

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 6 OF 2001

BETWEEN:

ATTORNEY GENERAL

Appellant

and

**MICHAEL SPICER
ALEXANDER BENEDETTO**

Respondents

CRIMINAL APPEAL NO. 10 OF 2001

BETWEEN:

WILLIAM LABRADOR

Appellant

And

THE QUEEN

Respondent

Before:

**The Hon. Sir Dennis Byron
The Hon. Mr. Satrohan Singh
The Hon. Mr. Albert Redhead**

**Chief Justice
Justice of Appeal
Justice of Appeal**

Appearances:

**Mr. Terrence Williams, Senior Crown Counsel, Mr. David Abednego,
Crown Counsel, with him for the Attorney General And THE QUEEN.**

**Mr. Sydney Bennett with Miss Michelle Matthew for Michael Spicer.
Mr. Paul Dennis with Miss Nicole Mc David for Alexander Benedetto.
Mr. Edward Fitzgerald Q.C. of the British Bar for William Labrador,
Mr. Hayden St. Clair Douglas and Mr. Terrence Neale with him.**

Oct. 8: 9: 10: 11: 12:, 2001

Jan. 14: 2002

JUDGMENT

- [1] **Singh JA:** On January 14, 2000, Lois McMillen [the deceased] lost her life. On September 27, 2000, Labrador, Spicer, Benedetto and George were indicted for the Murder of the said Lois McMillen. They went on trial before **Benjamin J.**

THE TRIAL

- [2] On May 3, 2001, **Benjamin J** at the trial of accused **Labrador, Spicer, Benedetto**, and **George**, upheld a submission of **no case to answer in favour of Spicer, Benedetto and George** and he set them free. The learned judge overruled a similar submission made on behalf of **Labrador** and his case went to the jury.
- [3] On May 10th 2001, the said jury of nine convicted **William Labrador** of the offence of the **Murder of Lois McMillen**. On that day **Benjamin J** sentenced him to **imprisonment for life**.
- [4] The case for the prosecution appeared to be, that on the night of January 14, 2000, Labrador, Spicer, Benedetto and George had a rendezvous with Lois McMillen, whom they all knew before, and with whom they were familiar. They kept the rendezvous. Something happened and Lois McMillen lost her life. She first had to flee her motor vehicle, and then she was violently drowned in the Sir Francis Drake Channel in the West End of Tortola. She was cut with a knife, beaten, and then drowned.
- [5] The case for prosecution was based on circumstantial evidence and certain alleged confessions from Labrador and Benedetto. The defence of Labrador was a denial of the crime

THE APPEAL

- [6] The Attorney General has appealed from the decision of **Benjamin J** to free **Spicer and Benedetto** on the no case submission, and **Labrador** has appealed from his conviction. Because these appeals are embryonic of the same incident and of the same trial, in an effort at the avoidance of the obvious prolixity that will be necessitated in order to deal with all the issues raised, I will write a consolidated judgment.
- [7] **I will first address the appeal of Labrador against his conviction.**

THE APPEAL OF LABRADOR:

- [8] The issues that arose for our determination of Labrador's appeal were concerned with: **[1] Insufficiency and unreliability of the prosecution evidence. [2] Prosecutorial misconduct. [3] Errors of the judge in his summing up. [4] Errors of the Judge in his handling of the jury's deliberations and verdict. [5] Non disclosure and [6] Additional evidence.** I propose now to address the first issue.

INSUFFICIENCY AND UNRELIABILITY:

- [9] Queen's Counsel Mr. Fitzgerald, addressing the issue of insufficiency and unreliability, submitted that **Benjamin J** wrongly rejected the appellant's submission of no case to answer. Further or in the alternative, he submitted, that the verdict of guilty reached at the end of the whole trial was unsafe and unsatisfactory.
- [10] Learned Counsel's submissions were premised on the fact, that the star witness Jeffrey Plante, was a "**con man**" with numerous convictions for dishonesty, that he had an interest to serve, in terms of obtaining preferential treatment in exchange for his evidence against the appellant, and, that in Hawaii, he was engaged in a similar exercise as this one when a person sharing a cell with him allegedly confessed to him. Counsel also submitted that there was no forensic or other evidence to link Labrador with the crime.

