special care or with caution, and the risk attendant upon a jury not conducting their enquiry in such a fashion should be exposed to them. A child might have been put up by an adult, who would have his own reason for so doing, to make an allegation of indecent assault against a man. Indeed, that has been the suggestion by the defence in this case, that is, that the girls were told by their mother to make this allegation because of domestic differences between her and the accused. It is true that an adult witness can also be suborned to tell an untruth, but it is just as true that a child's will can be more easily overcome in this regard. It is also the case that children are given to flights of fancy, and can well imagine that certain events occurred which never in fact occurred. As a result, the risk attendant upon approaching their evidence without the caution is apparent, as LORD MORRIS has put it in D.P.P. v. Hester (*supra*).

The judge seemed to have directed attention to the possibility of the children having been coached to tell story of indecent assault; he had also told the jury, that they will have to be satisfied as to the truth of their testimony. He introduced the youth of the children in two instances but I must confess my inability to appreciate the full meaning of the last extract from the summing-up set out earlier in this judgment, which, it may be said, came closest to the required admonition. I am not sure whether he meant that it was a wicked thing for the girls to concoct such a story, or for the accused to have attempted to have sexual intercourse with the children if the jury were not sure that penetration took place, in which event they could convict of an attempt. I experience this uncertainty not only because of the language used, “even if you accept that what they are saying is true and you are not sure about penetration, you may properly convict him”, but also, because he had immediately previously invited them to consider an attempt. I am inclined towards the latter interpretation; but even if it was meant to convey to the jury by that passage that it was wicked of the girls to tell an untruth, I cannot find, even putting all the passages together, and after the most anxious consideration, that the jury were told how they must approach the evidence, *viz.*, with caution. Telling them that they can only convict if they accept that the girls were speaking the truth is as far as it went accurate, but not, in my judgment, adequate. He should have gone on to instruct them as to the manner in which they must approach the evidence in ascertaining whether the children were in fact

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telling the truth.

I have given some thought as to whether this was a fit case in which to apply the proviso, and have come to the conclusion that it is not. The question whether or not the proviso should be applied has been considered in a number of cases, and I will now proceed to examine a few of them, in order to justify my conclusion.

In R. v. Lewis (1938) 26 Cr. App. R. 110, the question was whether the proviso should be applied where an accomplice had given evidence. The trial judge had omitted to warn the jury that it would be unsafe for them to convict the appellant on the evidence of accomplices without corroboration. In delivering the judgment of the court, LORD HEWART, L.C.J., said (*ibid.*, at p. 114):

“That there was corroborative evidence is manifest, proceeding from the lips of the appellant himself. One might even go further, and say that there was strong corroborative evidence, which the jury might well have thought sufficient corroboration of the evidence of Sansun and Wassell. But that is not enough. The question is, was there corroborative evidence so cogent and convincing that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion? In the opinion of this court, the evidence in this case was not so strong as to entitle us to say that the jury must inevitably have come to the same conclusion if they had been properly directed.”

In my opinion, the same situation holds in a case not only of accomplices, but also in any other case where corroboration is required whether by rule of law or practice. In the instant case, can it be said that there was cogent and convincing evidence *de hors* the evidence of the girls themselves? Such evidence, for whatever it is worth, comes from the girls' mother who said that when she returned to the house on the day of the alleged assault, she saw a blind which she had left in certain position, no longer in that position; Barbara was lying on the bed with her feet pulled up in a “crouched up” position, and she “appeared sickly.” Under cross-examination, she said she observed Barbara ‘lying half-dead and exhausted on the bed.’ She then went on to give evidence of the complaint made to her first by Barbara and then by Carol. She denied that Barbara had told her that she (Barbara) had a headache, though she admitted saying so before the magistrate. She also said at the trial that Carol had gone to the shop to purchase a ‘Whizz’ tablet for Barbara. In addition, the mother had found a piece of cloth not in its accustomed place, *viz.*, under the pillow, where she had placed it that very morning; she had found it on the ground, and upon examination by the Bacteriologist and Pacteriologist, it showed the presence of spermatozoa. According to the girls, the appellant used this bit of cloth with which to wipe himself after having intercourse with them. According to the mother, the appellant was

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in the habit of using it for the same purpose when she and he had had sexual intercourse.

Barbara's condition when her mother returned home can hardly be described without anything else, as a distressed condition, as was the case in R. v. Redpath (1962) 46 Cr. App. R. 319. In that case, the allegation was that the appellant had indecently assaulted a girl, age seven. Apart from the mother who gave evidence that the child went home trembling, and immediately made a complaint, there was the evidence of a Mr. Hall who, with his wife, had been in the vicinity of the place where the assault took place, and who identified the appellant as a person they saw walking towards the girl, and returning and driving off afterwards in a car. No sooner had that occurred, the girl came out of the moor in a very distressed condition. She was terribly white, her eyes were very round, and she appeared on the brink of tears. She burst into tears, whereupon Mr. Hall took her home. In dealing with the distressed condition of the child, LORD PARKER, L.C.J., said *ibid*, at p. 321):

“It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may, in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to that evidence, because it is all part and parcel of the complaint. The girl making the complaint might well put on an act and simulate distress. But in the present case, the circumstances are entirely different. Here is this little girl emerging from the moor in a matter of seconds after the appellant has left, not about to make a complaint at that particular moment and, with no idea that she is being observed or, that anybody thinks that anything improper has happened. Quite clearly, in those circumstances the observation of Mr. Hall, an independent bystander, was very strong evidence, if accepted by the jury, of the little girl's story.”

In the instant case, Barbara was seen in this ‘crouched up’ and ‘half-dead’ position some four hours after the alleged assault, and she appeared ‘sickly’, nothing else except that Carol went off to purchase ‘Whizz’ for her, presumably for a headache. Carol, herself, displayed nothing symptomatic of illness; indeed, she was jumping up on a bridge as she made the complaint to her mother, presumably, in good health. I find it difficult to conclude that that evidence regarding Barbara's condition was of such a strong corroborative nature, so as to render it cogent and convincing evidence on which the jury would have convicted, in the absence of

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the warning. There is the evidence of the piece of cloth. Now, if evidence as to the space of time after which spermatozoa cannot be detected on cloth by pathological examination could have been given, together with the evidence as to when last previous to the Saturday in question the appellant had used it after intercourse with his wife, and if that evidence went a certain way, then that could have been strong corroboration of the girl's evidence. The State's case sadly lacks these deficiencies, unlike the case of R. v. Gregg (1934) 24 Cr. App. R. 13, where the trial judge failed to direct the jury on corroboration. In that case the appellant was charged with a sexual offence against a unsworn young child of seven years. She gave unsworn testimony, but this was corroborated by the sworn evidence of another girl, aged nine. However, there was strong corroborative evidence to the effect that the assaulted girl contracted gonorrhoea, and it was proved that the appellant suffered from that disease around the time the girl was assaulted. The court held that even though the summing-up was defective in the directions concerning corroboration, and the need for it, no injustice had been done and they affirmed the conviction.

Even where the fact of the commission of the offence in the case of sexual assault is not disputed and the only issue is one of identity, there is the necessity for warning on corroboration, and if the alleged victim was a child, the approach along the lines as set down in Campbell (1956) 40 Cr. App. R. 95, should be followed. If this is not done, the courts will hesitate to use the proviso. Such was the decision in R. v. Sayer (1959) 43 Cr. App. R. 187, where PARKER, L.C. said (*ibid*, at p. 190):

The court feels that that is wrong, and that in such a case as this, the ordinary warning must be given to a jury of the danger of acting on the uncorroborated evidence of the complainant. This is particularly so when the complainant was a child who, true, was sworn, yet in fact was only nine years of age. It is true that there was evidence capable of amounting to corroboration in that, the other small boy, Michael, had himself been with Andrew; but even so, in regard to that small boy there ought, in the opinion of the court, to have been at least a general warning, given to the jury as to the danger of acting on the evidence of small children, whether the child in question was the complainant or was a child claiming to corroborate the complainant."

This view was again expressed by ASHWORTH, J., in R. v. Trigg (1963) 47 Cr. App. R. 94 at p. 101):

"In principle this court feels that cases where no warning as to corroboration is given where it should have been should, broadly speaking, not be made the subject of the proviso to s. 4. There are cases where the

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evidence has been such that this court has felt it possible to apply the proviso, but those cases, in the view of this court, must be regarded more , as exceptional than as in any sense a regular matter.”

In the circumstances, I would not be inclined to invoke the proviso, for I am of the opinion, that this is not a fit and proper case in which to do so. But, in view of the position that even without corroboration but with adequate admonition, the jury could in law, have convicted the appellant on the evidence of the two girls alone, I would agree that a retrial be ordered. I would therefore move for a quashing of the conviction and sentence, and for the ordering of a retrial.

CHANCELLOR: In the light of the previous judgments delivered, all I would wish to say is this: In law, a warning of the danger of acting on the uncorroborated sworn evidence of children is just as necessary to be specifically stated as it is likewise to say, that in all charges of sexual offences, it is not safe to convict on the uncorroborated testimony of the complainant, but that they may do so if satisfied of its truth. So that in a case of a sexual offence involving a young person, each ground for the warning should be mentioned. [See R. v. Gammon (1959) 43 Cr. App. R. 155.] Even if the witness has a sufficient understanding of the nature of an oath to enable his or her evidence to be sworn, the jury must be warned of the danger of acting on it without corroboration, according to the particular reason or reasons which may exist in the particular case.

In this case it is true that the trial judge, in inviting the jury to say whether the offence was proved to their satisfaction, told them, “You have to be satisfied as to the truth of those two girls’ testimony.” He left the case to them on the basis that they must accept and believe that both girls were “witnesses of truth however young they may be”; and that they were neither speaking from information given to them by someone else nor coached by the mother to say such a “terrible thing” against the appellant, to put him in trouble.

On the basis of the directions given, the appellant must have been convicted on each indictment because they accepted and believed both children and found that each had corroborated the other. In this sense, then, the appellant could not have been prejudiced by the lack of the required warning that it is dangerous to convict without corroboration, for the judicial direction clearly implied that they must believe both girls before finding the offence proved to their satisfaction. But the aspect of direction which was particularly lacking in the summing-up was, the omission to draw to the jury’s attention the special need for care, the special need for caution, in dealing with and assessing the evidence of children as young as Carol and Barbara, especially in a case involving a sexual offence. In sexual cases, it has been recognised that the danger exists that a false accusation could be made from a variety of causes such as sexual neurosis, jealousy, fantasy, spite,

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etc., whilst the very young could be not only unreliable or inaccurate, but prone to be over-imaginative or susceptible to the influence of third persons. As there can be no question of looking for corroboration of evidence which is not believed, or of finding corroboration in such evidence, the jury should have been invited to consider whether in the circumstances of this case, having regard to the nature of the offences and the ages of the children, they still found Carol and Barbara sufficiently creditworthy, which they were entitled to do. If both were not found to be creditworthy, that would be the end of the case. If one was creditworthy and the other was not, then there could not be corroboration. For it is of the essence of corroborative evidence that “one creditworthy witness confirms what another credit worthy witness has said.” [*per* LORD MORRIS in Director of Public Prosecutions v. Hester [1973] A.C. 296, at p. 315.]

Of course, no stereotyped formula is necessary in directions of this kind. LORD SALMON made this clear in R. v. O’Reilley (1967) 51 Cr. App. R. 345, at p. 349, when he said: “The rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words or incantation has to be used, and, if not used, the summing-up is faulty and the conviction must be quashed. The jury must, in reality, be made sufficiently” aware of the dangers to which the law is attuned and takes cognisance.

If a jury were to believe what Carol said, but think at the same time that it would be dangerous to act on it without confirmation because the very young are inclined to be inaccurate or over-imaginative, or susceptible to the influence of third persons, it is neither illogical nor nonsensical to treat the evidence of Barbara, who is also very young but whose evidence they might also believe, as something which enables them to act on Carol’s evidence, or *vice versa*, with more confidence than would have been the case if such evidence had stood alone. [See *Cross on Evidence*, 4th Edn., p. 173.] But then the necessary direction would have to be given to guide the jury when examining the evidence of young persons. If, despite the warning given, their credibility remains unshaken, so as to enable them to feel sure of the guilt of the accused, it could not then be said that they were deprived of the opportunity of assessing or evaluating this particular type of evidence in the way required by law. The omission to do so in this case, has failed to attract the jury’s attention to a ground for issuing a warning in considering the evidence of young children, which the law in its wisdom considers necessary. To apply the proviso would not be satisfactory.

I would therefore wish to support what has been proposed by my brothers, *viz.*, that there should be a retrial.

In the result, then, the appeal would be allowed, the conviction and sentence

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quashed, and there would be an order for a retrial.

**Conviction and sentence set aside.
New trial ordered.**

RAMNARINE SINGH
Appellant

v.

NARINE SZALA
Respondent

[Full Court (Bollers, C.J. and Mitchell, J.) February 28, 1975]

Landlord and Tenant – Plaintiff denied access to part of the demised premises – Damages for breach of covenant for quiet enjoyment by the landlord – Whether the covenant for quiet enjoyment is breached only by actual physical interruption – Landlord and Tenant Act, Cap. 61:01, s. 13.

The appellant (landlord) was ordered by the Magistrate to pay the respondent (tenant) damages for the loss of use of a room and general damages for breach of the implied covenant for quiet enjoyment. The evidence before the Magistrate disclosed that the respondent was the tenant of the appellant from June, 1971 to June, 1973, in respect of a cottage and a room below, situate at 309 Murray Street, Georgetown at an assessed rent of \$80.00 (eighty dollars) per month. In the lower court, the plaintiff (respondent) claimed that since November 1971, the defendant (appellant) wilfully trespassed and withheld the room from the respondent by keeping same locked, thereby depriving the respondent of access thereto.

Conversely, it was the contention of the appellant that the respondent had possession, control and occupation of the cottage and the room, for which she had the key, until she removed from the premises in June 1973. The appellant denied that he stored gardening tools or other belongings in the room.

The learned Magistrate found that the respondent was not aware at the inception of the tenancy that the room in question formed part of the demised premises. The Magistrate accepted the evidence of the respondent that the respondent was not given the key.

On appeal, the appellant contended first that the judgment awarded by the Magistrate was bad in law. Secondly that the Magistrate misdirected himself when he

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stated that the respondent was not aware at the inception of the tenancy, that the room formed part of the demised premises and thirdly, that the judgment was based on a wrong principle.

HELD: (1) That under s. 13 of the *Landlord and Tenant Act, Cap. 61:01*, a tenant is deemed to be in possession of the demised property at the commencement of the tenancy.

(2) That the covenant for quiet enjoyment is implied in every tenancy including parol lettings and mere agreements.

(3) A landlord is under an obligation at the commencement of a tenancy to put the tenant in possession of the premises let and to ensure he suffers no interference.

(4) A tenant who is deprived of possession is entitled to a cause of action for breach of the implied covenant of quiet enjoyment.

(5) There was a breach of the implied covenant for quiet enjoyment in this case and accordingly, the respondent was entitled to damages.

Appeal dismissed with costs fixed at \$27.20. Decision of magistrate affirmed.

Cases referred to:

- (1) Lavender v. Betts [1942] 2 All E.R. 72
- (2) Ludwell v. Newman [1795] 6 Term Rep. 458
- (3) Jenkins v. Jackson (1888) 40 Ch. D. 71
- (4) Miller v. Emcer Products, Ltd. [1956] W.L.R. 267; [1956] 1 All E.R. 237; [1956] Ch. 304 C.A.
- (5) Coe v. Clay (1829) 5 Bing. 440.
- (6) Jinks v. Edwards [1856] 11 Exch. 775.
- (7) Wallis v. Hands [1893] 2 Ch. 75; 62 L.J. Ch. 586; L.T. 428.
- (8) Markham v. Paget [1908] 1 Ch. 697; 77 L.J. 451; 98 L.T. 605.
- (9) Owen v. Gadd [1956] 2 All E.R. 28; 2 Q.B. 99; 100 Sol. Jo. 354.
- (10) Sanderson v. Benwick-upon-Tweed (1884) 13 Q.B.D. 547; 53 L.J. Q.B.D. 559; 51 L.T. 495; 49 J.P. 6.
- (11) Browne v. Flower [1911] 1 Ch. 219; 80 L.J. Ch. 181; 103 L.T. 557.

F. Ramprashad, S.C. for the appellant.
Ashton Chase for respondent.

MITCHELL, J. (delivered the judgment of the Court): The plaintiff in the

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matter, Narine Szala (respondent) had claimed the sum of \$2,500.00 (two thousand five hundred dollars) from the defendant (appellant) as damages for breach of the covenant for quiet enjoyment and trespass committed by the defendant (appellant) in respect of the premises situate at 309 Murray Street, Georgetown, within the Georgetown Judicial District.

The evidence for the plaintiff (respondent) which was led before the magistrate, disclosed that the plaintiff (respondent) Narine Szala was a tenant of the defendant (appellant) from June, 1971 to June, 1973 in respect of a cottage and a room below, at 309 Murray Street, Georgetown at a rental of \$80.00 (eighty dollars) per month. These premises were assessed under the then *Rent Control Ordinance, Cap. 186* and the maximum rent in respect of the premises was fixed at \$80.00 (eighty dollars) per month as from 16th February, 1972, as in the certificate of assessment tendered as Ex. 'A'. The premises covered by the certificate of assessment, Ex. 'A', included a room in the ground floor which measured 12' 4" by 8'. It was the contention of the plaintiff (respondent) that from November, 1971 to the time of the filing of the claim, the defendant (appellant) wilfully trespassed and withheld the said room from the plaintiff (respondent) and kept it locked. The rent for the said room was estimated at \$13.50 per month.

According to the plaintiff (respondent), the defendant (appellant) occupied this room and put his garden tools and other belongings in there. She had spoken to the appellant on several occasions but he had kept the key.

The appellant admitted that the respondent was his tenant in respect of the premises in question including the room downstairs for which she paid a rental of \$80.00. The appellant testified that the respondent had possession, control and occupation of the premises and the room downstairs until she removed from those premises in June, 1973. He never had anything to do with the room during her occupation nor did he interfere with her occupation. He had no gardening tools or other belongings in the room during the said tenancy. The room had a padlock, hasp and staple and the respondent had the key.

The learned magistrate, after having seen and heard the witnesses and the arguments, found in favour of the respondent and awarded damages against the appellant in the sum of \$323.50 with costs \$15.00 and a fee to counsel of \$50.00. The learned magistrate, in his reasons for decision, stated that in his opinion the plaintiff was not aware at the inception of the tenancy that the room formed part of the demised premises. He believed and accepted the evidence of the respondent that the room in question was being used by the appellant as a store room, that the respondent was never given the key and that the respondent was denied access to that room during the subsistence of her tenancy. He then proceeded to award damages for the loss of the use of the said room during nineteen (19)

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months at \$6.50 per month, general damages for breach of quiet enjoyment in the sum of \$200.00. From this decision of the learned magistrate, the appellant (defendant) has appealed on the grounds that:

The decision of the learned magistrate was erroneous in point of law because: (a) the judgment of \$323.50 represented loss of use of the room in question and general damages for breach of quiet enjoyment; (b) the learned magistrate misdirected himself when he stated that the respondent was not aware at the inception of the tenancy that the room formed part of the demised premises.

(2) The decision was unreasonable or could not be supported having regard to the evidence.

(3) The judgment was based on a wrong principle or was such that a magistrate viewing the circumstances reasonably could not properly have so decided.

When the appeal came up for hearing, counsel for the appellant began his arguments by referring to the case of Lavender v. Betts [1942] 2 All E.R. 72, and emphasising that there was no interference with possession. He said that quiet enjoyment presupposed that there was possession. The magistrate had found that the respondent was denied access to the room in question and never had possession.

In Lavender v. Betts the defendant landlord had removed the doors and windows of the flat in which the plaintiff tenant lived, rendering it habitable only at great discomfort to the plaintiff tenant. It was held that the acts of the defendant/ landlord were a breach of the covenant for quiet enjoyment which was an implied term of the statutory tenancy, and the plaintiff was entitled to punitive damages.

ATKINSON J., in the course of his judgment at p. 73 [1942] 2 All E.R. said *inter alia* "... a landlord has no conceivable right to interfere with their possession or to trespass upon the premises occupied by them, unless he obtains an order giving him possession of the premises."

Counsel for the respondent referred to s. 4 (1) of the *Landlord and Tenant Act, Cap 61:01* of the Laws of Guyana and said that the common law actions arising out of the relationship of landlord and tenant were preserved in the Laws of Guyana. He then referred to paragraph 1295 of Volume 23 of *Halsbury's Laws of England* (3rd edition) at page 604 and argued that, under the covenant for quiet enjoyment, the respondent was entitled to be put into possession of the premises which were leased to her at the outset of her tenancy and to remain quietly in possession thereof throughout the term. He said that there were two aspects. First, to be put into possession and second, quiet enjoyment of that possession.

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Counsel for the respondent referred to the case of Ludwell v. Newman [1795] 6 Term Rep. 458.

In the case of Ludwell v. Newman [1795] 6 Term Rep. 458 which concerned a covenant for quiet enjoyment the Court held *inter alia*:

“That the defendant’s covenant for quiet enjoyment meant legal entry and enjoyment without the permission of any other person ...”

He then referred to paragraph 1298 of the said Volume 23 of the *Halsbury’s Laws of England* at page 605 which stated *inter alia*:

“The covenant for quiet enjoyment operates according to its terms to secure the tenant, not merely in the possession, but in the enjoyment of the premises for all usual purposes; and where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts or omissions of the landlord or those lawfully claiming under him, the covenant is broken, although neither the title to the lands nor the possession thereof, may be otherwise affected. Whether this interference has taken place is, in each case, a question of fact.”

In the case of Jenkins v. Jackson [1888] 40 Ch. D. 71. KEKEWICH, J. in the course of his learned judgment said *inter alia*:

“But ‘quiet enjoyment’ in such a case did not mean enjoying without noise, but without interference with or interruption of the enjoyment of possession.”

Under s. 13 of the *Landlord and Tenant Act, Cap. 61:01* of the Laws of Guyana it is stated:

“The doctrine of *interesse termini* in the common law shall have no application in Guyana, and every tenant shall be deemed to have entered into possession of the land or buildings intended to be let as from the date fixed for the commencement of the tenancy, if the same were in possession of the landlord at the time of entering into the contract for a tenancy.” (emphasis mine.)

We interpret this relevant section under the *Landlord and Tenant Act* to mean that in circumstances such as the tenancy in this case, the tenant (plaintiff) would be deemed to be in possession of what is let, i.e. would be deemed to be in possession of the room in question under the house, as a matter of law (in spite of magistrate’s finding of fact to the contrary). This, it would seem to us also, emerges

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as the corollary in the consideration of the case of Miller v. Emcer Products Ltd. [1956] 2 W.L.R. 267, where it was held that the tenant was not entitled to damages because no covenant for title was implied in the underlease since the express covenant for quiet enjoyment extended on the true construction of the underlease to all property demised. The cases of Coe v. Clay [1829] 5 Bing. 440 and Jinks v. Edwards (1856) 11 Exch. 775 and the principle emerging from them that a lessor impliedly contracts to give the lessee possession of the property demised at the beginning of the term was also considered. ROMER L.J. considered several authorities in delivering the judgment of the Court of Appeal with SIR RAYMOND EVERSHED, M.R. and BIRKETT, J. He said *inter alia* at page 244. ([1956] 1 All E.R. 237):

“By the very force of the liability which is imposed on a lessor under the covenant of quiet enjoyment the tenant is entitled to be put into possession of the premises which are leased to him at the outset of his tenancy [Ludwell v. Newman [1795] 5 Term 458] and to remain quietly in possession thereof throughout his term.”

ROMER, L.J. then referred to a statement of CHITTY, J. in Wallis v. Hands [1893] 2 Ch. 75 at p. 84 to the effect that:

“... the essence of a breach of a covenant for quiet enjoyment in a lease appears to me to be a disturbance of the lessee’s possession;”

and went on to express in his own words:

“I do not, however, think that CHITTY, J. was intending to say that the covenant does not begin to operate until the tenant has obtained possession, for it is quite clear that it operates from the moment when the demised term starts to run.”

Earlier in his judgment in Miller v. Emcer Products Ltd., (*supra*) he had stated that the question as to whether a covenant for quiet enjoyment should be implied in parol lettings and in mere agreements was an uncertain one over a period of many years, and it was not until Markham v. Paget [1908] 1 Ch. 697 that SWINFEN EADY, J., after a review of the authorities, decided definitely that it should be so implied. Before the abolition of the doctrine of *interesse termini* (as stated under s. 13 of the *Landlord and Tenant Act, Cap. 61:01*) the law provided that a person having an *interesse termini* had adequate remedy against the grantor of a term who did not put him in possession, without the necessity of having to resort to an action on the covenant for quiet enjoyment. That action was found also on an implied covenant. But with the doctrine of *interesse termini* in the common law having no application to Guyana in terms of s. 13 of the *Landlord*

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and Tenant Act, Cap. 61:01, the only recourse left to a tenant, who is in fact a tenant, when he is not put in possession of all his tenancy, as he is entitled to be, is to bring an action for the breach of covenant for quiet enjoyment which is implied in his tenancy.

The appellant landlord in the case must have known that he was renting to the respondent tenant premises which included the lower room and for which the respondent would be obligated to pay the rent. Impliedly he was under an obligation at the commencement of that tenancy to put the tenant in possession of that tenancy which he was letting to him and to see that he remained quietly in possession of it. It is our view that if he did not put him in possession of the tenancy to which he was entitled, the tenant has a cause of action in Guyana for breach of the implied covenant of quiet enjoyment.

In the case of *Owen v. Gadd* [1956] 2 All E.R. 28, scaffold poles were erected immediately in front of the windows and door of the shop in order that necessary repairs should be carried out by the lessors to the upper part of the premises which they occupied. The poles remained there for eleven days. They interfered with the access of the public to the shop windows of the lessee and with her trade. In an action by the lessee for damages for breach of the covenant for quiet enjoyment, the county court judge found that the existence of the scaffolding constituted a breach of the covenant and was not so trifling or transitory in character as to disentitle the lessee from maintaining a claim, and awarded the lessee forty shillings damages.

It was held on appeal to the Court of Appeal (LORD EVERSLED, M.R., BIRKETT and ROMER, L. JJ.) that, the purpose of the demise being that the premises should be used as a shop for retail sale of particular articles, the erection of the scaffolding constituted an interference sufficiently physical and direct to be a breach of the covenant for quiet enjoyment and the decision of the county judge should stand. In the course of his learned judgment, LORD EVERSLED, M.R., said in [1956] 2 All E.R. at page 30:

“In the well-known text book *Foa’s General Law of Landlord and Tenant* (17th Edition) at p. 292, there is stated the following proposition under a heading ‘substantial interference with enjoyment.’

The question whether the quiet enjoyment of the premises demised has been interrupted or not is in every case one of fact; and the covenant is broken although neither the title to the land, nor the possession of the land, may be otherwise affected where the ordinary, lawful enjoyment is substantially interfered with by the acts of the lessor or those lawfully

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claiming under him.”

He went on to state at p. 31:

“I am prepared to assume that the disturbance or interruption must at least be of what is called a direct and physical character.”

It was argued by the counsel for the appellants in that case and repeated in the present appeal that there could be no breach of the covenant for quiet enjoyment unless there was what he called an actual physical interruption into or on the premises demised on the part of the landlords or some persons authorised by them by their actually entering on or invading the premise etc. LORD EVERSLED, M.R., thought that that submission was not justified by the authorities. He was supported in his conclusion by BIRKETT and ROMER, L. JJ.

Applying those considerations to this case, we are of the view that there is evidence on which the magistrate could have come to the conclusion that there was direct physical interference with the room in question by keeping it locked. We are of the view taken by LORD EVERSLED, M.R. in Owen v. Gadd (*supra*) that there is no sufficient warrant for any such limitation as advanced by counsel in this appeal to be placed on the language by FRY, L.J., as expressed in the well known case of Sanderson v. Berwick – upon – Tweed [1884] 13 Q.B.D. 547, which was reiterated in the language of PARKER, J. in Browne v. Flower [1911] 1 Ch. 219.

In this, as in other appeals from magistrates, we appreciate also, that the appeal is from the judgment of the magistrate and not from his memorandum of reasons for decisions, though these do give some guide as to his thinking on the issues which are raised on the case under review.

For the reasons given we are persuaded to the conclusion that on the facts the magistrate could have found as he did that the respondent never had the key to open and use the storeroom, and on the law that the respondent was entitled to be put into possession of that room, the possession of which was denied to her, and entitled to remain quietly in possession of that room. There was thus a breach of the implied covenant for quiet enjoyment of the premises including the storeroom and for this she was entitled to damages.

Accordingly, we dismiss the appeal and affirm the judgment of the magistrate with costs to the respondent in the sum of \$27.20 (twenty seven dollars and twenty cents).

Appeal dismissed. Decision of Magistrate affirmed.

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Costs to the respondent fixed at \$27.20.

MARIA AUSTIN AULT
a.k.a. ANNAMARIE LYNETTE AULT
Petitioner

v.

CECIL AULT
Respondent

[High Court (Collins, J.) November 4, 7, December 11, 30, 1975]

Custody – Custody of children of marriage granted to petitioner in divorce proceedings–Application by petitioner for leave to take children out of jurisdiction – Welfare of the child paramount consideration.

Contempt of Court – Respondent failing to hand over custody of child to petitioner in disobedience of order – Application by respondent for variation of order – Right to be heard – Welfare of the child.

On June 13, 1975 in divorce proceedings, the petitioner was granted a *decree nisi* as well as custody of the eight (8) children of the marriage.

On June 24, 1975, the petitioner filed an application before the High Court seeking leave of the Court to take the children out of the jurisdiction to the United States of America and for an order that the respondent deliver to the petitioner one of the children of the marriage still in his possession.

On September 19, 1975 the respondent filed an application seeking a variation of the order made in the divorce proceedings on June 13, 1975 so as to exclude the one child, Anthony, whom he still had in his possession.

The applications were heard together because they both dealt with substantially the same matters.

Counsel for the petitioner objected to the respondent being heard because he had disobeyed an order of court by not handing the one child over to the wife.

HELD: (1) The respondent was clearly in contempt of court but the fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard where the disobedience did not impede the course of justice.

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(2) In deciding the question of custody and upbringing of a child, the Court should have regard to the welfare of the child as the first and paramount consideration. Having regard to all the circumstances, the child should grow up in the society of his brothers and sisters.

(3) Custody of the child granted to the petitioner with leave to take all the children out of the jurisdiction to the United States of America.

**Petitioner's Application granted.
No order as to costs.**

Cases referred to:

- (1) Hall v. Hall [1963] P. 378; [1963] 2 W.L.R 1054; [1963] 2 All E.R. 140. (1963) 107 Sol. Jo. 338.
- (2) B (M) v. B (R) [1968] 1 W.L.R. 1182; [1968] 3 All E.R. 170; (1968) 112 Sol. Jo. 504;
- (3) Hadkinson v. Hadkinson [1952] P. 285; [1952] 2 All E.R 567. [1952] 2 T.L.R. 416.

Stanley Moore for the petitioner.
Ashton Chase for the respondent.

COLLINS, J.: These proceedings concern the children of the marriage of parents now divorced from each other. In the divorce proceedings instituted by the wife, the husband did not appear and a *decree nisi* was granted to the wife by HARPER, J. on the 13th June, 1975, on the ground of malicious desertion and she was also granted custody of the eight (8) children of the marriage. The present proceedings arose from two applications. Firstly, on 24th June, 1975, the wife filed an application for leave to take the children out of the jurisdiction to the United States of America, and for an order that the husband deliver one of the children of the marriage who he still had in his possession to the wife. The husband filed an answer. This was fixed for hearing on November 15, 1975 before HARPER, J. Secondly, on 19th September, 1975, the husband filed an application seeking a variation of the order of HARPER J., made in the divorce proceedings on 13th June, 1975 so as to exclude the child, Anthony. In other words, that the husband should be excused from delivering Anthony to the wife. The wife filed an affidavit in answer. On 28th October, 1975 during the hearing of the Chambers List, I fixed 3rd December, 1975, for the hearing of this application. Later on 28th October, 1975, Mr. Moore, counsel for the wife, requested that both the applications be heard at an earlier date as the wife was travelling to Guyana early in November for a limited stay, and would be available to give evidence. Accordingly, with the consent of HARPER J., I caused notices to be

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sent out that the matter would be heard before me on 5th November, 1975. Both applications carried the same number 1236/74 because both flowed from the divorce proceedings No. 1236/74. Notices, therefore, would not differentiate between the first and the second application. However, on 5th November, 1975, I intimated that I was proceeding with both applications together on the affidavits and that counsel may cross-examine the husband and wife on the affidavits. Counsel for the husband said that he had received no notice of hearing and was not in a position to cross-examine the wife. The matter was then adjourned from 9.30 a.m. to 1:00 p.m. when counsel began to cross-examine the wife. The husband himself arrived a few minutes after 1:00 p.m. I heard the applications together because they both dealt with substantially the same matters. Two short *dicta* from the reported cases seem to support this view.

In Hall v. Hall [1963] 2 All E.R. 140, ORMROD, L.J. said at p. 141:

“On October 25th there was before the Registrar a summons by both parties to vary the order as to access. So far as the husband was concerned, it was an application that the children should come to him for Christmas; the wife’s application was that the husband should no longer have access, pending suit, to the children of the marriage. The learned Registrar dismissed the application ...”

In B (M) v. B (R) [1968] 3 All E.R. 170, WILLMER, L.J. said at p. 171:

“Having established herself with her new husband in this new home, the mother applied to the High Court for an order for custody of Amanda. There was a cross-application by the father, who also asked for an order of the High Court for custody in his favour. That is how the matter came before the Judge.”

Mr. Moore, counsel for the wife, submitted early in the hearing that the husband ought not to be heard because HARPER, J., made an order giving custody of all the children to the wife, and that the husband had not brought the child, Anthony, to the Court, nor had he handed the child over to the wife. During his cross-examination the husband admitted that he had signed a copy of the *decree nisi* of divorce; that he understood that custody of all the children had been given to the wife; and that he had not handed over the child, Anthony, to the wife in accordance with the order of HARPER, J. It seemed clear then, that the husband was in contempt of the order of HARPER, J. I continued, however, to hear his application on the merits. In the case of Hadkinson v. Hadkinson [1952] 2 All E.R. 567 DENNING, L.J. said at page 575:

“The fact that a party to a cause had disobeyed an order of the court was

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not of itself a bar to his being heard, but if his disobedience was such that, so long it continued it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the order which it might make, then the court might, in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.”

In the case before the learned Lord Justice a wife who had successfully petitioned for divorce, was given the custody of the only child of the marriage, a boy, until further order of the Court, but directed that he should not be removed out of the jurisdiction of the Court without its sanction. Having remarried after the decree absolute she later caused the child to be removed to Australia where she was living with her present husband. On a summons issued by the father of the child, WALLINGTON, J., on May 29th, 1952 ordered the mother to return the child within the jurisdiction not later than 31st August, 1952. She appealed against this order but it was held that she could not prosecute her appeal until she took the boy back to England. In the present case, the child, Anthony, was with the father in Guyana. I do not think the considerations referred to by DENNING, L. J., apply. I heard the case on its merits notwithstanding the contempt.

The case for the wife is that the parties were married in 1960 and have eight (8) children born between 1960 and 1972. The wife left Guyana for the United States of America and returned in June, 1974, spent one month here and returned to the United States of America. She returned to Guyana in June, 1975, and left in July, 1975. She has established herself as a permanent resident in the United States of America. She and the husband were divorced in June, 1975. She wants to take all the children to New York in the United States of America, where she has a job paying \$114.00 (one hundred and fourteen dollars) (US) per week working from 5 p.m to 11 p.m. and has a rented home in which to house herself and the children. When the wife went to the United States of America she left the children with the husband who lived in a house with the wife’s mother. The wife says she has not seen Anthony since he was two years old.

The case for the husband is that, for a year after the wife went to the United States of America, he lived with the children at the home of the wife’s mother, Miss Canterbury, until she put him out of the home. The husband took the children with him to his new home. Gradually, the children left the father’s home and went back to Miss Canterbury, their grandmother’s home; all the children, that is, except Anthony, born on 21st August, 1968. The elder sons each visited the father and told him they were going to steal Anthony from him and take him to their grandmother. To avoid this, the husband took Anthony to live at friends at Mocha Village for a few months. When Anthony returned to the father’s home the

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father said he did not send him to school for fear that the elder sons might steal Anthony and take him to the grandmother. The husband works for a cinema and earns \$42.16 (forty two dollars and sixteen cents) per week. He now lives with one Megan Martin, a married woman, separated from her husband. With them live Megan Martin's three (3) children by her first husband. The husband and Martin have 2 (two) children of their own, one 2 years old and the other 6 months old. Anthony also lives with the husband. Since the Ault children have left the home, the husband does not support them, but two of the children, Ann (15) and Jerome (10) visit him. The husband is much attached to Anthony and says that Anthony is to him. He is hoping to get Anthony started at school at St Pius in East La Penitence. He already goes to Sunday School there. The husband has hardly seen the last child of the marriage, Julian, who was born in the United States of America. The husband says he does not wish to see his children brought up in the United States of America. He wants them brought up at home in Guyana. By and large, I think that both parties gave their evidence truthfully. Where, however, there is conflict between the testimony of the parties, I prefer the evidence of the wife.

In deciding the question of custody and upbringing of a child, the Court should regard the welfare of the child as the first and paramount consideration. But paramount does not mean exclusive. I have had to consider whether Anthony should be left with his father and the father would have one of the eight (8) children of the marriage or whether Anthony should be with his mother and thus grow up with his other brothers and sisters. I have had to consider whether the children should be allowed to leave Guyana perhaps for good and never to know their father or whether they should remain here and probably grow up without a mother. In all the circumstances, I decided that Anthony should go into the custody of the wife so that he can grow up in the society of his brothers and sisters and that the wife should have leave to take all the children out of the jurisdiction to the United States of America. I made no order as to costs.

**Application granted to petitioner.
No order as to costs.**

Solicitors:

D.P. Bernard for petitioner.

H.B. Fraser for respondent.

TELBERT CLEMENT

Plaintiff

v.

**C.B. AUSTIN, COMMISSIONER OF POLICE
REYNOLDS GUYANA MINES LTD.**

Defendants

and

H. FRASER

Added defendant

[High Court (Bollers, C.J.) March 5, April 2, 26, June 10, 25, 1975]

Employment – Termination of – Supernumerary constable appointed by Commissioner of Police and employed by private company – Notice of termination of employment issued by Commissioner of Police – Whether employment terminated by the notice – Power of Commissioner of Police – Police Ordinance No. 39 of 1957 (now Police Act, Cap. 16:01), ss. 82 (6), 84 (1) (6).

Commissioner of Police – Officer of the State – Injunction against officer of the State in his official capacity.

Natural Justice – Fair hearing – Termination of employment of supernumerary constable by Commissioner of Police in accordance with Statute – No opportunity to be heard – Whether principles of natural justice applicable.

Master-servant contract – Breach – Remedy therefor – High Court Act, Cap. 3:02, s. 38 (2)

The plaintiff who was a supernumerary sergeant appointed by the first-named defendant, Commissioner of Police under s. 84 (1) of the *Police Ordinance, No. 39 of 1957*, (now *Police Act, Cap. 16:01*) and employed by the second-named defendant, Reynolds Guyana Mines Ltd. on the terms and condition of a contract, brought an action against both defendants claiming that he was wrongfully dismissed from his employment as a supernumerary constable. He sought, *inter alia*, a declaration that the first-named defendant's purported revocation of his appointment as a supernumerary constable was void and of no effect. He also contended that he was still in the employ of the second-named defendant because his employment was not terminated by the second-named defendant and because he was never charged for any offence alleged by either of the defendants as a basis for his dismissal nor was he given a chance to be heard in his own defence in

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relation to his dismissal.

The first-named defendant died subsequent to the filing of the writ and H. Fraser the incumbent of the post of Commissioner of Police was added as a defendant, in his official capacity.

HELD: (1) A State's servant cannot be sued either in contract or in tort in his official capacity. However, an action for damages may be maintained against him in his individual capacity. Seccomar et anor v. R.C. Butler [1973] L.R.B.G. 86 and Harry v. Thorn (1966-67) 10 W.I.R. 348 applied.

(2) The defendants were sued for damages for breach of contract and the action, if at all maintainable, must be brought in accordance with the provisions of s. 38 (2) of the *High Court Act, Cap. 3:02* in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant or any other officer authorised by law with the consent of the appropriate Minister.

(3) The plaintiff was given one month's notice by the Commissioner of Police in accordance with s. 82 (6) of the *Police Act, Cap. 16:01* and it therefore follows that he acted within his powers and therefore there is no cause of action against the defendants. Demerara Bauxite Co. v. Hunte 21 W.I.R. 109

(4) Had the Commissioner of Police not given the required one month's notice he would have been legally responsible in his personal capacity in which case the added defendant could not be visited with that omission, as it would not be his act or omission.

(5) The plaintiff was properly dismissed under s. 82 (6) of the *Police Act, Cap. 16:01* and where the Commissioner of Police gives the employee one month's notice of the termination of his employment it is immaterial whether or not the employer gives two months' notice or no notice at all.

(6) The plaintiff was a mere servant and in a situation such as this the rules of natural justice have no application and there is thus no room for the injection of the *audi alteram partem* principle. There is nothing in the legislation in relation to s. 82 (6) which requires the defendants to determine any right or obligation of the plaintiff, hence there is no duty to act judicially.

(7) This is a case of master and servant contract, the remedy for a breach of which is damages.

**Action dismissed.
Judgment for the defendants.**

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Cases referred to:

- (1) Demerara Bauxite Co. Ltd. v. Joseph Hunte 21 W.I.R. 109.
- (2) Seecomar Singh *et anor* v. R.C. Butler [1973] L.R.B.G. 86.
- (3) Abrams v. The Anglican School [1960] L.R.B.G. 78; (1960) 2 W.I.R. 187.
- (4) Raleigh v. Goschen [1989] 1 Ch. 73; 77 L.T. 429; 14 T.L.R. 36.
- (5) Bambridge v. Post Master General [1906] 1 KB. 178.
- (6) Hosier Bros. v. Derby (Earl) [1918] 2 KB. 671.
- (7) Jaundoo v. Attorney-General (1972) 16 W.I.R. 141.
- (8) Harry v. Thorn [1967] L.R.B.G. 68; (1966-67) 10 W.I.R. 348.
- (9) Board of Education v. Rice [1911-13] All E.R. 36.
- (10) Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] All E.R. 66.
- (11) Vidyodaya University of Ceylon v. Silva [1965] 1 W.L.R. 77; [1964] 3 All E.R. 865; 108 Sol. Jo. 896.
- (12) Vine v. National Dock Labour Board [1957] AC. 488; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939; 106 Sol. Jo. 86.

F. R. Allen for plaintiff.

E. Beharry for first-named defendant.

E. Luckhoo for second-named defendant.

BOLLERS, C.J.: The plaintiff originally brought this action against the first-named defendant Carl B. Austin, Commissioner of Police and the second-named defendant Reynolds Guyana Mines Ltd., alleging that he was wrongfully dismissed from his employment by the company as a supernumerary constable and claiming a declaration that the first-named defendant's purported revocation of his appointment as a supernumerary constable was void and of no effect, payment of his salary and other emoluments due to him since his purported dismissal, alternatively damages and pecuniary compensation for his wrongful dismissal, and lastly an injunction restraining the defendants from carrying into effect any action in respect of the notice of dismissal served on him. Subsequent to the filing of this writ the first-named defendant died and the plaintiff obtained an order substituting Henry A. Fraser the present incumbent of the post of Commissioner of Police as an added defendant.

In his statement of claim in brief the plaintiff avers that he was duly appointed a supernumerary sergeant by the first-named defendant under s. 84 (1) of the *Police Ordinance No. 39 of 1957* (now the *Police Act. Cap. 16:01*) and duly sworn in on the 7th December, 1970. Thereafter he continued in employment with the second-named defendant on the terms and conditions of a contract. On the 15th of June, 1972, he received a notice from Carl B. Austin, Commissioner of Police

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purporting to revoke his appointment as a supernumerary sergeant from the 1st of August, 1972, in accordance with the provisions of s. 84 (6) of the *Police Ordinance No. 39 of 1957* (now *Cap. 16:01*) and calling upon him to hand in to the quartermaster by the 31st July, 1972, all government property issued to him. His main complaint is therefore that such a revocation of his appointment is null and void and he is still in the employ of the second-named defendant because his employment was not terminated by his employer the second-named defendant, and because he was never charged for any offence alleged by either of the defendants as a basis for his dismissal nor was he given a chance to be heard in his own defence in relation to his dismissal.

At the hearing counsel for the defendants made certain preliminary objections *in limine*, only some of which I consider necessary on which to rule. Counsel for the first-named defendant submitted:

- (1) The Commissioner of Police is not a legal person and cannot be sued in his official capacity; proceedings were erroneously brought against him in his official capacity and cannot be sustained.
- (2) An injunction cannot be obtained against an officer of the State in his official capacity.
- (3) Court would have no jurisdiction because an injunction cannot be issued to restrain the defendant from discharging the functions vested by law in him in his capacity of Commissioner of Police.
- (4) The action is not maintainable against the first-named defendant in view of s. 82 of the *Police Act, Cap. 16:01*

Counsel for the second-named defendant submitted in effect that if the revocation of the appointment of the plaintiff by the Commissioner of Police was lawful then it would follow that his employment with the second-named defendant company must terminate or the company would be committing an illegality against the criminal law by employing a person to guard firearms and explosives who is no longer legally authorised to do so. Counsel also submitted that the plaintiff was also properly dismissed under s. 82 (6) of *Police Act, Cap. 16:01* and as was decided in the case of The Demerara Bauxite Co. Ltd v. Joseph R. Hunte where the Commissioner of Police gives the employee one month's notice of the termination of his employment it is immaterial whether or not the employer gives two months' notice or no notice at all.

It must be made clear that in this case counsel for the plaintiff stated categorically and it is verified by the rubric that the added defendant was being sued here in his

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official capacity, and the arguments proceeded on that basis. The law is well settled in Guyana as I understand it that the *Republic Act No. 9 of 1970* which declared Guyana to be a Republic replaced the concept of the Crown by the State and that the State's servant in accordance with the common law though he retain his personal liability for torts committed, ordered or directed by him, he cannot be sued for such wrongs in his official capacity. In Seecomar Singh et anor v. R.C. Butler No. 1685 of 1973 where I reviewed all the authorities: Abrams v. The Anglican School [1960] L.R.B.G. 78; Raleigh v. Goschen [1898] 1 Ch. 73; Bambridge v. Postmaster General [1906] 1 K.B. 173; Hosier Bros. v. Debry (Earl) [1918] 2 K.B. 671 and Jaundoo v. Attorney General (1972) 16 W.I.R. 141 at p. 148, I held that a State servant cannot be sued either in contract or in tort in his official capacity nor can an injunction be granted against him to restrain him from doing any act in his official capacity; and I can find no reason to depart from this opinion. This view is supported by the judgment of the Full Court in Harry v. Thorn (1966-67) 10 W.I.R. 348 at p. 349 where the Court held that in the absence of legislation similar to *Crown Proceedings Act 1947* (U.K.) in this country no judgment can be entered against a Crown servant for any unauthorised act done by him in that capacity, though an action for damages may be maintained against him in his individual capacity. In any event the plaintiff here has sued both the defendants for damages for what he alleges to be a breach of contract and the action if at all maintainable must be considered in the nature of a claim which may be preferred against the Crown in English by petition, and as a result must be brought in accordance with the provisions of s. 38 (2) of the *High Court Act, Cap. 3:02* in a suit instituted by the claimant as plaintiff against the Attorney General as defendant or any other officer authorised by law with the consent of the appropriate Minister.

The plaintiff admits that he was employed under s. 82 (6) of *Police Act, Cap. 16:01* and contends that his dismissal was wrongful and unlawful as he did not receive two (2) months' notice or indeed any notice at all of the termination of his employment from his employers, the second-named defendants; but on a reading of the section it is clear that there is no compulsion placed on the employer to give such notice. That section enacts as follows:

“Where any person availing himself of the services of supernumerary constables, subordinate officers, inspectors or officers no longer desires to maintain such supernumerary constables, subordinate officers, inspectors or officers, or wishes to reduce the number of such supernumerary constables, subordinate officers, inspectors or officers in his service, he may terminate their services by giving two months' notice thereof in writing to the Commissioner. A supernumerary constable, subordinate officer or inspector shall be given one month's notice of the termination of his employment by an officer of police.”

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In Demerara Bauxite Co. v. Hunte at p.23 of the judgment of the learned Chancellor it states:

“The law therefore permits him (the employer) to have the legal right of ceasing to be responsible for payment by giving two months’ notice to the Commissioner, but the Commissioner must within this period terminate the employment by one month’s notice or run the risk of making himself legally responsible if he fails to comply accordingly.

Whilst the Commissioner has the right to insist on two months’ notice from the employer before he moves, there is nothing to prevent him from dispensing with the whole or any part of this notification, which is for his convenience, and proceed immediately to give him one month’s notice of termination.”

And the judgment states categorically that there is nothing to prevent the Commissioner on his own from dismissing a supernumerary constable, irrespective of the wishes of the employer, if he deems it fit so to do on the giving of one month’s notice. There is good reason for this, for if it comes to the knowledge of the Commissioner of Police that the individual is not a fit and proper person to have been appointed a supernumerary constable it is only right that he should revoke his appointment, and not let the employer run the risk of having on his premises such a person assigned to guard explosives and firearms which are materials dangerous in themselves. The plaintiff has admitted that he was given the one month’s notice by the Commissioner of Police and therefore it follows that the Commissioner of Police acted in accordance within his powers under s. 82 (6) of the Act.

The allegation in the statement of claim that he was not charged for any offence nor was he given a hearing in his own defence in relation to the dismissal so that he continues to be in the employment of the second-named defendant is without foundation in law. I think I can say with safety that it is well settled that in a situation such as this the rules of natural justice have no application and there is no room for the injection of the *audi alteram partem* principle. In the Board of Education v. Rice [1911-13] All E.R. 36 decided by the House of Lords as long ago as 1911 LORD LOREBURM stated:

“Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon Departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes up for determination is a matter to be settled by discretion involving no law. It will, I suppose, usually be

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of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial.”

Subsequent authorities which received their climax in the case of Ridge v. Baldwin [1963] 2 All E.R. 66 reveal that where a body or authority is called upon to determine what the rights of an individual should be and must act judicially or in a quasi judicial capacity then the principles of natural justice must be imposed. This is not such a case. There is nothing in the legislation in relation to s. 82 (6) *Cap. 16:01* which requires either the first-named or the second-named defendant to determine any right of the plaintiff hence there is no duty to act judicially. This is a simple case of a master and servant contract, the remedy for a breach of which is damages. As LORD REID pointed out in Ridge v. Baldwin in considering the application of the principles of natural justice to the cases of dismissal, there are three classes of cases to be distinguished:

- (i) dismissal of a servant by a master [See Vidyodaya University of Ceylon v. Silva [1965] 1 W.L.R. 77];
- (ii) dismissal from office held at pleasure; and
- (iii) dismissal from an office where there must be something against a man to warrant his dismissal;

and it is only the third class of case that the principles of natural justice arise. Thus the Courts have repeatedly held that an official is to act as a tribunal where facts are to be “made to appear” to him or he must “be of opinion” that they exist, or his powers are exercisable where he “deems” certain conduct suspicious, or he is to be “satisfied” of a certain state of facts, or he is “to inquire and decide” certain matters. In the present action the plaintiff is not an official and the second-named defendant is not an official body of authority, and the legislation does not require either the first or the second-named defendant to determine any right or obligation of the plaintiff. The plaintiff is a mere servant of his employer, and when his employment was terminated and his appointment as a supernumerary constable was revoked the defendants were not sitting as a tribunal. The general principle governing dismissal of a servant was stated by LORD KEITH in Vine v. National Dock Labour Board [1957] A.C. 488, 507:

“Normally and apart from the intervention of statute, there would never

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be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages.”

It is the opinion of Zamir in his “declaratory judgment” at p. 141, that generally speaking, the principle applies to public as well as to private employment, especially so in the not infrequent cases where public authorities are given explicitly or implicitly the statutory power to dismiss their employees at pleasure. Such powers of dismissal, it was held could not be negated or impaired by contract. It is true that statutory provisions may limit the power of dismissal and where such limitation is disregarded, a dismissal may be held invalid. There have been cases therefore where dismissal from public employment not falling within the four corners of the statutory powers to dismiss is declared invalid and of no effect. The present action however, is not such a case, and it is conceded that the Commissioner of Police followed the procedure as laid down in s. 82 (6) of *Cap. 16:01* when he gave the required one month’s notice as decided by the Court of Appeal in Demerara Bauxite Co. v. Hunte. Had he not done so, then he might, as stated by the learned Chancellor at page 23 of his judgment, have run the risk of making himself legally responsible for his personal default if he failed to comply accordingly. The legal responsibility referred thereto I understand to mean responsibility in his personal capacity in which case the added defendant could not be visited with that omission, as it would not be his act or omission.

It must follow then that there is no cause of action against either defendant (No. 2 or added) disclosed in the statement of claim and the action must be dismissed and judgment entered in favour of the defendants with costs to be taxed against the plaintiff.

Stay of execution granted for six (6) weeks.

**Action dismissed.
Judgment for the defendants.**

Solicitors:

H.B. Fraser for plaintiff.

State Solicitor for first-named defendant.

E.A. Luckhoo for second-named defendant.

ARJUNE SINGH

Plaintiff

v.

SUKIA

NAKERAM SAWH

SOOKDEO SAWH

Defendants

[High Court (Bollers, C.J.) April 29, May 8, 1975]

Pleadings – Striking out – Pleading disclosing no reasonable cause of action – Recourse only in plain and obvious cases – Rules of the High Court, Cap. 3:02, O. 17, rr. 4, 32.

Pleadings – Amendment – Application for leave to amend statement of claim six years after consent judgment – Whether leave should be granted.

Estoppel – Res judicata – Judgment by consent – Subsequent action flowing from consent judgment – Consent judgment binding until set aside.

Equity – Laches and acquiescence.

In 1967 the plaintiff was sued by the first named defendant for a sum of money and the plaintiff consented to judgment with respect to part of the said sum and obtained leave to defend as to the balance of the claim. There was no appeal from the consent judgment.

The plaintiff's properties were then levied upon in satisfaction of the judgment and sold at execution sale to the second and third named defendants and subsequently transports for those properties were passed to them. In 1969 they were declared the owners of the aforesaid properties by an order of the Court. The plaintiff filed this present action seeking *inter alia* an order that the execution sale was null and void and a declaration that he was still the owner of the properties. Nowhere in the plaintiff's statement of claim in the present action did he seek an order setting aside the judgment. He however alleged fraud and argued that he was mentally ill during the history of the actions.

Counsel for the defendants submitted that the statement of claim disclosed no existing cause of action and that even if the matters pleaded were established the plaintiff would not be entitled to the declarations or injunctions sought because, *inter alia*, the matters put in issue by the plaintiff were already litigated and determined.

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HELD: (1) Facts must be alleged which must, not may, amount to a cause of action.’

(2) If the facts averred in the statement of claim do not in law entitle the plaintiff to any of the reliefs claimed, there is no cause of action and in deciding whether a statement of claim discloses a reasonable cause of action or not the Court may look only at the statement of claim and no other document or pleading.

(3) It is only in plain and obvious cases that recourse should be had to the summary process of striking out pleadings which are vexatious or frivolous or in any way an abuse of the process of the Court under O. 17 r. 32 as the Court will not permit a plaintiff to be driven from the judgment seat except where the cause of action is obviously bad and almost incontestably bad.

(4) A consent judgment operates as a barrier to any further litigation and is binding until set aside and if there was any irregularity in the obtaining of the judgment by consent the plaintiff must be considered to have waived it.

(5) The plaintiff is seeking to re-open a matter which has already been the subject of litigation and which has already been adjudicated upon, the subject matter of which must be considered *res judicata*.

(6) Leave to amend statement of claim denied as the plaintiff slept upon his rights and acquiesced for a great length of time and must be met with the maxim that delay defects equity.

Action dismissed with costs to the defendants to be taxed.

Cases referred to:

- (1) Bruce v. Oldhams Press Ltd. [1936] All E.R. 287.
- (2) Dyson v. Attorney General [1911] 1 K.B. 410.
- (3) Rediffusion (Hong Kong) Ltd. v. Attorney General of Hong Kong [1970] A.C. 1136; [1970] 2 W.L.R. 1264; 114 Sol. Jo. 455, P.C.
- (4) Kinch v. Walcott [1929] A.C. 483.
- (5) Jonesco v. Beard [1930] A.C. 298.

C. La Bennett for plaintiff.

A. Chase for defendants.

BOLLERS, C.J.: The background to this action reveals that in 1955 the plaintiff and the first-named defendant executed a joint mortgage on their properties situate at 34-38 Huis't Dieren, Essequibo and 36-37 Middlesex, Essequibo respec-

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tively in favour of the British Guiana Credit Corporation, in order to enable the plaintiff to obtain a loan, from the aforesaid corporation. The plaintiff failed to honour the terms and conditions of the mortgage deed and was in arrears of interest and capital, as a result there was a foreclosure of the mortgage and threatened execution. In 1965 the first-named defendant paid the sum of three thousand eight hundred and three dollars and twenty-nine cents (\$3,803.29) towards the capital interest and legal expenses in order to liquidate the balance due on the mortgage and between the years 1955 – 1963 had paid one thousand two hundred and fifty dollars (\$ 1,250.00) towards the said mortgage.

In 1967 the first-named defendant then filed a writ against the plaintiff claiming the sum of five thousand and fifty three dollars and nine cents (\$5,053.09) owing and payable to him and the plaintiff in action No. 435/66 consented to judgment in the sum of three thousand eight hundred and three dollars and twenty-nine cents (\$3,803.29) and obtained leave to defend as to the balance of the claim, stay of execution for six (6) weeks was granted. This sum was never paid and another application for stay of execution was made, but refused. In August, 1966, lots 34-40 Huis't Dieren with the erections thereon were sold at execution sale and purchased by the third-named defendant, and in October, 1966, the second-named defendant purchased lots 41-44 Huis't Dieren at execution sale; and in January, 1967, he purchased lots 45-48 Huis't Dieren in like manner. Transports in respect of all these properties were in 1966 and 1967 conveyed to the purchasers after execution sale. In action number 1018/67 the second and third-named defendants filed a writ against the plaintiff, alleging that he had gone onto the land which had been purchased, and transported to them, and reaped the fruits and crops from the said land and had generally trespassed thereon, and prevented them from entering on the said land whereby they claimed possession of the said lots and declarations accordingly that the third-named defendant Sukhdeo Sawh was the owner of lots 34-40 section 'H' Huis't Dieren and the second-named defendant Nak-eram Sawh was the owner of lots 41-48 Huis't Dieren. These two defendants succeeded on a summons in obtaining an interlocutory injunction against the plaintiff restraining him from entering on the land until the determination of the action. A summons was then filed by the plaintiff seeking an order to set aside the interlocutory injunction. This application was subsequently struck out. A subsequent application was made for an order to set aside the order on which the interlocutory injunction was obtained and this application by way of summons was again struck out for non-compliance with Order 35 r. 14 of the High Court Rules.

The action proceeded and eventually on the 7th January 1969, an order was made by GEORGE J. declaring the two defendants to be the owners and the persons entitled to the possession to the lots claimed by them as aforesaid and an injunction was granted against the plaintiff restraining him from entering on lots 34-48

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section 'H' Huis't Dieren and from interfering with the peaceful occupation and the enjoyment of the aforesaid property by the two defendants.

The plaintiff in the present action in the endorsement to the writ now claims a declaration that at all material times subsequent to July 25, 1965, he was and is still the owner by transport of lots 34-48 Huis't Dieren; he also claims a declaration that by reason of his illness in 1966 he was incapable of properly putting his case or seeking proper and adequate representation in litigation in that year, a declaration that by reason of misleading and false information given to the Court in his absence in action No. 1018/67 the judgment be set aside and a declaration that the purported sales at execution of lots 34-48 Huis't Dieren were null and void and of no effect and an injunction that the numbers two and three defendants be restrained from selling or alienating the said lots.

In his statement of claim the plaintiff alleges that in 1964 because of ill health the first and second named defendants suggested he make a will and he did so, and for the purpose of drafting the will the plaintiff delivered to the numbers one and two defendants transport No. 1324/55 for the said properties. At the time of action No. 435/66 he was mentally ill and could not attend Court, and seek proper legal representation nor could he have authorised any solicitor to act on his behalf. As a result the first and second-named defendants obtained orders in action No. 435/66 without his knowledge and in his absence due to his mental illness. He alleges that the first-named defendant did not disclose to the Court the true amount of money that he owed to the corporation nor did the first-named defendant disclose an arrangement which the two of them had with the corporation. He alleges that by reason of these false and incomplete misrepresentations and disclosures to the Court, the second-named defendant obtained judgment for three thousand eight hundred and three dollars and nine cents (\$3,803.09).

When he became aware that execution was being levied on his property he made application by way of summons for a stay of execution, but because of his mental illness he could play no further part in the matter and his application was refused when he failed to appear on the date fixed for hearing of the matter in Chambers. He claims that for the entire history of action 1018/67 he was mentally ill, was incarcerated at the instance of the first and second-named defendants with the view of being sent for mental observation, and was again institutionalised at the mental hospital.

His main contention is that during the entire history of the action 1018/67 he played little or no part in the Court proceedings as he was either not well enough to attend Court or was totally unaware that there were fixtures for Chambers or otherwise. He therefore claims:

- (a) an order that transport No. 1324 of 25th July, 1955, be returned to

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the plaintiff forthwith;

- (b) that the purported sale at execution on August 9, 1966, October 25, 1966 and January 17, 1967, respectively, be declared null and void and of no effect;
- (e) a declaration that the said lots 34-48 section 'H' Huis't Dieren, Essequibo Coast, are still the property of the plaintiffs;
- (d) an injunction restraining the defendants or any of them from selling or otherwise disposing of the said lots 34-48 section 'H' Huis't Dieren, Essequibo Coast.

Alternatively, that the defendants pay to the plaintiff the sum of sixteen thousand dollars (\$16,000.00) being the value of the said lots 34-48, Huis't Dieren, Essequibo;

- (e) damages in excess of five hundred dollars (\$500.00).

Counsel for the defendants now makes a submission *in limine* that the statement of claim discloses no existing cause of action and even if the matters pleaded were established the plaintiff would not be entitled to the declarations or injunctions sought. The submission is founded on six (6) grounds:

- (1) The matters now put in issue by the plaintiff have already been litigated and determined;
- (2) The plaintiff has failed to comply with Order 35 r. 13;
- (3) Assuming, but not admitting any irregularity or voidable act, the plaintiff having acquiesced in or waived the irregularity cannot now complain of it,
- (4) Laches and limitation operate against the plaintiff;
- (5) The plaintiffs consent in a previous relevant action operates as an estoppel against succeeding in this action;
- (6) The property in issue having passed to innocent third parties equity will not grant the declaration sought.

Order 17 r. 4 of the High Court Rules states that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the

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party pleading relies for his claim or defence. And in Bruce v. Odhams Press Ltd. [1936] 3 All E. R. at p. 294 it was stated by SCOTT L. J. that:

“The word material means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted the statement of claim is bad.”

Facts must be alleged which must, not may, amount to a cause of action. See S.C.R 1970, p. 247. Order 17 r. 32 which follows the English Order 18 r. 19 empowers the Court to strike out any pleading on the ground that it discloses no reasonable cause of action. And in the case of the action being shown by the pleadings to be frivolous or vexatious the Court or a Judge may order the action to be stayed or dismissed or judgment entered accordingly as may be just. In the S.C.P 1970, p. 284, it states that apart from the rule the Court has an inherent jurisdiction to stay or dismiss actions and to strike out pleadings which are vexatious or frivolous or in any way an abuse of the process of the Court; it is however only in plain and obvious cases that recourse should be had to the summary process under this rule. In Dyson v. Attorney General [1911] 1 K. B. at p. 419, it was said by FLETCHER MOULTON L.J. that the Court will not permit a plaintiff to be driven from the judgment seat except where the cause of action is obviously bad and almost incontestably bad. In Rediffusion (Hong Kong) Ltd. v. Attorney General of Hong Kong. [1970] 2 W.L.R. 1264, at p. 1271 (H) LORD DIPLOCK said:

“‘a cause of action’ is a state of facts the existence of which entitles the Court to grant to the plaintiff the relief applied for in the action.”

Thus, if the facts averred in the statement of claim do not in law entitle the plaintiff to any of the reliefs claimed, there is no cause of action.

I am of the view therefore, that in deciding whether a statement of claim discloses a reasonable cause of action or not the Court may look only at the statement of claim and no other document or pleading. The submission however, does not stop there, but includes the allegation by the defence that this matter is *res judicata* and I am of the view that in that situation if there is no dispute as to the facts alleged by the defendant, the Court can then consider the whole of the pleadings filed.

In this case, from the documents which have been filed and from the records of action No. 455/66 and 1018/67 it is beyond dispute that when the plaintiff was sued by the first-named defendant for the sum of five thousand and, fifty-three dollars and nine cents (\$5,053.09) being the total sum paid to the British Guiana Credit Corporation for the plaintiff's indebtedness to them, the plaintiff consented

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to judgment in the sum of three thousand eight hundred and three dollars and twenty-nine cents (\$3,803.29) from which there was no appeal, and that consent must operate as a barrier to any further litigation. No application was ever made to set aside this judgment. A judgment by consent is therefore binding until set aside and acts as an estoppel. See Kinch v. Walcott [1929] A.C. 483. The plaintiff's properties were then levied upon in satisfaction of the judgment and sold at execution sale to the second and third-named defendants and subsequently transports to those properties were passed to them. In action No. 1018/67 by Order of Court dated January 7, 1969, and entered February 7, 1969, they were declared to be the owners of the aforesaid properties. It is clear that this subsequent action flowed from the consent judgment obtained in action No. 455/66, and nowhere in the plaintiff's statement of claim in the present action does he seek an order setting aside this judgment. He merely alleges that he was mentally ill during the history of the hearing of these two actions. In point of fact the fly sheet of action No. 1018/67 discloses that the plaintiff was represented by counsel when he filed the summons seeking an order to set aside the interlocutory injunction that had been made against him. It appears to me therefore that the plaintiff in the present action is seeking to re-open a matter which has already been the subject of litigation and which has already been adjudicated upon, the subject matter of which must be considered *res judicata* and the maxim is "*interest reipublicae ut sit finis litium.*" Further, it is conceded that fraud was pleaded in paras. 9 & 10 of the statement of claim, but there was non-compliance with Order 17 r. 6 as particulars were not stated. However, where a judgment has been obtained by fraud, the appropriate procedure is to bring an action to set it aside, giving full particulars of the fraud alleged, Jonesco v. Beard. [1930] A.C. 298.

I also agree that if there was any irregularity in the obtaining of the judgment by consent in action No. 455/66, the plaintiff must be considered to have waived it. For after the consent the plaintiff made two applications for a stay of execution; the first of which was struck out and the second refused. He then made an application by way of summons to set aside the interlocutory injunction granted against him. This application was struck out and another application made which was again struck out when a point *in limine* was taken. As counsel points out in the present action an extension of time had to be granted for the plaintiff to file and deliver his statement of claim; and even then, though the plaintiff pleaded fraud he did not seek to set aside the judgment. I must reach the conclusion therefore, that the present action is only a flimsy attempt by the plaintiff to re-open a matter which has already been litigated.

The plaintiff now seeks at this stage to file and serve an amended statement of claim:

- (a) to give particulars of fraud alleged; and

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(b) to include in the prayer for relief an order that by reason of the fraud of the defendants that the two judgments in action No. 435/66 & 1018/ 67 be set aside and/or waived.

In the exercise of my discretion I would refuse this application as the plaintiff is alleging that he was mentally incapacitated not only at the time that the two actions were heard but at the time the original transaction of the mortgage was entered into; which would be seventeen (17) years after the present action was filed and some six (6) years after the consent judgment was obtained; and he now seeks the discretionary remedy of a declaration and the equitable remedy of injunction. He must be met by the maxim that delay defeats equity where he slept upon his rights and acquiesced for a great length of time. The documents which were tendered in evidence show that he was making applications for a stay of execution of the consent judgment, and he was legally represented in action No. 1018/67 when he sought to have the interlocutory injunction granted against him discharged. There was then no plea of mental incapacity. In my view there should be a grave risk of injustice being done to the defendants if this application were granted, for transport of the properties which were originally in the name of the plaintiff have now passed to the second and third-named defendants against whom it has not been alleged that they are not *bona fide* purchasers for value without notice. The action is therefore dismissed with costs to the defendants to be taxed.

Action dismissed.

Solicitors:

H.D. Eleazer for plaintiff.

H.B. Fraser and Dabi Dial for defendants.

OMAR PERSAUD
Appellant

v.

JAITON
Respondent

[Court of Appeal (E.V. Luckhoo, C., Persaud and Haynes, JJ. A), June 27, July 1, 1975]

Magistrate – Jurisdiction – Failure of prosecution to prove location of shop within

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25 miles of the Atlantic Ocean – Submission of no-case before magistrate ruled – Additional evidence – Prosecution permitted to recall witness to prove location after close of case for defence – Discretion of magistrate to permit recall – Whether conviction sustainable.

Price Control Offence – Sale of margarine above price fixed by law – Necessity to prove shop within 25 miles of the Atlantic Ocean – Time when such proof should be given.

In the Magistrate's Court, the respondent was charged with selling margarine, a price controlled article, above the price fixed by law. At the close of the case for the prosecution, her counsel submitted there was no proof as the law requires that the shop in which the article was sold was within 25 miles of the Atlantic Ocean, and without even waiting for the court to rule closed his client's case. Thereupon the prosecutor asked for the recall of a witness to prove the facts of the shop's location, but despite objection by counsel, the magistrate allowed the prosecutor's application and convicted the respondent.

On appeal, the Full Court reversed the magistrate's decision holding, (i) the additional evidence went to establish jurisdiction to hear the case; (ii) the additional evidence did not arise *ex improviso*, and could reasonably have been foreseen; (iii) it was a grave injustice to the respondent to introduce additional evidence of the kind after the close of the defence.

On appeal to the Court of Appeal,

HELD: (1) That no question arose as to the magistrate's jurisdiction to hear the case because he was possessed of jurisdiction to hear it whether or not the shop was within 25 miles of the Atlantic Ocean. Proof of locality to found jurisdiction, therefore, went not to hearing the case; the matter concerned jurisdiction to convict the defendant in the absence of proof that the defendant's shop was within 25 miles of the Atlantic Ocean.

(2) That facts and circumstances of the case did not attract the application of the *ex improviso* rule which is concerned with the right of the prosecution to lead evidence in rebuttal or contradiction to exculpatory facts led by the defence after the close of the prosecution's case. That rule was wrongly applied since it had no relation to the power of the court to recall a witness to lead additional evidence to prove its case, and no evidence having been led by the defendant there was nothing to rebut or contradict. So the setting aside of the conviction by the application of the *ex improviso* rule was misconceived.

(3) That a magistrate has both a statutory and a common law inherent discretion

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to allow the prosecution to reopen for further evidence. This discretion is to be exercised judicially not arbitrarily, nor capriciously, nor as a matter of course. The court may properly allow a reopening before the defence opens or during its course or even after its close and then let in evidence without which the complaint might be dismissed.

(4) That the Full Court was not justified in faulting the magistrate's exercise of his discretion since the circumstances did not demonstrate he had exercised his discretion wrongly. The appeal must therefore be allowed and the decision and conviction by the magistrate restored.

**Appeal allowed. Judgment of the Full Court set aside.
Decision of the magistrate restored.**

Editorial Note: This case is reported at (1975) 23 W.I.R. 73

Cases referred to:

- (1) Boston v. Jagessar [1920] L.R.B.G. 82.
- (2) R. v. Frost [1835-42] All E.R. 106; 9 C. & P. 129; 2 Mood. C.C. 140; 4 State Tr. N.S. 85; 1 Town St. Tr. 1; Gurney's Repts. 1.
- (3) R. v. Day (1940) 27 Cr. App. R. 168.
- (4) Chung-A-Tham and Another v. Ross [1941] L.R.B.G. 30.
- (5) Duffin v. Markham and Another [1918-23] All E.R. Ext. Vol. 1404; 88 L.J.K.B. 581; 119 L.T. 148; 82 J.P. 281; 16 L.G.R. 807; 26 Cox C.C. 308, D.C.
- (6) Price v. Humphries [1958] 2 Q.B. 353; [1958] 3 W.L.R. 304; [1958] 2 All E.R. 725; 122 J.P. 423; 102 Sol. Jo. 583; 123 J.P.J. 4, D.C.
- (7) Charles v. Wong [1916] L.R.B.G. 156.
- (8) John McKenna (1956) 40 Cr. App. R. 65, C.C.A.
- (9) Middleton v. Rowlett [1954] 1 W.L.R. 831; [1954] 2 All E.R. 277; 98 Sol. Jo. 353; 52 L.G.B.G. 334.
- (10) Saunders v. Johns (1964) The Times, Nov. 19; [1965] Crim. L.R. 49, D.C.
- (11) Charles Reginald Browne (1944) 29 Cr. App. R. 106.
- (12) R. v. Rice and Others [1963] 1 Q.B. 857; [1963] 2 W.L.R. 585; [1963] 1 All E.R. 832; 47 Cr. App. R. 79; 127 J.P. 232; 107 Sol. Jo. 117.
- (13) R. v. Herby McDonald (1972) 18 W.I.R. 89.
- (14) Phelan v. Back [1972] W.L.R. 273; 116 Sol. Jo. 76; The Times, Dec. 16, 1971, D.C.
- (15) French's Dairies (Sevenoaks) Ltd. v. Davis [1973] C.L.R. 630.
- (16) Piggott v. Simms [1972] C.L.R. 595.
- (17) R. v. Doran (1972) 56 Cr. App. R. 429.

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- (18) Hargreaves v. Hilliam (1894) 58 J.P. 655.
- (19) William Jackson (1920) 14 Cr. App. R. 41.
- (20) Wedd v. Leadbetter, [1966] 1 W.L.R. 245; [1966] 2 All E.R. 114: 130 J.P. 277; 110 Sol. Jo. 90; 82 L.Q.R. 153. DC.
- (21) Royal v. Prescott-Clarke and Another [1966] 1 W.L.R. 788; [1966] 2 All E.R. 366; 130 J.P. 274; 110 Sol. Jo. 312; D.C.
- (22) Harper v. Commissioner of Police (1967) 10 W.I.R. 517.

Appeal from the judgment of the Full Court of the High Court.

G.H.R. Jackman, Deputy Director of Public Prosecutions (ag.) for the appellant.

D.A.B. Trotman for the respondent.

HAYNES, J.A. (delivered the judgment of the Court): The respondent was charged for that on December 15, 1972, from a shop situate at Windsor Forest, West Coast, Demerara, she sold a one-pound tin of Golden Cream Margarine for the price of 68 cents when, it was alleged, the maximum controlled price therefor was 64 cents. The article would be price-controlled only if the said shop was located within 25 miles of the Atlantic Ocean. If it was, say, 26 miles therefrom, no offence would have been committed at all. Therefore, it was essential, and the burden was on the prosecution to prove as a necessary part of the proof of guilt itself, that geographically this shop was so situated. This fact was not a mere formal requirement in the sense that it was not a fact independent of the commission of the offence, similar to the proof, say, of a consent or authority to prosecute; or of the service of a notice of intention to prosecute; or of a regulation or order creating an offence, even though in another sense it might be described as a technical matter. It was a fact to be proved as forming part and parcel of the proof of guilt in itself, a material, vital part thereof.

At the close of the case for the prosecution, counsel for the respondent submitted that there was then no proof of this ingredient. Counsel for the appellant in this Court submitted there was. It is proposed to deal with this case on the assumption that at that stage there was no such proof. Immediately after this submission was made, the defence was closed, even before the magistrate had ruled. Apparently, before a ruling, the prosecutor asked leave to recall a witness to prove the location of the shop within 25 miles of the Atlantic Ocean. The defence objected, but the magistrate decided to allow the application. Sgt. Rupert Chance was recalled by the prosecution. He supplied the required proof and a conviction followed. The respondent appealed. The Full Court set aside the conviction, and so the matter reached this Court on an appeal by the police. It was contended, mainly, on behalf of the appellant, that the decision of the magistrate was right and proper use of his discretionary power; that there was no injustice or prejudice to the respondent; and that, consequently, there was no ground on which the Full

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Court could rightly fault its exercise.

In their judgment that Court found that the magistrate was wrong on three grounds, namely: (1) that the additional evidence went to establish his jurisdiction to hear the case; (2) it did not arise *ex improviso*, and could reasonably have been foreseen; and (3) it was of so vital a nature that introducing it at that late stage after the close of the defence, of necessity resulted in grave injustice to the respondent. I shall deal with these grounds in turn.

Ground 1. To hold that a question of jurisdiction to hear the case was involved, is unsupportable. The magistrate had jurisdiction to hear the case, whether or not the shop concerned was within 25 miles of the Atlantic Ocean; provided as was the case here, the premises were situate within his magisterial district. What he could not do, in the absence of proof of this fact, was to find that an offence was committed. Such proof, therefore, went, not to jurisdiction to hear the case, but perhaps, using this term in a secondary sense, to jurisdiction to convict, having heard the evidence. Apropos of this point, this opportunity is taken to point out, without stating any approval or disapproval of what was said there, that there is, in the case of Boston v. Jagessar [1920] L.R.B.G. 82 – a view expressed that, if at the close of the case for the prosecution, jurisdiction was not proved, the magistrate himself might properly, in a fit case, exercise his discretion either to call or recall a witness to prove it. [See particularly DALTON, J. (at p. 86).] This brief criticism is sufficient to dispose of this first ground on which the Full Court founded its judgment.

Ground 2. The facts and circumstances of this case did not attract the application of the *ex improviso* rule. The *locus classicus* of this rule is the well-known statement of TINDAL, C. J., in R. v. Frost (1835-42) All E.R. 106, cited in the judgment of the Full Court and applied in R. v. Day (1940) 27 Cr. App. R. 168, at p. 171. However, this rule is concerned with the right of the prosecution to lead evidence to rebut or contradict exculpatory facts proved in answer to the prosecution's case after the close of the defence. It is not related to the power of the magistrate, statutory or inherent, to allow the prosecution, at some stage after the close of their case, to recall a witness to lead additional evidence in proof of some fact essential to the completion of their case to found a conviction. The prosecution, in a criminal case, has a right to lead rebuttal evidence. But there is a limitation to it. In R. v. Frost (*supra*), PARKE, B., a very distinguished judge in criminal law and procedure, in disallowing the objection of the defence to the proposal of the Attorney General for the Crown, after the defence of Frost had been closed, to call evidence in reply, said (p. 116):

“If the Crown could have foreseen the necessity of giving this evidence, it ought to have been given in chief, but as it appears to have arisen

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entirely *ex improviso* and as the fact is entirely new, the Crown has a right to call this witness back.” (Underscoring mine.)

And in court, forensic debate arises usually on the question whether the particular case falls within or outside of this limitation. In Chung-A-Tham & Anor v. Ross [1941] L.R.B.G. 30, in the Full Court, SIR MAURICE COMACHO explained the reason for the rule thus (p. 31): “The *ex improviso* rule is established, the Court apprehends, in order to arrive at finality of litigation and to preclude the prosecutor, after gaining knowledge of the defence, from calling rebutting evidence on issues he should have prevised.” But in this case, no evidence was led by the defence in answer to the facts proved by the prosecution. So there was nothing to rebut or contradict. This second ground for setting aside the conviction was, therefore, misconceived. That question just did not arise.

But it was in relation to the third ground that counsel for the respondent argued most strenuously in support of the decision of the Full Court. He submitted that the additional evidence was material and not a mere matter of procedure; that it was prejudicial to the defence in that it procured her conviction, and, most importantly, that to let in such evidence after the close of the defence was legally impermissible. It was not at all disputed that matters or requirements purely and strictly formal might be proved properly by the prosecution, with the leave of the Court, after the close of their case and before the defence is led, even after a “no case” submission is made. [For examples, see Puffin v. Markham & Anor [1918-19231 All E.R. Ext. Vol. 1404 (proof of a control order or regulation); Price v. Humphries, [1958] 2 Q.B. 353 (proof of a written consent to proceedings being brought) and Chum-A-Tham Anor v. Ross [1941] L.R.B.G. 30 (proof of a Defence Regulation Order)]. And it could not be contended successfully against the existence of a judicial discretion to allow, at that stage, proof of even material facts going to the merits of their case to establish it *prima facie* [See Charles v. Wong, [1916] L.R.B.G. 156 (proof of value of property for a conviction of larceny); John McKenna, (1956) 40 Cr. App. R. 65 (proof that articles made wholly or mainly of iron or steel); Middleton v. Rowlett [1954] 2 All E.R. 277, *per* LORD GODDARD, C.J. at p. 279 (proof of identity of driver in a case of dangerous driving); and Saunders v. Johns (1964) “The Times”, November 19, *per* LORD PARKER, C.J. unreported but referred to in [1966] 2 All E.R. 114, at p. 115 – in every case, after a “no case” submission] But, stressed counsel for the respondent, here the defence was closed, and this, he submitted, made all the difference and disqualified all these authorities from application; there was either no discretion then to allow this evidence in, or if there was, this was not a fit case for its exercise. So he contended.

The crucial aspect involved is the close of the defence. Admittedly, as was said by CASSELS, J., in Charles Reginald Browne (1944) 29 Cr. App. R. 106, at p. 111:

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“There is a stage for the evidence of the prosecution. There is a stage for the evidence of the defence.” But this is a general principle of practice and not an inflexible rule of law. [See R. v. Rice & Others (1963) 47 Cr. App. R. 79, *per* WINN, J., at p. 85, and also R. v. Herby McDonald (1972) 18 W.I.R. 89. *per* HERCULES, J. A. (ag.), at pp. 92-93 – holding, for the Court, that allowing some evidence for the defence to be led during but before the close of the prosecution, did not nullify a conviction by a magistrate for unlawful possession of ganga, there being no consequential prejudice or injustice]

And there could be much legal wisdom in what was said by the LORD CHIEF JUSTICE WIDGERY in Phelan v. Back (1972) W.L.R. 273, at p. 275:

“There are, of course, rules of procedure governing every court. Those rules derive from law or from convention, and there is no doubt that as a general principle such rules must be observed. That means that if the rules are not observed, or if any departure from them is to take place, that departure must be justified according to the circumstances of the particular case.”

And then the Lord Chief Justice added, pregnantly:

“... We must not allow the rules to be our masters, they must remain our servants, and the authorities show a wide range of circumstances in which prosecution witnesses can be called or recalled after the close of the prosecution case.”

Then one must conjoin with this weighty pronouncement what the Lord Chief Justice added in French’s Dairies (Sevenoaks) Ltd. v. Davis [1973] C.L.R. 630, at p. 631: “...a prosecutor should not call evidence after close of his case without the justices’ leave, and the later the application to call fresh evidence, the heavier the obligation on him to show that the ends of justice really required it to be done.” And, of course, it must be remembered always, that in considering the interests of justice, the interests of the prosecution have to be taken into account as well as those of the defence.

There is clear authority that it could be a proper exercise of his discretion for a magistrate to allow the prosecution to reopen its case to lead vital additional evidence during the progress of the case for the defence. Piggott v. Simms [1972] C.L.R. 595 is one such case. There the defendant was charged with driving a vehicle at a time when his blood contained a proportion of alcohol exceeding the prescribed limit, as certified in an analyst’s certificate. The prosecutor closed his case without putting in this certificate. Without making any submission, the defendant began giving evidence. The prosecutor then sought permission to put

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in the document. Despite objection, he was allowed to do so; but the justices, without proceeding further with the hearing, stated a case for the opinion of the Queen's Bench Divisional Court. That Court (LORD WIDGERY, C.J., MELFORD STEVENSON and MILMO, JJ.), held that although there had been no mere error of procedure but a failure to adduce a vital part of the prosecutor's case, the justices had a discretion to permit the prosecutor to put in the certificate at the stage it was put in. The matter was remitted to them to continue the hearing. And in R. v. Doran (1972) 56 Cr. App. R. 429, where again the prosecution was allowed to introduce evidence while the defence was in progress, EDMUND DAVIES, L.J. (as he then was) said (p. 436): "... the problem in every case is whether it is right and proper to serve the ends of justice that further Crown evidence should be permitted."

But what is the state of the authorities as regards allowing the prosecution to reopen its case and put in vital evidence after the close of the defence?

Hargreaves v. Hilliam (1894) 58 J.P. 655, was a prosecution for killing game without a licence. After the prosecution closed its case, solicitor for the defendant closed his, without leading evidence. Then he submitted that no case was made out in the absence of proof of the written authority of the Commissioner of Inland Revenue authorising the proceedings. The justices refused to allow the prosecutor to put in the authority then actually in his hands. They dismissed the summons. The Divisional Court (CAVE and COLLINGS, JJ.) remitted the matter the justices for reconsideration. Admittedly, what was involved there was a true formality, but CAVE, J., appeared to be speaking generally, when he said (p. 655):

"It is not the usual practice that a case shall not be allowed to be reopened, ... I may say, so far from its being the practice that a case shall not be reopened, my practice is always distinctly to the contrary, and that I am always ready to hear any evidence which is there ready to be tendered and which, owing to any accident or mistake or want of foresight, if you like, on behalf of the counsel or parties has not been given before the case is taken to be closed."

William Jackson (1920) 14 Cr. App. R. 41 was a trial at Assizes on indictment. The appellant was convicted for receiving stolen jewellery and a razor. The thief – Waller – testified for the Crown. At the close of the prosecution, counsel submitted "no case", as the only proof of ownership was the uncorroborated evidence of Waller, but this was rejected. The appellant testified in his defence and closed his case. The Recorder then adjourned the trial to enable further evidence of ownership to be led for the Crown through two witnesses who were on their list, but were absent, when the Crown closed its case. He said he allowed this in the

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interests of justice. The Court of Criminal Appeal dismissed their appeal. And the Lord Chief Justice said (p. 43): “The point taken by counsel for the defence was merely technical. Technical points ought not to prevail where there is a possibility of their being remedied without doing any injustice.”

Saunders v. Johns [1965] Crim. L.R. 49 might well have been relied on by the respondent, if it had come to his attention. The defendant was charged with exceeding the speed limit. The issue was identity. A constable testified he had stopped the driver of a car which had been speeding, but gave no evidence identifying the defendant as the driver. Solicitor for the defendant, at the close of the prosecution’s case submitted there was no case to answer, but was overruled. The defence was closed without calling any evidence. Then it was that the constable was recalled and he gave evidence of identification. The defendant was convicted. On a case stated, the Divisional Court held that to introduce such evidence at that stage in those circumstances was clearly wrong.

Webb v. Leadbetter [1966] 2 All E.R. 114 is cited for reference to certain passages in the judgment of the Lord Chief Justice. The prosecution, in that case, had been allowed to call additional evidence after the close of the defence, and after the justices had retired to consider their decision. The Divisional Court held this to be wrong. And the Lord Chief Justice, in the course of his judgment, said (p. 115):

“... strictly, once the prosecution have closed their case, there would be no opportunity for them to call further evidence, subject of course, to evidence in rebuttal, with which we are not concerned. Nevertheless, it does seem to me that there must always be some residuary discretion in the court to allow, in particular circumstances, evidence to be called, but the manner in which that discretion is exercised must depend on the stage of the case.” (Underscoring mine.)

Then, His Lordship, after referring to a case which decided that in a trial before a jury no evidence can be called after the summing-up, went on to say this (also at p. 115):

“The same considerations do not wholly apply in magistrates’ courts, but, nevertheless, as a general rule and in the absence of some special circumstances, it would certainly be wholly wrong for the justices to purport to exercise a discretion to allow evidence to be called once they had retired, and indeed, probably, after the defence had closed their case.” (Underscoring mine.)

Royal v. Prescott-Clarke & Anor [1966] 2 All E.R. 366, was heavily relied on by

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counsel for the appellant as a strong persuasive authority which this Court should apply to hold that the Full Court erred. The defendant was charged with driving on a special road from which learners were prohibited. The relevant regulations provided that before a road could become a special one, there had to be a publication in a newspaper to that effect in which a date would be mentioned for the opening of the road as special. At the close of the prosecution, no evidence had been given of such publication. The defence was closed either without or after leading evidence. During his address, counsel for the defendant submitted there was no proof that this road was a special one. The prosecution applied then for an adjournment to produce in evidence the newspaper with the relevant notice. The justices felt it was too late for fresh evidence, refused the application and dismissed the information. The Divisional Court held they were wrong to do so. WINN, L.J., said this (p. 369):

“In any such case as this one where there is no question of the prosecution being given a further opportunity to go out and scout about for evidence to strengthen their case, but it is merely a matter of their going to look in a newspaper, and if they find there what they need, bringing the newspaper to the court, in all ordinary circumstances and in the absence of any conduct on the part of the prosecution which might be properly described as misconduct or election not to call other evidence and in the absence of any grave potential prejudice to the accused, there is only one way in which the discretion can properly be exercised. In this particular case, the justices wrongly exercised the discretion which was entrusted to them; they should, in my view, in law, have granted the adjournment in the particular circumstances of this case.”

In effect, the Court held that in the particular circumstances it was the duty of the magistrates to allow the prosecution’s case to be reopened even at that late stage.

In Harper v. Commissioner of Police (1967) 10 W.I.R. 517, Harper was directed by a police constable in uniform in the Public Buildings Courtyard as regards parking his car in it. He did not comply. The Courtyard had been declared a controlled parking place by the effect of reg. 2 of the *Motor Vehicles and Road Traffic (Amendment) (No. 5) Regulation, 1965*. But it became such only from a date fixed by proclamation published in the “Official Gazette”. After the close of the defence, counsel for defendant submitted that as it had not been proved that this was done, the Courtyard was not proved to be a parking place as alleged in the information. The trial judge could not take judicial notice of the publication in the “Official Gazette” under the laws of evidence of that island, and upheld the submission. He did not allow the prosecution any opportunity to tender the relevant evidence and convicted the defendant. On a case stated, the Divisional Court of Barbados (WARD and WILLIAMS, JJ.) remitted the matter to the mag-

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istrate to allow the prosecution to reopen their case and put in the evidence needed. Here again, the Court felt that, in the circumstances, it was the duty of the magistrate to exercise his discretion in favour of the prosecution. And in R. v. Doran (1972) 56 Cr. App. R. 429, EDMUND DAVIES, L.J. (as he then was) in a case where the prosecution was allowed to call two new witnesses to strengthen their case, during the defence, in upholding this exercise of discretion, said (pp. 438-439):

“So this is not a case – and we stress it, for it indicates the limitations which must be placed upon the calling of belated Crown testimony – where criticism can properly be levelled against the Crown by saying: ‘You are now belatedly trying to repair an omission in the preparation and presentation of your case, which should have been effected before you closed it.’”

Applying to this country what the authorities cited up to this point appear to lay down, it would seem a fair summary to put the position thus.

It is the duty of the prosecutor to tender all material and relevant evidence available to him and necessary to establish a *prima facie* case, before he closes his case. But if for one reason or the other he fails to do so, that is not the end of the matter. He would have no right to reopen his case to lead further evidence. But the magistrate has both a statutory and a common law inherent discretion to allow the prosecution to reopen for further evidence. This discretion is to be exercised judicially, not arbitrarily or capriciously or as a matter of course. The prosecutor must disclose to the Court a judicially acceptable reason or excuse for the omission, and satisfy it that the ends of justice require that the discretion be exercised in his favour. But the court will bear in mind that, as the interests of justice include the interests of the defence as well as those of the prosecution, it would be wrong to allow the prosecution then to repair their omission, if this would or might cause injustice or improper prejudice to the defendant or be otherwise unfair to him.

The court may properly allow a reopening before the defence opens or during its course or even after its close, and then let in evidence without which the complaint might be dismissed. Such evidence might be proof of a purely procedural matter or might form a vital part of the proof of guilt itself. But a prosecutor should make his application at the earliest possible opportunity, because the later the stage at which he acts the heavier is the onus of justifying the claim to the exercise of the discretion in his favour. And although this discretion is the magistrate’s and his alone to exercise as he thinks fit once he acts judicially, yet the circumstances of a case might be such that it becomes his duty to exercise it in one particular way.

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Consideration of these principles and their application in different cases lead to the conclusion that the Full Court was not justified in faulting the magistrate's exercise of his discretion, on the third ground on which their decision was founded. The circumstances of the case did not demonstrate that the magistrate exercised his discretion wrongly. The prosecution had proved clearly that the defendant had sold the food item at a price above the fixed maximum price, if her shop was situated within 25 miles of the Atlantic Ocean; by a mere slip they had omitted to prove such location of the shop; the defendant's lawyer, after making a "no case" submission on this ground immediately closed the defence even before the prosecutor replied or the magistrate ruled; the prosecutor's application was made therefore at the earliest possible opportunity; the fact sought to be proved was well-known to the magistrate, to the police, to the defence and was hardly disputable; the witness to be recalled was there ready to testify so that no unjust delay would ensue; and no prejudice would result to the defendant, because there and then her case could be reopened, and any evidence she wished to lead, received. Indeed, in these circumstances and having regard to the strong efforts being made by the courts to stamp out or contain the high incidence of offences of that kind, it might well be said that it was the duty of the magistrate to exercise his discretion the way he did.

Saunders v. Johns is not an authority against this conclusion. It is a just decision on its own particular facts. On to the close of the defence, although the evidence proved a traffic offence, it did not identify the defendant as the offender. It was the evidence put in on the reopening, that, then and only at that late stage, proved any *actus reus* by and connected the defendant with the offence charged, although identity was the crucial issue in the case from the commencement. And this happened although the prosecutor had an opportunity before the defence was closed, to apply for a reopening as LORD CHIEF JUSTICE PARKER stated he should have done. [See Webb v. Leadbetter (*supra*) at p. 115] But he had chosen, then apparently, to rely on the constable's evidence already given.

Here, the defence never challenged the allegation that the item sold was price-controlled, the cross-examination being directed to whether a sale at the price alleged did take place; the evidence for the prosecution proved the sale clearly, that is, the crucial issue; the prosecutor had no opportunity to apply to reopen his case before the close of the defence, and the additional evidence did not for the first time identify the defendant with the sale. So Saunders v. Johns is clearly distinguishable. Admittedly, here, the omission related to a vital and material part of the proof that an offence was committed. But if the defence had not been closed simultaneously with the making of the submission, and the prosecutor had made his application in the course or at the end of his reply, then, without doubt, at that stage the magistrate would have been entitled to permit further evidence to

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be led. And where, as done here, counsel for the defendant employs the forensic manoeuvre (and I use this term inoffensively) of closing his case before the prosecutor gets up to reply, with the intention or effect of forestalling an application to reopen, it could not be right that, *per se* an estoppel should be raised against the existence then of any discretion to allow a reopening or against the propriety of so doing. Indeed, the Lord Chief Justice could hardly have intended so to lay down in Sanders v. Johns, because in the later case of Webb v. Leadbetter (above), he was cautious in the language he used. There, he said (p. 115) that after the close of the prosecution “...as a general rule and in the absence of some special circumstances, it would be wholly wrong for justices ... to allow evidence to be called once they had retired, and indeed, probably after the defence had closed.” He said “probably” not “also”. In short, he refrained from laying down positively that as a general rule it was wrong to allow further evidence after the defence was closed. He went only as far as saying this was so “probably”, and even this statement was qualified with “in the absence of special circumstances”.

Furthermore, this was not a case within the limitation laid down on the calling of belated prosecution evidence in the judgment of EDMUND DAVIES L.J. (as he then was) in R. v. Doran (*supra*). The Lord Justice there clearly stressed the view (pp. 438-9) that it was one of “the limitations which must be placed upon the calling of belated Crown testimony”, that the failure to lead the evidence in the first instance should not be due to lack of vigilance “in the preparation and presentation” of the case. The magistrate must have realised that here was a mere slip in failing to lead evidence of an indisputable fact, usually proved in such cases in routine and mechanical fashion, without challenge, in his court. In those circumstances, to rely on a contention that the defence was closed before the proof was laid on, was one of those technical points which, LORD CHIEF JUSTICE HEWART said in Jackson (*supra*, at p. 43), “ought not to prevail where there is a possibility of them being remedied without doing injustice.” And here the remedy lay in the use of his discretionary power to allow a reopening of the prosecution. And so he did. He might well have cited in justification a passage from the judgment of that very distinguished judge, SIR CHARLES MAJOR in Charles v. Wong [1916] L.R.B.G. 156, where the learned Chief Justice said (p. 157):

“... A magistrate is, no less undoubtedly than a judge, invested with the power and, indeed, the duty, at any stage of criminal proceedings, and notwithstanding the close of the case on either side, to call for, or require or allow to be given, fresh evidence on a material point necessary for the just determination of the charge before him, subject to the usual conditions as to examination and cross-examination by either side.”

Before concluding this judgment, it might be expedient to pronounce this warn-

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ing. This discretionary power is an important procedural adjunct to the conduct of a summary hearing in a manner calculated to prevent mere technicality from defeating the ends of justice. It is neither possible nor desirable to lay down inflexible rules to guide its exercise. The facts and circumstances of one case may differ greatly from those of the next and only very general guidance can be given in any judgment. But, as stressed earlier, it is a power not to be exercised as of course. It would be wrong to use it so freely that those responsible for prosecutions would get to feel that adequate care and vigilance need not be employed in the preparation of a case and in the presentation of all the available evidence necessary to establish *prima facie* proof, before the close of the prosecution, because leave could be obtained easily at any later stage to repair the omission. Such a use of the power will be an abuse of it; it will encourage slipshod prosecuting; it will fade the line of division between case for the prosecution and the case for the defence; and ultimately may defeat the very interests of justice it is intended to promote.

In the final analysis its just use must be dictated by sound judgment on the part of the magistrate, his sense of fairness and an honest endeavour to find, on every application, the just answer to the question, "What is right and proper to be done in this case in the interests of justice?" The answer the magistrate found here was, in my judgment, the right one and the Full Court was not justified in setting aside the conviction. The appeal is allowed, and the decision and conviction by the magistrate are restored.

LUCKHOO, C.: I concur.

PERSAUD, J.A.: I concur

**Appeal allowed.
Judgment of the Full Court set aside.
Decision of the magistrate restored.**

IVOR MOONILALL
Appellant

v.

THE STATE
Respondent

[Court of Appeal (E. V. Luckhoo, C., G. L. B. Persaud and Cummings JJ. A.)
July 12, 1973; January 9, 1975]

*Road traffic – Causing death by dangerous driving – Dangerous driving –
Judge*

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withdrawing causing death by dangerous driving from jury – Whether Judge had jurisdiction under s. 35A of the Motor Vehicles and Road Traffic Ordinance, Cap. 280 to leave lesser offence of dangerous driving to the jury having withdrawn the offence of causing death by dangerous driving – Motor Vehicle and Road Traffic Ordinance, Cap. 280, s. 35 (1), (3) (now Motor Vehicle and Road Traffic Act, Cap 51:02, s. 35 (1) (3)).

The appellant was indicted with the offence of causing death by dangerous driving contrary to s. 35 A of the *Motor Vehicle and Road Traffic Ordinance, Cap. 51:02*. (now s. 35 (1) of *Motor Vehicles and Road Traffic Act, Cap. 51:02*). In the court below the judge found that there was insufficient evidence to connect the person who died with the person who was struck down as a result of the accident. Counsel for the appellant argued that this being established, the court had no jurisdiction to submit the offence of dangerous driving to the jury. The judge rejected this argument and directed the jury to find the appellant not guilty of causing death by dangerous driving but to decide on whether he was guilty or not guilty of dangerous driving.

The issue on appeal was whether the jury could properly have been invited to consider the question of a summary offence of “dangerous driving” when there was no case to answer on the indictable offence of causing death by reckless or dangerous driving.

HELD: (1) (CUMMINGS, J.A. dissenting): Under s. 35A of the *Motor Vehicles and Road Traffic Act, Cap. 51:02*, the jury must first consider the offence of causing death by dangerous driving before considering an alternative verdict in relation to the offence of dangerous driving. It is for the jury and not the trial judge to be satisfied that the offence of causing death by dangerous driving had not been proved before a consideration of the lesser offence of dangerous driving could be made.

(2) The trial judge, having withdrawn the issue of causing death by dangerous driving from the jury, erred in leaving the issue of dangerous driving for the consideration of the jury.

(3) (*per* CUMMINGS, J.A., dissenting): The trial judge had not withdrawn the indictment of causing death by dangerous driving and the jury had to have given legal consideration to and made a finding based on the judge’s directions in relation to it. Therefore the offence of causing death by dangerous driving was properly left for the jury’s consideration. Their verdict meant that they had considered the first issue and then went on as further directed to consider the second issue for which they returned a verdict of guilty of dangerous driving.

Appeal allowed.

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Conviction and sentence quashed.

Editorial Note: This case is also reported at (1974) 22 W.I.R. 125

Cases referred to:

1. Annie Wight (1918) 13 Cr. App. R. 211
2. R. v. Abbott [1955] 2 All E.R. 899; [1955] 2 Q.B. 497; 39 Cr. App. R. 141
3. R. v. Shipton *ex. p.* D.P.P. [1957] 1 All E.R. 206
4. R. v. Attfield [1961] 3 All E.R. 243; [1961] 1 W.L.R. 1135; 45 Cr. App. R. 309
5. Heydon's Case (1584) 3 Co. Rep. 7a; 76 E.R. 637
6. R. v. Young [1964] 1 W.L.R. 717; [1964] 2 All E.R. 480; 48 Cr. App. R. 292
7. Salkeld v. Johnson (1848) 2 Ex. 256; 154 E. R. 487
8. R. v. Courtley [1958] Crim. L. J. 200

J. O. F. Haynes, S.C. with C. La Bennett for the appellant.
G. H. R. Jackman, Senior State Counsel for the State.

CHANCELLOR: The appellant, Ivor Moonilall, was indicted on a single count of causing the death of David Kersting by dangerous driving, contrary to s. 35A of the *Motor Vehicles and Road Traffic Ordinance, Cap. 280* [now s. 35 (1) of the *Motor Vehicles and Road Traffic Act, Cap. 51:02*]. A verdict of not guilty was returned on this count on the direction of the trial judge, but the jury found him guilty of dangerous driving and a fine of \$250.00 (in default, imprisonment for six months) was imposed.

At the close of the case for the defence, counsel for the appellant had, in the absence of the jury, submitted, *inter alia*, that there was no case to go to the jury on the indictment, and, further, that as a consequence of this, no jurisdiction would be open to leave the question of "dangerous driving" *simpliciter* for the consideration of the jury. On the submissions made, the trial judge ruled that there was no *prima facie* proof that the accused had, by his driving, caused the death of David Kersting, but declined to withdraw the issue of dangerous driving from their purview.

In the course of his summing-up he said:

"At the conclusion of the evidence in this case, as a result of certain technical, legal arguments, I have come to the conclusion that there is not sufficient evidence that could satisfy a jury that the aspect of the causation of the death of David Kersting had been established. It is

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purely a legal matter and I have resolved that matter in favour of the defence. The result is, that the indictment which is now being placed before you requires you to consider whether or not Ivor Moonilall had been proved by the State to have driven a motor-vehicle on the road in a manner dangerous to the public; in other words, whether Ivor Moonilall had committed the offence popularly described as ‘dangerous driving’. When you come to give your verdict in the case I will require you to accept this direction – that the defendant is not guilty of the offence of causing death by dangerous driving, but that he is guilty or not guilty accordingly as you find, of the offence of dangerous driving.”

The only point which stands for determination in this appeal is whether the jury could properly have been invited to consider the question of “dangerous driving” when there was no case to answer on the indictment proper. Counsel’s argument was that in Guyana dangerous driving is not an indictable offence, and that when the indictment for causing death by dangerous driving was removed from the jury, nothing was left for their consideration in view of the specific wording of what is now ss. 35 (1) and 35 (3) of the *Motor Vehicles and Road Traffic Act*. These sections read as follows:

“35. (1) Any person who causes the death of another by the driving of a motor vehicle on the road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be, on the road, shall be guilty of a misdemeanor and on conviction thereof on indictment shall be liable to imprisonment for the five years.”

“35. (3) If upon the trial of a person for an offence against this section the jury are not satisfied that his driving was the cause of the death but are satisfied that he is guilty of driving as mentioned in subsection (1) of this section, it shall be lawful for them to convict him of an offence under section 36 of this Act whether or not the requirements of section 45 of this Act have been satisfied as respects that offence.”

Whenever convenient, I shall refer to the offence under s. 35 (1) of causing death by reckless or dangerous driving as “the indictable offence”, and that of reckless or dangerous driving only under s. 35 (3) as “the summary offence”.

These provisions have clearly served to carve a jurisdiction for the jury to return a verdict on the summary offence, where the indictable offence has not been proved to their satisfaction. The offence under s. 36 deals with the quality of driving in

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the same terms as s. 35 (1), but was originally intended only to be cognisable within the summary jurisdiction.

The imperative words in s. 35 (3) could hardly escape notice. In effect, it stipulates conditions which must be fulfilled before recourse could be had to a consideration of the summary offence when the indictable offence is charged. The language only makes this jurisdiction available on the strict terms contained within the walls of that subsection. It is only “if... the jury are not satisfied that his driving was the cause of the death but are satisfied that he is guilty of driving as mentioned in subsection (1)” that “it shall be lawful for them to convict him of an offence under section 36” of the Act. In other words, it shall not “be lawful” for a jury to convict of the summary offence unless and until what is promised will have been duly fulfilled.

The conditions therein specifically circumscribe and refer to an area specially reserved for and essentially incidental to the province of the jury, *viz.*, that which embraces conclusions on factual aspects, where minds are allowed to examine evidence, assess its weight, resolve conflicts, apply reason, draw inferences, attach preferences, and finally determine whether they are not satisfied on one issue, before proceeding to consider in like fashion, the other issue, if not so “satisfied”. All of this naturally presupposes that the matter is allowed to travel to the stage where the jury is permitted throughout to enter into the region of fact by considering evidence. In other words, there must be *prima facie* evidence that the accused caused death by his dangerous driving before s. 35 (3) can be truly operative. The jury’s responsibility then would be to examine the whole evidence in the case in order to be “satisfied” whether or not he is guilty of the offence as charged. To do that they would not only have to be persuaded according to the cogency of the evidence but take into account the presumption of innocence of the accused person. This would necessarily further require a direction from the trial judge on the burden of proof in regard to the indictment proper, so as to enable the jury to apply the common law formula which normally obtains in criminal cases – that the jury must be satisfied beyond reasonable doubt. That is the standard of proof required by law except in such cases where the burden of proof might by statute, lie on the accused person to prove his innocence or to prove a negative, in which event, the case is not to be proved beyond reasonable doubt. It would be sufficient that the balance of probability be in his favour.

But in the instant case, before the jury could say that they are not satisfied that the indictable offence was committed, they must not only be allowed to assess the facts, but do so in relation to a proper direction as to the burden of proof so that they will have been satisfied beyond reasonable doubt. But they never had the opportunity of so doing. In the same way as the jury would have to make up its mind as to whether it is not satisfied that the driving caused death, so, also, would

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it have to make up its mind as to whether it is satisfied that that driving was dangerous for the purposes of the alternative verdict. So that it would have to deal with two separate subject-matters, and reach two separate conclusions, on the common basis that in each case it would have to be satisfied beyond reasonable doubt. It is only when a conclusion is reached in relation to the first subject-matter, namely, the indictable offence, that it is not satisfied, that it is permissible to advance to a consideration of the second subject-matter, namely, the summary offence, to determine whether it is satisfied or not.

“Satisfied”, as I said before, must in each instance have the same connotation. It cannot mean one thing at one moment and something else at another; and if it must mean “beyond reasonable doubt” when returning a verdict of guilty on the summary offence, it cannot mean anything less when considering the first question on the indictable offence. This adverbial qualification is implicit and must be read into the meaning of “satisfied” in both instances.

When, therefore, the matter never reached the jury on the indictable offence for their direct consideration and participation, but was pre-determined by the judge to the extent that they were only called upon in law to return a formal verdict, the conditions, which s. 35 (3) laid down before the summary offence would become available for consideration, were incapable of being fulfilled. Had there been a *prima facie* case on the indictable offence, only then would the door have been opened for jurisdiction to consider the summary offence; but when the indictable count was withdrawn, that jurisdiction no longer became available.

I am therefore forced to conclude that there was no jurisdiction in our law, as it stands, for the trial judge to have allowed the case to go to the jury to consider “dangerous driving” as a possible verdict when he had withdrawn from their consideration the charge in the indictment proper for causing death by dangerous driving. The judge’s notes on the submission of counsel at the end of the case were:

“Court rules:

(1) *No prima facie* proof that the defendant’s driving caused the death of David Kersting, the deceased.

(2) Case will be left to the jury to consider alternative partial verdict of driving in a manner dangerous to the public as permitted by sec. 35A (3) of *Cap. 280*.”

(3) This ruling was made clear in that part of the summing-up already set out. If there was an indictable offence of dangerous driving *simpliciter*, no problem would have arisen. It would then have been possible to add a separate count to the in-

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dictment therefor and on failure to prove the first count, an automatic jurisdiction would have arisen to consider the second count. Perhaps those responsible for amendments to the law will consider whether it would not be in the interests of justice to create an indictable offence for dangerous driving so as to meet situations such as the instant case, and at the same time, reflect whether the punishment which is attached to the summary offence would be adequate for all cases of reckless or dangerous driving on indictment.

In the result, the appeal must be allowed and the conviction and sentence set aside.

PERSAUD, J.A.: The appellant was indicted with the offence of causing death by dangerous driving, contrary to s. 35 A of the *Motor Vehicles and Road Traffic Ordinance, Cap. 280* (Kingdon Edition) (now s. 35 of the *Motor Vehicles and Road Traffic Act, Cap. 51:02*).

Upon the close of the case for the defence, learned counsel submitted that there was not sufficient proof that the person named in the indictment as having been killed as a result of the dangerous driving was the person who died as a result of the accident. In the event of his submission being of merit, said counsel, then the court had no jurisdiction to submit the offence of dangerous driving to the jury. The learned judge agreed with the first submission, but rejected the second, with the result that when he came to sum up to the jury he directed them in the following language:

“At the conclusion of the evidence in this case, as a result of certain technical legal arguments, I have come to the conclusion that there is not sufficient evidence that could satisfy a reasonable jury that the aspect of the causation of the death of David Kersting has been established. It is purely a legal matter and I have resolved that matter in favour of the defence. The result is that the indictment which is now being placed before you requires you to consider whether or not Ivor Moonilall has been proved by the State to have driven a motor vehicle on the road in a manner dangerous to the public. In other words, whether Ivor Moonilall has committed the offence popularly described as ‘dangerous driving’. When you come to give your verdict in the case, I will require you to accept this direction – that the defendant is not guilty of causing death by dangerous driving but that he is guilty or not guilty, accordingly as you find, of the offence of dangerous driving.”

The submission before us is really a repetition of the submission before the trial judge, *viz.*, having ruled in favour of the defence that there was no case of causing death by dangerous driving, the judge could not properly have left the offence of

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dangerous driving *simpliciter* with them; that he ought to have directed them to return a verdict of not guilty on the indictment as a whole. The verdict of guilty of dangerous driving consequent upon the direction of the judge, argues counsel, is a nullity in law, and cannot be cured by the application of the proviso.

Learned counsel relies heavily upon the interpretation which he places on subsection (3) of s. 35A which allows a jury to return a verdict of guilty of dangerous driving on an indictment of causing death by dangerous driving, and which provides as follows:

“If upon the trial of a person for an offence against this section the jury are not satisfied that his driving was the cause of the death but are satisfied that he is guilty of driving as mentioned in subsection (1) of this section, it shall be lawful for them to convict him of an offence under section 36 of this Act...”

This submission is substantially the same as s. 8 (4) of the *Road Traffic Act, 1956*, of the United Kingdom, later s. 2 (2) of the *Road Traffic Act, 1960* (U.K.). It has since been omitted from the *Road Traffic Act, 1972* (U.K.).”

Learned counsel submits that the subsection means or imports that a jury must deliberate upon the offence of causing death by dangerous driving before they are required to consider the question of dangerous driving *simpliciter*. To put the submission another way, if before the case is submitted to the jury for their consideration, there is not a *prima facie* case of causing death by dangerous driving, the judge is not legally entitled to leave the question of dangerous driving to them; it is only if they have first considered the former, and have acquitted the defendant of that offence, may they then consider the latter. Counsel has cited the cases of Annie Wight (1918] 13 Cr. App. R. 211, and R. v. Abbott [1955] 2 All E. R. 899, in support of his submission. It is my view that both those cases can be distinguished from the instant case. In Annie Wight the appellant was convicted of manslaughter. There was no evidence to support what was no more than a theory of the prosecution that the appellant had inflicted the injuries to the deceased child, from which the child died. It was held that had a no case submission been made, it would have been the duty of the judge to give effect to the submission. There can be no doubt that the court was merely stating what the common law was, and was not dealing with a situation such as the present one, where a statute authorises the jury to consider the lesser offence. R. v. Abbott merely restated the law that where two persons are joined in one indictment, and charged on separate counts with the same offence, if at the end of the case for the prosecution there is no case against one defendant, he is entitled to have his case withdrawn from the jury on a no-case submission.

Counsel did not cite the case of R. v. Shipton, ex p. v. D.P.P. [1957] 1 All E. R.

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206, but I would like to refer to it, as in that case the first point we are now discussing arose, and the decision there appears to support the present appellant's contention. In Shipton the defendant was charged with motor manslaughter. The position there was that under s. 34 of the *Road Traffic Act, 1934* (U.K.), it was open to a jury to acquit of manslaughter, but to convict of reckless or dangerous driving. The jury acquitted of manslaughter but failed to agree on the lesser verdict, whereupon the trial judge made an order for the appellant to be re-tried on the issue of dangerous driving before the next quarter sessions. An application by the Director of Public Prosecutions for leave to prefer a voluntary bill of indictment charging him with dangerous driving was refused by the judge. The recorder of the quarter sessions ruled that he had no jurisdiction to try the appellant for the offence of dangerous driving. The Director of Public Prosecutions then applied for leave to move for an order of mandamus directing the recorder to try the issue. The application was refused, the court holding that the recorder had taken the proper view. LORD GODDARD, L.C.J., expressed the view that perhaps it was a pity the judge did not give leave to prefer a voluntary bill. Be that as it may, it seems that the decision turned on the fact that the jury failed to arrive at a verdict as regards the dangerous driving. Had they done so – and it is crystal clear that it was open to them to have done so – no difficulty would have arisen. In delivering the judgment of the court LORD GODDARD said (at p. 207 *ibid.*):

“We all know that on the charge of wounding with intent it is open to a jury to return a verdict of malicious wounding. In the opinion of the court, exactly the same position arises there as it does here. If a jury find a man not guilty of the offence charged in the indictment and do not go on to say ‘but we find him guilty of malicious wounding’, there is an end of the matter. Perhaps it is a pity that the learned judge did not give leave to prefer a voluntary bill. If a voluntary bill had been preferred, whether the accused would have been able to plead *autrefois acquit* or not, I do not know. There was no count for dangerous driving in the indictment, but there have been expressions of this court that another count should not be joined in an indictment for manslaughter. If it were not for the *Road Traffic Act, 1956*, which makes a considerable difference by providing a separate offence of causing death by reckless and dangerous driving, I should have liked to consider those cases. I think, however, that it is perfectly clear, and the Solicitor-General has not been able to show us any authority to the contrary, that the present position is that as the jury acquitted the accused of manslaughter and did not see fit to return a verdict of dangerous driving, the learned recorder had no jurisdiction to try the indictment;”

Dangerous driving by itself is in our law a summary offence, but where a statute makes the offence a matter for the determination of a jury in certain circum-

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stances, the statute invests it with the quality of an indictable offence in those circumstances, not in the sense that an accused person can be indicted for dangerous driving *simpliciter*, but only that the jury is vested with the jurisdiction to determine that question upon an indictment which includes that offence as one of the ingredients, and the High Court is given the power to fix adequate punishment for that offence by itself.

My understanding of subsections (1) and (3) of our s. 35, is that the offence of causing death by reckless or dangerous driving is an indictable offence triable by a jury, and if the jury are not satisfied that the driver's driving was the cause of death, but they are satisfied that he had committed an offence under s. 36 of the Act (i.e., reckless or dangerous driving) they may convict him of the latter offence. It would appear that in the absence of subsection (3) the jury could not properly have gone on to consider reckless or dangerous driving which, according to our Act, remains a summary offence, unlike the position in the United Kingdom where such an offence was, until the *Road Traffic Act, 1972*, also amenable as an indictable offence. Now it is a summary offence even in the United Kingdom. I have given some thought to s. 102 of the *Criminal Law (Procedure) Act, Cap. 10:01*, which provides that every count in an indictment shall be divisible, "and if the commission of the offence charged, as is described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the accused person may be convicted of any offence so included which is proved although the whole offence charged is not proved ..." My understanding of that section is that the 'offence so included' must also be an indictable offence under the *Criminal Law (Offences) Act, Cap. 8:01*, and therefore would not apply in a case such as the instant one. In any event, when s. 35A of the *Motor Vehicles and Road Traffic Ordinance, Cap. 280*, was inserted in *Cap. 280* by the *Motor Vehicles and Road Traffic (Amendment) Ordinance, 1961 (No. 26)*, s. 102 was already on the statute books, and if it was felt that the latter section was adequate to meet the situation where a jury would be entitled to convict of the lesser offence of dangerous driving or reckless driving upon an indictment for causing death by dangerous or reckless driving, it seems that it would have been unnecessary to have enacted subsection (3) of s. 35A. It must have been felt that s. 102 was inapplicable to indictments launched under s. 35A.

It seems to me that on a plain reading of the subsection the trial judge is debarred from withdrawing the substantive charge from the consideration of the jury but at the same time leaving the subsidiary or lesser offence of dangerous or reckless driving with them. This is not the same thing as leaving the entire indictment with them for their verdict where the evidence warrants it, and inviting them to consider the lesser offence if they are not satisfied that the main offence has been committed. What the learned judge has done in this case is tantamount to vesting the jury with jurisdiction to adjudicate on a summary offence when the statute

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does not authorise them so to do unless they are themselves satisfied that the main offence has not been committed. In my opinion, the subsection does not contemplate the action taken in this matter.

I would therefore agree with the learned Chancellor that this appeal ought to succeed.

CUMMINGS, J.A.: It is with regret that I find myself unable to agree with the judgments just delivered and the orders proposed by my learned brothers.

The submission of counsel in the Court below at the close of the evidence for the prosecution was, *inter alia*, that there was not sufficient evidence to connect the person who died with the person who was struck down as a result of the accident. He argued that if that were so the learned trial judge should withdraw the indictment for causing death by dangerous driving from the jury, and that if he did so, then there was nothing left to go to the jury; his argument being that the jury would have to consider causing death by dangerous driving and then if not satisfied that the death was caused by the dangerous driving, then go on to consider, in accordance with s. 35 (3) of the *Laws of Guyana, Cap. 51:02*, whether there was dangerous driving *simpliciter*.

A careful analysis of this section is consequently attracted. If upon a trial for causing death by dangerous driving the jury are not satisfied that the death was caused by the – I use the word “alleged” – alleged dangerous driving, but that there was dangerous driving, then they may convict of dangerous driving *simpliciter*. That section creates an indictable offence providing that offence is linked to causing death by dangerous driving (not indictable unless it is so linked).

Now, what is a trial? A trial is not a withdrawal to the jury-room to consider a verdict; the accused is arraigned, the charge and indictment are read to him, he pleads, the jury are sworn, the evidence is led first by the prosecution, and if a *prima facie* case is established, then evidence is called for from the defence, and in some cases, counsel for the prosecution and defence counsel, or the accused himself, addresses; the learned trial judge sums up and then the jury are directed to consider their verdict. When they are considering their verdict they have got to consider the entire trial, they must take into account all the evidence led, and each juror does not walk in – I say this with great respect, I do not intend to in any way derogate from the submission of counsel or underrate the importance of this case – each juror does not walk into the jury-room with an *Archbold* to look up the law for himself and having evaluated the evidence and applied his own view of the law reach a conclusion that he is satisfied, so that he feels sure of the guilt of the accused or that he is not so satisfied, and accordingly return a verdict one way or the other. What the jury has got to do is to consider the facts found by them on

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the evidence, subject to the directions of the learned trial judge, as Odgers in *The Common Law of England Vol. 11*, puts it (at p. 1073):

“Where there is a jury, the general rule is that the judge decides all questions of law, and the jury, all questions of fact. Hence, it is for the judge to determine what facts are admissible in evidence; it is for the jury to weigh the evidence and find the verdict.”

The jury are bound to accept the directions of the trial judge on a question of law, questions of facts are for them; a judge may express his opinion; the jury, if they wish, may disregard his opinion. There is the famous case of R. v. Atfield (1961) 45 Cr. App. R. 309, in which the judge endeavoured to stop the case by telling the jury that in his opinion, he thought they ought to stop the case as the prosecution had not led sufficient evidence to justify the charge. The jury went into the jury-room and when they returned they refused to stop the case. They heard the evidence and they brought the man in guilty. Well, there were comments from the Court of Appeal on that case. [See also *Archbold, 36th Ed.*, para. 564, and the other cases cited therein].

But the point I seek to emphasise is this: that when that section provided that the jury must be satisfied, the satisfaction of the jury is a legal satisfaction. They must be satisfied, not by some whim or caprice, but because of the learned trial judge’s directions to them on the law as applied to the facts as found by them. The satisfaction of the jury may be compared to the exercise of a discretion vested in a judge. The word ‘discretion’ is not usually preceded in the creating Act by the word “judicial” but, nevertheless, the judge must exercise a judicial discretion. The cases which enunciate and emphasise this principle are legion [See Order 25 of the English rule and notes thereon as set out in the *Yearly Supreme Court Practice (1939)*.]

It is worthy of emphasis to observe that the learned trial judge did not give his ruling at the close of the case for the prosecution; the jury having returned, the case continued, the indictment was still before the jury, evidence continued, the judge summed up; it was during the summing-up he that he said to the jury that there was a hiatus in this evidence. (He said, “because of the legal technicality”) The record revealed that the prosecution had not proved that the deceased was one and the same person who had been struck down when the accident took place. Because of this, the State had not discharged their onus; the burden of proof had not been satisfied. He further told them, “I direct you as a matter of law to return a verdict of not guilty on the issue that death was caused by dangerous driving.” Put another way, what he was saying was: “You can’t do it, you cannot be satisfied so that you feel sure and so I direct you to return a verdict of not

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guilty.” The jury had to consider that direction; they had, as I apprehend the law, to follow it; they had to give it legal consideration, and the legal consideration was to return a verdict of not guilty. That verdict was their expression that they had reached a state of satisfaction (albeit influenced by established jurisprudential judicial coercion). The judge at no stage withdrew the indictment from the jury; had he done so, that might have been fatal. He put the entire indictment which embodied two issues. Having directed them, as I stated above, he then went on to tell them that it remained for them to consider, in accordance with the provision of s. 35 (3) of the relevant Act, whether there was dangerous driving *simpliciter*.

Before I pass on, let me readily concede that the word “satisfied” is capable of a narrower meaning than the one I have expressed. Consequently, it is necessary to ascertain which meaning should be applied here.

It was found in England at one stage that jurors were very reluctant to convict of motor manslaughter – that appears in the report of a Royal Commission upon whose recommendations this offence of causing death by dangerous driving was enacted in England some time in 1956. Instead of a jury having what they appear to consider the unpleasant task of convicting for motor manslaughter, it was now open to them to convict for causing death by dangerous driving; that could then form a separate count or the only count.

The English law as set out in *Archbold*, 34th Ed. para. 2825, was up to 1960 *in pari materia* with our law. It is clear that s. 35 (3) was enacted for the purpose of making dangerous driving an indictable offence when linked to an indictment preferred for the offence of causing death by dangerous driving (as it then was in England).

The enactment must be interpreted so as to give effect to the intention of the legislature, and this is accomplished by the application of well-established canons of construction. These are conveniently set out in *Craies on Statute Law*, 6th Ed., where the learned author stated (at p. 96 *et seq.*) as follows, and I quote for case of reference:

“The most firmly established rules for construing an obscure enactment are those laid down by the Barons of the Exchequer in Heydon’s Case, which have been continually cited with approval and acted upon, and are as follows: ‘That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) What was the common law before the making of the Act, (2) What was the mischief and defect for which the common law did not provide (3) What

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remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro private commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.' These rules are still in force and effect, with the addition that regard must now be had not only to the common law, but also to prior legislation and to the judicial interpretation thereof. 'In order properly to interpret any statute it is as necessary now as it was, when LORD COKE reported Hevdon's Case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief In interpreting an Act of Parliament you are entitled, and in many cases bound to look to the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes, in order properly to interpret the statute in question."

[See also Salkeld v. Johnson (1 834) 2 Ex. 256, 272 and *Maxwell on the Interpretation of Statutes*, 11th Ed., pp. 6, 116 and 183.]

Applying those canons of construction to this section, what did the legislature really mean? Did the legislature intend that if the judge did his duty, and his duty is very clearly set out in the case R. v. Young which is reported in [1964] 1 W.L.R. 717 and referred to in para. 548 of *Archbold*, 36th Ed. If a judge is of the opinion that there is not sufficient evidence upon which to found a conviction he should direct them to bring in a verdict of not guilty; or did it intend him in a case of this nature, to choose the narrow meaning and to regard that he had a different duty which would have resulted in a non-direction and, consequently, a misdirection to the jury? This latter course would have completely demolished the very *raison d' etre* of this provision. Surely with great respect to those who think otherwise, this results in an absurdity and consequential public inconvenience. In my view, the legislature intended him to act in accordance with the view expressed by LORD PARKER in the Court of Appeal in R. v. Young (*supra*), and so direct the jury. I feel that I am reinforced in my view by the comments of STABLE, J. in the case of R. v. Curtley [1958] Crim. L J. 200; it is referred to in *Archbold* 34th Ed., and also in *Wilkinson on the Road Traffic Offences*, 3rd Ed., p. 73. In that case, the Director of Public Prosecutions preferred an indictment for causing death by dangerous driving as a first count, and a second count for dangerous driving. The learned trial judge threw out the second count and allowed the charge to be presented only on the first count as he felt that the jury, and he himself, had no jurisdiction to try that second count as it was only a summary offence, but he

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directed the jury in accordance with the provisions of the section similar to our s. 35(3).

That is not the case here. The case here is that the issue of dangerous driving is presented as it ought to have been presented, on a charge of causing death by dangerous driving. The judge so directed the jury, but, I repeat, in accordance with his duty; he directed on the first issue that there was not sufficient evidence to justify the offence. Now, where did he go wrong? I find it difficult to see that the learned trial judge erred in any way.

The cases cited by learned counsel – Abbott and Wight and the case of Shipton referred to by learned brother PERSAUD, were cited by learned counsel in the Court below. In my view, all three cases are easily distinguishable. In Shipton's case, the prisoner was indicted for manslaughter, but under the law as it then was, it would have been open to the jury, if not satisfied that the offence of manslaughter had been committed, to convict of dangerous or reckless driving. The jury acquitted of manslaughter but disagreed on dangerous or reckless driving. The learned trial judge directed a retrial at quarter sessions. Accordingly, an indictment for manslaughter was presented at quarter sessions, but the learned recorder held that he had no jurisdiction to try the offence of manslaughter and that it was consequently not open to him to put the offence of dangerous or reckless driving to the jury. After several procedural efforts to have the matter retried, it was eventually held that the learned recorder was right. In my view, it is possible that if that indictment was put to a jury the prisoner could have successfully pleaded *autefois acquit*, and since the offence of dangerous driving *simpliciter* was only indictable when linked to the offence of manslaughter, the ruling of STABLE, J., in R. v. Courtley, *loc. cit.*, would have been applicable.

I find the instant appeal interesting and not without difficulty, but I take the view that when using the word “satisfied” the legislature meant, “judicially satisfied,” and the jury, having returned a verdict, expressed thereby that they were accordingly satisfied on the first issue. They then went on as further directed to consider the second issue, and returned a verdict of guilty of dangerous driving.

For the reasons I have endeavoured to outline, I feel that this appeal should be dismissed and the conviction and sentence affirmed.

Appeal allowed.

MOHAMED KHALIL**Appellant****v.****THE STATE****Respondent**

[Court of Appeal (Luckhoo C., G.L.B. Persaud and Crane, JJ.A.) March 14, April 9, 1975]

Criminal Law – Robbery with aggravation – Dock identification – Necessity for identification parade – Alibi – Duty of Judge to point out weaknesses in identification.

Summing-up – Evidence – Duty of Trial Judge – Whether summing-up was fair, proper and adequate.

The appellant had been convicted for robbery with aggravation on the evidence mainly of the visual identification of a single witness, Mungia, who did not know his name but who gave a description to the police. This witness claimed that the appellant, K., had run five yards in front of her from a distance of twenty yards away where the alleged robbery had taken place. The witness had been shown the appellant at the police station and there she pointed him out as the robber. No identification parade was conducted and the explanation by the police for not doing so was that the name of the robber was given. This was clearly in conflict with Mungia's evidence. The appellant's defence an oath consisted of an alibi.

HELD: (1) That there were two issues namely (a) was there a necessity for the police in the circumstances of this case to hold an identification parade, and (b) was the summing up of the trial judge ample, fair, proper and adequate.

(2) That an identification parade ought to have been held to ensure the ability of the witness to recognise the suspect so that any suspicion of unfairness or risk of erroneous identification would have been excluded. Identification must be sufficiently positive and not be grounded on mere similarity or resemblance.

(3) That when, at the police station, the police brought the appellant out for the witness to see him this amounted to a dock identification as it may have tended to suggest to the witness that the prisoner was believed by the authorities to be the culprit.

(4) That a witness's identification of a person should as far as possible be unaided and that nothing should be done to influence or affect the recollection of a witness

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and thus destroy the value of his/her evidence of identity.

(5) That in the circumstances the jury ought not to have been left to consider whether it was reasonable of the police to decide whether or not to hold an identification parade. It ought to have been pointed out by the trial judge, to the jury, the circumstances under which the identification was made and the weaknesses in it. The trial judge's summing-up was not sufficiently fair and the jury was misdirected on a number of occasions.

Appeal allowed. Conviction and sentence set aside.

Editorial Note: This case is also reported at (1975) 23 W.I.R. 50

Cases referred to:

- (1) Robert William Long (1973) 57 Cr. App. R. 871 C.A.
- (2) Arthurs v. Attorney – General For Northern Ireland (1970) 55 Cr. App. R. 161 H.L.

The appellant in person.

G.H.R. Jackman, Deputy Director of Public Prosecutions (ag.) for the State.

E. V. LUCKHOO, C.: The jury found the appellant guilty of the offence of Robbery with aggravation. He was sentenced to two years' imprisonment and to receive a whipping of six strokes. On 14th March, 1975, this court heard his appeal and had little difficulty in quashing the conviction and sentence. We now give our reasons. Two questions arise:

- (a) Was there a necessity for the police to hold an identification parade (which was not done) in the circumstances of the case?
- (b) Was the summing-up of the trial judge ample, fair, proper, and adequate?

The conviction rested wholly on the visual identification of a single witness, one Mungia. The appellant had at all material times strenuously denied any involvement in the crime. His defence on oath consisted of an alibi. On 10th December, 1973, Mungia was selling ice-blocks at a school some 20 yards from a store owned by one Badrie who was, on that day, assaulted and robbed in his store at about 10.30 a.m. by two East Indian boys whom he did not recognise or know. He shouted, "Thief!" people came; they too shouted, but the intruders escaped. The attack on Badrie must have been swift and sudden, for although he came face to face and to grips with his assailants, he confessed his inability to identify anyone. The day was a "rainy" one. Mungia saw two persons running out of Badrie's

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yard; they ran past her at a distance of five yards; she gave a statement to the police the same day. In evidence, in answer to the appellant, she said: "I did not tell the police your name. I gave a description of the person I saw." The police arrested the appellant on 14th December and took him to the station. Gordon Howard, a detective – corporal, told him that it was reported that on 10th December he, in company with another East Indian boy, robbed Badrie of \$30. He cautioned him and the appellant said, "Nah me". The day after the appellant was arrested Mungia was taken to the police station. She said this in evidence:

"On 15.12.73 I went to Providence Police Station. I saw the accused there. The police brought him out to me.

"In his presence I told the police, 'That is the boy I saw running out of Badrie's yard.'

"He said that it was not he, but it was somebody else. "

Immediately the question arises: Why did the police not hold an identification parade, but instead presented the appellant alone to Mungia for her to say whether he was the one of the boys she saw running out of Badrie's yard ?

Cpl. Howard said that he did not think it was wise to place the appellant on an identification parade "because the name was mentioned to him". But the appellant's name could not have been mentioned to him by Mungia because she said she did not "tell" the police the appellant's name but only gave a "description" of the person she saw. She said further that, "When he (the appellant) was coming out of the yard I did not know his name ... I had given the police a statement ... on 10th December, 1973 – the same day the story happened. In that statement I did not mention his name because I did not know it then. "

In these circumstances, there was every reason why an identification parade should have been held. By the very token that Mungia was taken to the station to see whether the person at the station was the one she had seen running away, the desirability and, indeed, necessity of having a parade should have commended itself to the police. The attempt at an excuse hazarded by Cpl. Howard – that he did not think it was "wise" to do so because the "name" was given to him – should have been rejected out of hand. How could it be "wise" to have a "one-man parade" and not a "proper" parade to test the witness in a fair way? If a potential witness is shown the person to be identified singly in circumstances to indicate, as in this case, that the police suspected that person, the witness would be much more likely, however fair and careful he might be, to assent to the view that the man he was shown corresponded to his recollection, and when this happens courts will, in the absence of other evidence, be inclined to set aside a conviction as

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being unjust and unsafe. It is essential that a witness's recollection of the physical appearance of the person previously observed under incriminating circumstances should, as far as possible, be unaided. The very object of a parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested, and every precaution should be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witness's attention being directed specifically to one "suspected person" instead of equally to all persons on parade. It is quite wrong to suggest to the witness that the prisoner was believed by the authorities to be the offender. Nothing should be done to influence or affect the recollection of the witness and thus destroy the value of his or her evidence of identity.

In the circumstances of this case, the only satisfactory method of identification would have been to place the appellant among a sufficiently large number of persons of similar age and build and condition of life. As it was not unfashionable for long hair to be worn in those days, as the appellant was wearing his hair, it could hardly have posed a problem to secure such like persons.

We would like to make it perfectly clear that a distinction must be drawn between identification by the personal impressions of a relatively strange person, and identification by the personal impressions of one well-known and familiar to the beholder. If, for example, a father were to say he saw his son, who was residing at his house, in a certain street at a certain time, that would be admirable evidence. But if the person who had only seen his son on some rare occasion were to say in the same way that he had seen his son at a certain time at a certain street, that would be evidence of much less value, unless the son had some peculiarity which would tend to confirm the identification. For identification to be of any real value, it must be sufficiently positive and not be grounded on mere similarity or resemblance. The method of identification employed in this case was not dissimilar to a "dock identification" which courts in the past have deprecated as a substitute for an identification parade, because the witness in court would almost automatically fasten his gaze on the prisoner in the dock and might yield to the temptation of making a positive identification even where uncertainty exists, on the basis that if the prisoner were not the right person, the police would not have had him in the dock.

If, perchance, the witness looks elsewhere, at least the prisoner would be spared a cut-and-dried identification. What happened, however, at the police station on 15th December was even worse than a dock identification, and should have been deprecated. It is true that Mungia had said she knew the appellant "since election time" which was some six months before, but then she was only able to "describe" him to the police. The trial judge, instead of condemning the method of identification employed on

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15th December, put the matter entirely out of perspective and glossed over the omission made by saying:

“You will also appreciate that no identification parade was held in this case. Cpl. Howard, you may think, gave some explanation as to why that happened. You will recall that he said he did not think it wise to place the defendant on an identification parade. ‘I did not think it wise because the name was mentioned to me.’ Well, you will decide whether you will accept that; whether it is a reasonable explanation or not.”

In the circumstances, it was hardly proper to leave it open for the jury to say whether they accepted Cpl. Howard’s explanation as being “reasonable” when prudence and fair play indicated the contrary. The trial judge said:

“A discretion is left to the police in any case, whether they were charging the person or not, to place him on an identification parade, for the jury to decide afterwards whether they are satisfied that that is the person.”

This direction is, if not confusing, hardly helpful. In the first place, the police cannot under the guise of the exercise of a discretion seek to imperil the liberty of the subject by dispensing with an identification parade when the circumstances clearly demanded that one should have been held. An accused person is, under the Constitution, “presumed to be innocent unless proved to be guilty.” [Art. 10 (1)]. This proof of guilt is not to be secured by unfair methods. Mungia, from the evidence, did not know the appellant well enough for a parade to have been dispensed with. How could the jury be satisfied from her evidence that the appellant was the “person” when her identification was not tested in a proper way?

Let us examine other aspects of the summing-up to see whether the trial judge was sufficiently fair in the manner of his presentation of the case to the jury. He directed them in relation to Mungia’s evidence that, “Credibility depends on the powers of observation of the witnesses ... Credibility would also depend on the accuracy of recollection of the witnesses ... How did Mungia strike you in the witness-box? Did she strike you as a person who knows what she is talking about? Did her evidence suggest confidence? Did she herself exude confidence?” In the first place, credibility does not depend on “the powers of observation” nor on “the accuracy of recollection of the witnesses”. A witness with limited powers of observation or recollection could honestly believe to be true what he or she gives in evidence. A jury might give such a witness credit for his ‘truthfulness’ in his observations and recollection, and still not depend on his evidence (although the witness might appear to know what he or she is talking about, or might exude confidence) on the basis that the witness might have been mistaken.

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Human fallibility is a different thing from human perversion. A jury would have to consider not only whether the witness was truthful, but dependable. Because Mungia might have given the impression of being a witness of truth does not necessarily mean that she should be regarded as dependable. The limited opportunity which she had of observing the two persons running to escape capture on a “rainy” day from a distance of only 20 yards could well have led to a mistake in identification. Further, when the trial judge said, “She had no motive for speaking against him and speaking an untruth,” he was not attacking the problem from the right angle. Likewise, when he went on to say, “You are in a position to assess Mungia’s integrity, her veracity, her being bound to speak the truth by virtue of the oath she has taken.” Her honesty of purpose should not be confused with a genuine mistake which could have been made under the circumstances of her purported identification. Then he went on to ask them whether “the police would descend to the depth of degradation and whether they would enlist Mungia in the process of so doing.” The idea of a conspiracy does not arise when the issue is one of mistaken identity, and, what is more, he sought to illustrate the improbability of Mungia conspiring with the police by saying this, “You may think that Badrie was in as good a position as Mungia and if the police wanted to prompt anybody, to force anybody to say anything, you may think that they had just as easy a chance with Badrie as with Mungia.” With what logic this statement is made, we are unable to appreciate!

Then the judge went on to say, “You may think that he had a greater motive in getting even with the person as distinct from Mungia who had no quarrel with the defendant. She (Mungia) is saying however, that the defendant is the person. Is she lying?” The contrast adopted here is seeking to place Mungia’s evidence in a very favourable light, and detracts from a fair approach to assessing her evidence under the circumstances of her identification.

The law does not require a judge in this kind of case to give a specific warning about the dangers of convicting on visual identification. Still less does it require him to use any particular Form of words. In this case, as in all cases, a judge should sum up in a manner which will make clear to the jury what the issues are and what is the evidence relevant to these issues. Above all, he must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses, it is likely that the summing-up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it. [See Robert William Long (1973) 57 Cr. App. R. 871, *per* LAWTON, L.J.]

LORD MORRIS OF BORTH-Y-GEST, in Arthurs v. Attorney – General for Northern Ireland (1970) 55 Cr. App. R. 161 at p. 167, in dealing with the question as to whether the particular summing-up was fair and ample, said (p. 168):

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“It seems to me that those specific words such as ‘warning’ or ‘danger’ may not be found in the summing – up. Its whole tenor and spirit was such as to call attention to the possibilities of making a mistake in identification and of the need to be sure that no such mistake was in fact made.”

His Lordship went on to say:

“It is the aim of all to strive to reduce to a minimum the risks of the conviction of one who is in fact innocent. A judge will have this aim constantly in mind during his conduct of a trial and in his direction to the jury. It is manifest that in cases where the vital issue is whether the identification of the accused is certain and reliable, the judge must direct the jury with great care. However careful is his general direction as to the onus of proof the judge will feel it necessary to deal specifically with all the matters relating to identification... A summing-up that fails to give adequate direction to the jury or which in the circumstances and in relation to the facts of a particular case, fails carefully to alert them to the risks of convicting an innocent person, might in any event be held to be defective and to warn the use by the Court of Criminal Appeal (Northern Ireland) of certain of its ample powers.... A summing-up does not follow a stereotyped pattern. It need contain no set form of words. Each case has its own features and a summing-up must be related to those features and to the problems of the particular case. A judge will invite the jury to give due consideration to the special issues which are presented by the evidence. He will be guided by his duty as well as by his desire to ensure, so far as he could ensure, that no innocent man is convicted.”

In this case, not only were the police remiss in not holding an identification parade, but the trial judge had misdirected the jury on a number of occasions which would justify quashing of the conviction and sentence, which this Court was forced to do on 14th March, 1975.

PERSAUD, J. A.: I agree

CRANE, J.A.: I agree

Appeal allowed. Conviction and sentence set aside.

RAMDAT SOOKRAJ**Appellant****v.****EDWARD CERES****Respondent**

[Court of Appeal (Persaud, Crane and Haynes, JJ. A.) November 14, December 2, 1974; March 13, 1975]

Appeal – Larceny – Doctrine of recent possession – Application for leave to appeal from order of Full Court – Leave of Court of Appeal – Ground involving question of law alone – Question of law cf: question of law alone – Court of Appeal Act, Cap. 3:01, s. 31 (1) and 31 (2).

The applicant was convicted summarily of the indictable offence of burglary and larceny. The larceny included “Timex” wrist – watches valued \$1,300.00 the property of one Harold Dhanraj, and thirty – five wrist – watches belonging to one Mohamed Haniff. Evidence was led to the effect that Harold Dhanraj’s store at the Stabroek Market was broken and entered between 7:45 a.m. on Sunday, May 21, 1972 and 6 a.m. on Monday, May 22, 1972 and the watches in question, cash and a quantity of National Insurance stamps stolen therefrom; also that on May 25, 1972, thirty two of Mohamed Haniff’s watches, fourteen of which were identified by Haniff but later found missing when the police arrived, were in the applicant’s possession. The remaining eighteen were later removed and produced as exhibits.

The applicant gave two different explanations on May 25, 1972, of his possession – one oral to Haniff and a city constable, in which he said he had bought them from a certain man, and the other in a written statement to the police in which he said the watches were his property; he had imported them recently.

At the trial, Haniff did not positively identify the eighteen watches nor formally lay claim to them as his property. He merely testified that when shown the watches, he told the applicant they belonged to him and he was not cross – examined on the point. The Magistrate nevertheless rejected a no-case submission on the applicant’s behalf that (i) there was no evidence that the applicant broke and entered the premises and (ii) there was insufficient evidence of identification of the eighteen watches found in his possession.

On appeal to the Full Court two issues arose: (i) was there sufficient evidence to identify the watches found in the applicant’s possession with those stolen from Dhanraj’s store at the time alleged? If so, (ii) was the offence established (if any) larceny or receiving? The Full Court found there was sufficient identification and that larceny was proved.

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Leave to appeal was not given by the Full Court, and the applicant now applies to the Court of Appeal under s. 31 (2) of the *Court of Appeal Act, Cap. 3:01* for leave to appeal from the decision of that court under s. 31 (1) (a), i.e, on a ground which he alleges involves a question of law alone.

HELD: (1) That s. 31 (1) (a) does not by its terms restrict the right to appeal to a point of law actually taken in the Full Court, and no such limitation is implied.

(2) That in order to succeed, the applicant must satisfy the court not only that his proposed grounds of appeal involve questions of law alone, but also, that fair or reasonable argument could be urged to establish error on the part of the Full Court in relation to such questions of law.

(3) That a question of law alone was clearly involved in the ground that, accepting the facts found by the Magistrate, the Full Court erred in holding that the legal effect of such evidence established the offence of burglary and larceny rather than the offence (if any) of receiving.

(4) That the remaining question is whether there are reasonable arguments which may be urged to satisfy the Court of Appeal that the Full Court erred in law in so holding.

(5) That leave to appeal should be given having regard to the possible bearing of these matters on the question of larceny or receiving.

Leave to appeal to the Court of Appeal granted.

Editorial Note: This case is also reported at (1975) 23 W.I.R. 180

Cases referred to:

- (1) R. v. Huot (1968) 70 D.L.R. [2d] 703.
- (2) R. v. Boak [1925] S.C.R. 525.
- (3) Gauthier v. R. [1931] S.C.R. 416.
- (4) Belyea v. R.; Weinraub v. R. [1932] S.C.R. 279.
- (5) Bonner v. Lushington (1839) 57 IP. 168.
- (6) Ross v. Rivenall [1959] 1 W.L.R. 713; [1959] 2 All E.R. 376; 123 J.P. 352; 103 Sol. Jo. 491.
- (7) Willams v. Waterman (1961) 3 W.I.R. 499.
- (8) Soloman v. Khan (1962) 5 W.I.R. 132.
- (9) Lampard v. R. [1969] S.C.R. 373.
- (10) Sunbeam Corporation (Canada), Ltd. v. R. [1969] S.C.R. 221.
- (11) R. v. Hookoomchand and Sagur [1871] L.R.B.G. 12.

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- (12) R. v. Johnson (1967) 10 W.I.R. 359.
- (13) Owen v. Bulworths Properties, Ltd. (1956) 96 C.L.R. 154.
- (14) R. v. Hoodhoo [1933] L.R.B.G. 182.
- (15) R. v. Alleyne [1938] L.R.B.G. 7.
- (16) R. v. Loughlin [1951] W.N. 325; 35 Cr. App. R. 69; 49 L.G.R. 545, C.C.A.
- (17) Duke v. R. (1967) 10 W.I.R. 173.
- (18) R. v. Crowhurst (1844) 174 E.R. 851.
- (19) R. v. Smith (1845) 175 E.R. 86.
- (20) R. v Dibley (1849) 175 E.R. 344.
- (21) R. v. Headley (1964) 6 W.I.R. 317.
- (22) R. v. Francis (1874) 12 Cox C.C. 612.
- (23) Hockin v. Ahlquist Brothers, Ltd. [1943] 2 All E.R. 722.
- (24) R. v. Jadusingh (1963) 6 W.I.R. 362.
- (25) Miller v. Howe [1969]1 W.L.R. 1510.

Sir Lionel Luckhoo, S.C., with B.O. Adams, S.C., for the appellant.
G.H.R. Jackman, Senior State Counsel, for the respondent.

HAYNES, J.A.: The applicant was convicted summarily for burglary of the drug store of Harold Dhanraj in the Stabroek Market between 7:45 a.m. on Sunday, 21st May, 1972, and 6.00 a.m. on Monday, 22nd May, 1972, and stealing therefrom a quantity of Timex wrist – watches valued at \$1,300.00, a quantity of National Insurance Stamps valued at \$50, \$450 in cash, all the property of Harold Dhanraj, together with thirty-five wrist – watches to the value of \$700, the property of Mohamed Haniff, all to the total value of \$2,500. There was no direct evidence that Sookraj actually did break and enter the premises, so the prosecution founded their case on the so – called doctrine of recent possession.

Evidence was led that thirty-two of the wrist – watches belonging to Mohamed Haniff were in the possession of Sookraj on the 25th May, 1972. Only eighteen of these were tendered in evidence as Exhibits “C1-C18”. Two witnesses, Mohamed Haniff and City Constable Heywood, testified that Sookraj had shown them the remaining fourteen watches in the store before the police seized Exhibits “C1-C18”. Later on the said 25th May, 1972, and at the time of the seizure they were not found. Sookraj gave two explanations of his possession of the watches: one was oral, and was given on May 25th, 1972, to Haniff and Heywood between 8.30 a.m. and 9.30 a.m. He told them that he had purchased the watches on the very night of Sunday, 21st May, 1972, from a man brought to him by a woman named Francis who lived nearby; that he (Sookraj) was told by this man that the watches had “come off a trawler”, and he had purchased them, presumably in good faith, believing that the vendor had brought them from Trinidad on his trawler. And later the said day, he made a written statement to the police. In it he claimed that

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the watches removed from his store on that day were his property which he had imported about two or three weeks previously.

At the hearing, Haniff gave some evidence of identification of Exhibits “C1 – C18”. He did not on oath formally claim the missing fourteen watches as his property or give any particulars of their identification. About them, he testified only that “he (Sookraj) took me at the back and showed me some Timex watches and others. I told the defendant that these watches here are my watches. He told me he bought these watches that came from a trawler.” He was not cross – examined on their identification. As regards the oral explanation, the prosecution had the woman, Francis, in court. She was identified by Heywood, but she was not called to testify. At the close of the case for the prosecution, counsel for Sookraj submitted that there was no case to answer because: (a) there was no evidence that Sookraj did break and enter the premises; and (b) there was insufficient evidence of identification of the watches found in his possession. The magistrate overruled this submission. He called for a defence to the charge as laid. The applicant did not testify. He made an unsworn statement adopting the explanation in the written statement to the police. This explanation the magistrate disbelieved and consequently he found the defendant guilty. His appeal to the Full Court was dismissed.

We do not have before us the reasons of the Full Court, but we have seen the record and grounds of appeal before them. And it is clear that the crucial issues that arose out of the proceedings in the Magistrate’s Court were: (a) Was there sufficient evidence identifying the watches found in the possession of Sookraj with those stolen from Dhanraj’s store at the time alleged? (b) If so, was the offence established (if any) larceny or receiving? The Full Court upheld the findings that the watches were sufficiently identified and larceny proved. So the applicant wishes to challenge on this count the decision of the Full Court

The *Court of Appeal Act, Cap. 3:01, s. 31*, reads thus:

“(1) Where the Full Court makes an order on appeal from an inferior court in a criminal cause or matter, any party to such appeal may appeal to the Court of Appeal from the order of the Full Court –

(a) upon any ground which involves a question of law alone;

(2) No appeal shall lie under subsection (1) except with leave of the Full Court or the Court of Appeal.”

What is involved in this matter is an application to this Court under s. 31 (2) for leave to appeal under s. 31 (1) (a) on a question of law alone. It was resisted by

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counsel for the State on the ground that the applicant was seeking leave to appeal on grounds of appeal involving questions of fact alone or questions of mixed law and fact. And this, he contended, was not legally permissible under s. 31 (1) aforesaid. The right of appeal from the Full Court is conferred and circumscribed by the provisions of s. 31 and it would be wrong for us to give an interpretation to s. 31 (1) (a) thereof which would result in the broadening of the scope of appellate jurisdiction under the Act beyond the limitations which are stipulated in the Act itself.

What then is “any ground which involves a question of law alone”? It may or may not be significant that the subsection does not read “any ground which involves a question of law” but “any ground which involves a question of law alone” Be that as it may, as was pointed out by FREEDMAN, J.A. in the Manitoba Court of Appeal in R. v. Huot (1968) 70 D.L.R. (2d) 703:

“It is easy to say that the Crown has a right of appeal only on a question of law. What is not always so easy to decide is whether, in a given case, the particular question under appeal is one of law.” But in this judgment, although it may not be necessary to endeavour to lay down any exhaustive definition of what is “a question of law alone”, or to frame any precise and conclusive test to be applied to determine this question whenever it arises, it is judicially instructive to refer to certain authorities on what was “a question of law” or “of law alone”.

In R. v. E. W. Boak [1925] S.C.R. 525, ANGLIN, CI, reading the judgment of the Supreme Court of Canada dealing with the scope of this phrase, said (at p. 528):

“That clause was meant to cover questions of law arising out of the proceedings at the trial based upon facts admitted or conclusively found and not involving the appreciation or weighing of evidence by the appellate court. This is implied in the term ‘law alone’.”

Oliver Gauthier v. R. [1931] S.C.R. 416, was an appeal to the Supreme Court “on a question of law alone” under s. 1023 of the *Criminal Code*. Gauthier was convicted for stealing a car. His appeal to the Appellate Division of the Supreme Court of Ontario was dismissed. The Supreme Court per ANGLIN, C.J.C. (at p. 416) said:

“The Court is unanimously of the opinion that it has no jurisdiction to hear this appeal. On examination, it turns out that the questions raised are all questions of fact – questions of the appreciation of evidence ... in regard to which there is no right of appeal to this Court under section

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1023 of the *Criminal Code*.”

And in Roy E. Belyea v. R.; Harry Weinraub v. R. [1932] S.C.R., p. 279, the same learned Chief Justice of Canada said (at p. 296):

“The right of appeal... is, no doubt, confined to ‘questions of law’. That implies, if it means anything at all, that there can be no attack by him (the appellant) in the Appellate Divisional Court on the correctness of any of the findings of the fact.”

Bonner v. Lushington (1893) 57 J.R.168 was a decision on a case stated on a question of law. C, a prostitute, was convicted for the statutory offence of unlawfully in a public street behaving in a riotous and indecent manner. On appeal, the quarter sessions held C. was not guilty, but stated a case asking if, under the circumstances, she was guilty. LORD COLERIDGE, C.J. said (at p. 169):

“This is a case which the court must decline to hear as not involving any point of law ...it is nothing but a mere question of fact, and the appeal is dismissed .”

In Ross v. Rivenall [1959] 2 All E.R. 376, the recorder had allowed an appeal from convictions of Ross for unlawfully taking and driving away a car without the consent of the owner and unlawfully using it uninsured. He stated a case for the opinion of the Divisional Court as to whether on the facts found, his conclusion was correct in point of law. The court held he was wrong. SALMOND, J. said (at p. 378):

“If, at the end of the case for the prosecution, he (the Judge) found there was in law some evidence against the appellant but that it was not strong enough to call for an answer, I, for myself, have grave doubts whether this Court could have interfered. The recorder’s view might have been mistaken, but it would not have been a mistake in law and accordingly, would not have been a mistake that could successfully be challenged in this Court... the recorder decided that in law there was no evidence to support the charge. This, in my judgment, was a wrong conclusion on a point of law...”

Williams v. Waterman (1961) 3 W.I.R. 499 was a decision of the Federal Supreme Court (ARCHER, C.J., WYLIE and LEWIS, JJ.). The appellant was convicted in the Magistrate’s Court at Port-of-Spain of larceny and sentenced to nine months’ imprisonment with hard labour. He appealed to the Court of Appeal of Trinidad and Tobago and his appeal was dismissed. The record did not contain reasons for the judgment of the Court of Appeal.

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The evidence disclosed that monies belonging to the Fire Services Sports Club were in the custody of the person in charge of the clerical staff in the Fire Services building, Wrightson Road, Port-of- Spain. This officer kept these monies in two envelopes. On Saturday, November 28, 1959, before leaving the office for the weekend, he placed these envelopes in a cabinet in his office behind a cash pan, locked the cabinet and took the key with him. His office was not locked. The appellant was a fireman employed as a mess attendant in the same building, and during that weekend was performing his duties in the mess and at a certain period was alone in the building. On the Monday morning, it was discovered that the lock on the cabinet had been broken, the two envelopes were now in front of the cash pan and most of the money had disappeared. On the cash pan was found a finger-print which the finger-print expert concluded was that of the middle finger of the appellant's right hand. The appellant in a written statement denied having gone into the room at all, but later alleged that on the Friday afternoon the clerical officer had brought the cash pan to the mess and left it there and that the appellant later returned it to that officer. The officer concerned, and another witness who was with him in the mess, denied that the cash pan had been taken to the mess hall at all.

The second ground of appeal reads as follows:

“(ii) The appellate court erred in law in holding that the learned Magistrate was right in convicting the appellant of the charge of larceny inasmuch as there was no evidence, in the alternative, no satisfactory evidence, upon which such a finding could have been made.”

The relevant law allowed an appeal as of right “upon any ground which involves a question of law alone”. The appeal was dismissed. WYLIE, J. said (at p. 501):

“The second ground alleges that the Court of Appeal erred in law in their decision because there was no evidence, or in the alternative no satisfactory evidence, upon which the appellant could have been convicted. In support of this ground, counsel submitted that the inference drawn by the Magistrate from the facts, and particularly from the fingerprint evidence, ought not to have been drawn. It is quite clear that this submission could not succeed without this court examining the evidence and deciding whether the evidence was sufficient to justify a conviction. It follows that such a ground cannot be a ground which involves a question of law alone and consequently, so far as this ground also is concerned, this court has no jurisdiction to hear this appeal. For these reasons we will dismiss the appeal.

“The question whether a ground of appeal comes within sub-paragraph

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(a) of reg. 40 (1) has arisen on several occasions and it seems desirable, therefore, to refer in more detail to the legal principles which must be followed by this court in deciding whether or not a ground of appeal involves a question of law alone. In the present case, counsel submitted that the ground of appeal that there was no case to answer at the close of the prosecution's case, would be a ground which involves a question of law alone. This court cannot accept that this is so in every case, for it is often impossible for a court to dispose of this ground without itself examining the evidence led by the prosecution, making its own findings of fact and coming to its own conclusion on that evidence whether there was a case for the appellant to answer. Only after reaching its own conclusion on the facts in this manner, would the court have to consider the law applicable to the offence to decide whether, in the light of these conclusions, there was a case to be answered. This makes it clear that such a ground of appeal frequently involves a question of mixed law and fact.

The question whether there is any satisfactory evidence or sufficient evidence to justify a conviction can never be a question of law alone."

And again at p. 502:

"... in a considerable number of cases, it is attempted to put forward as a ground of law alone, a ground such as is referred to in this judgment prefaced by the words 'The court erred in the law that...'. It is abundantly clear that the use of such language cannot alter the nature of the question to be decided."

And in Soloman v. Khan [1962] 5 W.I.R. 132, the Court of Appeal of Trinidad and Tobago (WOODING, C.J., HYATALI and PHILLIPS, JJ.A.) followed Williams v. Waterman. The facts of that case were these: Premises at 15 Stone Street, Port-of-Spain, were let to the appellant by the respondent for use as a dwelling-house. There was no express covenant against their user for any other purpose and progressively thereafter the appellant used them for business purposes despite repeated protests by the respondent. The respondent served the appellant with a notice to quit and thereafter the respondent in ejectment proceedings instituted by her, obtained an order of ejectment against the appellant on the ground that she was using the premises, as the Magistrate found, mainly for business purposes and was accordingly in breach of an obligation of her tenancy to use them as a dwelling-house. On appeal by the appellant to the former Full Court of Trinidad and Tobago, her appeal was dismissed. She thereupon appealed to the now defunct Federal Supreme Court which could only have entertained the appeal on a ground involving a question of law. The Court of Appeal of Trinidad

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and Tobago inherited the jurisdiction. WOODING, C.J., delivered the following judgment of the Court. He said:

“Accordingly, this court cannot entertain the appeal unless upon a ground involving a question of law alone.

Two grounds are set forth in the notice of appeal... The second claims that the learned Magistrate and the Full Court ‘erred in law in not giving effect to condonation of the alleged breaches of the tenancy agreement’. This needs to be examined carefully since, as was said by the Federal Supreme Court in Williams v. Waterman (1961) 3 W.I.R., at p. 502: ‘... in a considerable number of cases it is attempted to put forward as a ground of law alone, a ground such as is referred to in this judgment prefaced by the words “The court erred in law in that...” It is abundantly clear that the use of such language cannot alter the nature of the question to be decided.’ The true issue was whether the respondent as landlord can be held to have assented to the change by the appellant of the use of the premises ... what we are really being asked to decide is whether the respondent as landlord ought to be held to have assented to the change of the user of the premises, which is a question not of law but of the proper inference to be drawn from an assessment of all the relevant facts.

For these reasons, we hold that the second ground of appeal is likewise not one involving a question of law alone and, therefore, that neither the Federal Supreme Court nor the British Caribbean Court of Appeal had, and consequently this court has not, any jurisdiction to entertain this appeal. The appeal is accordingly dismissed with costs.”

In the Canadian case of Lampard v. R. [1969] S.C.R. 373, CARTWRIGHT, C.J. said (at p. 380):

“It has often been pointed out that where a trial judge makes findings of primary facts and draws an inference therefrom an appellate tribunal is in as good a position as was the trial judge to decide what inference should be drawn, but in drawing the inference the Court is making a finding of fact. In the case of an appeal at large, the Court of Appeal has of course, power to substitute its view, as to what inference should be drawn, for that of the trial judge, but where, as in the case at bar, the jurisdiction of the Court of Appeal is limited to questions of law in the strict sense it has no such power.”

And finally, in Sunbeam Corporation (Canada) Ltd. v. R. [1969] S.C.R. 221,

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RITCHIE, J. reading the majority judgment, after saying (at p. 226):

“... I am satisfied that the point to be determined on this appeal is a very narrow one and turns on the question of whether or not the grounds of appeal alleged before the Court of Appeal involved ‘a question of law alone’ so as to give that court jurisdiction...”

continued (at p. 231): “... it is well settled that the sufficiency of evidence is a question of fact and not a question of law ...”

But the legal effect of findings of fact of the court below raises a question of law, that is to say, whether those facts proved the offence charged, or a different one, or no offence at all. (See R. v. Hookoomchand & Sagur [1897] L.R.B.G. 12, at p. 17; Roy E. Belyea v. R. [1931] S.C.R. 279, at p. 296; R. v. Johnson (1967) 10 W.I.R. 359, at p. 360; and R. v. Huot (1968) 70 D.L.R. (2d) 703, at p. 705).

Two other aspects of the relevant law must be considered: first of all, s. 31 (1) (a) does not by its terms, restrict the right of appeal to a point of law actually taken in the Full Court, and in my view, no such limitation is implied. I conceive that what was said by DIXON, J., in Owen v. Bulworths Properties Ltd. (1956) 96 C.L.R. 154, applies to our s. 31 (1) (a). At p. 163, that learned judge said:

“The jurisdiction of the Supreme Court given by s. 41 (2) is to decide an appeal as to question of law only... the jurisdiction so exercisable is not; restricted to questions of law which have been specifically raised before the magistrate. It extends to all questions of law which are necessarily involved in his decision whether his attention was drawn to them or not; although the Court will not entertain a point of law not raised before the magistrate if, assuming it to have been taken before him, it is possible that it might have been met by calling further evidence.”

The second point is that, in order to succeed in this application, the applicant must satisfy this court not only that his proposed grounds of appeal involve questions of law alone, but also that fair or reasonable argument could be urged to establish error on the part of the Full Court in relation to such questions of law. This requirement must flow as a matter of principle, as the power to grant leave is discretionary. And, further, in my judgment the principle underlying the rulings of SAVARY, J., in R. v. Boodhoo [1933] L.R.B.G. 182, at p. 186, and VERITY, J. in R. v. Alleyne [1938] L.R.B.G. 7 at p. 10 – cases dealing with the exercise by a trial judge of his discretion under the now repealed statutory power to state a case on a question of law for the consideration of the now defunct Court of Crown Cases Reserved – apply by analogy. In my judgment these authorities correctly expound the relevant law and general

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principles to be applied in deciding whether the applicant should be granted leave to appeal on all or any of the grounds in his application. These grounds are:

“1. The Full Court erred in law in holding that a *prima facie* case of break and enter and larceny had been made out at the close of the case for the prosecution.

2. The Full Court erred in holding that there was sufficient identification of exhibits C1, C4 and C7 by the witness Haniff and that the learned Magistrate could properly act on such evidence.

3. The Full Court erred in law when it held that it was not necessary for the witness Haniff to lay claim on oath at the trial to the Timex and other watches or to give reasons for making such a claim.

4. The evidence given by Haniff in relation to his claim to Timex and other watches alleged to have been seen in the defendant’s (appellant’s) shop was either inadmissible or of no probative value, and further, the evidence that some woman in a neighbouring house told Haniff in the defendant’s absence that she knew nothing, was inadmissible and prejudicial and the Full Court erred in holding that all this evidence was not inadmissible.

5. The Full Court misdirected itself when it held that the fact that Haniff had identified exhibits C2 and C3 to the police as his watches whereas he identified exhibits C4 and C7 in Court did not shake his credibility so as to make his evidence manifestly unreliable.

6. The decision of the Full Court was wrong because the learned Magistrate did not properly analyse the evidence.

7. The Full Court misdirected itself in relation to the evidence of the City Constable Heywood because –

(a) The man called Khan was not identified in Court.

(b) The evidence in relation to Khan was irrelevant and inadmissible, and

(c) It was the duty of the prosecution to call Francis, who was in Court, and her husband to show that the defendant’s (appellant’s) account was false.

8. Assuming exhibits C1, C4 and C7 had been properly identified, the Full Court misdirected itself when it held that the inference of receiving

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could or should not have been drawn.

9. The Full Court misdirected itself when it held that it was not incumbent on the prosecution to rebut the defendant's explanation in relation to the Timex and other watches alleged to have been seen in the defendant's (appellant's) shop having regard to his explanation to the Police with respect to another set of watches, exhibits C1- C18.

10. The Full Court erred when it approved of the Magistrate's approach to the doctrine of recent possession and the onus of proof."

Grounds 2, 5, and 6 clearly raise questions of fact. On appeal, if leave is granted on these grounds, this court will be asked to substitute its own conclusion of fact for that of the Full Court as regards the sufficiency of the evidence of identification. If the Full Court erred in drawing the wrong inferences, they made an error of fact, not of law. Ground 7 (a) also raises a question of fact and it seems plain, per adventure, that Mohamed Haniff is one and the same person as Khan. Ground 7 (b) falls with 7 (a). So leave is refused to appeal on grounds 2, 5, 6, 7 (a) and (b).

Ground 8 raises this question: accepting the facts found by the Magistrate, the Full Court erred in holding that the legal effect of such evidence established the offence of burglary and larceny rather than the offence (if any) of receiving. This ground clearly involves a question of law alone. Therefore, the remaining question is, whether there are reasonable arguments which may be urged to satisfy this Court on appeal that the Full Court erred in law in so holding. Counsel for the respondent admitted ultimately that this ground involved a question of law alone. But, he contended that the Full Court was plainly right and that no reasonable argument can be urged against their ruling. He argued that as the Magistrate found that the applicant was in possession of thirty-two of the stolen watches shortly after the theft of them, he could legally convict him of the offence charged. [See James Loughlin (1951) 35 Cr. App. R. 69, and Duke v. R. (1966-7) 10 W.I.R. 173]. But putting the matter that way over – simplifies the legal position, for there are these additional considerations:

(1) The Magistrate rejected the applicant's claim in his unsworn statement that he had no stolen watches in his store on the 25th May, 1973, because whatever watches were there, they were his property imported from abroad prior to the burglary and larceny from Dhanraj's store. The legal position then, was that the applicant in his defence in court had given no explanation of his possession of the stolen property for to deny that property is stolen is not an explanation of possession of it within the doctrine of recent possession. But also he had given an oral account of possession of thirty-two watches since the night of Sunday, 21st May,

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1973. He had given the exculpatory explanation of their purchase then in good faith from the husband of the woman, Francis. The police had put this oral explanation in evidence. In his reasons for his decision, the Magistrate makes no reference as to whether or not he considered and found this explanation untrue. These questions therefore arose properly for the consideration of the Full Court: (a) Should the Magistrate have considered this oral explanation before deciding – (i) if any offence was committed; and (ii) if so, which one? (b) If he should have done so, did he? And (c) If he should have, and did not, was that an error of law vitiating the conviction?

(2) If the oral exculpatory explanation was to be considered, should the prosecution have called the woman, Francis as a witness to rebut it? On the one hand, there is R. v. Crowhurst (1844) 174 E.R. 851 and also R. v. Henry Smith (1845) 175 E.R. 86, fit to be considered in support of the affirmative answer to this question. On the other hand, there is R. v. Dibley (1849) 175 E.R. 344 fit to be considered in relation to the procedure adopted here of just making Francis available to be called by the defence.

(3) It is relevant to consider how much of the stolen property was found in the possession of the defendant, in deciding whether to call for the defence to or convict for the lesser offence. [See R. v. Headley (1964) 6 W.I.R. 317, per HENRIQUES, J.A., at p. 319]. Here, property to the value of \$2,500 was stolen, but only \$700 worth of watches was found. Of this, only “C1-C18” were tendered in evidence. And the applicant has raised the question of the admissibility and probative value of the evidence of Haniff in relation to the remaining fourteen watches. But the evidence was clearly admissible. The fact that the watches were not tendered could not justify the exclusion of Haniff’s evidence if it tended to prove they were part of the stolen property. [See R. v. Francis (1874) 12 Cox 612; Hockin v. Ahlquist Brothers Limited [1943] 2 All E.R. 722; R. v. Jadusingh (1963) 6 W.I.R. 362, and Miller v. Howe [1969] 1 W.L.R. 1510]. Further, it is evidence of the applicant’s oral explanation of his possession of “C1-C18”, which he told Heywood were obtained in the same transaction with the fourteen watches. But though admissible, what did it prove in relation to the fourteen watches? Was it necessary for Haniff formally to claim them on oath in the witness-box as his, and give evidence of points of identification? Haniff testified only that he told the applicant the fourteen watches were his. If this was not at the trial legal evidence and proof of ownership, then there was from Haniff in the witness-box no evidence of their identification. I have not come across any authority on this point.

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In my view, having regard to possible bearing of these matters on the question of larceny or receiving, in the circumstances of this case, leave should be given to argue grounds 1, 3, 4, 7 (c), 8, 9, and 10. In the result, leave is granted to appeal on all the grounds of this application, save and except grounds 2, 5, 6, 7 (a) and (b), which do not raise questions of law alone.

PERSAUD, J. A.: I concur

CRANE, J. A.: I concur.

Leave to appeal to the Court of Appeal granted.

**IN THE MATTER OF THE ESTATE OF W. FREDERICK TAHARALLY
AND
IN THE MATTER OF AN APPLICATION BY ROBERT EDWARD
TAHARALLY
Applicant**

v.

**SHEILA AGATHA TAHARALLY
Respondent
(Executrix)**

[High Court (Morris, J.) January 12, February 7, March 13 and November 23, 1972]

Estate – Will – Bequest of immovable property – Mortgage on immovable property – Whether mortgage payments to be made out of the bequest or residue of the estate – Deceased Persons’ Estates Ord., Cap. 46, Vol. 2 – Civil Law Ord., Cap. 2, Vol. 1, 3A, 3B.

Robert Edward Taharally made an application by way of originating summons through his duly constituted attorney, Wilfred Earnest Dinally, for orders pertaining to the administration of the deceased’s estate. He applied for directions on the construction of the will, distribution of the estate under the will and of the residue and on the rights of the beneficiaries under the will. The main source of contention was in relation to a bequest of immovable property by the deceased to his wife, Sheila Agatha Taharally. This property had been mortgaged to the Guyana

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and Trinidad Mutual Life Ins. Co. Ltd. The point for consideration therefore was whether the primary fund for the payment of the mortgage loan was to be made from the mortgaged property or from the personalty that comprised the residue of the estate.

HELD: (1) That a mortgage debt in Guyana as in England was not ‘naturally incident’ to the property.

(2) That the immovable property which was bequeathed and which was subject to a mortgage, was not the primary security for the mortgage debt. There was nothing in the will which revealed an intention, express or implied, on the part of the testator to make this property the primary security for the mortgage debt.

(3) That the mortgage debt in question must be paid from the residue of the testator’s property and not be borne specifically by the property which was bequeathed.

(4) That it was the testator’s specific intention that his wife should obtain the specific devise of the property unencumbered by the mortgage debt and as such it was ordered that she take the devise accordingly.

(5) That the rights of the other beneficiaries would be as set out in the will and that deceased’s wife, as executrix, must distribute the residue accordingly.

Orders accordingly.

Cases referred to:

- (1) Wythe v. Henniker (1833) 2 Mylne & Kerr Repts. 635.
- (2) Knight v. Davis (1833) 3 M & K Repts 358.
- (3) Armstrong v. Burnett (1855) 20 Bevan Repts. 424.
- (4) Halliwell v. Tanner (1830) 1 Russ & M. 633.
- (5) Re Butler Le Bas v. Herbert [1894] 3 Ch. 250; 23 Digest 486.
- (6) Re Demerara Turf Club in Liquidation v. D.T.C. Ltd. [1915] L.R.B.G. 191.
- (7) Simpson v. Yhap [1960] L.R.B.G. 326.
- (8) Jenkinson v. Harcourt (1854) K. Repts. 688.

R. H. Luckhoo for applicant.

A. S. Manraj for respondent.

In this originating summons the applicant is asking for certain orders set out therein. These orders, in essence, are that this Court give directions:

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- (a) As to Clause 2 of the will of Frederick Taharally also known as Fred Gainford Taharally (deceased).
- (b) To the Executrix as to the distributions of the Estate of the said deceased and as to the amount of the residue to be distributed, and
- (c) Make a determination of the rights of the beneficiaries under the said will.

2. Determination of (a) above would seem to be a necessary prerequisite before the orders sought could be made.

Let us therefore consider (a) above:

This refers to clause 3 of the will in question which reads as follows:

“I devise to my wife, Sheila Agatha Taharally, my property situate at Lots 26 and 27 Jacaranda Avenue, Bel Air Park East with building and erections thereon.”

3. It was common ground and not contested that the property referred to above had been mortgaged to the Guyana and Trinidad Mutual Life Insurance Company Limited for \$23,017.00 (twenty-three thousand and seventeen dollars) with interest in the sum of \$577.00 (five hundred and seventy-seven dollars) as set out in the Statement of Assets and Liabilities.

4. The point for consideration is this: Which is the primary fund for payment of the mortgage loan? Is it (a) the particular property that is mortgaged or (b) the personalty that comprise the residue of the estate?

5. A perusal of the will reveals no express answer as to which is the primary fund. As a matter of fact, as Mr. Luckhoo for the applicant observes there is an absence from the will of the clause with the usual words “After payment of any just debts etc.”

In the circumstances this question falls to be determined in accordance with legal principles applicable.

6. There is no statutory rule which directly answers this.

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The *Deceased Persons' Estates' Administration Ordinance, Cap. 46* Vol. 2 prescribes no provision for the order of the application of assets in discharge of debts due by an estate.

The *Civil Law Ordinance, Cap. 2* Vol. 1, however, makes provision for dealing (among other matters) with movable and immovable property.

Section 3 of the said Ordinance is the relevant section.

At (A) thereof is to be seen the legislature's enactment for the cessation of the applicability of Roman Dutch Law to wills, gifts, and movable and immovable property and other matters, from and after 1st January, 1917.

At (B) thereof it is enacted that our Common Law shall be the common law of England effective as from the date above.

Section 3B reads thus:

“The Common Law of the Colony shall be the Common Law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by Courts of Justice in England and the Supreme Court shall administer doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter”.

At (C) thereof there is express enactment to the effect that the English Common Law of real property shall not apply to immovable property in this country.

At (D) thereof there is provision for the application of ONE COMMON LAW for both immovable and movable property to be ... construed ... according to the principles of English Common Law applicable to personal property.

Section 3 (D) reads thus:

“There shall be as heretofore one common law for both immovable and movable property and all questions relating to immovable property within the Colony and to the movable property subject to the law of the colony shall be adjudged, determined, construed and enforced as far as possible according to the principles of the Common Law of England applicable to personal property”.

With certain provisos, the most relevant of them perhaps, is to be seen at (b) which reads as follows:

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“Provided that –

(b) the law and practice relating to conventional mortgages of immovable property shall be the law and practice now administered in those matters by the Supreme Court”.

To the extent of (b) above therefore, this aspect of the Roman Dutch Law still remains as part of our law.

7. In so far as the question which is the PRIMARY FUND to pay the MORTGAGE DEBT under the deceased’s will remains to be determined, consideration of the common law of England applicable to personal property along with such part of the relevant Roman Dutch Law as remains with us would, it seems clear, be helpful in finding an answer.

8. Let us then have a look at their comparative historical development,

- (a) In ENGLAND, and
- (b) In GUYANA,

where immovable property, encumbered by a mortgage loan, was devised under a will.

In re (a) above:

In England, prior to statutory enactment (to which I shall refer a little later) and in the absence of any specific direction by the testator in his will as to which fund should pay the mortgage debt, the general common law rule was that such debt would be paid out of the testator’s PERSONAL Estate and not be restricted to be paid from the property devised or bequeathed.

There were exceptions to this general common law rule, for example:

- (1) If the property in question had come to the testator “*cum onere*”, that is to say if the mortgage debt was not “contracted” so to speak by the testator himself but had come to him already burdened with the debt, the general common law rule did not apply with the result that the property bore the debt; and again
- (2) Where the property in question was subject to charges “naturally incident” to the property in question.

In *Halsbury’s Laws of England* Volume 14 p. 380 para. 7, it is stated as follows –

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“At Common Law a liability which is naturally incident to any particular form of property must be borne by that property”.

The phrase ‘naturally incident’ in this context means something naturally attaching to, something naturally or usually appertaining to as, for example, one may say ‘Danger is naturally incident to travel’, or in regard to property, one may say the right of alienation, in England, is ‘naturally incident’ to a title in fee simple, or in Guyana, to a title held say under freehold.

Decided cases cited by Mr. Luckhoo illustrate circumstances where debts “naturally incident” to the property in question, had to be borne by the property devised or bequeathed and not by the testator’s general personal estate according to the common law rule.

These cases as well as *Halsbury’s Laws of England (supra)* provide examples of such circumstances, as for instance:

(a) A Fine, incident to the preservation of a lease, must be borne by the person to whom the term of the lease is left, or

(b) In the case of Repairs – where the legatee of a leasehold which is in need of repair must bear the cost of repairs and is not entitled to have the cost of repairs paid out of the testator’s personal estate, or

(c) In the case of Calls made on shares in a company, such calls must be paid by the legatee of the shares.

Among the many cases cited were:

- (1) Wythe v. Henniker (1833) 2 Mylne & Kerr Rep. 635.
- (2) Knight v. Davis (1833) 3 Mylne & Kerr Rep. pp. 358, 361.
- (3) Armstrong v. Burnett (1855) 20 Bevan Rep. 424.
- (4) Halliwell v. Tanner (1830) 1 Russ & M 633.
- (5) Re: Butler Le Bas v. Herbert [1894] 3 Ch. 250; 23 Digest 486.

In the light of the above it seems that in England a mere mortgage debt was not ‘naturally incident’ to the property in question. In brief, apart from certain exceptions, some of which are mentioned above, one travelled along the road leading to the general personal estate of the deceased in the absence of any specific contrary direction expressed in the will, in order to obtain payment of the testator’s debts where he left property “*cum onere*”. In such a case, the general personal estate of the deceased was the primary fund.

This then, was the Common Law position in England prior to statutory enact-

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ment.

9. Above I had indicated that I would refer to English statutory enactments in this connection. Commencing with the *Real Estate Charges Act of 1853*, commonly referred to as *Locke King's Act*, a change was made in the common law in regard to real property mortgaged by the testator. This act made such property primarily liable for the payment of the mortgage debt in the absence of a contrary direction in the will.

Amending Acts of 1867 and later 1877 extended the liability to leaseholds and by s. 35 of the *Administration of Estates Act 1925* the liability was extended to any interest in property, real or personal that was encumbered with a mortgage debt.

10. And now let us consider the position in GUYANA, where immovable property, encumbered by a mortgage debt, was devised under a will as in the matter with which we are now dealing.

As stated above in our *Civil Law Ordinance, Cap. 2 s. 3D* proviso (b):

“The law and practice relating to conventional mortgages ... of immovable property shall be the law and practice now administered in those matters by the Supreme Court”.

In effect as has been already stated, this means ‘according to Roman Dutch Law’.

11. What then is the position of a Guyana mortgage? It would be helpful to consider the Roman Dutch Law in this regard as that law, as indicated earlier, still obtains by virtue of proviso (b) set out above.

Decided cases have made clear that the distinction between a English mortgage and a Guyana mortgage is quite substantial.

In Re Demerara Turf Club in Liquidation v. D.T.C. Ltd. [1915] L.R.B.G., p. 191 at p. 193, SIR CHARLES MAJOR, C.J. said:

“By the law of this Colony a mortgagee has a right upon failure of his debtor to observe... any of the covenants... contained in the instrument of mortgage, to take proceedings against the debtor to enforce the security given for his so doing.

The proceedings take the form of an action for ascertainment (where that is necessary) of the amount of the debt and for a decree that the

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mortgaged property be deemed to be liable to be taken in execution and sold to satisfy the same”.

and at p. 199:

“In this Colony the remedy under an instrument of mortgage is SALE and not the mortgagee’s acquisition, by means of a decree of foreclosure of his mortgagor’s interest in the mortgaged property without sale. Here that interest can only be obtained by purchase at sale ...”

In England, of course the mortgagee can obtain, in proper circumstances, an order for foreclosure.

And yet again in Simpson v. Yhap [1960] L.R.B.G., p. 326 at p. 330, FRASER, J. said:

“Unlike an English mortgage, the Roman Dutch Law mortgage does not convey title to the property. On the contrary, the property is held “*in statu quo*” by the mortgagee but made subject to the payment of the mortgaged debt. Hence the concept of the Equity of Redemption does not arise”.

and at p. 330/1, FRASER, J. continuing said:

“The true nature of the Roman Dutch mortgage is reflected in the form of remedy available to the mortgagee.”

Dr. Ramsahoye in his informative review of the history of the Roman Dutch mortgage in *The Development of Land Law in British Guiana* at p. 297 writes in much the same vein:

“Under the Roman Dutch Law a mortgagee had no legal dominium over the property charged to secure the obligation although he had a *IUS IN REM*. Questions as to foreclosure or the Equity of Redemption in the English sense could not arise.”

and further on the same page, the learned author continues:

“The right of the mortgagee was always an action for the recovery of money, the real security being only subsidiary, the primary demand being personal.”

In the course of his contention on behalf of the applicant, Mr. Luckhoo advanced

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his arguments (as I understood him) in the following sequence:

Firstly: The Guyana mortgage (unlike the English mortgage) is a JUDGMENT where the mortgaged property is made specifically executable for the payment of the mortgage debt.

Secondly: A JUDGMENT having been obtained by the mortgagee when the mortgage was passed before the Registrar, there was no necessity for him to apply to the Court for a foreclosure order as in England – the only requirement being to apply to the Court for an Order for Sale of the mortgaged property.

Thirdly: That as this judgment is registered against the land, thereby making the land specifically executable for the repayment of the mortgage debt – can we say that this mortgage debt or liability became a debt ‘naturally incident’ to the property mortgaged?

Mr. Luckhoo concludes his argument by saying that if it (the mortgage debt) can be so construed (that is as being ‘naturally incident’), it would fall within the exception to the English Common Law rule in regard to debts being ‘naturally incident’ to the property mortgaged.

I have previously indicated (paragraph 8 above) that a mortgage debt in England was not ‘naturally incident’ to the property in question. Similarly I also hold that a mortgage debt in Guyana under Roman Dutch Law, or at the highest, giving that phrase its plain and ordinary meaning, was never ‘naturally incident’ to the property.

12. The only question, therefore, which remains to be determined is (as expressed by the VICE CHANCELLOR SIR PAGE WOOD in JENKINSON v. HARCOURT (1854) K Rep. 688 at p. 695):

“Whether or not the particular property which is a security for the debt was made the primary security or merely by way of pledge for the debt.”

To determine this it seems necessary to peruse the will and see whether the testator indicated therein either expressly or impliedly any intention to make the particular property – that is to say the property at lots 26 and 27 Jacaranda Avenue, Bel Air Park East – the PRIMARY SECURITY or merely mortgaged the property by way of pledge for the debt.

13. Close scrutiny of the will reveals no such intention (either express or implied) on the part of the testator to make the property in question the primary security

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for the mortgage debt.

14. In the result therefore I hold that:

(1) The mortgage debt in question must be paid from the residue of the testator's property and not be borne specifically by the mortgaged property situate at lots 26 and 27 Jacaranda Avenue, Bel Air Park East as described in paragraph 3 of the will.

(2) That it was the testator's intention in his will that the respondent (mentioned in his will – paragraph 3 thereof – as “My wife Sheila Agatha Taharally”) should obtain the specific devise of the said property unencumbered by the mortgaged debt.

In the circumstances, I direct that the respondent take the devise accordingly.

The rights of the other beneficiaries under the will have not been challenged or contested in the course of this hearing and will follow as set out in paragraphs 2 and 4 of the will in question and the respondent, who is the Executrix, is hereby directed to distribute the residue accordingly.

At this stage I would like to express my full appreciation of the arguments advanced and authorities cited by both Mr. Luckhoo for the applicant, (a son of the deceased by a former marriage), and Mr. Manraj for the respondent (the widow of the deceased). The arguments and authorities I found most helpful in my endeavours to determine this question, which as far as I could ascertain was never determined before in the peculiar circumstances of this case.

Orders accordingly.

HENRY AND MICHAEL ROBERTS**Appellants****v.****THE STATE****Respondent**

[Court of Appeal (Bollers, C. (ag.), G.L.B. Persaud and Haynes JJ.A.) July 23, September 8, 1975]

Summing up – Relating to the evidence – Acting in concert – Aiding and abetting – Doctrine of common design.

Defences – Self-defence – Whether or not there is a duty to retreat – Accident – Definition by the judge correct.

Acting in concert – Meaning of aiding and abetting.

Medical evidence – Expert evidence – Jury accepting or rejecting expert medical evidence – Direction in relation to self-defence.

Prior to October 11, 1973 the appellants and one Rupert Angel had a continuing dispute over title to and possession of land in the second depth at No. 5 Village, Corentyne, Berbice. Each claimed to have been in exclusive possession of this land and on October 11, 1973 there was a clash on the land between the appellants (a father and son) on one side and Rupert and Doreen Angel (husband and wife and the victims herein) on the other. During the clash all four received injuries of varying degrees of severity. Dr. Patrick Chetram, G.M.O. examined all of them at the Skeldon Hospital, and at the trial of the appellants for felonious wounding of the victims, gave evidence as to his findings and as to his opinion regarding the possible cause or causes of the various injuries seen. Both appellants were found not guilty of the offence charged but guilty of the lesser offence of unlawful and malicious wounding. Each was sentenced to three years imprisonment for wounding Rupert Angel and to one year for wounding Doreen Angel, the sentences to run concurrently.

On appeal the appellants contended that the trial judge had not properly put their defence to the jury that they had been acting in self-defence and that any injuries sustained by the victims were accidental. Further, they contended that the trial judge's directions on acting in concert were not sufficiently clear so as to assist the jury and that the trial judge did not properly relate the law to the evidence.

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HELD: (1) That the law and the facts were compartmentalised and were not at all or not adequately related as regards self-defence or accident or acting in concert in common design.

(2) (*per* PERSAUD, J. A.): It serves no useful purpose and certainly does not assist a jury for a judge to compartmentalise the facts separately from the law... with [*sic*] no attempt made to relate one to the other The judge must discuss the defence with the jury explaining to them what possible verdicts are available depending on what facts they find.

(*per* HAYNES, J.A.): The trial judge ought to have put to the jury... possible views of the evidence which might afford a defence... and dealt adequately with them in his charge... directing their attention specifically to what facts they should take into account.

(2) (*per* HAYNES, J. A.): That the trial judge mis-directed the jury as regards the duty to retreat in relation to self-defence. Failure to retreat, where this is possible, by itself without more, does not defeat a plea of self-defence. Failure to retreat is only an element for the jury to consider in relation to the reasonableness of the accused's conduct. In giving directions on retreating the trial judge should have told the jury to consider whether the actual or apprehended attack was a forcible, felonious, and atrocious crime or mere affray or non-felonious assault.

(3) (*per* HAYNES, J.A.): That the definition of accident as given by the trial judge was correct but that the directions in relation to aiding and abetting, acting in concert and common design were incomplete especially taking into account the facts of this case where the defences of self-defence and accident were raised. Further, mere presence of one is insufficient to prove acting in concert.

(4) That inadequate directions were given on the medical evidence which was favourable to the defence in that one of the injuries seen on one accused supported the view that he may have been attacked with a cutlass and therefore this evidence should have been related to the issue of self-defence.

(5) (*per* PERSAUD, J.A.): A jury can properly reject medical evidence only if there is other credible evidence, even though non-expert evidence, upon which they can properly act; and there is good reason for preferring that evidence in place of the medical evidence.

**Appeals allowed.
Convictions and sentences set aside.**

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Cases referred to:

- (1) Baldeo Dihal v. R. (1960) 2 W.I.R. 282
- (2) Shoukatallie v. R. (1961) 4 W.I.R. 111; [1961] 3 All E.R. 998 PC.
- (3) Palmer v. R. (1971) 55 Cr. App. R. 223
- (4) R. v. Howe (1958) 100 C.L.R. 448
- (5) R. v. Belnavis (1964) 8 W.I.R. 128
- (6) Walter Mc Innes (1971) 55 Cr. App. R. 551
- (7) R. v. Shaw (No. 2) (1963) 6 W.I.R. 17
- (8) R. v. Johnson (1966) 10 W.I.R. 359
- (9) Michaud v. R. (1969) 13 W.I.R. 72
- (10) R. v. Bartley (1969) 14 W.I.R. 407
- (11) R. v. Simmonds (1965) 9 W.I.R. 95
- (12) R. v. Saman & Ors (1970) 15 W.I.R. 35
- (13) Julian v. R. (1969) 13 W.I.R. 66
- (14) R. v. Julien (1969) 53 Cr. App. R. 407
- (15) Mc Lean v. R. (1960) 2 W.I.R. 361
- (16) R. v. Moore (1967) 10 W.I.R. 527
- (17) R. v. Cohen & Bateman (1909) 2 Cr. App. R. 208
- (18) R. v. Findlay (1944) 2 D.L.R. 773, C.A.
- (19) R. v. Sparrow [1973] 2 All E. R. 129

C. Massiah for the Appellants.

G. A. G. Pompey, Deputy Director of Public Prosecutions, for the State.

PERSAUD, J.A.: I agree that these appeals should be allowed and the convictions and sentences quashed. But there are one or two observations that I wish to make.

The first concerns the manner in which a judge should deal with the evidence and the law relevant to the matter then in hand. It serves no useful purpose, and certainly does not assist a jury, for a judge to compartmentalise the facts separately from the law so that the jury are told what the law is in one distinct compartment, and what the evidence is in another, and no attempt is made to relate one to the other. Relating the law to the evidence is not to be confined to the prosecution's case only: the summing-up must at the same time take the defence into account, and the judge must discuss the defence with the jury explaining to them what possible verdicts are available depending on what facts they find. In dealing with the defence of self-defence in Baldeo Dihal v. R., RENNIE, J., speaking for the Federal Supreme Court, said [(1960) 2 W.I.R., at p. 282]:

“The law of self-defence was meticulously explained as a lecturer might well explain it to a class of students, but nowhere in the directions are the jury told what facts they should take into account when considering

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this aspect of the case.

Nowhere in the directions were they told what facts they should take into account in determining whether or not to retreat was reasonable.

... no assistance was given to the jury by relating the evidence to the law.”

In the course of his directions, there is nothing wrong – indeed, there is every advantage in so doing – in the judge attracting the jury’s attention to the evidence both for the prosecution and the defence as he discusses the law, and there and then directing them as succinctly as is possible in the circumstances, as to the verdicts at which they can properly arrive in accordance with the directions in law.

The other matter is this: While I accept that there may be circumstances where a jury can reject medical evidence in a case, and form their own opinion, in my view, they can only properly do so if there is other credible evidence, even though non-expert evidence, upon which they can properly act, and if there is good reason for preferring that evidence in place of the medical evidence. Where there is no such evidence pointing away from the medical evidence, for a jury to reject the medical evidence and to come to another conclusion is to conjecture. I refer to the *dictum* of DENNING, L. J. in Shoukatallie v. R. [1961] 3 All E.R., at p. 998, to the effect that the jury might conceivably have taken the view, despite the medical evidence, that Peeka (the deceased) was actually shot dead, so that when the second accused (Mahomed Ali) assisted in disposing of the body. Peeka was already dead, in which event the second accused would have been guilty only of being an accessory after the fact. If those were the facts, then of course that would have been the true legal position. But with the greatest of respect to the learned Lord Justice, those were not the facts; rather, there was no evidence other than the medical evidence as to the cause of death, and this showed that the deceased had died from drowning. The case for the prosecution was that the deceased had been shot by the appellant while the latter was in a boat being steered by Mahomed Ali, and that both the appellant and Mahomed Ali had been acting in concert. The post-mortem examination disclosed that the deceased had been immersed in the Mahaica Creek while still alive, and that the cause of death was drowning, facilitated by the act of the first accused, to wit, shooting and wounding the deceased. But I agree, if I may say so, with the following *dictum* of LORD DENNING (*ibid.*, at p. 998):

“... up to the moment that Peeka fell shot. Mahomed Ali may have been merely a spectator. Then Peeka fell so badly wounded, that he was to all appearances dead, so that Mahomed Ali thought he was dead. Then

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Mahomed Ali, in order to save his brother, the appellant, from conviction, helped him to dispose of the body by throwing it into the water. In that event, Mahomed Ali would not have been guilty of murder for he had no intent to kill. He would only have been guilty of manslaughter.”

In any event, Mahomed Ali had been discharged by the Federal Supreme Court and his case was not engaging the attention of the Privy Council to necessitate the observations by DENNING, L. J.

I agree with the order proposed by my learned brother HAYNES.

HAYNES, J. A.: Prior to the 11th day of October, 1973, the appellants, Henry Roberts and Michael Roberts and Rupert Angel disputed over title to and possession of 4 1/2 acres of ricelands in the second depth at No. 51 Village, Corentyne, Berbice. Each *claimed to have been in exclusive possession of this land at all material times*, and on the 11th October, 1973, each was claiming the right to cut the rice growing on it then. On that day, there was a clash on the land between the appellants Henry and Michael Roberts (father and son), on one side, and Rupert and Doreen Angel (husband and wife), on the other, in the course of which all four received injuries of varying degrees of severity.

Dr. Patrick Chetram, Government Medical Officer, examined them all at the Skeldon Hospital. He found Rupert Angel to be suffering from four injuries, namely, (i) a stab wound on the lower left back, 1 1/2 inches long by 3/4 inch deep; (ii) an oblique incised wound from the middle of the nose about 1 1/2 inches downwards to the right angle of the mouth severing the skin and underlying muscles; (iii) an incised wound at the back of the neck about 5 inches long by 1/8 inch deep; and (iv) his left thumb was practically severed. All those injuries were stitched, and although the doctor did not consider them dangerous to life he admitted Angel as a patient. In his opinion, the stab wound could have been caused by a sharp-cutting instrument, such as a knife, and the other injuries by a sharp-cutting instrument, such as cutlass, in both cases used with a moderate degree of force. Doreen Angel was suffering from: (i) an oblique incised wound about 4 inches by 1/2 inch at the back of the left elbow; (ii) a small incised wound at lower end of right forearm; and (iii) suspected fracture of the left forearm. In the doctor’s opinion injuries (i) and (ii) could have been caused by a sharp instrument such as a cutlass, and injury number (iii) by a blunt instrument, such as a stick, or a hard fall on a hard object. Dr. Chetram considered Rupert Angel would have had a permanent scar on his face which would amount to a disfigurement. Doreen Angel, however in his opinion, had relatively minor injuries and he did not consider any of them could cause in any way a disfigurement.

He next saw the appellant, Henry Roberts, and observed that Roberts was suffer-

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ing from: (i) an incised wound on the left side of the head about 1 1/4 inches long; and (ii) a fracture of the right arm. In the doctor's opinion, the first injury to the head could have been caused by a sharp-cutting instrument such as a cutlass used with some degree of force. He did not think that such a wound could have been caused by a blunt instrument such as a stick. Injury number (ii) could have been caused by a blunt instrument such as a stick. It was possible that the second injury could have been caused by falling on the ground but that would depend on the force of the fall and the type of object fallen upon. Lastly, he examined Michael Roberts and observed that the latter was suffering from two injuries, namely, an incised wound at the back of the head 3 inches long, skin deep, and a small lacerated wound on the left cheek. The injury to the head of Michael Roberts could have been caused by a sharp-cutting instrument such as a cutlass, and was not caused by a blunt instrument such as a stick. The second injury, the small cut to the cheek, could have been caused by a blunt instrument such as a stick or by falling to the ground. None of these injuries were considered dangerous to life, but the doctor referred both Doreen Angel and Henry Roberts to the New Amsterdam Hospital for x-rays.

Police investigations followed. As a result, eventually, the appellants were indicted jointly at the Berbice Assizes for wounding Rupert Angel and Doreen Angel with felonious intent. Both were found 'not guilty' of the offence charged but 'guilty' of the lesser statutory offence of unlawful and malicious wounding. Each was sentenced to be imprisoned for three years for wounding Rupert Angel and for one year for wounding Doreen Angel, concurrently. They appealed to this court.

At the trial, as was to be expected, the appellants and the Angels took up diametrically opposite positions. For the prosecution, Doreen Angel supported by her children – Cecelia (16), Evadney (13) and Rupert (11) – told a story of a joint unprovoked felonious attack by the appellants on Rupert and Doreen Angel, on the land itself, while the Angels were lawfully there to cut rice in the course of which Henry Roberts wounded Rupert Angel with a cutlass on the face and chest and Michael Roberts stabbed him with a knife on the left side of his back: Doreen Angel struck Henry Roberts twice on the head with a piece of black sage stick about 3 feet long and 3 inches in circumference, to save her husband from further injuries from him; Michael Roberts "chopped" Doreen Angel on the left elbow and right forearm with a cutlass, hit her with a stick on her left hand, and she, in self-defence, using the same black sage stick, hit him three times on his head causing him to fall to the ground. The appellants, on the other hand, asserted that the Angels (father, mother and children) were the aggressors; that the family with cutlasses surrounded them, then lawfully on the land, menacingly; Rupert and Doreen Angel threatened "murderation today", Doreen added, "Cecelia and Evadney and Rupert, all you know all you duty;" Doreen wounded Henry Roberts

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twice on the head with a stick and a cutlass and Michael Roberts on the head with a cutlass; Henry Roberts struck nobody; Doreen Angel was cut accidentally by Michael Roberts warding off a cutlass attack by her, and Rupert Angel was cut by Doreen Angel unintentionally while Michael Roberts was using Rupert Angel as a shield against Doreen Angel's cutlass attack on him. It is clear that the defences differed. Henry Roberts was saying he had wounded nobody, while Michael Roberts denied wounding Rupert Angel, but admitted that, unintentionally, he wounded Doreen twice with a cutlass he was using to ward off her forcible and felonious cutlass attack on him.

Although both appellants denied wounding Rupert Angel, on the first count of the indictment in the circumstances of this case, it was right that the judge should direct the jury that if they disbelieved these denials, they should go on to consider whether the wounds on Rupert Angel were inflicted in self-defence. [See Palmer v. R. (1971) 55 Cr. App. R. 223] As regards the second count, the State's case against the appellant Henry Roberts for wounding Doreen Angel, depended on the application of the rule as to acting in concert, because it was common ground that he never touched her, and the issue of accident and self-defence arose plainly for consideration as affecting the position of the appellant Michael Roberts. Thus the situation called for full, clear and helpful directions on the law of self-defence, of accident and of the criminal responsibility of one accused for the *actus reus* of another under the so-called doctrine of "acting in concert", and for a proper measure of assistance on the facts of the case.

The law as to self-defence was put in these words in the summing-up:

"Now, let us look at the defence known as self-defence. Like accident, self-defence is a complete defence in law. In our law, members of the jury, every man is entitled to defend not only himself but all those near and dear to him, such as his wife, or any member of his family, or even a friend and, in certain circumstances, even strangers, and also his own property; but there are certain legal limitations to this defence which the law has wisely laid down and those are as follows: (i) the accused must have retreated as far as he could until stopped by some physical object or impediment, such as a wall or trench, but, if the assault is so fierce as not to allow him to yield a single step without great danger to his life or some grievous bodily harm then he is entitled there and then to strike his assailant and if necessary to kill him; (ii) self-defence must only be necessary for the protection of one's life or limb and not excessive or greater than is actually necessary for mere defence, or, is by the way of revenge, or after all danger has passed; (iii) in all cases of self-defence the means of resistance must at all times be reasonable in the circumstances and the force used must be commensurate with the force received."

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Although the point was not taken on behalf of the appellant it is manifest that this direction was faulty in at least two respects, as regards the limitation of an essential or imperative condition of a duty to retreat if this is at all possible, before resorting to force. This would be a misdirection, if it was intended to mean, or the jury might reasonably understand it to mean, that failure to retreat where this was possible, by itself without more, defeated a plea of self-defence. In the R. v. Howe (1958) 100 C.L.R. 448, the High Court of Australia, approving a ruling of the Supreme Court of South Australia sitting as a court of Criminal Appeal, held through DIXON, C.J. (pp. 462-463):

“The view of the Supreme Court appears also to be correct as to the position which the modern law governing a plea of self-defence gives to the propriety of a person retreating in face of an assault or apprehended assault before resorting to violence to defend himself. The view which the Supreme Court has accepted is that to retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out. No doubt in certain circumstances it was so regarded. In art. 305 of Sir James Stephen’s *Digest of Criminal Law*, 9th ed. (1950). pp. 252, 253 it is stated that subject to some wide exceptions, if a person is unlawfully assaulted by another without any fault of his own but with a deadly weapon it is his duty to abstain from the infliction of death or grievous bodily harm on the person assaulting until he has retreated as far as he can with safety to himself... But there can be no doubt at this day that whether a retreat could and should have been made is an element for the jury to consider as entering into the reasonableness of the defendant’s conduct. HOLMES, J. pronounced upon the question in a way which one may well be content to adopt: ‘Rationally, the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing: not a categorical proof of guilt.’”

And in R. v. Belnavis (1964) 8 W.I.R. 128, a judgment of the Court of Appeal of the West Indies Associated States, LEWIS, J. A. (p. 131) said:

“A person who is attacked or reasonably apprehends an imminent attack is entitled to defend himself by the use of such force as is reasonably necessary. The possibility of retreat is only one of the relevant factors which the jury is entitled to consider in deciding whether the degree of force used in self-defence was reasonably necessary in the circumstances.”

This statement of the law was adopted in Walter Mc Innes (1971) 55 Cr. App. R.

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551, where EDMUND DAVIES, L. J. (p. 560) stated:

“The first criticism of the learned judge’s treatment of self-defence is that he misdirected the jury in relation to the question of whether an attacked person must do all he reasonably can to retreat before he turns upon his attacker. The direction given was in these terms: ‘In our law ... to show that homicide arising from a fight was committed in self-defence it must be shown that the party killing had retreated as far as he could, or as far as the fierceness of the assault would permit him.’

... In our judgment, the direction was expressed in too inflexible terms and might, in certain circumstances, be regarded as significantly misleading. We prefer the view expressed by the Full Court of Australia that a failure to retreat is only an element in the considerations upon which the reasonableness of an accused conduct is to be judged [see Palmer v. R. (1971) 55 Cr. App R. 233; [1971] 2 W.L.R. 840], or as it is put in Smith and Hogan, *Criminal Law*, 2nd Ed. (1969) p. 231, ‘... simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable.’”

Undeniably, there would be misdirection in the summing up if it is conveyed to the jury, as it might have done a clear implication that the mere failure to retreat, if retreat was practicable, *per se* defeated the plea of self-defence.

And, further, according to a clear current of authority [see R. v. Shaw (No. 2) (1963) 6 W.I.R. 17; R. v. Belnavis (1964) 8 W.I.R. 128; R. v. Johnson (1966) 10 W.I.R. 359; Michaud v. R. (1969) 13 W.I.R. 72 and R. v. Bartley (1969) 14 W.I.R. p. 407] based on the common law of England, where the actual or apprehended attack is of a forcible and felonious kind (as distinct from a simple or non-felonious assault), there is no duty at all to retreat, before resorting to force.

In R. v. Shaw, LEWIS, J. A., in a judgment of the Court of Appeal of the West Indies Associated States (p. 21), after citing passages from *Foster’s Crown Cases* Coke 3rd Ins. 56, *Russell on Crime*, 11th Ed., p. 492, and *Stephen’s Digest* 9th Ed., said:

“The court sees no reason to doubt the accuracy of the statements of the law on this point as expounded in *Foster* and summarised in *Archbold*. In our opinion the authorities referred to above establish that for the prevention of, or the defence of himself or any other person against the commission of a felony where the felon so acts as to give him reasonable ground to believe that he intends to accomplish his purpose by open force, a person may justify the infliction of death or bodily harm pro-

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vided that he inflicts no greater injury than he in good faith might in the circumstances reasonably believe to be necessary for his protection; and that in such a case he is under no duty to retreat but may stand his ground and repel force by force. Put shortly, a person thus attacked may justify the use of necessary force, if unavoidable, in self-defence, but he is under no obligation to retreat.”

Then in Johnson v. R., WOODING, C.J. in the Court of Appeal of Trinidad and Tobago said (p. 405): “No question of retreat can arise since on the prisoner’s version of the facts his was an act done for prevention of a forcible and atrocious crime.” In Michaud v. R., the Court of Appeal approved of the following passage in the summing-up (p. 73):

“If the attack is a felonious one, the victim is under no duty to retreat but may stand his ground and repel force by force. If, however, the attack is not felonious, then the victim must – if possible – retreat, and can only be excused for a death caused by resistance if it is no longer possible for him to withdraw in safety.”

But LEWIS, C.J. (p. 76) stressed that – “The intention on the part of the attacker to commit a felony must, however, manifestly appear from the evidence, and the principle does not apply to assaults and affrays where no obvious felonious act is attempted.” Again, in R. v. Bartley (1969) 14 W.I.R. 407, WADDINGTON, J.A. in the Court of Appeal of Jamaica (sitting with LUCK-HOO, J.A. and HERCULES, J.A.) said (p. 411):

“In our view, there are important distinctions between cases of killing in self-defence in circumstances where, if established, the homicide would be excusable, and cases of killing in the course of defending one’s person or property from the commission of a forcible and atrocious crime, in which if the defence is established, the homicide would be justifiable. One distinction is that there is generally a duty to retreat in the former case, but in the latter case there is no such duty.”

And, finally, in Palmer v. R. (*supra*), LORD MORRIS (p. 231) said: “Their Lordships conclude that there is no room for criticism of the summing-up.” where the trial judge had told the jury (at p. 230), “There is no duty to retreat if there is a forcible or violent felony being attempted upon you or manifestly attempted against you.” So here again the direction on the question of retreating was insufficient, particularly so as on the appellants’ account of the events Rupert and Doreen Angel had used words possibly indicating, if believed, an intention to commit then the known felony and the forcible and atrocious crime of murder. The jury

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should have been directed accordingly. [See R. v. Simmonds (1965) 9 W.I.R. 95]

The jury by their verdict, rejected self-defence. They may have found either that the appellants were the aggressors as the prosecution alleged, but were not satisfied as to the existence of the specific intent; or that the Angels were the aggressors, as the defence asserted, but that either the appellants could have taken avoiding action by retreating from the land and perhaps reporting to the police station or taken, legal action or could not have retreated, but used more force than was necessary, in both cases, lacking the specific intent. The verdict of guilty of unlawful wounding is consistent with either view. So that the failure to direct the jury fully and accurately on the law as to retreating might well have led to the rejection of the plea of self-defence and the conviction of the appellants.

As regards accident, the law was explained thus:

“What is the defence of accident? Accident can be said to be an occurrence or event over which a person has no control in the sense that he had no causal connection with it and which was the undesigned or unintended result of his voluntary conduct. Accident is a complete defence in law.”

This definition, while perhaps somewhat ponderous, was sufficiently accurate to leave no room for meaningful criticism in the circumstances of this case. The position, however, as regards acting in concert in a common design calls for more critical examination. The trial judge told the jury that:

“... in all appropriate cases where two or more persons are charged in one indictment, the State is permitted to rely upon a very convenient doctrine known as the doctrine of common design and that doctrine is simply this: where two or more persons are jointly indicted for the commission of a crime even though only one or some of them actually committed the crime, in the eyes of the law both or all of them are equally guilty and subject to the same punishment once you are satisfied that they were confederates or partners, present, actively aiding and abetting each other in the commission of the crime in question. Once you are satisfied that they were all acting together in concert with a common purpose or design to commit the crime in question then it matters not whether only one or some, or all of them did the act, or even if it is not clear or certain which of them actually perpetrated the act. Just a simple example: A and B plan to burgle C’s house. A actually breaks and enters the house with an intention to commit a felony therein, whilst B remains outside as a lookout. In the eyes of the law the lookout is equally as guilty as the actual burglar and subject to the same punishment.”

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“Aiding and abetting” is a legal phrase. Its meaning should be explained to a jury. It ought to have been made clear to them what sort of conduct would amount in law to “actively aiding and abetting” on a joint charge for wounding one person. The trial judge did recognize the need for this, but the example he gave of a “look-out” on a burglarious enterprise was unfortunately inapt and unhelpful in a case of this nature, and might have been misleading. In my judgment there was an incompleteness of direction here on the law of “acting in concert” or “common design”. The jury might not have understood how to apply it to the facts here. I shall return to this aspect later.

The main complaint on appeal was that the appellants did not get a fair and proper trial because the summing-up was defective in that the facts were not related to the law relevant to the issues raised. To commence with, it is well to bear in mind on this topic, the pregnant words of LUCKHOO, C., in R. v. Saman & Others (1970) 15 W.I.R., at p. 40:

“... in some cases, it may be quite sufficient to state principles of law and to state the facts and to leave them for the jury to decide without relating one to the other. But in other cases ... a little more is required.”

The problem always is: On which side of the line does the case in hand fall⁹ Baldeo Dihal v.R (1960) 2 W.I.R. 282, a decision of the Federal Supreme Court, is a Caribbean *locus classicus* on this question. It was an appeal from a conviction for murder. The summing-up had to deal with issues of self-defence and provocation. The conviction was set aside and a new trial ordered. REN-NIE, J. (pp. 282-283) said:

“Exception was taken to the form of the directions when dealing with the questions of self-defence and provocation. It was submitted to us that the law was laid down in one compartment, so to speak, and the facts were referred to in another, and no attempt was made to relate the one to the other. The directions do seem to deserve this criticism. The law of self-defence was meticulously explained as a lecturer might well explain it to a class of students, but nowhere in the directions are the jury told what facts they should take into account when considering this aspect of the case. The nearest they got to having the facts related to self-defence is the statement that, when considering self-defence, it would be relevant for them to compare the wounds on the body of the deceased with the injuries on the appellant. This statement, however, deals with only one factor of self-defence – whether there was the necessity to use such force... Nowhere in the directions were they told what facts they should take into account in determining whether or not to retreat was

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reasonable...

As in the case of self-defence, so in the case of provocation; no assistance was given to the jury by relating the evidence to the law.”

In Julian v. R. (1969) 13 W.I.R. 66, the Court of Appeal of the West Indies Associated States allowed an appeal from a conviction for wounding with a cutlass inflicting serious wounds to the scalp, back and right hand. The witnesses for the prosecution told three different versions: (1) of an unprovoked cutlass attack on the injured man; (2) also of an unprovoked attack, but a hatchet (unused) was at sometime seen in the hand of the victim, and (3) involving a struggle on the ground, in the course of which the appellant wounded the victim, after a hatchet upraised against the appellant had been taken away from the injured man. The defence was that the injured man had struck the appellant with the hatchet, raised it a third time, then it was that the appellant struck in self-defence. LEWIS, C. J. said (p. 72):

“In the opinion of this court this was a case in which a careful direction applying the law of self-defence to the facts as put forward by both sides was necessary. It was not sufficient just to give a theoretical discourse on the law of self-defence and leave the jury to apply it to whatever versions of the case they might find.”

And in Julien (1969) 53 Cr. App. R. 407, an appeal from a conviction for assault causing actual bodily harm, where self-defence was raised, the Court of Appeal (Criminal Division) agreed with the contention that the direction on that issue was not satisfactory, because, in addition to other defects, WIDGERY, L.J. pointed out (p. 410), the Deputy-Chairman “did not further analyse the evidence so as to show how the principles of self-defence should be applied to it.”

So it depends on the particular facts of every particular case. Without doubt, in this charge the law and the facts were compartmentalised and not at all or adequately related, as regards self-defence or accident or acting in concert in common design. In my judgment this was a case in which such relating was necessary, particularly as regards self-defence and acting in concert in common design. The evidential issues were somewhat complicated. There were two alleged victims. There were two accused. Their defences were not identical on each count. The case against both on the first count was the same in outline. But it was different on the second count. As regards the defences to this count, ‘accident’ was relied on by the one accused only. But if this plea succeeded, or the jury were in doubt about it, then the other accused, Henry Roberts, also could not be convicted on that count – acting in concert with the appellant Michael Roberts. The same consideration applied if the appellant Michael Roberts were to succeed on

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this second count on self-defence. Again, the possible views of the facts, on the evidence before them, that could raise the issue of self-defence, would not be the same as regards each appellant. Take the case of the appellant Henry Roberts. It was common ground that Rupert Angel never struck him and while Doreen Angel did, that could not by itself found self-defence relative to Rupert Angel. Such self-defence could arise only on the basis of a reasonable apprehension or fear on the part of this appellant of serious bodily injury from Rupert Angel, contributed to by their joint threats and the cutlass wound from her.

But as regards the appellant Michael Roberts, a different view of the facts could arise on the evidence to support the plea. On the first count, the view was open that following a threat of “murderation” from Rupert Angel and Doreen Angel. he (Rupert Angel) and this appellant were in an actual physical struggle. Angel with a cutlass out for “murderation” and the appellant with a knife, in the course of which the appellant cut Rupert Angel on the left side of his back, in possible self-defence. Then, as regards Doreen Angel on the second count, there was a possible view of the facts that, after wounding his father, Doreen Angel made a cutlass attack on this appellant while he was engaged with Rupert Angel, wounding him on the back of his head, and he, while she still had her cutlass, wounded her with his, in possible self-defence. These were three possible different views on the evidence raising the issue of self-defence. All of these features called for a careful relating of the law to the facts to show how the law of self-defence was to be applied to the evidence the jury accepted. It was hardly satisfactory only to give a theoretical discourse on the law, then read out the evidence, and leave it to the jury to apply it to whatever version they might find acceptable.

The trial judge ought to have put to the jury these possible views of the evidence which might afford a defence (of self-defence) to the accused and dealt adequately with them in his charge [see McLean v. R. (1960) 2 W.I.R. 361 and R. v. Moore (1967) 10 W.I.R. 527]; he should have directed their attention specifically to what facts they should take into account (for example, that the appellants were on their own property and were protecting their rice crop, if they so found) in determining whether retreat was reasonable [see Baldeo Dihal v. R. (*supra*)]; he should have directed their attention pointedly to such facts as were relevant to determine whether the actual or apprehended attack was a forcible, felonious and atrocious crime or a mere affray or non-felonious assault, with the proper directions as to retreating in each case [R. v. Simmonds (1965) 9 W.I.R. 95]; and he should have directed their attention to the facts they should take into account in determining the reasonableness or not of the force used.

As regards this failure to relate the law to the facts, the appellant complained strongly about the trial judge’s treatment of a particular piece of evidence favourable to the defence although coming from a prosecution witness. Doreen Angel had

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testified that, to save her husband from further injury from the appellant Henry Roberts, she struck that appellant on the head with a piece of ‘black sage’ stick; then immediately after, she was forced to use this stick to strike the appellant Michael Roberts twice on the head in self-defence. The stick was not produced in court. The appellants asserted she used a cutlass on them. Dr. Bacchus testified that he found one incised wound on the head of each appellant, which was caused by a sharp-cutting instrument, such as a cutlass, and that a black sage stick could not have caused these wounds. Now, this did not fit in with the prosecution’s theory. This was, that it was Evadney Angel alone, on their side, who had a cutlass; and it was common ground that only Doreen Angel actually struck the appellants. So that, according to the State, the appellants had used cutlass and knife as against a stick in the hand of the two Angels. This, the State wished to contend, made nonsense of or tended to defeat the plea of self-defence, at least on the ground that the force used against the Angels was excessive and unreasonable. The defence, on the other hand, wished to contend that following the threats of “murderation” by the two Angels, Doreen Angel led the attack with a cutlass, with which she wounded the appellants, so that to use a cutlass in defence against her cutlass was not unreasonable. This touched upon the second count directly. But the first count was affected also, because if Doreen Angel used a cutlass after threatening to kill, then it might not be unreasonable to fear that the husband who, it was alleged, had made a similar threat and was armed also with a cutlass, might follow up with a similar attack. So all in all, whether or not Doreen Angel had, and used, a cutlass was vitally important. Dr. Bacchus’s evidence on the point was favourable to the defence, and it was, in my opinion the duty of the trial judge to deal with it adequately and helpfully. How did he deal with it? He told the jury:

“... Counsel for the State asks you in accordance with your functions as jurors that you can accept parts and reject other parts of a witness’s testimony, to reject Dr. Chetram’s evidence that the injuries seen to the head of the two accused were not caused by a sharp-cutting instrument such as a cutlass as he said but by a blunt instrument as the Angels claimed.

The jury has a right to have an opinion as well as an expert and there are cases where a jury may disregard the evidence of an expert, but it is for you to say whether a medical practitioner seeing the wounds to the head as he saw on these accused and giving it as his opinion that these injuries could have been caused by a sharp-cutting instrument such as a cutlass and not by a blunt instrument such as a stick, whether you would reject that part of his evidence. It is entirely a matter for you. That is what counsel for the State is asking you to say. You may very well feel that you are not prepared to accept it, it is very unreasonable. So that is

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how I see it, members of the jury.”

The appellants contended this direction was inadequate and unsatisfactory. The State said it was adequate. I do not think it was. The evidence itself and its bearing on the issue of self-defence called for more critical examination and for relating the facts to the law on the issue. As I see it, if Doreen Angel used a cutlass, this fact was relevant to certain aspects of self-defence: (a) whether her conduct (and incidentally her husband's) could have put the appellants in reasonable fear of serious bodily injury; (b) whether their joint conduct manifested an intention to commit a felonious act rather than a mere assault or affray; and (c) whether the means of resistance was reasonable. Conviction or acquittal might have turned on the jury's finding on this issue of fact. In a case like this, and where conviction or acquittal might turn on a particular point of fact, it might not be sufficient to tell a jury. “It is a matter for you,” and leave it there. Judges do not preside over criminal trials merely to record the evidence and the arguments raised on both sides, to read them out to the jury and then say, “How's that?” In a very simple case, perhaps, this might pass appellate muster. But not in such a case as this. In R. v. Cohen and Bateman. CHANNELL, J. said [(1909) 2 Cr. App. R. at p. 208]:

“In our view, a judge is not only entitled, but ought to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevancy of questions of fact, and it is therefore right that the jury should have the assistance of the judge.”

And in R. v. Findlay [1944] 2 D.L.R. 773, C. A., O'HALLORAN. I. in the Court of Appeal of British Columbia, said (p. 775):

“No doubt each judge should be left to sum up a case to the jury in his own way, so long as he does not misdirect the jury in law or in fact. But that does not absolve him from presenting to the jury the material evidence related to the case for the prosecution and the defence respectively, and from doing so in a manner which will enable the jury to appreciate its full significance as related to the essential questions of fact upon which guilt depends.”

Sir Patrick Devlin in his Hamlyn lecture ‘*Trial by Jury*’, 1956, referring to the influence of the judge in a criminal trial over a verdict said (p. 111): “The judicial influence springs from the nature of the process. It is such that without the assistance of the judge a jury in many cases could not arrive at a just verdict.” And (p. 115): “All the material which gets into the ring that is kept by the rules

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of evidence is not of course of equal value, and it is the task of counsel and then of the judge to select and arrange. In discharging this task, counsel can be helpful but not disinterested and the jury must look chiefly to the judge for direction on the facts as well as the law.” Then finally (pp. 116-117):

“The summing-up is a vital part of the jury trial. ... On the facts he (the Judge) tells the jury that they are free agents and they are not bound by any opinion on fact which he may express. But it is obvious that they are likely to be very much influenced by his opinions on the facts and by the way in which he presents them.”

And recently in R. v. Sparrow [1973] 2 All E. R. 129, at p. 135, LAWTON, L.J. put the position this way. “He (the judge) and the jury try the case together and it is his duty to give then the benefit of his knowledge of the law and to advise them as to the significance of the evidence.”

Undoubtedly, a jury might justifiably reject expert evidence and opinion as unacceptable because of other relevant credible non-expert evidence. In Shoukatallie v. R. [1961] 3 All E. R. 996, P.C., the case for the Crown was that the appellant and one Mahomed Ali were acting together in a common design to kill Peekka. The evidence of the prosecution was that, shortly before his death, Peekka was paddling along the river in his corial. A shot rang out. It came from another corial in which were the appellant and Mahomed Ali (No. 2 accused). The appellant had fired the shot. He then shouted, “Shut your rass, you no dead yet,” and fired the gun again at Peekka who fell on his face in his corial. The Crown’s theory was that thereafter the two accused tied up Peekka and threw him overboard. Later a search was made in the river nearby. The body of Peekka was found tied to a log of wood by a vine. A post-mortem examination indicated that Peekka was shot, then tied up and immersed and drowned in the water while still alive. The accused men both made statements from the dock denying they were in the vicinity or knew anything at all about the crime. In their judgment the Privy Council commented on an omission in the summing-up: a certain possible view of the facts, they said, was not put to the jury. At p. 997, LORD DENNING said:

“Another view which the jury might conceivably have taken was that, despite the medical evidence, Peekka was actually shot dead, so that he was not alive but dead, before Mahomed Ali took any part in the matter. In that event, Mahomed Ali would only have been guilty as an accessory after the fact.”

This view of the facts rejected the medical evidence.

The prosecution witnesses – the Angels – said that Doreen Angel used the black

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sage stick only; and the appellant had stated all the injuries the doctor saw on them were inflicted by her, so none were sustained before or after the incident. If the jury believed this, they could on such belief reject the doctor's evidence that the wounds were "incised" as inaccurate. Therefore, the credibility of the Angels on this point of fact was of vital importance. And on this subject the trial judge said not a word. Doreen Angel had strong motive for not speaking the whole truth, if she wished not to; she now might inherit the disputed land; the imprisonment of the appellants would leave her occupation and enjoyment thereof probably unchallenged; the corroborative evidence of her minor children could hardly be looked on as independent testimony. On the other hand, Dr. Bacchus was a disinterested witness; nothing appeared on the evidence to suggest a motive for favouring the appellants, and whether or not a wound was "incised" or "lacerated" was a simple matter on which an experienced doctor at a public hospital ought not to make a mistake. If the jury found that the Angels were deliberately lying about the cutlass, then this could affect their credibility on other issues, namely, whether Rupert Angel also was armed with a cutlass and whether threats of "murderation" were in fact made. There was just no really independent evidence on these points. The trial judge ought to have put and stressed these considerations to the jury. Further, he should have reminded them that the appellants had admittedly taken Doreen Angel's cutlass to the police station and that from the start, before they would have known of the doctor's findings, they alleged that Doreen Angel had a cutlass. And what was equally if not more serious, was his failure specifically to relate this evidence of Dr. Bacchus to the issue of self-defence. These were substantial defects in the summing-up.

Finally, in relation to the second count, the summing-up on acting in concert in a common design to wound Doreen Angel with intent is open to two further just criticisms. In the first place, there was no warning that the mere presence of the appellant Henry Roberts in company with the appellant Michael Roberts when the latter wounded Doreen Angel was insufficient by itself to prove that the two appellants were acting together in wounding her. Secondly, again the facts were not related to the law. Take, first, the case for the prosecution. It was a conceivable view of the facts on their evidence, that the plan of the appellants was to attack Rupert Angel only, and that the appellant Michael Roberts, acting independently, wounded Doreen Angel, because she, unexpectedly, intervened as she did. This should have been put to the jury. Shoukatallie v. R. (*supra*) illustrates the duty of a trial judge to do so, as an entitlement of the accused person. On this view the appellant Henry Roberts would have been entitled to an acquittal on that count, even if the remaining appellant was convicted justly. Another possible view of the facts, referred to in another context, was that Doreen Angel was the aggressor, but the appellant Michael Roberts ought to have retreated from her attack; or although he could not, he used unreasonable force in his defence. Then, different considerations would apply to find the appellant Henry Roberts guilty

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also on this count, by the application of the doctrine of common design. There would then be no evidence of a pre-arranged plan, so that the jury will have to find in the evidence some words of encouragement or some overt act proving that the appellant Henry Roberts was abetting the appellant Michael Roberts in resisting her attack in an unlawful manner. On the prosecution's case, it ought to have been made plain to the jury that to convict the appellant Henry Roberts on this count, they had to be satisfied beyond reasonable doubt that either the two appellants had pre-arranged to attack Doreen Angel or to attack the husband initially, and the wife only if she intervened actively. In all these matters the jury received no assistance whatever as to how to apply this doctrine of common design to the facts put before them; neither were they directed as to the facts relevant to be considered for the correct application of it to whatever version of the facts they found proved. If the trial judge had duly related the law of common design to the facts, these possible views of them might not have escaped his attention.

In addition to the passage set out earlier in this judgment, the only other direction on this topic was this passage near the end of the charge:

“If you are satisfied so that you can feel sure that the circumstances as put forward by the State are true then you may properly convict both these two accused persons of wounding with intent and this would equally apply to the second count, even though the evidence is clear that only the number two accused is alleged to have assaulted the mother and number one accused did her nothing, once you are satisfied that the doctrine of common design as I have previously explained it to you properly applies here.”

As the trial judge's earlier direction was incomplete, this final one was unhelpful. R. v. Saman & Others (*supra*) involved the doctrine of common design on which the State relied to establish guilt of murder on the part of two appellants, who, with a third man, had gone to steal from the home of a woman, Mangri, whom the latter strangled to death, it was alleged. The case for the prosecution against these two rested mainly on incriminating statements to the police put in evidence. The State alleged a common design to commit burglary with violence. The trial judge told the jury of the law on “acting in concert... with a common design, a common purpose, aiding and abetting each other to commit the offence”; then he read each statement and asked the jury to say whether it showed the accused was acting in concert with the others, if weight was given to it. The learned Chancellor, in the passage cited already, held that this was “hardly satisfactory”; this was a case where “a little more is required” relating the law to the facts, and that the summing up was inadequate. In my judgment, these observations apply here.

Summarising the position, the law of self-defence was stated incorrectly as re-

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gards the aspect of the duty to retreat; the law of the doctrine of common design was incompletely stated and insufficiently explained; and in both cases it was not related to the facts in evidence. As a result, the summing-up was so defective that the trial was unfair and not in accordance with our common law concept of justice. It is not a fit case for the proviso. The convictions should not be allowed to stand. The appeals are allowed and the convictions and sentences set aside. In all the circumstances of the case, the interests of justice do not require that a new trial be ordered. The appellants are accordingly discharged.

BOLLERS, C. (ag.): I agree.

Appeals allowed.

Conviction and sentences set aside.

EDGAR CORLETTE
(Plaintiff)

v.

GEORGE GRANDSOULT
(Defendant)

[High Court (Collins, J.) May 30, August 14, 1975]

Contract – Sale of goods – No forfeiture clause – Purchase price payable by instalments – Default by purchaser – Rescission of contract by vendor – Whether

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vendor can forfeit instalments paid.

By agreement in writing made between the plaintiff and the defendant the plaintiff agreed to buy and the defendant to sell a Black Humber Super Snipe motor car for the sum of \$1,500.00.

The plaintiff paid the defendant the sum of \$1,000, receipt of which was duly acknowledged by the defendant. The balance of \$500.00 was to be paid in monthly instalments of \$75.00. Six instalments were paid leaving a balance of \$50.00 owing and due on the 13th January, 1973.

The agreement provided (*inter alia*) that:

“If any instalment becomes due and is not paid within the specified time the vendor has the power to repossess the vehicle or sue the purchaser for the whole amount outstanding.”

The last instalment was not paid and the defendant rescinded the agreement, repossessed the car and gave it away.

The plaintiff sued the defendant for specific performance of the agreement of sale, with an alternative claim for rescission of the agreement and a refund of the \$1,450.00 paid to the defendant.

HELD: That there was part payment of the purchase price. The contract did not provide for the forfeiture of sums paid. The relevant clause gives the vendor power to repossess or to sue the purchaser for the amount outstanding. Since the defendant rescinded the contract and took possession of the car he is required to return to the plaintiff all instalments paid by the plaintiff for the purchase of the car.

**Judgment for the plaintiff in the
sum of \$1,450.00 with costs.**

Cases referred to:

- (1) Stockloser v. Johnson [1954] 1 All E.R. 630.
- (2) Palmer v. Temple (1839) 9 Ad. and El 508.
- (3) Mayson v. Clouet [1924] A.C. 980.
- (4) Dies v. British and International Mining and Finance Corporation Ltd. [1939] 1 K.B. 724; 108 L.J.K.B. 398.

L. Ramgopaul for plaintiff.

E.O. Edwards for defendant.

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By an agreement in writing made between the plaintiff and the defendant the plaintiff agreed to buy and the defendant to sell a Black Super Snipe motor car for the sum of \$1,500.00.

Paragraphs 2 and 3 of the Statement of Claim read as follows:

(2) "The plaintiff paid the defendant the sum of \$1,000.00 (one thousand dollars) receipt of which was duly acknowledged by the defendant, and it was agreed that the balance of \$500.00 (five hundred dollars) would be paid in monthly installments of \$75.00 (seventy five dollars) commencing on the 13th day of each and every month.

(3) Possession of the said motor car was given to the plaintiff but the ownership remained with the defendant as the registration was never transferred by the defendant to the plaintiff.

The defendant in his defence admits these two paragraphs. The parties agree that six instalments of \$975.00 were paid leaving a balance of \$50.00 owing and due on 13th January, 1973. Here the stories of the two parties diverge. The plaintiff said that in January, 1973 he went to the defendant and offered him \$50.00 as the final payment, but the defendant refused to accept it saying that he was too busy then to go about effecting the transfer of the registration of the car. The plaintiff said that he offered the money again in February, 1973 and that the defendant again refused to accept it giving the same excuse, that he was too busy. The plaintiff said he was hospitalised in March, 1973 and while in hospital he gave the defendant's sister the keys to the car, the car being parked in the hospital compound, with certain instructions. Upon his discharge from hospital also in March, 1973, the plaintiff said he again offered the defendant the \$50.00 balance. By this time the defendant had already repossessed the car and according to the plaintiff, the defendant told him that he had no car for him as the time for the payment of the last \$50.00 had already passed. The plaintiff, therefore, sued the defendant for specific performance of the agreement for the sale of the car with an alternative claim for rescission of the agreement and to a refund of the \$1,450.00 paid to the plaintiff.

The defendant in his evidence said that in April, 1973 the authorities at the hospital spoke to him, and using a set of duplicate keys to the car which he had always retained, he moved the car which he said was in a dilapidated condition and gave it away to a friend. The defendant said that the final instalment of \$50.00 had never been offered to him by the plaintiff. The defendant said that it was he who approached the plaintiff more than once at the latter's workplace between December, 1972 and March, 1973 seeking to get payment of the \$50.00. The defendant said that he relied on one of the terms of the written agreement

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which gives him the right to repossess the car if an instalment has not been paid.

I accept the evidence of the defendant that the last instalment of \$50.00 was not offered him by the plaintiff in January, February, or March, 1973 as alleged by the plaintiff.

The rights of the parties fall to be determined by the terms of the written agreement entered into by them. Under the heading "Seizure" the following term appears in the agreement.

"If any instalment becomes due and is not paid within the specified time the vendor has the power to repossess the said vehicle or sue the purchaser for the whole amount outstanding."

The last instalment was not paid and the defendant rescinded the agreement, took possession of the car and gave it away.

In Stockloser v. Johnson [1954] 1 All E.R. 630 at p. 637 DENNING, L.J. said:

"It seems to me that the cases show the law to be this – (1) when there is no forfeiture clause, if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross claim by the seller for damages; see Palmer v. Temple (1839) 9 Ad. and El 508, Mayson v. Clouet [1924] A.C. 980, Dies v. British and International Mining and Finance Corporation Limited [1939] 1 K.B. 724 and *Williams on Vendor and Purchaser* 4 Edition Volume 2 p. 1006."

In Dies v. British and International Mining and Finance Corporation 108 L.J.K.B. 398 (cited above) STABLE, J. said at p. 404:

"It was said further that the sale, which under certain circumstances enables a purchaser in default to recover payment or part payment of the purchase price, is a rule applicable to the sale of land only, and must not be extended to the sale of goods, but no authority for the latter proposition was cited to me, and I was referred to certain passages in the seventh edition of *Benjamin on Sale* at pp. 989, 994 and 995 which state the rule as being of general application. At p. 989 the principle is summarised in these words. 'In ordinary circumstances unless the contract otherwise provides, the seller on rescission following the buyer's default, becomes

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liable to repay the part of the price paid.' If this passage accurately states the law, as in my judgment it does, where the language used in the contract is neutral, the general rule is that the law confers on the purchaser the right to recover his money, and that to enable the seller to keep it he must be able to point to some language in the contract from which the inference to be drawn is that the parties intended and agreed that he should."

It seems to me that from the contract the \$450.00 was paid in part payment of the purchase price. This was not disputed. It seems to me also that the contract did not provide for the forfeiture of sums paid. The relevant clause in the agreement gives the vendor power to repossess or to sue for the amount outstanding. In the result since the defendant rescinded the contract and took possession of the car he is required to return to the plaintiff all instalments paid by the plaintiff for the purchase of the car. There will be judgment for the plaintiff for \$1,450.00 and costs.

**Judgment for the plaintiff in the
sum of \$1,450.00 with costs.**

Solicitors:

N.O. Poonai for the plaintiff.

D.P. Bernard for the defendant.

TOOLSIE PERSAUD LIMITED
Appellant
(Defendants)

v.

DURGA PERSAUD
Respondent
(Plaintiff)

[Court of Appeal (G.L.B. Persaud, Crane and Haynes, JJ.A.) March 20, October 8, 1975]

Employment Contract – Termination or dismissal – Employer’s unilateral reduction of remuneration – Unilateral departure from original quantum of wages – Whether action for liquidated or unliquidated damages appropriate.

Toolsie Persaud Limited v. Durga Persaud

In the Court below, the Respondent sued the Appellants for \$3,571.14 for work done and services rendered between January 12 and June 28, 1969 and on January 11 and August, 1970. The nature of the work involved the unloading of sand, stone and quarry sittings from boats and pontoons. The rate for unloading as originally agreed was 15 cents per ton, but the appellants unilaterally reduced it to 8 cents per ton.

The High Court decided that there was agreement of service between the parties and that, following the Guyana Court of Appeal decision in Nobrega v. A.G. of Guyana, an employer has no right to unilaterally change a contract with his employee so as to reduce remuneration. Based on that reasoning the High Court gave judgment for the respondent in the sum of \$3,216.14 with costs fixed at \$700.

The appellants appealed that decision mainly on the ground that the rate of the wage was unilaterally reduced and that the discharge of every separate pontoon constituted a separate contract of service.

HELD: (by Persaud, J.A. giving the judgment of the Court): (1) The trial judge was correct with when he found that the appellants could not unilaterally alter the terms of the contract of employment.

(2) The handing to the respondent of his pay pocket with a reduced wage could not amount to a termination of the old contract and a new offer at the new rate when the respondent protested the new rate. Continuation of work by the respondent at the new rate could not be regarded by the appellants as an acceptance of the new rate of wages.

(3) To vary a contract or to enter into a new contract there must be an agreement on both sides or a *consensus ad idem*.

(4) There could not have been a fresh contract in respect of each pontoon, since it must have been understood that the material would be discharged at a fixed rate.

**Appeal dismissed. Judgment of the Court
below confirmed with costs of the Respondent.**

Editorial Note: The High Court decision was previously reported at [1974] G.L.R. 5.

Cases referred to:

1. Nobrega v. Attorney-General (1968) 10 W.I.R. 186.
2. Marriot v. Oxford Co-op Society [1969] 3 All E.R. 1126.

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3. Hill v. Peter Gorman (1975) 9 D.L.R. 124.

C. Lloyd Luckhoo, S.C., with Stanley Persaud and Jane Savage-Luckhoo for Appellants.
Ashton Chase with W.M. Zephyr for the Respondent.

PERSAUD, J. A. (delivered the judgment of the Court): The appellants (defendants) who are the employers are seeking a rescission of a judgment of the High Court whereby that court awarded the respondent (plaintiff) the sum of \$3,216.14 as representing arrears of wages owed by the employers to the employee for work done and services rendered. The learned judge found that there had existed an agreement of service between the parties, and that he was bound by the majority decision of the court in Nobrega v. Attorney-General. (1968) 10 W.I.R. 186, to the effect that an employee did not have a right unilaterally to alter the terms of a contract with his employee so as to reduce that latter's remuneration.

The circumstances of this case are as follows: The plaintiff was employed by the defendants over a period of time in the unloading of sand, stone and quarry sifting from boats and pontoons moored alongside the defendants' wharf at Canje. Up to October, 1968 the plaintiff was in receipt of a wage calculated on the basis of 15 cents per ton of sand unloaded, so that if he was one of four men who unloaded 400 tons of sand from a pontoon, he would receive \$15, calculated at 100 tons per person at 15 cents per ton. He was paid at the end of every week; but in October, 1968 without prior discussion or agreement having been made between the parties, he found that his wages had been reduced to such an extent that when calculated in relation to 100 tons of sand, it worked out at 8 cents per 100 tons. The defendants contended that as from October, 1968 it was agreed that a new rate would be payable in respect of sand, that is, \$8 per pontoon. The judge found against this contention, and held that the act of the defendants in reducing the rate of pay amounted to a unilateral variation of the contract of service, and awarded a sum of money which represented the difference of the wages between the old and the new rates, save for a short period during which he found the plaintiff did not work. There was some evidence given by members of the Labour Department that as a result of the reduction of the rate of wage, a strike of the employees was called, when the Labour Department intervened in an effort to effect a reconciliation. This was never achieved. I will not now deal with the efforts at conciliation and the effect of the failure to reach an agreement and the decision to continue working at the new rate pending agreement. This appeal was argued before us mainly on the basis that the rate of wage was reduced unilaterally; that the discharge of every separate pontoon involved a separate contract of service the terms of which were of course satisfied upon the completion of the discharge of the pontoon. It was described as 'piece-work', and the submission is that so long as there is no notification of a change of rates, the prevailing rate

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stands, in which case the plaintiff was entitled to 15 cents per ton up to October, 1968; but after October, 1968 the plaintiff was entitled to no more than \$8 per pontoon, he having been notified of the new rate, the notification having been effected by the payment of the reduced pay packet, and his acceptance of the new rate by his continuing to work. It was further contended on behalf of the defendants that even if it is held that the plaintiffs conduct in continuing to work did not amount to acceptance of the new rate, by his continuing to work at the new rate, he is now estopped from claiming at the old rate. For the defendants it was also submitted that the plaintiff was really a 'piece-worker' engaged in the discharge of stone and sand from the defendants' pontoons, and that a fresh contract was entered into between himself and the defendants every time he commenced discharging a pontoon and such contract was terminated upon the completion of that job of work. Although the defence filed did allege that the plaintiff was employed as a labourer doing 'piece-work', it would appear that this point was not taken before the trial judge, and he was not called upon to discuss the point. It is by no means conclusive of the point that the plaintiff was paid a lump sum in respect of more than one punt, as it is to be expected that the wages earned would be computed over a period of time, say, weekly or fortnightly, and paid in a lump sum. The defendants have given no evidence on this aspect of the matter, but the plaintiffs evidence was that he was employed both as a day and a 'piece-worker', and when there was no 'piece-work', he would be given day work. For myself, I cannot accept, in view of the evidence, that there was a fresh contract in respect of each pontoon. It must have been understood that sand and stone from all pontoons would be discharged at a fixed rate. So that the real question to have been determined is whether the reduction of the rate of pay amounted to a variation of the contract, whether it was unilaterally varied and, if so, whether the plaintiff can maintain that he is entitled to be paid the difference in the two rates during the relevant period of time.

It must be remembered that this is not a case of a written notice as was the event in Marriott v. Oxford Co-op Society. [1969] 3 All E.R. 1126, where the plaintiff was served with a notice in which it was said, "... we cannot see our way clear to retain you in your present position. We are prepared to offer you employment at a weekly wage of £3 less per week than your present basic pay." LORD DENNING, M.R. held that the letter containing those words did not amount to a termination of the contract; it was only an offer to vary it, or to rescind it by agreement and substitute another contract. But, following some discussion, in a subsequent letter to the plaintiff, the defendants wrote that, "It has therefore been decided that the previous recommendation for reducing your pay by £3 shall be rescinded and substituted with a reduction of £1 per week ... The reduction in pay will become operative from Monday, 30th January, 1967." DENNING, M.R. held that the latter letter amounted to the termination of the contract, even though the plaintiff continued in the employ of the defendants under the new terms for a few

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weeks, and had been protesting his reduction of pay ever since the earlier letter. At first blush it would appear as if the Marriott case stands in support of the defendants in this case, but upon closer examination, I have come to the opinion that it really does not, as the that case was whether the appellant was entitled to redundancy pay under the *Redundancy Payment Act, 1965 (U.K.)*. He would have been so entitled if his position had become redundant, and he had been dismissed by reason of that redundancy. The matter was dealt with very clearly by WINN, L.J. when he said (at p. 1130 *ibid*):

“As a general approach to this whole topic it is really very desirable that in relations between employers, and workmen and employers and the workmen’s union, there should be, so far as it can possibly be achieved, simplicity; academic discussions as to the operation in certain circumstances in the law of contract of repudiation and acceptances, and acceptances of offers, novations and counter-offers, and so on, should not be allowed to produce waste of time or energy. All that really is to be decided is: has there been a reduction in the employer’s need for labour, or labour of a particular category or in a particular place? If so, is it as a result of such falling-off of his requirements that the contract of employment in question has come to an end? If it has come to an end for that reason and has been brought to an end so as no longer to be open to the workmen to perform, either by notice from or by conduct of the employer inconsistent with his duty to the employee, then there is a right to redundancy payment, albeit it can be excluded in one of two different ways or for one of the two quite different reasons.”

In holding that Crown could not unilaterally alter the terms of a contract of employment in Nobrega v. Attorney General. (1967) 10 W.I.R. 187, STOBY, C. approved *of a dictum* of MACKAY, J. A. in Hill v. Peter Gorman Ltd., (1957) 9 D.L.R. 124, as being a correct statement of the law. That *dictum* is (*ibid.*, at p. 132):

“Where an employer attempts to vary the contractual terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms.

I cannot agree that an employer has any unilateral right to change a

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contract or that by attempting to make such a change he can force an employee either to accept it or quit.”

LUCKHOO, J. A. (as he then was) in his dissenting judgment did not refer to the Peter Gorman case, as in his view the Nobrega case did not involve a question of the Crown’s right to vary a contract, but rather whether the Crown had a right to dismiss a public servant at pleasure; and it was on this point that the Privy Council reversed this court, and held that LUCKHOO, J. A., was right, that is, that the Crown had such a right, and what was done was in effect a dismissal at pleasure of the public servant in that case.

In the Court of Appeal CUMMINGS, J. A., also referred, with approval, to the *dictum* of MACKAY, J.A. In the Peter Gorman case, GIBSON, J. A., dissented. He held that the defendant (employer) had terminated the contract with his agents (of whom the plaintiff was one) by giving them reasonable notice of his intention so to do, and had outlined to them his revised terms of remuneration. But he also expressed the opinion that (p. 135, *ibid.*): “It is a well-known principle that where there is a contract of employment, the condition of the agreement cannot be varied without the consent express or implied, of both parties.” In the Peter Gorman case, the facts were these: The plaintiff was employed by the defendant as a salesman under a contract providing for an indefinite employment terminable on two weeks’ notice and which fixed his remuneration as a stipulated rate of commission on net sales. The contract included a restrictive covenant applicable for one year in respect of the area of employment should the plaintiff’s employment be terminated for any cause. The defendant was concerned about delinquent customers’ accounts and, although the plaintiff’s contract did not so provide, the defendant subsequently began to deduct (withhold) 10% of commissions earned by the plaintiff and by other salesmen as a reserve for bad debts. The plaintiff complained periodically about the deduction but remained in the defendant’s employ for over a year after they were initiated. In an action to recover the withheld commission, the trial judge found that the plaintiff had never agreed to have his commissions reduced by a reserve for bad debts and he preferred the plaintiff’s evidence to that of the defendant’s president. Held, on appeal, by a majority, the trial judge’s findings of fact must be supported, and the judgment for the plaintiff affirmed.

In the instant case, the judge found (and the evidence was overwhelming in this regard) that the plaintiff did not agree to the reduction in his wage. Indeed, the history of events points unequivocally to the conclusion that there was more than a mild protest; there was a strike involving the intervention of the Labour Department in an endeavour to resolve the matter, but these efforts met with no success. How then, can it be said, that by continuing to be employed at the lower rate of pay the plaintiff accepted that rate as the agreed rate? The fact that he agreed to

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accept the new rate pending the outcome of the conciliation talks would have had the contrary effect to that contended for by learned counsel for the defendants. Both the majority view expressed by this court in Attorney General v. Nobrega, as the case was called when it engaged the attention of this court, and the *dicta* in the Peter Gorman case are against the defendants' contention.

I therefore find that the trial judge was right when he came to the conclusion that the defendants could not unilaterally have altered the terms of the contract of employment. Handing the plaintiff his pay envelope with a reduced wage could not amount to a termination of the old contract, and a new offer at the new rate when the workman protested the new rate. Nor could the continuation of work by the workman at the new rate be regarded as his acceptance of the new rate under these particular circumstances.

To vary a contract, or to enter into a new contract there must be agreement on both sides, or as it has been described, *consensus ad idem*.

In my judgment this appeal ought to be dismissed, and the judgment of the court below affirmed with costs to the plaintiff (respondent).

CRANE, J.A.: I concur.

HAYNES, J.A.: I agree with the dismissal of this appeal with costs.

Appeal dismissed. Judgment of the Court below confirmed with costs to the Respondent.

Solicitors:

A.G. King for the Appellants.

H.B. Fraser for the Respondent.

ORI & TULSIE PERSAUD
Appellants
v.
THE STATE
Respondent

[Court of Appeal (Persaud, Crane, Haynes, JJ. A.), October 24, 25, December 1, 1975]

Criminal Law – Wounding with intent – Alibi – Burden of proof – Direction that

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evidence for defence sometimes strengthens prosecution's case – Too casual a direction – Need for a further or special direction on onus of proof.

The appellants Tulsie Persaud and Hansraj Ori, were indicted for the crime of wounding Bhagwan Singh with intent. The case for the prosecution was that they acted in concert in so doing.

Both were found guilty at the Demerara Assizes for that offence. However, on appeal, Tulsie Persaud's appeal was allowed for the reason that there was no evidence on record to show he was acting in concert with Hansraj Ori to wound the injured man, and the trial judge should have withdrawn the case against him from the jury.

The appellant Hansraj Ori raised an alibi as his defence, *viz.*, that he was nowhere near the scene of the crime at the time of its commission and called evidence in support. Nevertheless, the jury found him guilty obviously because they did not believe him for they were told to acquit if they did so.

On appeal, a difficulty however arose, in view of too casual a general direction to the jury on the burden of proof. They were told that they might well think that Hansraj Ori's evidence served to strengthen the case for the prosecution.

HELD: (1) That the direction on the burden of proof was so casual that the circumstances called for a further direction or reminder on the burden of proof.

(2) The jury may well have understood the judge to mean that the prosecution's case could be strengthened if the accused had lied about his alibi or had failed to establish it to their satisfaction, and if they so understood, it would have been a grievous wrong to the accused.

Appeal allowed. Conviction and sentence set aside.

Editorial note: This case is also reported in (1975) 22 W.I.R. 201

Cases referred to:

- (1) R. v. Maraj, Basdeo and Dookram (1962) 4 W.I.R. 278
- (2) The Queen v. Harold Narine [1967] L.R.B.G. 139
- (3) R. v. Adams and Lawrence (1967) 11 W.I.R. 166.
- (4) R. v. Johnson [1961] 1 W.L.R. 1478; 126 J. P. 40; 105 S.J. 1108 [1961] 3 All E.R. 969; 46 Cr. App. R. 55
- (5) The State v. Balram Gobin et al. (1975) (Guyana Court of Appeal Crim. Appeals Nos. 26-29, d/d. 20/8/75).
- (6) Broadhurst v. R., [1964] AC. 441; [1964] 2 W.L.R. 38; [1964] 1 All

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- E.R. 111; 107 Sol. Jo. 1037, PC.
- (7) R. v. Lobell [1957] 1 Q.B. 547; [1957] 2 W.L.R. 524; 121 J.P. 282; 101 Sol. Jo. 268; [1954] 1 All E.R. 734; (1957) 41 Cr. App. R. 100
- (8) R. v. McPherson (1957) 41 Cr. App. R. 213.
- (9) R. v. Roberts (1965) 9 W.I.R. 66.
- (10) R. v. Chew (1927) 19 Cr. App. R. 73.

G. A. G. Pompey, Deputy Director of Public Prosecutions, for the State.

K. A. Juman-Yassin for the first-named appellant.

F. Ramprashad, S. C., for the second-named appellant.

CRANE, J.A., (delivered the judgment of the court): There was insufficient evidence that the accused Tulsie Persaud acted in concert with his brother, the appellant Hansraj Ori, to assault the complainant Bhagwan Singh with intent to cause him grievous bodily harm, or to maim, disfigure or disable him, and it was for that reason on October 25 last, we allowed his appeal and set aside his conviction for that offence, at the same time reserving our decision in the case of Hansraj Ori.

The prosecution's case, briefly stated, was that while Tulsie Persaud was doing no more than holding the complainant's hand and entreating him in a low tone of voice to leave a tent at the wedding reception that was kept on the premises of one Battiejar at No. 2 Canal Polder, West Bank, Demerara, on the night of April 22, 1972, the accused Hansraj Ori came up and struck the complainant a savage blow on the left side of his face with a sturdy piece of wood causing him to suffer grievous bodily injury.

As indicated above, neither by word nor deed could any nexus be forged between Tulsie Persaud and Hansraj Ori to spell out acting in concert and. for that reason, we were constrained to allow the former's appeal.

The defence of Hansraj Ori, however, was based on a different footing, i.e., on an alibi. On oath, he steadfastly maintained that he was nowhere in Canal No. 2 on April 22, the date on which the prosecution alleged that he assaulted the complainant. However, it is right to say that his alibi was supported by one of the prosecution witnesses, a woodcutter named Abdool Shakoor in the respect that he was away at the material time at a place in West Demerara called Potosi Relief where both he and Shakoor worked together cutting wood between April 21 and 23, 1972. The alibi was also supported at the trial by his brother, his co-accused. Tulsie Persaud, in that he was not at Battiejar's wedding reception on the night in question, but that it was really he, Tulsie Persaud, who struck the complainant when the latter attacked him with a rum bottle.

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It is evident, as their verdict indicates, that the jury did not accept the alibi, and, it must follow, did not believe the testimony of the witnesses in support of it. That being so, the only remaining question is, whether the trial judge took the requisite step that has been laid down as a guideline in the decided cases that should be followed in certain circumstances, and directed the jury that in the event of their rejecting or not believing the alibi, they should satisfy themselves before convicting the accused that the prosecution had discharged the burden of proof by proving all necessary ingredients of the charge. This “further step” has been counselled by GOMES, C.J. in R. v. Maraj, Basdeo and Dookram (1962) 4 W.I.R., at p. 278, and was commended by STOBY, C. to our judges in the Guyana High Court as the correct model for them to follow “in some cases” when an accused person sets up the defence of alibi and testifies in support of it. [See The Queen v. Harold Narine [1967] L.R.B.G. 139 and Adams & Lawrence (1967) 11 W.I.R. 166.] Maraj’s case is important in that it furnishes the reason which makes it compelling that a jury should be given a direction along the following lines when the defence of alibi has been setup. SIR STANLEY GOMES, C.J. said (*ibid*, at page 278):

“The main reason why that further direction or reminder is required to be given is that, where an accused person gives evidence or calls witnesses, or does both of these things, in support of his alibi, the jury is confronted with two diametrically opposed versions which are created by the presentation of evidence, the truth or falsity of which can be tested and be determined by them. In such event, a jury, in the absence of the further direction, might think that if they reject the alibi, they must or can only accept the version put forward by the prosecution.”

What this means simply is, that if the jury rejects the alibi as unworthy of belief, it does not necessarily follow they are bound to accept the prosecution’s version of the facts, for it has to be remembered that when an accused proffers an alibi, what he is in effect obliquely doing is endeavouring to establish his innocence; though there is no obligation on him to do so. If he fails to establish he was elsewhere because the jury does not believe his alibi, that does not mean the prosecution are, on that account, entitled to succeed. We consider it important in the interests of justice that a clear direction to this effect should be given when the circumstances warrant it; although we are fully appreciative of the fact that there is no set formula for so doing. All the trial judge is required to do in the circumstances is to give a “further direction” to the general direction that the burden of proof lies on the prosecution to prove its case making it clear that if the accused were to fail in his attempt to convince them that he was not present at the scene of the crime, they must not feel themselves at liberty to convict him out of hand without first ensuring that the prosecution has proved its case. For reason of simplicity and precision, we would also commend for consideration what was said in this re-

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spect by the old Court of Criminal Appeal of England in R. v. Johnson [1961] 3 All E.R., at page 970, as a fitting way for juries to be instructed on the point, *viz.*, the jury should be told that, “If a man puts forward an answer in the shape of an alibi, as in the shape of self-defence, he does not in law thereby assume any burden of proving that answer,” which is really only another way of expressing the same idea. It is unfortunate, we think, that so much has in the past had to be written on what is, really, a simple matter to explain to juries: nevertheless, it remains a fact that misdirections do occur from time to time by a failure to focus attention on this crucial matter of the onus of proof when the necessity to do so arises.

Quite recently, this Court was called upon to examine the identical topic under review, and HAYNES, J. A., when dealing with the defences of alibi in The State v. Balram Gobin et al. (1975) G.C.A. Crim. Appeals Nos. 26-29, dated 20th August, 1975, fittingly observed:

“The other substantial ground of appeal related to the alibi defences of appellants Nos. 2, 3 and 4. Every one of them gave evidence on oath – he or she was at home just close by at the material time. By their verdict the jury demonstrated disbelief of these alibis. It was contended, in effect, that the jury might have convicted these appellants because of such disbelief. If they did so, that would be wrong in principle and a miscarriage of justice.

He who asserts must prove. And so the prosecution must prove the prisoner’s guilt. It is not for him to prove his innocence. These are fundamental common law principles. But while the law does not require him to establish his innocence, he himself may wish to do so. If then he swore he was elsewhere when the crime was committed, and the jury-disbelieved him that he was where he testified he was then, how does this affect the question of his alleged guilt’¹ Judicial experience has shown that there is a real danger that in such circumstances a jury might say: Since he lied to us, it must be because he is guilty. We find him ‘Guilty.’ LORD DEVLIN in Broadhurst v. The Queen [1964] 1 All E.R 111 (P.C.), warned trial judges about this situation. He said (pp. 119-120):

‘... It is very important that a jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evi-

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dence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.'

Or, they might say, 'Well, as we disbelieve him, we have to believe and accept the prosecution's story. We find him Guilty.' The authorities R. v. Chew and R. v. Maraj, Basdeo & Dookram, discussed in the judgment of the learned Chief Justice, made it a compulsive practice to direct the jury against such an approach. No set formula need be used, once it is made clear to them they could not rightly and fairly convict the accused just because they felt he lied and that such a conclusion did not *per se* mean that the prosecution's case was proved and they had to convict."

On a close scrutiny of the summing-up, we look in vain, in the particular circumstances, for some such direction as was counselled by GOMES, C.J. in Maraj's case (above), or such as was made use of in The State v. Balram Gobin et al (above), where the trial judge told the jury, apart from directing them on the general burden of proof, that it was the duty of the State to prove guilt beyond reasonable doubt, that the accused were under no obligation to prove their innocence, but if they were to find the defences unworthy of belief, that circumstance alone would not entitle them to return a verdict adverse to the accused persons. It is, however, otherwise in this appeal where all the trial judge has said in relation to the burden of proof on the matter of the alibi is this:

"Remember that the burden of establishing guilt is on the prosecution but you must also consider the evidence for the defence which may have one of three results. It may convince you of the innocence of the number one accused, members of the jury, or it may cause you to doubt, in which case the accused is entitled to an acquittal. Or it may, and it sometimes does, strengthen the case for the prosecution."

Without doubt, this is a most casual general direction on the burden of proof. There is an obvious lacuna created by the judge having employed a formula that is inappropriate to a direction on alibi, unless it is qualified. No indication is given of the circumstances whereby evidence led on behalf of the accused can operate to strengthen the case for the prosecution. Is the trial judge to be understood to mean that the prosecution's case can be strengthened if the accused has lied about his alibi? If so, that would be grievously wrong. Here, a doubt is obvi-

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ously created, for if there is a possibility that the jury may have understood him to mean that the prosecution's case can be strengthened because the accused has failed to prove his alibi, then all the more it seems to us the need arose in the present case to guard against that possibility by giving the "further direction or reminder" we have been considering. In what circumstances does evidence given on behalf of the defence sometimes strengthen the case for the prosecution?⁹ The summing-up is silent in this respect; it has not enlightened the jury of such instances as the last sentence of LORD DEVLIN's speech in the above passage from Broadhurst's case would appear to suggest it should do. And here it seems the following observations of STOBY, C. in Adams & Lawrence (above) become appropriate.

"In the case of an alibi a special direction may or may not be necessary. If the circumstances are such, and the general direction so casual, that the jury is in danger of misunderstanding on whom the burden lies, then a special direction should be given."

We have already remarked on the casual nature of the general direction that was given on the burden of proof of the alibi in the summing-up, and must observe it was obviously borrowed from the well-known judgment of LORD GODDARD in R. v. Lobell (1957) 41 Cr. App. R. at p 104, which he repeated in R. v. Mc Pherson. (1957) 41 Cr. App. R. at p. 216 It will also be observed in that quotation the Chief Justice's suggestion of the "convenient way" of directing juries on the burden of proof in relation to self-defence and provocation, but we doubt whether this direction was intended by him to apply (at least not without a further or special direction) to the defence of alibi where there is no evidential burden on the accused as there is when he sets up self-defence or provocation to which the direction in question is really apposite. If a man sets up self-defence, he may well strengthen the case for the prosecution by showing the jury he was really the aggressor; or if he sets up provocation, he may well convince them from what he has said or done that he was not indeed acting under the stress of provocation – which onus the prosecution must negative. It seems to us there can be no harm in following the suggested "convenient way" of directing juries which the trial judge has obviously done in this case, provided a "further direction" on the onus of proof is given as in R. v. Roberts (1965) 9 W.I.R., at p. 66.

It being then a matter for speculation in the instant case whether the jury got the impression that one of those instances where the case for the prosecution is strengthened is when an accused has lied about his alibi, we cannot say for certain whether they got it or not. Nevertheless, it suffices that they might well have, and that there has been no attempt to erase by further direction the harm that might have been created in the jury's minds.

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In the light of decided English and West Indian cases, the above direction was too casual and inadequate on the burden of proof on the defence of alibi. [See R. v. Chew (1972) 19 Cr. App. R. 73, and the direction of GOMES, J. in Maraj's case (above) which this Court has recommended in Harold Narine's appeal should, in appropriate cases, be followed as a model.] But nowhere in the summing-up has it been made clear to the jury that "they could not rightly and fairly convict the accused just because they felt he lied and that such a conclusion did not *per se* mean that the prosecution's case was proved and they had to convict." [*per* HAYNES, J. A. in Balram Gobin's case]

For these reasons, we will allow the appeal of Hansraj Ori and set aside his conviction and sentence.

Appeal allowed

Conviction and sentence set aside.

LYNDEN REECE
Appellant
(Prosecutor)

v.

HAKIM ABDULLA
Respondent
(Defendant)

[Court of Appeal (E.V. Luckhoo, C., Crane and Haynes, JJ.A.) December 6, 1974; January 3, February 10, 1975]

Magistrates – Summary jurisdiction offence – Decision not given at conclusion of hearing, nor within six weeks thereafter as law requires – Decision given eleven months after conclusion of hearing – Whether decision null and void – Whether new trial necessary – Summary Jurisdiction (Procedure) Act, Cap. 10:02, s. 35 (1).

Statute – Construction mandatory or directory – Weighing respective balances of inconvenience to determine when read as one or the other.

In a Magistrate's Court for the Corentyne Magisterial District the respondent was charged with the summary conviction offence of exposing for sale by retail a price-controlled article without the retail selling price being marked on it.

At the conclusion of the hearing the court did not give its decision immediately nor within six weeks thereafter at a subsequent sitting as is required by law.

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Instead, the magistrate gave his decision some eleven months after the hearing convicting the defendant, and imposing a fine of \$500 with an alternative of six months' imprisonment. The relevant law is contained in s. 35 (1) of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02*, as follows:

“The court shall at the conclusion of the hearing or within six weeks thereafter at a subsequent sitting give its decision in the cause either by dismissing the complaint or by making such order against the defendant as the justice of the case requires.”

The Full Court, allowing the appeal from the magistrate's decision, held that s. 35 (1) above was mandatory, that failure to comply was fatal, that the decision was null and void, and that a new trial was necessitated. On appeal to the Court of Appeal,

HELD: (1) That the legislature could hardly have intended to create for one who had no control over the exercise of the magistrate's function, such a measure of inconvenience as would result in the ensuing hardship of having to meet the consequential expenses of a new trial and, possibly, suffer injustice through the unavailability of witnesses, and such benefits as might have accrued from the original hearing.

(2) That it is the duty of a magistrate to give his decision within six weeks to comply with the wish of the legislature.

(3) That the object of the legislature being to secure a speedy hearing of summary conviction offences, the inconvenience caused by holding the magistrate's decision null and void, far outweighed the inconvenience caused by non-observance of the six-week rule.

(4) That the statutory provision which requires a magistrate to give his decision within six weeks is not intended to be absolute or imperative in character, but only directory with the consequence that a failure to comply would not invalidate the decision given.

**Appeal allowed. Decision of the Full Court set aside.
Decision of the magistrate restored.**

Editorial Note: This case is also reported at (1975) 23 W.I.R. 34. Enmore-Hope Village District Council v. Mahamood Shaw et al is now reported at [1974] G.L.R. 377.

HAYNES J. A., in his judgment considered and interpreted s. 34 (1) of the *Sum-*

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mary Jurisdiction (Procedure) Act, Cap. 15 – the precursor to s. 35 (1) of the *Summary Jurisdiction (Procedure) Act Cap. 10:02*. The wording of the subsection is exactly the same.

Cases referred to:

- (1) Enmore-Hope Village District Council v. Mahamood Shaw *et al* [1974] G.L.R. 377.
- (2) Stepney v. John Walker & Sons. Ltd. [1934] A.C. 365; 103 L.J.K.B 380; 50 T.L.R. 287; 78 Sol. Jo. 238, H.L.
- (3) Liverpool Borough Bank v. Turner (1860) 45 E.R. 715; 2 De G.F. & J. 502; 30 L.J. Ch. 379; 3 L.T. 494.
- (4) Montreal Street Rail Co. v. Normandin [1917] A.C. 170; 86 L.J.P.C 113; 116 L.T 162; 33 T.L.R 174 P.C.
- (5) Heydon's case (1584) 3 Co. Rep. 7a; 76 E.R. 637.
- (6) Eastman Photographic Co. v. Comptroller of Patents [1898] AC. 571; 67 L.J. Ch. 628; 79 L.T. 195; 14 T.L.R. 527.
- (7) R. v. Ingall (1876) 2 Q.B.D. 199; 46 L.J.M.C. 113; 35 L.T. 552; 41 J.P. 181; 25 W.R. 57.
- (8) Caldow v. Pixell (1877) 2 C.P.D. 562; 46 L.J.Q.B. 54; 36 L.T. 469; 41 J.P. 647; 25 W.R. 773 D.C.
- (9) Grice v. Allen (1741) 94 E.R. 981; Barnes 414.
- (10) R. v. Justices of Derbyshire (1803) 102 E.R. 784.
- (11) R. v. Justices of the Borough of Leicester (1827) 108 E.R. 627; 7B & C 6; 9 Dow & Ry. K.B. 772; 4 Dow & Ry. M.C. 518
- (12) R. v. Sneyd (1831) 5 Jur. 962; 5 J.P. 579.
- (13) Mayor of Rochester *et al.* R. (1858) 120 E.R. 791.
- (14) R. v. Churchwardens of All Saints, Wigan [1876] 1 A.C. 611.
- (15) R. v. Justices of the County of London and the London County Council [1893] 2 Q.B. 476.
- (16) Brumfitt v. Bremner (1861) 142 E.R. 1.
- (17) Howard v. Bodington (1877) 2 P.D. 203; 42 J.P. 6.
- (18) Farrel v. Tomlinson (1761) 2 E.R. 782; 5 Bro. Parl. Cas. 438.
- (19) Barker v. Palmer (1882) 51 L.J.Q.B. 110; 8 Q.B.D. 9; 45 L.T. 480; 30 W.R. 59, D.C.
- (20) Quin v. Leathern [1900-03] All E.R. 1; [1901] A.C. 495; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.
- (21) Harris v. D.P.P. [1952] A.C. 694; [1952] 1 All E.R. 1044; [1952] 1 T.L.R 1075; 116 J.P. 248; 96 Sol. Jo. 312; 36 Cr. App. R. 39
- (22) R. v. Churchill *et al* [1965] 1 W.L.R. 1174; [1965] 2 All E.R. 793; 49 Cr. App. R. 317; 129 J.P. 387; 109 Sol. Jo. 792.

G.H.R. Jackman, Senior State Counsel, for appellant.
Doodnauth Singh for the respondent.

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E.V. LUCKHOO, C.: I am in agreement with the careful and painstaking judgments which have just been delivered by my brothers CRANE and HAYNES, and which I have had the opportunity of seeing beforehand.

This is the second occasion within nine months that the question has come to this court for decision as to whether certain statutory obligations are mandatory or only directory. The first instance was in the case of Enmore-Hope Village District Council v. Mahamood Shaw *et al.* [1974] G.L.R. 377 in which I delivered a minority judgment. After having the benefit of the citations, opinions and conclusions of my brothers CRANE and HAYNES in this case, I feel somewhat fortified in the view which I held in that case. Perhaps this Court might on some future occasion speak further on that issue.

So much has already been said in this case that little remains for me to add. I agree with my brothers that the statutory provision which requires a magistrate to give his decision within six weeks is not intended to be absolute or imperative in character, but only directory, with the consequence that the magistrate's failure to comply would not invalidate the decision given. It was not of the essence of the legislative purpose that if this statutory provision was disregarded the consequence of such disobedience would be to render nugatory what the magistrate had done.

In order to determine whether a statutory provision is mandatory or directory, a casual or superficial approach is not enough. One would have to get, so to speak, under the 'skin' of what is enacted; its scope and object would have to be surveyed; the justice or injustice that would accrue either way assessed; the extent of hardships and inconveniences examined, etc., if the probe is to reveal the true intendment and purpose of the legislature.

The Full Court was of the opinion that the main object of s. 35 (1) was to ensure that persons charged with summary conviction offences are dealt with expeditiously and do not have "their fates hanging in the balance for weeks, months, or even years". Let me look at the facts to see whether the Full Court's decision would not have the opposite, and, indeed, a more objectionable, effect. The magistrate had fully heard all the evidence on the 3rd December, 1971; reserved his decision to the 10th December, 1971 and, for some unknown reason, did not give it until the 2nd November, 1972. The Full Court's judgment was pronounced on the 21st September, 1974, without concern for the merits of the appeal. Its Order sending back the matter to be recommenced will mean that a cause which was originally heard in 1971 and adjudicated upon 1972, will have to begin afresh in 1975. And if, perchance, it were to be desired to test the result by advancing to the Full Court and, possibly, to the Court of Appeal, the final determination might well not be before 1976! Would this be ensuring that a person charged with a

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summary conviction offence was being dealt with “expeditiously”, so that his fate would not hang in the balance “for weeks, months, or even years”? The mandatory interpretation given would only serve to protract and not expedite the process. The legislature could hardly have intended to create for one who had no control over the exercise of the magistrate’s function, such a measure of inconvenience as would result in the ensuing hardship of having to meet the consequential expenses of a new trial and, possibly, suffer injustice through unavailability of witnesses, and such benefits as might have accrued from the original hearing. Far from aiding, it would be encumbering the due process of law. And what of the accused person who had succeeded in gaining a verdict in his favour in a decision given more than six weeks after the conclusion of the case? Would he have to be tried all over again, perhaps with consequential disadvantages, because that decision was to be regarded as a nullity? And how many trials would he have to face if succeeding magistrates were in like manner to take longer than six weeks to make their pronouncements? Factors such as these would, in effect, be suppressing the remedy to advance the mischief.

But the question might well be asked: Where or what is the remedy when a procrastinating magistrate chooses to ignore the stipulated period of six weeks? Obviously it was the intention of the legislature that the parties, whether prosecutor or defendant, should have a right to expect a decision within this period of time – no doubt thought to be a reasonable ‘yardstick’! As I see it, two courses seem to be available. A report of such neglect could be made to the administrative head of the department, who might require the magistrate to comply, and if he persisted in his neglect, a report of such conduct could be made to the Judicial Service Commission which exercises disciplinary powers. But more effective and expeditious ought to be recourse to the Full Court itself under the *Summary Jurisdiction (Appeals) Act, Cap. 3:04, s. 37*, where it is provided:

“37. (1) Wherever a magistrate or a justice of the peace refuses to do any act relating to the duties of his office, the person requiring the act to be done may apply to the Court on motion supported by affidavit of the facts for an order calling upon the magistrate or justice, and also upon the person to be affected by the act, to show cause why the act should not be done.

(2) If, after proof of due service of the order, good cause is not shown against it, the Court may make it absolute and the magistrate or justice, upon being served with the order absolute, shall obey it, and do the act required, and the costs of the proceedings shall be in the discretion of the Court.”

I can see no reason why a magistrate who, on a reserved judgment, during the six

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week period fixes the date for the giving of his decision after the six week period, cannot be compelled in terms of s. 37 (except good reason appears to require a contrary ruling, as for example, due to illness, incapacity of some kind, etc.) to give his decision not later than six weeks from the conclusion of the matter. In the same way, even if the six-week period has elapsed, I can see no reason why similar proceedings cannot be taken for an order that his decision be given within such time as may be specified by the Full Court, after the magistrate will have had an opportunity of showing cause why he should not be made to give his decision as soon as it is practicable after the motion is brought. In Stepney v. John Walker & Sons. Ltd. [1934] A.C. 365, at p. 398, LORD WRIGHT, in stating a principle, said:

“... It is true that in certain cases a writ of mandamus may issue to perform a duty for which the time of performance fixed by law has passed. What difficulties may be involved in such a course is shown by the judgment in the Mayor of Rochester v. R. E.B. & E. 1024, where the successor of the delinquent Mayor was ordered to revise the burgess list of the previous year; in the Exchequer Chamber, CROWDER and WILLIAMS JJ., thought the writ should not go; the LORD CHIEF JUSTICE BARON and MARTIN, B. thought it should; with these latter, WILLES J. only agreed with grave doubts. But the same course has been taken in other cases, for instance, in R. v. Hanley Revising Barrister [1912] 3 K.B. 518, where by inadvertence voters had been left on the lists whose names the revising barrister had ordered to be struck off. In these and similar cases the duty had not been fulfilled and the Court has held, it may be with justification, that the statutory times are merely directory and that it is more in accordance with the intent of the statutes that the act should be done, though out of time, than not be done at all.”

In my view, it is the duty of a magistrate to give his decision within six weeks to comply with the wish of the legislature. If he does not and/or shows that he has no intention of so doing, a person affected by what could be considered as a ‘refusal’ to do this act which relates to the duties of his office ought to be able to apply to the Full Court on motion for an order, which the magistrate would have to obey if made absolute under s. 37. It is hoped, therefore, that magistrates will understand and appreciate the desirability of heeding the direction of s. 35 (1), and avoid unnecessary delays in making their decisions available within six weeks after the conclusion of every hearing.

There is one other little matter to which I would like to advert before concluding, and that concerns a question of terminology, in the meaning of ‘mandatory’ and ‘directory’, which, speaking for myself, I understand in the sense used by my brother HAYNES in his decision. My brother CRANE, however, in his decision

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on occasion adopted the approach taken by LORD CAMPBELL in Liverpool Borough Bank v. Turner (1860) 45 E.R. 715. LORD CAMPBELL said in that case (at p. 718):

“No universal rule can be laid down for the consideration of statutes as to whether mandatory enactments should be considered directory only or obligatory with an implied nullification for disobedience.”

This statement, in my humble view and with very great respect to that very learned Lord Chancellor, would be more in accord with accepted usage of the ‘terms’ if it had read something like this:

“No universal rule can be laid down for the consideration of statutes as to whether enactments should be considered directory only or mandatory, that is to say, obligatory with an implied nullification for disobedience.”

For, as I apprehend, when a statute creates an obligation by directing what ‘shall’ be done, as for example, as to ‘manner’ or ‘time’, such a ‘direction’ would only be considered as ‘mandatory’ if the consequence of non-compliance would be to render what was done a nullity. The obligation enacted does not *per se* or *prima facie* become ‘mandatory’, but only after it will have been ascertained by a balancing of all the relevant factors whether it was so intended to be by the legislature.

I agree fully with the order proposed by my brothers. In the result, the judgment of the Full Court will be set aside and that of the learned magistrate restored.

CRANE, J.A.: The long title to the *Summary Jurisdiction (Procedure) Act, Cap. 10:02*, describes it as – “An Act to consolidate and amend the Laws relating to the Procedure with respect to Offences punishable on Summary Conviction”, i.e. it is an Act regulating criminal as opposed to civil procedure in the Magistrate’s Court. I mention this because what is said below must be understood to concern only summary criminal cases.

Prior to 1937, there was no time limit within which a magistrate was obliged to give his decision. When he adjudicated under the abovementioned Act, he could have lawfully given his decision discharging or convicting a defendant at any time after the conclusion of the hearing. The legislature, no doubt with good reason, considered this an unsatisfactory state of affairs, particularly when a defendant could find no sureties and was not permitted to go on bail. So it was thought fitting to curtail this latitude. Magistrates were taking too long over their decisions and it was considered in the interests of justice and the liberty of the

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individual that a time limit for adjudication be imposed. Accordingly, by s. 2 of *Ordinance 11 of 1937* (now s. 35 (1) of the *Summary Jurisdiction (Procedure) Act, Cap. 10:02*), a magistrate is required to give his decision either at the conclusion of the hearing of the evidence and addresses, or within six weeks thereafter at a subsequent sitting.

The problem with which we are now concerned and to which we must find a conclusive answer is this: In the event of a magistrate failing to comply with s. 35 (1) abovementioned, by giving his decision eleven months after the hearing, what is the legal effect of his non-compliance? Does it render his decision null and void and necessitate a new trial all over again? Is that really what the legislature intended? Strange to say, that was the conclusion to which the Full Court came. That Court reversed the respondent's conviction and fine of \$500 with an alternative of six months' imprisonment in the Magistrate's Court for exposing for sale by retail a price-controlled article without the retail selling price being marked thereon and ordered his retrial before another magistrate – an order from which the prosecution have now appealed to us.

It is well-known in the interpretation of statutes that where Parliament has not itself declared its intention, no cut-and-dried rule can be laid down for determining what are the consequences to be attached to the non-observance of a statutory requirement that an act "shall" be done within a specified time or that "it shall be lawful" for an act to be done in a particular way. Whenever that happens, this question invariably arises: Can the provisions of the statute under consideration be read as mere directions or instructions which, if not complied with, will have no invalidating effect, or must they be read as a command, the non-observance of which renders everything already done as null and void? It is generally agreed that to this no positive answer is possible. In the prevailing uncertainty, there is one point on which all authorities are in unison, and that is, that the only reliable guide to the legislative intent is to discover the object and scope of the piece of legislation under consideration. It was this aspect of the matter to which LORD CAMPBELL, L.C. adverted in Liverpool Borough Bank v. Turner, (at p. 380,) when he said:

"No universal rule can be laid down for the consideration of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try and get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

And, about which SIR ARTHUR CHANNEL advised their Lordships' Board in Montreal Street Rail. Co. v. Normandin [1917] A.C. 170, (at p. 174.):

"The question whether the provisions in a statute are directory or im-

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perative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at. ... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of acts done.”

Now, to adopt LORD HALSBURY’S modern paraphrase of the celebrated rule in Heydon’s case, (1584) 3 Co. Rep. 7a, as my line of approach to the problem in hand – (see Eastman Photographic Co. v. Comptroller of Patents [1898] A.C. 571 at p. 573 – “we are to see what the law was before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason for the remedy”) – it seems to me there can be no doubt that what the legislature had in mind in 1937 when it enacted the amending legislation, to which reference has already been made, was the desire that summary trials should be dispensed with as expeditiously as possible in the interests of justice and liberty. A speedy trial is always desirable. With delay is often associated inconvenience. Delay is, in fact, one of the greatest mischiefs in the administration of justice. It was LORD BACON who said, “Justice is sweetest when it is freshest”. In the year 1937, so intent was the legislature in remedying the mischief of the laws’ delay that it made provision to guard against injustice owing to the length of time it took magistrates to give their decisions. It did so by amending s. 35 (1) as aforesaid, and also by enacting s. 35 (2) of *Cap. 10:02*. which was entirely new. In addition to what I have said about s. 35 (1) concerning the precaution taken to ensure that a resident magistrate gives his decision within six weeks after the conclusion of a hearing, s. 35 (2) provides that in case he ceases to exercise jurisdiction in the district in which he has heard the matter or has ceased to hold office, he may still determine it by lodging his written decision with the clerk of court within the same period of six weeks and the decision must be read at the earliest opportunity after notice to the parties concerned.

It seems to me when s. 35 (1) and (2) are construed together, their joint effect must be interpreted as requiring a speedy conclusion to a case. I think the legislature’s endeavour to secure the decision of a resident magistrate within the reasonable time of six weeks from the conclusion of a hearing is to be clearly seen. And even where he does not reside any longer in the district in which he heard the case, the requirement of an early determination is very evident because when he has ceased to exercise jurisdiction in the case or has ceased to hold office, he is to lodge his decision with the clerk within the same period of six

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weeks, i.e., within the same time as if he were still resident in the judicial district. And as if to make doubly sure that the decision is speedily given, there is enacted a further precaution that it is to be read in court at the earliest opportunity thereafter. Although the legislature has not expressly said that speedy decisions are of the essence in adjudications in summary jurisdiction offences, I, for myself, am unable to see what other inferences could possibly be drawn from the language in s. 35(1) and (2).

The Full Court arrived at much the same conclusion too, when it considered that “the main object of s. 35 (1) is to firmly ensure that persons charged with summary conviction offences are dealt with expeditiously and do not have their fates hanging in the balance for weeks, months or even years.” It also arrived at the conclusion, which I think is equally justifiable, that the true construction to be put upon s. 35 (1) is that, *prima facie*, it is a mandatory and not a directory enactment. But what I find altogether impossible to support is the Court’s conclusion that it did “not conceive that any ‘serious general inconvenience or injustice that would not promote the main object of the legislature’ would be caused if it is held that s. 35 (1) is mandatory and not directory.”

In arriving at the above conclusion the Court, without adequate reflection and regardless of the consequences it would appear, applied the general rule that once one determines that an enactment is mandatory or imperative in nature, then that enactment must be obeyed and fulfilled to the letter, no matter what the circumstances might be. In the court’s thinking, if a mandatory section is not carried out *in ipsissimis verbis*, there can be no question of any act which has already been done being saved from nullification. Accordingly, which seems to be a *non sequitur*, no serious general inconvenience or injustice that would obstruct the main object of the legislature would be occasioned thereby.

While I entirely agree that there is nothing in the subsection itself [s. 35 (1)] which compels a construction of the word ‘shall’ as ‘may’ it seems to me that does not provide a solution to the matter. It was necessary to go further and ascertain whether the mandatory provisions of the section ought to be read as directory. The problem before the Full Court involved a matter of deeper significance than merely deciding whether s. 35 (1) is mandatory or directory, and if mandatory, then the words of the statute must be obeyed to the letter. I think the decisive point which was missed is the very important one that, apart from noticing the broad division between directory and mandatory, statutes that are mandatorily worded are themselves sometimes read as directory when neglect to perform them would “work serious general inconvenience or injustice”. Ordinarily, the word ‘shall’ is *prima facie* imperative and admits of no discretion; but that is not always conclusive. ‘Shall’ can also have a directory significance if Parliament so intended. LORD CAMPBELL made this point very clear in the first sentence in the passage quoted

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from his judgment in Liverpool Borough Bank v. Turner (*supra*). Although s. 35(1) is mandatory in form, it is directory in intent. There is nothing to prevent a statute containing imperative provisions from being read as directory if it were the intention and within the scheme and object of the particular enactment that it should be so read. As I said, all the authorities are at one that the object of the legislation must be looked at to determine this question. Of the decided cases I have examined, I think R. v. Ingall (1876) 11 Q.B.D. 199, and Caldow v. Pixell (1877) 11 C.P.D 562, are clearly in point and provide us with the maximum assistance.

The question that arose in Ingall was whether a certain valuation list should be treated as valid or as a nullity by reason of the fact that it was not made in conformity with statutory provisions. Section 42 of the *Metropolis (Valuation) Act, 1869*, provided that parish overseers ‘shall’ make and deposit valuation lists before the 1st of June, and ‘shall’ transmit them to the assessment committee for approval not sooner than fourteen and not later than seventeen days after notice of the deposit of the list is given. There was delay by the overseers in the performance of all acts pertaining to the lists, i.e., in the depositing, the transmitting and in the approving of the valuation list for the parish of All Saints, and the question for decision was whether the list ought to be deemed a nullity and void. Both justices of the Queen’s Bench Division upheld its validity, but the judgment of LUSH, J. is particularly enlightening in that it demonstrates the approach a court should take when deciding whether a mandatory statute should be read as directory merely. The learned judge said (at p. 208):

“We must, in construing the Act, strike a balance between the inconvenience of holding the list to be null and void and the risk of allowing injury to be done by the delay in making the list; the former seems to me the greater evil, and therefore in my opinion we ought to hold the list to be valid. If no means of redress were allowed to a person who is by reason of delay wholly deprived of the right to appeal, that would, no doubt, be a hardship and amount to a defect in the Act; but in a case of this kind a remedy by action probably exists for the benefit of a person injured because there has been a failure to perform a public duty.”

And so, I think it behoves any court when faced with a problem of the kind that confronted LUSH, J. to look at both sides of the picture and to try to find out which is the greater evil by balancing the opposing inconveniences against the object which the statute seeks to promote. In Caldow v. Pixell (above) DENMAN, J. adopted much the same approach. At p. 565 he said: “In the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative.” And later (at p. 567) he continued in this instructive vein:

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“The cases cited before us establish that, where a public officer is directed by a statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms.”

And LOPES, J. said (at p. 568):

“In construing the statute we must strike a balance between the inconvenience of holding the direction of the bishop and the proceedings subsequent thereto null and void, and the inconvenience of giving effect to the’ direction when it has been made after the prescribed time. It seems to me that the more objectionable course is to construe the statute as imperative, for by so doing the defendant, through no fault of the plaintiff, would escape the payment of a sum which he omitted to expend in keeping the buildings of the benefice in repair.”

Here, in the case under review, s. 35 (1) imposes a public duty on the magistrate, a public officer, for the benefit of those in litigation in the due course of the administration of justice. That section directs him to perform the duty of giving his decision in the case within six weeks from the time he concludes the hearing of it. Adopting the approach of JUSTICES LUSH, DENMAN and LOPES in the authorities quoted above, I ask myself this question. Would the inconvenience caused by holding the magistrate’s decision null and void outweigh the inconvenience caused by non-observance of the six-week rule and thereby incur the risk of not achieving a speedy trial which, as we have seen, was the object the legislature saw fit to promote in s. 35 (1) and (2)? It is true that both inconveniences spell delay, but the crucial question is: Which is the greater when considering the object of the legislature? If the former, then the inconvenience of holding the magistrate’s decision null and void ought to have been avoided by the Full Court. As I have shown above, that Court did not think so. My own view, however, is that the only possible answer to the question must be that the former is the greater inconvenience. Seeing that eleven months’ delay has already been caused by one magistrate’s non-observance of the six-week rule, would not a much longer period of delay be caused if his determination were to be considered null and void and the case remitted for retrial by another magistrate? Delay, being the antithesis of speed, certainly would not promote an expeditious trial, nor do justice to the defendant who was in no way to be blamed for a decision that was not given within six weeks after the hearing. Is it not therefore clear, in the instant case, that in “striking a balance” between the two inconveniences, nullification of the magistrate’s decision for non-observance of the statutory requirement as to time

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was the greater, and was not the proper course for the court below to have followed?

But what if the defendant had been acquitted instead of being convicted of the offence? Ought he to be forced to stand his trial all over again? Some of his witnesses may have gone abroad, may have died or otherwise been incapable of testifying again on his behalf. Weighing all these possibilities which are bound to arise if the hearing is nullified and rendered void, can there be any point in ordering a new trial, bearing in mind there is already a decision in the case? Nullification of the hearing and determination, in the circumstances, cannot conduce to a speedy trial, and even though the magistrate had taken eleven months to give his decision, that *per se* cannot be a circumstance rendering his adjudication invalid and necessitating a new trial which would inevitably incur more delay when expedition was the object to bear in mind, I am afraid it was this important aspect to which the Court below never really addressed its mind.

There is, admittedly, provision to compel a magistrate to perform an act relating to the duties of his office, *viz.*, s. 37 (1) of *Cap. 3:04*. But this remedy is available only where he refuses to do so, or where his delay can be construed as tantamount to a refusal. But it may well be asked in view of the fundamental rights provisions in art. 10 (1) of the Constitution of Guyana which guarantees “a fair hearing within a reasonable time”, whether he cannot be compelled by mandamus proceedings to give his decision immediately after the expiration of the six-week period – not, of course, if the evidence shows that he has refused to give it, for then proceedings under the Constitution in pursuance of a fundamental right will not be the appropriate remedy if there are other “adequate means of redress... available to the person concerned under any other law”. [See art. 19 (2) (b) proviso].

There was much speculation by the Full Court about the meaning of s. 67 (2) of the *High Court Act*, *Cap. 3:05 vis-a-vis* section 35 (2) of *Cap. 10:02*. Section 67 (2), which concerns both criminal and civil cases, was enacted recently by the *Law Revision Act, No. 4/1972*, but it does not impose, as does s. 35 (2) of *Cap. 10:02*, any time limit on a magistrate who ceases to act as such or who has been transferred from his district. It will be observed that s. 67 (2) has legislated on two aspects already covered by s. 35 (2), and in view of this fact, the question arises whether it is still necessary for a magistrate to give his decision within six weeks of a concluded hearing when he ceases to act as a magistrate or is transferred from the district in which he heard the case, because s. 67 (2) having legislated on the same subject-matter as s. 35 (2) without imposing any time limit for giving decisions, may have, either wholly or *pro tanto*, impliedly repealed s. 35 (2). On this aspect, the Full Court considered there has been no implied repeal for the reason that these two sections, being in no way repugnant to each other,

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are quite capable of standing sensibly together. It is quite unnecessary for me to express a concluded opinion on this point as we are, strictly speaking, concerned only with s. 35 (1), where a magistrate is still resident in the judicial district in which he concluded the hearing, and not where he has ceased to act as such or has been transferred from his district in accordance with s. 35 (2). My own view, however, is that the matter is not free from doubt. What did the legislature mean by legislating in s. 67 (2) on the selfsame two topics covered in s. 35 (2), and without reference to any time limit when there is already a time limit of six weeks concerning them? It may well be that the six-week rule is repealed when he is no longer commissioned as magistrate or has been transferred to another district, but I would prefer to think, like the Full Court, that there is no implied repeal. No one can gainsay that a time limit for giving magisterial decisions is not an object fit to be retained rather than for repeal. It is, however, clear that if a magistrate falls within the third category in s. 67 (2), i.e., of being “otherwise unable to deliver judgment”, it is conceivable that he may well fall well outside of the six-week period because among the possibilities one can readily think of, he might have taken seriously ill or have proceeded on long vacation for a period exceeding six weeks and cannot possibly give a decision within that time after the conclusion of the hearing.

I will conclude by affirming my belief in the principle which I think the Full Court correctly stated, *viz.*, that the “overriding consideration of magistrates is the public welfare and the due, proper and expeditious administration of justice”, but I am unable to agree that that principle is maintainable by holding the provisions of s. 35 (1) mandatory and peremptorily declaring invalid and of no legal effect any decision that is given more than six weeks after the conclusion of a hearing. I believe I have shown, from the standpoint of the object which the legislature intended to promote, that nullification of such decisions would only occasion greater delay and inconvenience than would non-observance of the six-week rule, and for this reason such a course ought to have been avoided.

For these reasons, I think the judgment of the Full Court must be set aside and that of the learned magistrate restored.

HAYNES, J. A.: In a very lucid judgment, my learned brother CRANE, J. A. has pronounced his reasons for allowing this appeal. I am in full agreement with his conclusion. Nevertheless, in view of the substantial practical significance of the point of law decided, the importance of the principles of statutory interpretation involved, and the fact that we are differing from a considered judgment of a Full Court of three judges, including the learned and much experienced Chief Justice, I conceive it right and proper to deliver a separate judgment.

The statutory provision involved – s. 35 (1) of the *Summary Jurisdiction (Proce-*

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jure) Act, Cap. 10:02 – might well have been worded differently; either thus: “The Court shall at the conclusion of the hearing or not later than six weeks thereafter give its decision”; or thus: “No decision of the Court in a criminal cause or matter shall be given later than six weeks after the conclusion of the hearing”; or thus: “The Court shall, at the conclusion of the hearing or within six weeks thereafter at a subsequent sitting, give its decision and any decision given thereafter shall be null and void and of no effect.” But the legislators chose an affirmative form of statutory expression in introducing this six weeks limitative provision in 1937, with no nullification clause annexed to the mandatory words used. These two considerations, the presence or absence of nullifying words, and the use or not of prohibitive or negative terms have been applied by judges from very early times as tests in the judicial exercise of the interpretation of mandatory provisions in a statute fixing time limits or other conditions for the performance of statutory obligations, to determine whether such provisions are ‘directory’ or ‘imperative’ in relation to the validity or invalidity of acts performed later than the statutory times fixed or done not in compliance with some other statutory conditions.

Grice v. Allen (1741) 94 E.R. 981 furnishes one of the earliest judicial pronouncements on the legal consequence of the absence of such an express nullification provision. The Court said (at p. 981): “Where an Act of Parliament requires a thing to be done generally, without requiring it to be done by any officer, etc., under a penalty, and doth not say that for want of the thing required a writ, etc., shall be void, it has been said, that such Act is directory only, and not making the writ, etc., void.” Relative to the effect of negative words in a mandatory statutory provision, R. v. The Justices of Denbyshire (1803) 102 E.R. 784 considered a statutory provision which fixed “the first special sessions after the Michaelmas Quarter Sessions” as the time when magistrates were to appoint a surveyor of the highways. The justices of Denbyshire had neglected to do so. LORD ELLENBOROUGH, C.J. said:

“This part of the Act is only directory to the magistrates to make the appointment at the time mentioned: but there are no negative words to prevent them from exercising their office in that respect at any subsequent time, if it shall be necessary. And common sense requires that if the appointment be not made at the first special sessions it should be made afterwards. “

And in R. v. The Justices of the Borough of Leicester (1827) 108 E.R. 627, the 54 G. 3, c. 84 provided that the Justices “shall make their sessions four times in the year, *viz.*, in the first week ... after the 11th October ...” LORD TENTERDEN, C.J., holding that this provision was directory only so that proceedings at any sitting of the sessions held at a later date were not void, went on to say (at p. 629):

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“It has been asked, what language will make a statute imperative, if the *54 G. 3, c. 84*, be not so? Negative words would have given it that effect, but those used are in the affirmative only.” And in *R. v. Sneyd* (1831) 5 Jur. 962, COLERIDGE, J. said (at p. 963): “... the general rule of construction has been, that, unless there are negative words in the statute, they are directory only.”

None of these early decisions were cited in argument in this appeal although they could have been referred to helpfully in support of it. In all of them, as in the case at the Bar, statutory obligations were imposed on public officers to be performed for the benefit of members of the public who had no personal administrative control over their prompt execution. But I must pronounce a judicial caveat that these tests are not necessarily conclusive. A statutory duty couched in negative terms might, perhaps rarely, in the context of a particular statute be ‘directory’. *The Mayor of Rochester et al v. R.* (1858) 120 E.R. 791 is an example of this. And one framed in affirmative language without a nullification clause might be ‘imperative’. *R. v. The Churchwardens of All Saints, Wigan* [1876] 1 A.C. 611 demonstrates this. There, LORD O’ HAGAN said (at p. 629): “It (the relevant statutory provision) has not a negative provision but its affirmative words are very stringent.... I can see no sufficient reason for holding the clause directory. Words, though affirmative, are not necessarily so if they are ‘absolute, explicit, and peremptory.’...” (See also *R. v. The Justices of the County of London and the London County Council* [1893] 2 Q.B. 476 and *Liverpool Borough Bank v. Turner* (1860) 45 E.R. 715). These cases illustrate the legal position that, despite the absence of a nullification clause or of negative words in such a statutory provision, the affirmative language of it or of any other interpretative or related section may be so stringent on the subject-matter of such a nature that either circumstance or their combination might justify or compel an ‘imperative’ classification as the effect of it. Consequently, although, in my judgment, the absence of a nullification clause in it, the deliberate choice and use of affirmative words and its historical and literal context singly and cumulatively point to the conclusion that s. 34 (1) is ‘directory’ and not ‘imperative’, I am not content to rest my reasoning and judicial approach on the application of these considerations. Additionally, I would rely on those more general considerations and principles, which are prescribed in passages which I accept as summing-up fairly the true doctrines of law on the correct approach to the problem in hand.

First of all, there is the succinct statement of ERLE, C.J. in *Brumfitt v. Bremner* (1861) 142 E.R. 1 (at p. 6): “It is well known that many requirements of the legislature are to be treated as directory only, the omission to observe them not being fatal, whilst others are essential, and must be strictly obeyed.” Then, the general principle expressed in *Liverpool Borough Bank v. Turner* (1860) 45 E.R. 715 in the words of LORD CAMPBELL, L.C. (at p. 718) thus:

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“No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.”

Next, LORD PENZANCE’S pronouncement in Howard v. Bodington [1877] 2 P.D. 203 (at p. 211):

“I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act;...”

And in Caldow v. Pixell (1877) 36 L.T. 469, DENMAN, J. there adopted as correct, as I do, particular extracts from the then current edition of Sir Peter Maxwell’s work on the *Interpretation of Statutes* (at p. 333). I put some of those selected passages together into this continuous statement of accepted doctrines:

“A strong line of demarcation may in general be drawn between cases where the provisions affect a public duty, and those which relate to a privilege or power. When powers or privileges are granted subject to compliance with certain regulations or conditions it seems in general not contrary to justice or policy to exact a rigorous observance of them; and it is therefore probable that such an observance was deemed essential by the legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, it is difficult to believe that the legislature intended the injustice and inconvenience to others which would result if the act to be done were of no legal validity, unless directions of the statute were strictly observed. In general then it seems that where a statute contains a privilege or a power, the regulative provisions which it imposed on its acquisition or exercise are essential or imperative.

On the other hand where the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only.”

In so doing, let me draw attention to certain authorities, some of which were, while others were not, but might have been cited at the hearing of this appeal on behalf of the respondent. I do this to demonstrate that my ultimate conclusion

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was reached only after full and critical consideration of those judicial decisions and pronouncements in them which appear *prima facie* to support the viewpoint of the Full Court.

To start with, there are statements of general principle or *dicta* in two of these cases which invite critical observations: Farrell v. Tomlinson (1761) 2 E.R. 782 is one. A statutory provision enabled the purchase of lands in fee simple for his own use and benefit by any former papist converted to protestantism if, within six months (lunar) of his declaration of recantation from popery, he did certain further qualifying acts. The appellant recanted on the 26th November, 1741. But he did not complete the performance of the remaining conditions until the 26th May, 1742. The House of Lords held that his subsequent purported purchase of such land was null and void. Their Lordships accepted and acted on the opinion of MR. JUSTICE ROBINSON (p. 786) that “when the legislature imposes terms and prescribes a thing to be done within a certain time, the lapse even of a day is fatal” The other is Barker v. Palmer (1882) 51 L.J.Q.B. 110. The County Court Rules, 1875, provided that the summons in certain actions “shall be delivered to the bailiff forty clear days at least before the return day and shall be served thirty-five clear days before the return day thereof.” Such a summons was delivered to the bailiff in less than this statutory time. Although it was served in time, the Court (GROVE, J., and LOPES, J.) held that the subsequent judgment was a nullity. GROVE, J., said (at p. 111): “Now, as far as I am aware, the directions in a statute as to time are always considered obligatory unless some power of extension is given....” Strong words in both cases indeed, if intended to be accepted as of general application. But were they so intended? And if they were, must this Court to-day apply them as true doctrines?

My answer is a two-fold one. In the first place, I heed the judicial admonitions of the EARL OF HALSBURY, L.C. in Quin v. Leathern [1900-3] All E.R. 1, at p.7: “...every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found”; and of VISCOUNT SIMON in Harris v. D.P.P. [1952] 1 All E.R. 1044, at p. 1050: “It must always be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the Court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances”. And more recently of THESIGER J. in R. v. Churchill et al (1965) 49 Cr. App. R. 317, at p. 319: “... the observations of judges in particular cases – however eminent are the judges – were made with reference to the facts of those cases. ... The words were not meant to be, and ought not to be, regarded as if they had been incorporated in the Statute Book.”

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In the second place, Farrell v. Tomlinson would appear to fall in the class of cases embraced by the extracts from Sir Peter Maxwell's work referred to and adopted in Caldow v. Pixell by DENMAN, J. (p. 471): "When powers or privileges are granted subject to compliance with certain regulations or conditions it seems in general not contrary to justice or policy to extract a rigorous observance of them; and it is therefore probable that such an observance was deemed essential by the legislature." And, "In general... where a statute contains a privilege or a power, the regulative provisions which it imposes on its acquisition or exercise are essential or imperative."

So that MR. JUSTICE ROBINSON'S *prima facie* wide statement of principles of construction should be limited in its application to this category of statutory provision granting to the individual, subject to regulative conditions, a privilege or a power to be exercise for his own material advantage.

Barker v. Palmer, I regard as a particular instance of a rule stated in *Craies on Statute Law*, 5th Edition, at p. 246, thus: "As a general rule statutes which enable persons to take legal proceedings under certain specified circumstances, must be accurately obeyed". And in *Maxwell's*, 8th Edition, p. 324, it is cited to illustrate an earlier statement: Enactments regulating the procedure in Courts seem usually to be imperative and not merely directory." Here again, the wide principle of GROVE, J – "... directions in a statute as to time are always considered obligatory..." – is not to be taken as of general application. I am satisfied that these two cases and pronouncements do not support the judgment of the Full Court. Farrell v. Tomlinson was a case of a statutory privilege and Barker v. Palmer, one of a statutory power, subject to imperative regulative conditions. Both are cases of a breach of a regulative condition by a party to the proceedings required to comply, and not by the Court of trial. So that also applicable is LORD PENZANCE'S observation in Howard v. Bodington (*supra*) (at p. 216) that:

"... I think that many things would render the proceedings void if done by the parties themselves, against whom it might be said it was their own fault if the proceedings had failed through their own remissness, which would not render the matter void if done by a third person, and that third person a public officer."

But still there is R. v. The Justices of the County of London and the London County Council [1893] 2 Q.B. 476. In that case *The Valuation (Metropolis) Act, 1869*, s. 42, enacted that for the hearing of valuation appeals, "the justices may hold the assessment sessions at any time after the first of February in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing thirty-first of March." [p. 479]. So that all appeals were required to be determined by a fixed time. The London

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County Council entered their appeal with the Assessment Committee as respondents in due time for the February sessions. But on account of an extraordinary pressure of business in the Court and through no fault of the parties whatever, it was not reached by the 31st March, 1891. The Justices proposed to hear the appeal on a later day. But the Assessment Committee applied for a prohibition to restrain the Justices from hearing it. The Queen's Bench (CHARLES, and VAUGHAN-WILLIAMS, JJ.) held s. 42 (13) to be 'imperative', so that the Justices had no jurisdiction to hear an appeal after the 31st March, 1891, and prohibition would lie. In the Court of Appeal, LORD Esher, M.R. and BOWEN, L.J. agreed it was 'imperative', but KAY, L.J. ruled it 'directory' only. A prohibition was, however, refused. The majority, in effect, applied the maxim *Lex non cogit impossibilia* to the situation. They determined that the circumstances constituted an exception taking the matter out of the purview of s. 42 (13), so that the appeal could legally be heard. KAY, L.J. agreed, on his construction of it, that prohibition would lie. As I read the majority judgments, if the circumstances were not as exceptional as they were, so that s. 42 (13) was applicable, the Justices' jurisdiction to hear an appeal would have ended on the 31st March, 1891, so that decisions given later than that date would have been a nullity.

This is the closest case to ours which my research was able to discover. These features exist in common: (1) Both statutory provisions fix final terminus of legal proceedings. (2) Both do so in affirmative, not negative or prohibitory language. (3) Both carry no express nullification clause for disobedience. (4) In both, the failure to comply was the Court's and no fault of the parties to the proceedings. (5) In both, if the provision be 'imperative', the result would be inconvenience or hardship or injustice to one or other of these parties. (6) In both, the parties had no personal control over the Court's arrangement of its affairs. (7) In each, it was a case of a statutory command to a public tribunal to perform a duty for the benefit of members of the public. (8) In both, what was involved was the disregard by a public tribunal of its statutory duty to the parties to a legal proceeding to conclude it by a fixed time. Yet, while the Court of Appeal found s. 42 (13) 'imperative', this Court has ruled that s. 34 (1) here is 'directory' only. The explanation lies in its *ratio decidendi*. At p. 488 LORD Esher, M.R. said:

“...When you look at the purpose for which that time is fixed – that upon that valuation or upon the determination by March 31 all rates are to be calculated, and by s. 45 many important taxes are to be calculated – I cannot say that in my opinion that limitation of time in sub-s. 13 is merely directory. I think it is ‘imperative’;...”

And (at p. 492) BOWEN, L.J. said:

“It is clear to begin with that time is of the essence of the matter – that is

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certain. It is necessary that the appeal should not be presented before a certain date, and it is necessary that the ministerial or mechanical operations should be performed within the periods which are assigned to them, and it is essential for the performance of public business, both for rating and taxing purposes, that March, 31 should be taken as the practical limit, and time in that sense is of the essence of the matter.”

The judges in the Queen’s Bench and LORD ESHER, MR. and BOWEN, L.J. in the Court of Appeal had examined not only s. 42 (13) but also the general scheme as revealed in all the sections of the statute. And this is what is required to be done here. It is only if, after so doing, we can reach justly the clear conclusion that “time is of the essence of the matter” in the above sense that, in my view, the Full Court’s judgment could be right, on this authority.

But before embarking on this exercise, I must consider Howard v. Bodington. It was really an instance of non-compliance with a regulative condition to which a statutory power was subject. Counsel for the respondent relied mainly on it. The case concerned the exercise by a Bishop of a diocese of a jurisdiction of a criminal nature, under a Church Discipline Act, after the submission to him of a complaint by parishioners against an incumbent. The statute provided that for the matter to proceed further, the Bishop, within 21 days of his receipt of the complaint, shall transmit a copy of it to the person complained of. In the events which happened, the Bishop received a complaint on the 30th August, but a copy was not sent to Rev. Bodington until the 22nd October of the said year. LORD PENZANCE held that this late proceeding was a nullity and ineffective in law to initiate a charge against the incumbent. The *ratio decidendi* of his judgment can be located in two passages of it. At p. 214-5 his Lordship said:

“... of all the important steps in the suit there is no step so important as that which regards the service of the first proceedings on the respondent That which is to give the respondent notice that he is to be made the subject of a suit is the most important step in the whole cause ... Because, of course, that which gives notice to him of the proceedings is the only thing that puts him on his defence, and enables him to bring forward all those things that are in his favour Therefore, the question that we are inquiring into is really, as far as one can see, one treated by the legislature as one of considerable importance. The service upon the respondent is practically the beginning of the suit, because the bishop after he receives the representation may say that the proceedings should not go on at all, and the very first step that really gives life and vigour to the suit is the service upon the respondent.”

And later (at p. 216) he said:

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“... it is of vital importance here to the individual that he should be brought into Court at the time within which the statute says he shall be brought into Court.”

To use the language of BOWEN, L.J. after considering the significance of the act of serving the copy on the incumbent in the scheme of this enabling statute as a whole, LORD PENZANCE in effect found that time was of the essence of the matter, so that the requirement of 21 days was ‘imperative’. He regarded the time of commencing the proceedings under the statute as vital. So what of the time of completion and of decision? Should that be treated here as of equal vital importance? And with the same consequence of nullification for disobedience?

As devil’s advocate I will state a number of submissions which could fairly be urged in favour of affirmative answers to these questions. It is axiomatic that a criminal prosecution should conclude with expedition. This is implied in the common law and constitutional rights to a fair trial. It is enshrined in the maxim *interest reipublicae ut sit finis litium*. No one charged should have criminal proceedings hanging over his head like a sword of Damocles for an unreasonable length of time. No complainant should have to wait that long to have the cause he instituted determined. And it is clear that s. 2 of the *Ordinance, No. 11 of 1937*, was enacted for the specific purpose of limiting the time within which a decision should be given. This shows that the legislature regarded the matter of a time limit as then of particular importance. The earlier law with no time limit for decision – was on the statute book at least from the passing of the *Summary Convictions Offences (Procedure) Ordinance, No. 12 of 1893*. Some extremely undesirable situation must have arisen to urge the legislature after at least 44 years to promulgate the change. The object of the amendment must have been to put an end to long delays in concluding a hearing. And counsel urged that if s. 34 (1) is to be held ‘directory’, this object might be defeated, particularly as no statutory penalty is laid down for disregard of the time limit. He might well have added that while the common law prerogative writ of mandamus or the statutory rule under s. 37 of the *Summary Jurisdiction (Appeals) Act* or a motion under art. 19 of the Constitution might provide remedies if a magistrate is dilatory or recalcitrant, such proceedings involve legal costs and expenses which most complainants or defendants can ill afford.

Finally, it could be argued persuasively that if s. 34 (1) is held ‘imperative’, no serious general inconvenience or hardship or injustice will happen, such as would have occurred in Montreal Street Railway co. v. Normandin [1917] A.C. 170, for these reasons: in practice the great bulk of criminal cases in the Magistrate’s Court involve simple questions of fact and can be and are easily and usually disposed of within the six weeks period. As to the rest, these cases of late deci-

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sions due entirely to no fault of the magistrate, for example, to disabling illness or unavoidable pressure of work, can be treated as exceptional instances outside of the purview of s. 34 (1) within the principle of the decision in R. v. The Justices of the County of London and The London County Council [1893] 2 Q.B. 467, or as covered by the later amendment, No. 4 of 1972; and the remainder – cases of judicial procrastination or disinterest or other fault of the Court – would comprise a small proportion of the total causes heard in any period. And if in those cases a trial should end within the six weeks and retrial shall follow, it might be contended that no greater inconvenience or hardship or injustice will be caused than is caused when a magistrate dies or resigns or is dismissed, or when a decision of the magistrate is set aside by a Full Court and a trial *de novo* is ordered. If magistrates realise this, it might be argued they will more likely ensure that decisions are given promptly.

These are some arguments which I conceive the judges of the Full Court or those who hold a different view from ours might feel were not considered fairly by us, if not mentioned and rejected by sound judicial reasoning. I recognize the cumulative force of these contentions, but do not find them convincing. Perhaps to hold s. 34 (1) ‘imperative’ would be the most effective means to ensure compliance with it. But the question is not what construction would best secure compliance, but whether it was the intention of the legislature by the amendment of 1937 to invalidate any decision given a day after the six weeks or later? It is certainly not so expressed. But is it implied? In my judgment, it is not. I cannot find in the legislative scheme for summary trials that the six weeks limit is so important in relation to the subject-matter that time is of the essence of the matter. The provision is cast in affirmative terms and no other section affects it to make its meaning absolute.

In the London County Council case, between March, 31 and April, 6 next in any relevant year the valuation list had to be completed, rates worked out and important taxes fixed so that the list would become effective and in force as from a fixed statutory date – April, 6. And if this did not happen, the whole subsequent administrative process would have been thrown out of gear. Hence the time for completion of the hearing of the appeals was of the essence of the matter and held ‘imperative’. In Howard v. Bodington, LORD PENZANCE felt able to reach the view that the time of transmission of a copy of the complaint to the incumbent was the most important step in the proceeding. Here, in our case, no statutory act has to be done on any fixed statutory date after the expiration of six weeks from the conclusion of the hearing, and no later procedural arrangements would be thrown out of gear if a decision is given much later. And I do not feel able to reach the view that to give a decision in six weeks is a most important or essential, as distinct from desirable, step in the hearing and determination of a criminal cause.

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The legal position, as I see it, is this: s. 34 (1) imposes a duty on a public officer to perform a public act within a fixed time for the benefit of certain members of the public who have no control over his prompt execution of this duty. When he does that act later, it would seem *prima facie* unfair, unjust, inconvenient and oppressive if these parties through no fault of their own should be prejudiced. The legislature should be presumed not to intend this. And the maxim *ut res magis valeat quam pereat* – it is better for the thing to have effect than to be void – which is applicable to statutes as it is to contracts, supports such a presumption. Hence, as far back as in 1877, MR. JUSTICE DENMAN in Caldow v. Pixell (1877) L.T. 469, at p. 471, said: “Where a public officer is directed by a statute to perform a duty within a specified time the provisions as to time are only directory”. I take this to be the general position, casting on a party seeking to satisfy a court that the enactment is ‘imperative’ a heavy onus in a civil sense.

If the legislature intends such a provision to be ‘imperative’, it could achieve this intention in more ways than one. It may do so expressly by a clause that if the act is done later it would be null and void and of no legal effect. If this is done, then *cadit quaestio*. But it may do so impliedly, also in more ways than one. It may rely on the principle that a court may hold that the command to do the act within the statutory time, while it does not necessarily imply a prohibition from doing it later, does so imply, where without such a prohibition the command would be nugatory and its aim and object defeated. (Caldow v. Pixell, at p. 417, adopting a statement from *Maxwell on the Construction of Statutes*). Thus, the implication may arise where the scheme of the act as a whole, and the relation of the particular provision to the rest of it is such that strict compliance with the time limit is of the essence of the matter [R. v. The Justices of the County of London and the London County Council [1893] 2 Q.B.D. 467 and Stepney Borough Council v. John Walker & Sons, Ltd. [1934] A.C. 365]; or, it may do so by the use of prohibitive or negative terms in wording the relevant provision [R. v. The Justices of the Borough of Leicester (1827) 108 E.R. 626, *per* LORD TENTERDEN, C.J. at p. 629, and R. v. Sneyd (1831) 5 Jur. 962, *per* COLERIDGE, J. at p. 963]. Again, sometimes it arises from the stringency of the affirmative words of the enactment if and when they are “absolute, explicit or peremptory” – [R. v. The Churchwardens of All Saints, Wigan et al [1876] 1 A.C. 611, *per* LORD O’HAGAN, at p. 6] and where the legislature has not indicated such intention in any of these ways, that intention might be imputed to it by a court weighing the consequences of holding it ‘directory’ or ‘imperative’; and then reaching a conclusion that the balance of convenience requires it to hold the enactment ‘imperative’ – [R. v. Inghall (1876) 2 C.P.D 562, *per* DENMAN, J. at p. 567, and LOPES, J. at p. 568].

In my judgment, this case does not fall within any of the propositions I have just set out. Section 34 (1) is worded in affirmative terms which were not sufficiently stringent to imply such nullity. No prohibitive or negative words were used. The

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time limit of six weeks was not of such importance in the legislative scheme of the whole enactment as to make time of the essence of the matter. Indeed, there is one circumstance not referred to yet in this judgment, which appears to indicate that time was not then regarded as essential as distinct from desirable. I refer to the provision, also introduced by *Ordinance No. 12 of 1937*, that where the magistrate, before he gave decision, ceased to exercise jurisdiction in the same district, or to hold office, it was lawful for him, within the said six weeks, to lodge his written decision with the Clerk of Court to be read by his successor “at the earliest opportunity, after notice to the parties concerned”. If the legislature had in mind that it was essential that in a summary criminal trial a decision must be given within six weeks after the conclusion of the hearing, it would have been easy to provide that in the aforesaid circumstances the magistrate shall lodge his decision in sufficient time to enable his successor to read it within the six weeks period. But this was not done. Instead, it legislated a procedure that could result in a decision being read after the six weeks. And the subsequent amendment introduced by *Ordinance No. 4 of 1972*, cannot and does not affect the position.

All of this tends, in my view, to negative what I call an ‘imperative’ intention. And as regards the test of weighing the consequences, unhesitatingly that leads me, for the reasons given by my brother CRANE. J. A., to view *ut res magis valeat quam pereat*, so that the decision of the Full Court should be set aside, and the conviction and order of the magistrate restored.

Appeal allowed.

Decision of the Full Court set aside.

Decision of the magistrate restored.

**EILEEN SUMINTRA BANKAY
 NIRVANTI LAM
 SAMUEL CHANDRA SUKHDEO
 HARDAT ARJUNE SUKHDEO
 HARRY SUKHDEO
 DRUPATTIE MOHABIR, AND
 RANI EDWARDS**

**Appellants
 (Defendants)**

v.

**SUKDAI SUKHDEO, WIDOW, SUING HEREIN AS
 ONE OF THE EXECUTORS AND RESIDUARY
 BENEFICIARY NAMED UNDER THE LAST WILL
 AND TESTAMENT OF JOHN HARRY SUKHDEO,
 DECEASED**

**Respondent
 (Plaintiff)**

[Court of Appeal (G.L.B. Persaud, Crane and Haynes, JJ.A.) September 18,
 19, October 8, 1975]

Will – Action to establish – Circumstances of suspicion attending preparation and execution – Credibility of witnesses as to preparation and execution – Whether onus of proof of genuineness of will established – Whether circumstances of suspicion dissipated by party propounding will.

Opinion Evidence – Previous and subsequent wills – Testator’s signatures – Expert witness as to comparison of admitted and disputed signatures – No reasons given in support of opinion – Whether court justified in resolving question on evidence of its own eyes – Evidence Act, Cap. 5:03 ss. 16 (2), (5), 18, 19, 20.

Probate action – Costs – Discretion of Court – Whether or not litigation is the fault of the testator.

James Harry Sukhdeo, the deceased testator, was twice married. His first wife, Hiriya, bore eight children and when she predeceased him, he married Sukdai who gave birth to six children.

When Sukhdeo died in 1972, he left three testamentary instruments and Sukdai brought an action in the High Court seeking to propound in solemn form the

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latest of them in which she shared Sukhdeo's estate along with her six children.

In the two earlier wills the seven named appellants, children of the testator's first wife, Hiria, were all named as beneficiaries, but, their names not having appeared in the latest, contested the grant of probate on the following grounds: (1) that Sukhdeo did not sign it; (2) that the will was ineffective as a testamentary document because in the body of it the testator's name "Harry" had been originally written as "Henry" and the word "West" was written for "East"; (3) that the will was not duly executed; (4) that the deceased lacked testamentary capacity at the time of execution.

Having satisfied himself that the onus of proof of the genuineness of the will rested on Sukdai being the party propounding it, and that none of six alleged circumstances of suspicion attending the due execution were proved, the trial judge pronounced in favour of the will after deciding all four issues against the appellants who now seek to upset those findings.

In finding that the testator did as a fact sign the will, the judge resolved an apparent conflict between the evidence of a barrister friend and adviser of the deceased testator, whose veracity and integrity he found to be unquestioned, and his clerk who impressed him as a witness of truth and reliability as to how it came about that the name "Harry" was substituted for "Henry" in the body of the will. The judge accepted the clerk's version in preference to the barrister's because, as he thought, the former seemed to have a better recollection. He thus accepted that both barrister and clerk endeavoured to tell the truth about the preparation and execution of the will. He, however, rejected as mere conjecture and as unreliable opinion evidence of a handwriting expert called on behalf of the appellants that the admitted and disputed signatures on a previous and the questioned wills were not both made by the deceased testator.

HELD: (1) (*per* HAYNES, J. A.) That the credibility of the barrister and his clerk was the crux of the matter.

(2) That the case was not difficult for the trial judge to adjudicate on the evidence before him. The only alternative to the genuineness of the handwriting was the supposition that it was a carefully planned forgery as an integral part of a criminal conspiracy involving a barrister of 26 years' standing, his clerk, of humbler status, but whose honesty and truthfulness impressed the trial judge tremendously and, presumably, the respondent.

(3) That it was purely a question of fact, and in all the circumstances of this case this court would not be justified in interfering with the trial judgment.

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(4) That the expert opinion evidence on which the appellants heavily relied to prove the will was not made by the deceased was devoid of reasons for the opinion that the deceased's signature was a forgery. The evidence only indicated in a general way the matters and things the expert considered in reaching his conclusion; no comparison being made in court the evidence was unsatisfactory and unhelpful. The trial judge would have been entitled to treat it as valueless and was not wrong to reject it.

(5) That the trial judge was justified on high authority in comparing the signature on the disputed will with the admitted signatures of the deceased and on the evidence of his own eyes to reach a firm conviction that the signature on the will was indeed that of the testator and no one else.

(6) That from the finding of the judge that he believed and accepted the evidence of the respondent and her witness, he must be held to mean that either the proven facts as found by him did not amount to suspicious circumstances or that they explained away any facts which did amount to suspicious circumstances.

(7) (*per* PERSAUD, J. A., on the matter of costs): That costs in probate actions, like any other type of action, are subject to the discretion of the court.

(8) That it could hardly be said that the litigation was brought about by the folly of the testator to warrant further costs being paid out of the estate.

(9) That in these circumstances it seems unjustified to order the costs of this appeal to be paid out of the estate; at least the defendants should not have their costs met from assets of the estate.

(10) That so to do would be to waste away the assets upon litigation that was not brought about by any act of the testator or executrix, and based on no valid ground.

(11) That the appeal be dismissed and the order of the court below affirmed; and that the third, fourth and fifth named defendants do pay the plaintiffs costs of this appeal.

**Appeal dismissed. Judgment of the High Court affirmed.
Costs to the respondent.**

Editorial Note: This case is reported at (1975) 24 W.I.R. 9.
The first instance decision of this case is reported in 1975 G.L.R.

Cases referred to:

(1) Hanoman v. Hanoman (1971) 18 W.I.R. 40.

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- (2) Mitchell v. Gard (1863) 164 E.R. 1280; 8 L. T. 438; 27 J.P. 487; 9 Jur. N.S. 673; 11 W.R. 773
- (3) Spiers v. English [1907] P. 122; 76 L.J.P. 28; 96 L.T. 582.
- (4) Re Cutcliffe [1959] P. 6; [1958] 3 W.L.R. 707; [1958] All E.R. 642; 102 Sol. Jo. 915; 23 Conv. 61 C.A.
- (5) Devine v. Wilson (1855) 10 Moo. P.C. 502; 14 E.R. 581 P.C.
- (6) Straker v. Luke [1947] L.R.B.G. 187.
- (7) Wintle v. Nye [1959] I. W.L.R. 284; [1959] 1 All E.R. 552; 103 Sol. Jo. 220; 75 L.Q.R. 294; 23 Conv. 225.
- (8) Moonan v. Moonan (1963) 7 W.I.R. 420
- (9) Thomas v. Thomas (1969) 20 W.I.R. 58; [1969] G.L.R. 558
- (10) Wakeford v. Lincoln (1921) 90 L.J.P.C. 174 PC.
- (11) Harrinarine v. R. (1963) 6 W.I.R. 399
- (12) Harmes v. Hinkson. [1946] 3 D.L.R. 497 P.C.
- (13) Barry v. Butlin (1838) 12 E.R. 1089; 2 Moo. P.C. 480; 1 Curt. 637.
- (14) Tyrrell v. Painton [1894] P. 151; 70 L.T. 453; 42 W.R. 343; 6 R. 540 C.A.
- (15) Powell v. Streatham Manor Nursing Home [1935] A.C. 243; [1935] All E.R. 58; 104 L.J.K.B. 304; 152 L.T. 563; 51 T.L.R.; 79 Sol. Jo. 179 H.L.
- (16) Watt v. Thomas [1947] A.C. 484; [1947] 1 All E.R. 582; [1947] L.J.R. 515; 176 L.T. 498; 63 T.L.R. 314 H.L.
- (17) Dass v. Masih [1968] I W.L.R. 756; [1968] 2 All E.R. 226; *sub. nom.* Dass (An infant) v. Masih 112 Sol. Jo. 295

Sir Lionel Luckhoo, S.C., for the third, fourth and fifth appellants.

F. Ramprashad, S.C., for the respondent.

PERSAUD, J.A. (delivered the judgment on the issue of costs): For the reasons given by my brother HAYNES I agree that this appeal should be dismissed and that the judgment of the court below be affirmed.

I propose to deal only with the question of costs.

In the court below the learned judge rejected the defence as being untrue and worthless and described the defendants' action as speculative when he said: "After hearing arguments I found no justifiable cause for the defendants to have opposed the will in question. Neither the testator nor the plaintiff contributed in any way to the opposition and/or counterclaim of the defendants (*sic*)..." and he ordered the defendants to bear their own costs while ordering the plaintiffs' costs to be paid out of the estate.

In this court the defendants have urged that they had every reason to question the due execution of the will, and therefore, the judge, in ordering them to bear their

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own costs, did not apply the proper principles of law. In answer to that submission, the plaintiff has urged that there were really no reasonable grounds of suspicion and that, in view of his findings, the judge was entitled to make the unsuccessful defendants bear their own costs.

The question of costs in probate actions, like any other type of action, is subject to the discretion of the court, but, as has been pointed out in Hanoman v. Hanoman (1971) 18 W.I.R., at p. 40, certain principles governing the matter, though not intended to be exhaustive, have been worked out over a period of time. In Mitchell v. Gard 164 E. R. 1280, at p. 1281, the matter is put thus:

“The basis of all rules on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question, who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary’ papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.

If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his improper conduct has induced a litigation which the Court considers reasonable, it is not unjust that the estate should bear the costs of litigation which his conduct has caused.

From those considerations, the Court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.”

In Spires v. English [1907] P. 122, the President of the court, SIR GORELL BARNES, said (at p. 123):

“In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reason-

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ably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shown why costs should not follow the event. Therefore, in each case where an application is made, the Court has to consider whether the facts warrant either of those principles being brought into operation.”

And in the later case of Re Cutcliffe [1958] 3 All E.R. 642. in dealing with the same question, HODSON, L.J. is recorded as having said (at p. 648):

“While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to cases where a testator has misled other people by his words either written or spoken, and perhaps inspired false hopes in their bosoms that they may benefit after his death. It does not seem to me that such a situation was in the minds of the learned judges who in the past laid down the practice that costs should be allowed out of the estate, where the fault of the testator has led to the litigation. The common situation is that which arises day by day in the courts, of construction where the testator has used language which is difficult to understand, and where by himself or by his solicitor he has created the difficulty. There the costs are normally borne by the estate.

It seems to me a strong thing, and a thing to which I should be slow to listen, to maintain that people whose evidence has been found by the learned judge to have been wholly false and who have lost their case with costs against them, should be heard to say that an order for costs should be made wholly or in part in their favour because the court normally exercises its discretion in these cases along certain lines and in accordance with certain principles. The discretion of the court is always there, and the rules on which that discretion is exercised are for the assistance of those who have to advise litigants before they embark on litigation, so that they may have some idea of what risks they run as to costs. In the Probate Division, notwithstanding exceptions to be found in the books, the probability is that people who unsuccessfully make pleas of undue influence and of fraud will be condemned in the costs not only of that charge but of the whole action.”

In the case before us it could hardly be said that the litigation was brought about by the folly of the testator to warrant any further costs being paid out of the estate.

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The evidence called on behalf of the plaintiff (executrix) and a comparison of the admitted signature of the deceased with that which appears on the disputed will support the judge's conclusion; and if he accepted the evidence of Mr. Jai Narine Singh and his clerk Joseph, then it was inevitable that he would have pronounced in favour of the will. It is true that Mr. Singh's evidence would appear to have contradicted that of his clerk in a material particular, that is to say, the former maintained that there had been no alterations in the name of the deceased from 'Henry' to 'Harry', and of the word 'West' to 'East', and that if there were such alterations he would have ensured that the testator initialled the alterations, while the latter asserted that he had mistakenly typed 'Henry' for 'Harry' and 'West' for 'East' and that upon Mr. Singh drawing this to his attention he erased 'Henry' and 'West' and typed in the name 'Harry' and the word 'East' in their place. The duplicate which was retained in office and which also carried the mistakes apparently was not changed. An examination of the original will discloses that while there have been alterations as described by the clerk, they are not of such a nature as would have necessitated the initials of the testator in the sense that on the face of the document there does not appear that the name 'Henry' and the word 'West' had been typed in and then struck out. So that one can say, with some amount of truth, that there is no alteration on the face of the document. And this is how I understood Mr. Singh's evidence when he said that there was no alteration.

The only other circumstance which the defendants have introduced to suggest that the will was improperly executed is to be found in the evidence of the handwriting expert, whose evidence has been dealt with by my learned brother. Perhaps, the expert ought to have compared the signature on the will with the signature on a cheque issued by the deceased soon after the date of the will. Had he done so, probably he would have discovered some marked similarity. These were the circumstances which, the defendant would urge, cast suspicion upon the execution of the will. In my opinion, the judge was right in rejecting them and coming down on the side of the due execution of the will.

In these circumstances it seems unjustified to order the costs of this appeal to be paid out of the estate; at least the defendants should not have their costs met from assets of the estate. To do so would be to waste away the assets upon litigation which was not brought about by any act of the testator or of the executrix, and which was based upon no valid ground. A proper order would therefore be that the appeal be dismissed and that the Order of the court below affirmed as it stands; but that the Nos. 3, 4 and 5 defendants, who are the only ones among the seven to have pursued this matter both in the court of first instance and in this court, do pay the plaintiff's costs of this appeal.

CRANE, J.A.: I concur.

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HAYNES. J. A.: James Harry Sukhdeo, the deceased testator, died on February 4, 1972, at the ripe age of 72. He had been twice married. His first wife, Hiria Sukhdeo, predeceased him in 1966. His second, Sukhai Sukhdeo, outlived him. Both bore him children: Hiria, eight (of whom seven were alive at his death) and Sukhdai, six. He had also fathered three illegitimate children born to one Sitawa Singh. His estate was declared at \$83,935.70, but was probably worth more. After his death, his widow (the respondent) sought to propound in solemn form an alleged testamentary document dated 26th October, 1971, as his last will and testament. It named the widow herself and their eldest son, Vishnu Sukhdeo, as the executors, and divided his whole estate among her and their six children.

The seven children of the first marriage (the appellants) contested this will. In their defence, as pleaded, they challenged it on these grounds: firstly, that the deceased did not sign it; secondly it was not effective as a testamentary document because the middle name 'Harry' in 'James Harry Sukhdeo' in the body of the will was an alteration of 'Henry' originally there, which alteration was unattested, so that the will was that of an unnamed testator; thirdly, it was otherwise not duly executed; and, fourthly, that the deceased lacked testamentary capacity on that date. The trial judge found against the appellants on every issue and pronounced in favour of the will. They are dissatisfied with his judgment and seek to upset it. They would be content with an order for a new trial.

At the hearing of the action, the evidence on the whole proved clearly that on 26th October, 1971, the deceased was of sound testamentary mind, memory and understanding. And this was not contested on appeal; likewise, the contention that the will was invalid as that of an unnamed testator, which was plainly meritless. If the deceased did not sign the will, then *cadit quaestio*, it was not duly executed. If he did sign it, then on the evidence before him the trial judge was right in finding for its due execution. Consequently, the main attack at the hearing of this appeal was at the finding that the deceased signed the will. The judge held it was not a forgery.

In reaching a conclusion on this question, on the facts of this case, the trial judge had to apply two important principles. The first was expressed by the RT. HON. SIR JOHN PATTERSON in the Privy Council in the case of Devine v. Wilson (1855) 10 Moore's P.C. Cas. 502, at p. 531, thus:

"... In a civil case, the onus of proving the genuineness of a deed (and so of a will) is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed (or will), must satisfy the jury (or judge) that it is genuine. The jury (or judge) must weigh the conflicting evidence, consider all the probabilities of the case,

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not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities.” (Parentheses mine).

The second principle involved the application of the first one in an action to propound a contested will. To determine the matter in the face of circumstances of suspicion (if any) by the unguarded application of what was said in Devine v. Wilson, (*supra*) that is to say, as involving just a question of belief or disbelief of witnesses simpliciter, would be wrong. (See Straker v. Luke [1947] L.R.B.G. 187; Wintle v. Nye [1959] 1 All E. R. 552; Moonan v. Moonan (1963) 7 W.I.R. 420, and particularly Thomas v. Thomas [1969] G.L.R. 558. There has to be a difference in approach, for, if the evidence established circumstances of suspicion relevant to the making and execution of the will, then the court had to be vigilant to scrutinise the evidence in support of it, with that suspicion in mind. And, unless that suspicion was dissipated, the burden of proof was undischarged and he would then have to pronounce against the will.

The respondent rested her case mainly on the oral evidence of Jai Narine Singh, a barrister-at-law of 26 years’ standing then, and of his clerk, John Joseph. Mr. Singh had been a close friend of the deceased for many years, his legal adviser and representative in litigation on many occasions. The deceased visited his office frequently. He was the president of the All Farmers Association’, a ‘brainchild’ of the barrister, with its office located below the latter’s home in Church Street, Georgetown. Admittedly, Mr. Singh had made wills for the deceased in 1968 and 1969. Summarising it, Mr. Singh’s evidence, on which the respondent relied, was to the effect that on 26th October, 1971, the deceased visited his chambers and gave instructions for a new will. This was prepared accordingly; the deceased read it out aloud and then signed it in the presence of John Joseph and one Gobin Persaud, who did not testify. John Joseph corroborated his employer to the extent that he (Joseph) typed the will and actually handed the original to the deceased who read and signed it in his presence and that of Mr. Singh and Gobin Persaud. The trial judge believed and accepted the evidence of these two witnesses. Of John Joseph, he said: “He impressed me *as* a witness of truth and reliability.” This was direct evidence of events which the trial judge found really happened. Counsel for the respondent contended that the issue – forgery or no forgery – was a simple question of fact and a pure question of credibility; the trial judge saw and heard these two witnesses, observed their demeanour and believed them; there was no principle or authority, he contended, on which this Court could rightly interfere. As I understood the argument, there were no suspicious circumstances existing which had to be dissipated. It was a straightforward question of belief or disbelief of witnesses whom the trial judge saw and heard.

Such a case as this differs from cases like Straker v. Luke and Moonan v. Moonan.

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In Straker v. Luke, the deceased had executed three wills. A reputable solicitor, whose veracity and integrity were unquestioned and whom the trial judge believed, made the will sought to be propounded. He received instructions from the deceased, prepared the will and read it to her; she signed it, indicating thereby her approval of it. Yet, the West Indian Court of Appeal reversed a judgment in favour of the will, despite their acceptance of the truth of the evidence of the solicitor. I quote from the judgment of the Court itself:

“It seems to us that upon a consideration of the substantial changes of testamentary dispositions made within a very short period and bearing in mind that these wills were changed when the testatrix was in a very poor state of health and in close contact with the respondent, the fact that the respondent was to derive increased benefits under these wills and had been made sole executrix; that her brother and sister also were to benefit, that the sister of the testatrix and a faithful servant were excluded from a share in her bounty, and that the appellant with whom she was not at variance and whom she desired to benefit under her will of the 13th October, is to receive a much smaller legacy would give rise to suspicions requiring explanation and if not dissipated might lead to the belief that the sudden changes were not the result of the free volition of the testatrix.”

Here, the disabling influence of proved circumstances of suspicion co-existed with the due preparation and execution of the will itself. There was no issue as to whether she made the will or was a capable testatrix; the question being whether she was a free one. In Moonan v. Moonan, again, a reputable solicitor testified to making the will on instructions of the deceased, and to the due execution of it. Yet, the Court of Appeal of Trinidad and Tobago, accepting this evidence as true, nonetheless upheld the trial judgment against the will. The main reason was the existence of the suspicious circumstance of the dangerous state of health of the deceased. An eminent doctor, whose evidence the trial judge accepted, had testified that the deceased at the date of the will was in a certain toxic condition in which he could act without being fully aware of the implications of what he said or did and could even sign his name clearly with such unawareness; but he could have had lucid moments. There was no evidence that when he gave the solicitor instructions or signed the will the deceased had lucid moments, and the solicitor himself was incompetent to speak of this. Consequently, WOODING, C.J. said [(1963) 7 W.I.R., at p. 427]: “We do not consider that the evidence of the solicitor removes the suspicion.” Just as it could and did not in Straker v. Luke.

In Straker v. Luke, undue influence or pressure on the deceased to make the will, unknown to the solicitor, was in issue; in Moonan v. Moonan, it was a question of testamentary incapacity, not observable by the solicitor. It is easy to see that belief

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in the evidence of the making and due execution of the will, in these cases, could not dissipate the particular suspicions. None of those issues arose in this case. The deceased here had full testamentary capacity. He was not suffering from any toxic or other differently produced automatism, and undue influence was not alleged. In the circumstances of this case, if the deceased signed that will on 26th October, 1971, it was a good will; if not, it was no will of his. A finding that the witnesses Jai Narine Singh and John Joseph were truthful as regards the preparation and execution of the will, in such a case as this, unlike as in Straker v. Luke and Moonan v. Moonan could not be made, and the will pronounced against. The credibility of these two witnesses was the crux of the matter. And so it was that at the trial, to defeat the case for the will, the appellants relied heavily on opinion evidence that the signature to the will was not that of the deceased. Detective-Inspector Oswald Erskine of the Police Crime Laboratory, a handwriting expert of seven years' court experience, before he testified, compared the signature to the will with two genuine signatures of the deceased, one to a cheque dated 1st December, 1969 (Ex. 'F2'), and the other to a bank slip (Ex. 'F3') dated 5th October, 1971. As a result, he said in examination-in-chief:

"It is my opinion that the person who wrote the signature on Exhibit 'A2' (will) is not one and the same person who wrote on the cheque and bank slip because the letter formation, the height ratio, spacing and connections and size of the letters, are different when compared. No other differences."

Under cross-examination, this witness added: "... handwriting identification is not an exact science and mistakes are made. It is true that signatures on cheques are not always the same." And in re-examination he was shown an earlier will of the deceased dated 2nd December, 1968 (Ex. 'C1'), and, after an on-the-spot visual comparison, he said: "I am of the opinion that the same person who wrote 'C1' did not write Ex. 'A2' (will)." The trial judge rejected this opinion as "mere conjecture and unreliable". Probably it was a harsh and unmerited criticism to describe it as "mere conjecture". But was it unreliable?

The manner in which expert evidence on handwriting should be given has been discussed in cases of high authority. In Wakeford v. Lincoln (1921) 90 L.J.P.C. 174, the prosecution called expert evidence to prove that a clergyman charged in the Consistory Court with an ecclesiastical offence had written 'J. Wakeford and wife' in the register of an inn where, it was alleged, he had spent a night with a woman. In the Privy Council, LORD BIRKENHEAD had this to say of the expert's testimony (p. 179):

"The expert called for the prosecution, gave his evidence with great candour. 'It is not possible,' he says 'to say definitely that anybody wrote

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a particular thing. All you can do is to point out the similarities and draw conclusions from them.’ This is the manner in which expert evidence on matters of this kind ought to be presented to the Court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of these matters, whether a particular writing is to be assigned to a particular person.”

In Harrinarine v. R. (1963) 6 W. I. R. 399, WOODING, C.J., reading the judgment of the Court of Appeal of Trinidad and Tobago, endeavoured to explain Wakeford v. Lincoln. There, the handwriting expert had pointed out similarities and dissimilarities and expressed the opinion that one and the same person had written the genuine samples and the disputed document. On appeal, it was contended that as this was essentially what the jury had to decide; it was incompetent for an expert to assign the disputed writing to a particular person. The Court rejected this contention. WOODING, C.J., after referring to 15 *Halsbury’s Laws* 3rd Ed., pp. 324-325, para. 591, pointed out (p. 400) that despite the limitations suggested in the passage in Wakeford v. Lincoln, in fact the Privy Council (sitting then as a Court of re-trial from the Consistory Court) had admitted into evidence the opinion of this expert, not only as regards similarities and dissimilarities, but also as to his conclusion that it was the handwriting of the clergyman or a very skillful forgery. So, WOODING, C.J., concluded (pp. 400-401): “... so long as he (the expert) supports that opinion or conclusion ... by stating the grounds on which he based it, it is for the court to come to a final and positive decision ... whether it is satisfied, that it is the handwriting of the particular person.”

In neither case was mention made of any relevant statutory provision. Apparently, it was the position at common law that was being considered. Here, in Guyana, however, the matter is controlled by the *Evidence Act, Cap. 5:03*. Once the witness is deemed by the trial judge under s. 16(5) to be ‘an expert’ under s. 16(2), then his opinion evidence can achieve probative status under s. 19, which reads thus:

“Comparison of a disputed writing with any writing proved to the satisfaction of the judge, to be genuine shall be permitted to be made by witnesses, and those writings and the evidence of witnesses respecting them may be submitted to the court as evidence of the genuineness or otherwise of the writing in dispute.” (Underscoring mine.)

And then s. 20 provides that: “Whenever the opinion of any living person is admissible in evidence, the grounds on which the opinion is based are also admissible.”

As a result of these statutory provisions, the opinion or conclusion of the expert

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is not merely one for the guidance of the court. It is something more. It is itself evidence or proof that a particular person did or did not write the disputed words. The tribunal of fact decides what probative weight (if any) this evidence has, in each case. But, from the nature of the subject-matter, unless reasons are given to demonstrate the accuracy of the opinion, the evidence might be valueless. And so the expert must give reasons or grounds (call it which you prefer) for his conclusion. I construe s. 19 to require that the comparison authorised by it is to be carried out in court. The expert would previously have made his examination of the proper writings out of court. But his 'comparison' under s. 19 contemplates his indicating in court the points of similarity or dissimilarity or any other features on which his conclusion is based. It would not be sufficient to do the comparison out of court and then in court only to state his conclusion as evidence. His reasons or grounds will serve a twofold purpose. They furnish the means for him to demonstrate and the court to test the accuracy of his opinion. And, further, they will aid the court in satisfying itself about the disputed writing in reliance on "the evidence of its own eyes", if it chooses so to rely.

In this case, Inspector Erskine gave no such reasons or grounds for his opinion that the signature to 'A2' was a forgery. He only indicated in a general way the matters and things he considered in reaching his conclusion. But he made no comparison in court as explained above. As a result, his evidence was unsatisfactory and unhelpful. The trial judge would have been entitled to treat it as valueless and this Court cannot hold he was wrong to reject it. But the evidence of Samuel Chandra Sukhdeo was on a different plane. He was familiar with his father's calligraphy and his opinion could be reliably acceptable under s. 18 (1) of the *Evidence Act, Cap. 5:03*. He swore the signature to the will was not his father's. Of him, the trial judge said, "He did not impress me as a truthful witness." So the Court rejected the expert as "unreliable" and that appellant as "untruthful". But the trial judge went further. He himself compared the signature with the admitted signatures of the deceased and on the evidence of his own eyes reached "a firm conviction that the signature on the will was indeed that of the testator and no one else."

Insofar as the Court relied on its own visual comparison of the signature on the will with the genuine signature of the deceased, then counsel for the appellants might well have urged upon it the caution mentioned in certain observations of LORD BIRKENHEAD in the Privy Council in Wakeford v. Lincoln (*supra*). At p. 179 His Lordship said: "Questions depending upon handwriting are in many cases doubtful, and in the past have given, and in the future will give, cause for great anxiety in courts of justice. But upon them, as upon other matters, it is necessary to come to a conclusion." Then, after discussing the handwriting, His Lordship continued (p. 180): "Looking at the papers before them, their Lordships, upon the evidence of their own eyes, have reached the conclusion that there

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can be no doubt upon the matter.” But despite their firm view that the errant clergyman had signed the register, LORD BIRKENHEAD went on to say this: “If this were the only piece of evidence, their Lordships, although without doubt in their own minds as to the authenticity of the writing, would not willingly rest their judgment on a single fact as to which error might be possible.”

Here, their Lordships were taking cognizance of the fact that, as Inspector Erskine said, “Handwriting is not an exact science and mistakes can be made.” And because of this ever-existing possibility of errors, they would have hesitated to rest their decision completely on “the evidence of their own eyes”. Here, although the trial judge did not express a similar unwillingness to rest his judgment on the evidence of his own eyes, in fact he did not do so. I read his judgment regarding his view of the signature as furnishing corroboration of other testimony of Jai Narine Singh and John Joseph, whom he believed. This was the identical approach of the Privy Council in Wakeford v. Lincoln (*supra*, at p. 180).

I have referred more than once to Straker v. Luke and Moonan v. Moonan, cases in which mere belief of the witnesses to the preparation and due execution of the wills did not dissipate well-founded suspicions. But such belief itself could dissipate suspicion, however well-founded. Harmes v. Hinkson [1946] 3 D. L. R. 497 PC, illustrates this. This was an appeal to the Privy Council from a judgment of the Supreme Court of Canada. A judge of the Supreme Court of Saskatchewan granted probate of the will of the deceased, Harmes, to the respondent, Hinkson. In it, legacies to an amount of \$14,000 went to blood relations and charities. The residue of \$52,000 went to Hinkson, a close friend of the deceased. Paul Harmes, a nephew, opposed the will for lack of testamentary capacity. Admittedly, the deceased, at the date of the will, was seriously ill from an ailment that weakened the power of mental concentration. Uncontradicted medical evidence, accepted at the trial, was to the effect that he could not then be mentally alert for periods of more than five minutes. Hinkson prepared the will. No one else was present. The nurses were called in to witness it; but the will was not read over in their presence. Hinkson testified that one hour and a half were spent in discussing the terms of the will; that all during this time, the deceased was fully and mentally alert, and himself instructed as regards the residue, “You can have it;” that he read the will clause by clause to the deceased, who approved of and signed it. Hinkson admitted that the deceased was persuaded by him to make a will. Harmes collapsed shortly after, lapsed into a coma and died the next day. The trial judge said he found Hinkson a guileless man, an honest and truthful witness. And he found for the will. The Saskatchewan Court of Appeal reversed this judgment on the ground that the trial judge could not have paid sufficient attention to the rule of law as to the onus of proof in the face of such circumstances of suspicion. The Supreme Court of Canada disagreed and restored the trial judgment. RINFRET, J. said [1943] 1 D.L.R. 625, at p. 628]:

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“The important point about these findings of the trial judge is that he made them in face of contradictory evidence, that he believed the appellant and that his conclusions were based on the credibility of the witnesses. He found that the appellant was a truthful witness,…”

The Privy Council dismissed the appeal. Their advice was delivered by LORD DU PARCQ. His Lordship referred to the two well-known rules of law affirmed in Barry v. Butlin (1838) 12 E. R. 1089 PC, that (1) The *onus probandi* lies on the propounder of a will to satisfy the conscience of the Court that the instrument is the true last will of the testator; and (2) If a party writes or prepares a will under which he takes a benefit, that is a circumstance of suspicion calling upon the Court to be vigilant and jealous in examining the evidence in support of the instrument, which should not be pronounced for unless the suspicion is removed. After explaining what was meant precisely in the first rule by the familiar metaphor ‘the burden of proof, LORD DU PARCQ went on to say (p. 510):

“The second rule has commended itself to many generations of Judges and has thus rightly acquired the status of a rule of law, but it is no more than an application to particular circumstances of a principle which may be supposed to guide all persons of prudence and good sense in their ordinary affairs. The principle is that when the only man who can prove a fact has a strong motive for ascertaining it, his evidence must be received with greater caution than that of a disinterested witness, and that every circumstance of legitimate suspicion which is found to exist must make any reasonable man less ready to accept his uncorroborated testimony. The rule applies this general principle to the particular case of a will. It warns the judge that, in circumstances such as exist in the case, the evidence of the witness who drew the will must be received with caution, but this does not mean that it must be rejected altogether. The burden of proof may be discharged. The adverse presumption may be rebutted. ... That question must always be one of fact, and the true meaning of SIR JOHN NICHOLL’s words is that unless the tribunal is finally satisfied that its initial suspicions were unfounded the burden of proof remains undischarged and the presumption must prevail.” [Underscoring mine. In L. 6 presumably His Lordship meant ‘asserting’.]

Later, LORD DU PARCQ said (p: 511):

“...Their lordships ... are satisfied that there is ... no ground at all for saying that the learned Judge either overlooked or disregarded the relevant rules of law. Those rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge,

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even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth. Their Lordships agree with the majority of the Supreme Court that no error in law has been established.” (Underscoring mine.)

And, finally (at p. 511), His Lordship said:

“... the learned Judge took a most favourable view of Mr. Hinkson’s evidence, and believed it, and their Lordships are of the opinion that the Court of Appeal had no sufficient reason for disagreeing with him. The appellant’s strongest argument was founded on the medical evidence which, considered by itself, would certainly make it at least doubtful whether the deceased had testamentary capacity and a disposing mind. But it was for the Judge to consider the evidence as a whole.”

Harmes v. Hinkson emphasises the difficulty of faulting a judgment where the trial judge appreciated rightly the existence and nature of the circumstances of suspicion, addressed his mind to the relevant rules of law, approached the evidence with vigilance and circumspection, and then still found the witnesses to the preparation and due execution of the will, honest and truthful. Except in cases akin to Straker v. Luke and Moonan v. Moonan, a Court of Appeal might be hard put to decide otherwise. Tyrrell v. Painton [1894] Probate Division, p. 151, a well-known decision, dealt with this same point. There, the will was challenged on the ground of fraud, that is, that somehow the deceased was deceived or tricked into signing it. The circumstances under which the will was prepared and signed were such as to cause the gravest suspicion. The trial judge approached the matter as if he had only to address himself to the question whether the will had been obtained by fraud, the burden of proving which lay on the plaintiff. He believed the attesting witnesses. He held fraud was not proved, and found for the will. His judgment was reversed. A. L. SMITH, L.J. said (p. 158):

“If the learned President had had his mind clearly brought to the undisputed facts of the case, including therein the letters written by Mrs. Bye (which raised substantial suspicion) ...and found as he did, I should not have been disposed to interfere with his decision.” (Parenthesis mine)

And later (p. 159):

“If the learned President had found as a fact that the suspicious circumstances had been explained and had then gone on to find as he did that he could not upon the evidence hold Thomas Painton had been guilty of fraud, I should have had great difficulty in disagreeing with such findings; but as the first is wholly untouched... I think that this appeal must

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be allowed.”

In the Court below the appellants relied on these facts as circumstances of suspicion:

(1) In the wills of 1965, 1968 and 1969 all or some of them were beneficiaries but in ‘A2’ all were disinherited; so that the will was unnatural.

(2) The testator knew how to make a will and made the 1965 one, so there was no need to go to Jai Narine Singh for this purpose on 26th October, 1971.

(3) In every one of the three earlier wills, Hoosain Ganie, a long-standing friend of the deceased was named as one of two executors, but in ‘A2’ he was not.

(4) The alleged original errors ‘Henry’ for ‘Harry’ in the name of the testator in the will, and of ‘West’ for ‘East’ Bank immediately after, had uninitialled alterations although the deceased was very careful about initialling corrections.

(5) The deceased had a granddaughter whom he had informally adopted, and who was described in the wills of 1968 and 1969 as “my adopted daughter, namely, Rajcoomarie”; but in ‘A2’ she was lumped with his own girls as “my daughters” and was described as “Rajcoomarie Sukhdeo”. And,

(6) The signature to the will was “shaky” and according to the handwriting expert there were differences (not specifically indicated) between it and the genuine signatures of the deceased.

(7) The trial judge carefully considered all these circumstances and concluded there was nothing suspicious in them” in the light of the evidence of the plaintiff and her witnesses – evidence which I believed and accepted as true and reliable”. I read this to mean that the facts he found proved, either did not amount to suspicious circumstances or explained away any which did. In this Court, this finding on the case, as was presented at first instance, was not effectively challenged. It was difficult to do so. It depended so much on the credibility of the witnesses. But in Powell v. Streatam Manor Nursing Home [1935] All E. R. 58, at p. 61, the Lord Chancellor did say that: “The judge of first instance is not the possessor of infallibility and, like other tribunals, there may be occasions when he goes wrong on a question of fact.” This may happen, if there was “any specific misunderstanding or disregard of a material fact” *per* LORD WRIGHT (*ibid.*, at p. 69) or “he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved”, *per* LORD DU PARCQ in Watt v. Thomas [1947] 1 All E.R. 582 at p. 591. According to the position taken by counsel for the appellants, these two citations would reflect exactly the ways in which the trial judge

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fell into error in his judgment, having regard to the rules of law applicable to an action to propound a will in solemn form.

What the appellants relied on heavily in this Court was this contention: A circumstance of grave suspicion, plain on the evidence, was, it was said, disregarded probably because it was not referred to as such in the Court below; if the attention of the trial judge had been drawn to it as such, then by itself or in accumulation with the circumstances actually put before him, a doubt as to the genuineness of the transaction might have been raised, of so great a degree that the conscience of the Court might not have been satisfied that the respondent's witnesses spoke the truth, the whole truth and nothing but the truth. In that event, the trial judge might well and reasonably have found that he was not satisfied that the deceased signed the will. If this contention could be substantiated then Thomas v. Thomas (*supra*) might apply. In that case, probate of a will in solemn form was opposed on the ground that it was a forgery. The trial judge believed the witnesses who testified to its preparation and due execution. He held there were no circumstances of suspicion and granted probate. This Court (LUCKHOO, C. CRANE, J. A., and CUMMINGS, J. A., dissenting), on the admitted and proved facts, found substantial circumstances of suspicion. And, as the trial judge had not addressed his mind to them in reaching his conclusion, an order was made for a new trial. So this submission, in the light of the principles of such cases as Tyrrell v. Painton, Harmes v. Hinkson and Thomas v. Thomas, must be assigned very careful consideration.

The witness John Joseph had testified to this effect: On 26th October, 1971, Mr. Jai Narine Singh gave him a sheet of paper with written instructions to prepare a will for the deceased; he typed the will in duplicate, handed the original to Mr. Singh and returned to his room. Mr. Singh called him back and told him there was an error in the will. The witness said: "I had 'Henry' for 'Harry' and 'West' Bank instead of 'East' Bank. I then changed 'Henry' to 'Harry' and 'West' to 'East' and handed it back to Mr. Singh." Joseph went on to say that the deceased read the original and signed it. He said the errors in the duplicate were never corrected. This duplicate was tendered as Ex. 'D'. He had never shown it to any of "the children". Later, on the instructions of Mr. Singh, he typed accurately copies from the original will as executed, and handed those copies to Mr. Singh to be shown to "the children". A copy of the will was shown to them or one of them, after the death. Mr. Jai Narine Singh in his evidence contradicted his clerk on this incident of error and alteration. He said: "I do not agree that the word 'Harry' typed on the first line of the will was 'Henry' and changed to 'Harry'." As regards this conflict, the trial judge accepted the version of Joseph who, he said, "seemed to have a better recollection." But then, Jai Narine Singh, after his denial of any alteration, had gone on to say: "If that was a change, I would have had it initialled." But, as the Court found, and rightly so, there was this alteration. Why

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then was it not initialled? Here, contended counsel for the appellants, was a circumstance of strong suspicion, unexplained in the evidence, tending to suggest that the will was never presented to the deceased for execution. Admittedly, however, the attention of the trial judge was drawn to this absence of initialling as a circumstance of suspicion. His acceptance of the evidence of Joseph provided a basis for the removal of any suspicion which arose out of the failure of Jai Narine Singh to insist on the initialling, or of the deceased to do so of his own volition.

Consequently, counsel did not rest only on this aspect of the ‘Henry’ for ‘Harry’ incident. Additionally, he stressed a different implication of it, not considered by the trial judge. And that was this: Samuel Chandra Sukhdeo, the only appellant to testify, said that, shortly after the funeral, at his chambers, Mr. Jai Narine Singh, instructed John Joseph to give him a copy of the will. They were shown one. It had ‘Henry’ for ‘Harry’ and ‘West’ for ‘East’ Bank. There and then he drew the errors to Mr. Singh’s attentions saying that his father would not sign a will with such errors. Both Singh and Joseph denied that this happened. Later they were shown the original executed will. It then must have had the correct name and address because, on seeing it, the only comment the witness made was that the signature was not his father’s.

It will be remembered that Joseph said he had not shown the uncorrected duplicate, Ex. ‘D’, to any of the children. Yet, presumably, the children or one or the other of them did get to know that ‘Henry’ had been typed for ‘Harry’, because in para. 8 of their defence dated 8th December, 1972 they pleaded an unattested alteration in the name of the testator and it was put to Mr. Singh in cross-examination. Counsel argued thus: The witness Samuel Chandra Sukhdeo could only and must have got his knowledge of those errors from the copy shown to him; since the copy had those errors, then the alterations in ‘A2’ must have been made after the death of the deceased and after the copy was shown to the children. This, counsel contended, was a tampering with the will; such impropriety was suspicious conduct of a kind which, by itself or together with the other mentioned aspect of the absence of initials to the alterations, would or might have raised in the mind of the Court a real doubt as to the truthfulness of both Jai Narine Singh and Joseph, and so as to the genuineness of the signature to the will.

The success of this argument depends wholly on an inference that, on the day after the funeral, when the appellants visited the barrister’s chambers, ‘A2’, which was locked in his cabinet, had then the same errors as were in Ex. ‘D’, the uncorrected duplicate. As a premise for this inference, the appellants relied on Samuel Sukhdeo’s evidence that the copy shown to them had these errors and Joseph’s, that this (the copy shown to the appellants) was a carbon duplicate of what was

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then in the cabinet. Then, as 'A2' at the trial had the alterations, *ergo*, the alterations were made after the death of the deceased. So went the argument to support a post-mortem "tampering" with the document 'A2' and to raise a new ground of suspicion.

If the signature to 'A2' is a forgery, then one or the other of two explanations could be the truth: Either the deceased did on 26th October, 1971, cause the will as originally typed to be prepared but died without signing it, or the entire document was concocted between his death and this visit. If, therefore, the fact can be established, on a balance of probability, that 'A2' in the cabinet then had these errors, this would be consistent with either hypothesis. But the trial judge believed the evidence of Joseph that the copy shown was an exact copy of the will as executed. This finding would have to be faulted if the appellants' point is to be made successfully. Counsel for them sought to do this or raise a doubt about it, by a piece of close interrogatory reasoning. "If," said he, "the copy shown did not have these errors, how did the appellants come to know of them?"

Counsel for the respondent suggested that Joseph really showed Ex. 'D' to them. The difficulty about this theory is, Joseph denied it, and the trial judge believed him. The plain fact is that this left the appellants' source of knowledge unexplained. Joseph himself said in cross-examination, "I don't know how the defendants knew that the duplicate had 'Henry' and not 'Harry'." In this regard I would venture two observations. One is this: Counsel for the appellants himself invited us to use in Court a pair of magnifying glasses to discern more clearly the underlying 'Henry' and 'East.' I myself did not accept the invitation. But, assuming he was right on this, then an early study of the will in the Registry in a similar way could have informed the appellants sufficiently of the alterations. The second one is this: The cross-examination of Joseph as to this aspect was inadequate. The witness said he did not show Ex. 'D' to any of the children. But did he at any time show it to anyone else who passed on the fact, for example, to Ganie in the same building? Or did he tell anyone at all about the error? Or was there then any-other clerk on their staff who had access to Ex. 'D' and could have passed on such information? The evidential burden was on the appellants, by a process of elimination, to narrow down the probable source of information to the copy shown to them. It was not on the respondent to establish these possibilities. In my judgment, the evidence was open to a conclusion that the appellants could possibly have obtained the information from some other source. Having regard to this possibility and the findings of the trial judge, this point fails.

After seeing and hearing witnesses for both sides, the trial judge believed those for the respondent. He believed that the deceased, wrongly or rightly, felt that the children of his deceased wife were undutiful ingrates. There was evidence to support this view. And this conclusion removed any suspicion which might have

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arisen from the fact that those children were excluded altogether from his testamentary bounty. Then, using the evidence of his own eyes, he was convinced that the signature of the will was that of the deceased. He found support in the opinion evidence of Hussain Ganie, a witness for the defence in the Court below, who said that although the handwriting appeared “shaky” to him, it was the signature of the deceased. But as SALMON, L.J. (as he then was) pointed out in Dass v. Masih [1968] 2 All E.R. 226, at p. 232: “Questions as to whether or not a document has been forged are very difficult questions to decide and are questions about which there are often different opinions.” Consequently, the judge did not base his conclusion for the will on this alone. He addressed his mind to the alleged circumstances of suspicion. He approached the evidence of the main witnesses with the relevant rules of law in mind. He believed the witnesses who said they saw the deceased sign the will.

This was not a difficult case for the trial judge to adjudicate, on the evidence before him. The only alternative to the genuineness of the handwriting was the supposition that it was a carefully planned forgery as an integral part of a criminal conspiracy involving a barrister of 26 years’ standing, his clerk, of humbler status, but whose honesty and truthfulness impressed the trial judge tremendously, and, presumably, the respondent. The judge, for the reasons he gave, found this hypothesis untenable. During the argument, counsel for the appellants hinted that there was other evidence which could have been led. If so, then the appellants have only themselves to blame for not leading it. It was purely a question of fact, and in all the circumstances of this case this Court will not be justified in interfering with the trial judgment.

This appeal is dismissed. The learned President will deal with the question of costs.

Appeal dismissed.

Judgment of the High Court affirmed.

Costs to the respondent to be borne by the appellants.

Solicitors:

Z. Sankar for the Nos. 3, 4 and 5 appellants.

Dabi Dial for the respondent.

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