THE LAW ON NO CASE SUBMISSIONS:

- [11] The proper and accepted judicial approach to a submission of no case to answer has been crystallized as follows: (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's

evidence taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) **Where however the Crown's evidence is such, that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and, where on one possible view of the facts there is evidence on which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ...**" A trial judge should not direct an acquittal if he formed the view that a conviction by the jury would be unsafe or unsatisfactory. Such a submission should not be upheld, because, the judge who considered the prosecution evidence as unworthy of credit, wanted to make sure that the jury did not have an opportunity to give effect to a different opinion. Following this practice the Judge could be doing something which was not his job. [R v- Galbraith [1981] 2 All ER 1060: See also Daley -v-R. (1994 JA C11 and Taibo -v-R [1996] 48 WIR 7.]

- [12] A case should not be withdrawn from the jury because the judge considered the witness to be lying. That is a function for the jury to perform. However, the submission is good, if the evidence, even if taken to be honest, has a base which is so slender that it is unreliable and therefore not sufficient to form a conviction **R. -v-Turnbull [1977] Q.B 224**. Even though the judge may be of the opinion, that the evidence of the prosecution was thin, or perhaps very thin, and that there were serious but not fatal weaknesses in the case, he ought to leave it to the jury, if he felt that the evidence of certain witnesses were to be accepted by the jury as being truthful and reliable, there would be material on which a jury could without irrationality be satisfied of guilt. **[Taibo -v- R. [1996] 48 WIR 74.]** Taibo also suggested that in a case where the prosecution evidence is weak and confusing, the essential task of the judge was to scrutinize the evidence with some care for the benefit of the judge during his summing up.

- [13] In **The State -v- Alvin Mitchell [1984] 39 WIR 185 Chancellor Massiah of Guyana** at p190 said:

“A distillation of the principles stated in those authorities, stripped of whatever philosophical or esoteric content some may conceive them to possess, yields the following. A trial judge ought to send the case to the jury where in his opinion there is sufficient evidence upon which a reasonable jury, properly directed, might convict. I emphasize on the word “might” and on its subjective character. The trial judge ought, on the other hand, to withdraw the case, if the evidence is so unsatisfactory or unsound (established through cross-examination or otherwise) that no reasonable jury could convict on it, or the evidence even if all is believed is so weak, tenuous or insufficient, that it cannot yield a lawful conviction.”

THE CONCLUSION ON LABRADOR’S NO CASE:

- [14] It is common ground that the Crown’s case against Labrador, stood or fell on the reliability of the witness Plante. It was also an accepted fact that he was a confidence trickster, a person with numerous convictions for dishonesty, a man who was married ten times, and a person who might have had an interest to serve. He was also one, who allegedly did on Labrador, a repeat performance of what he did to another cell mate in Hawaii some 6 years ago.
- [15] I would accept, that these “degrees” behind Plante’s name, would **prima facie** alert a tryer of fact to approach his evidence with extreme caution. However, I do not agree that such credibility disqualifications without more, would be enough to satisfy a no case submission.
- [16] A notorious criminal, or even a “pathological liar”, as Mr. Fitzgerald described Plante, could still at times be truthful. It is therefore necessary to scrutinize his evidence in order to determine its character, its alleged weaknesses, vagueness or inconsistencies, in order to determine this issue, always remembering, that credibility was for the jury.

[17] Jeffrey Plante, a U.S. citizen, and a well documented criminal, testified as to a confession made to him by Labrador whilst they were both in the prison cell in Tortola.

[18] This is what Plante said:-

“About two days or two days anyway before Good Friday, we were both Roman Catholics, Mr. Labrador had kind of left the religion and was trying to get back in. And I had a lot of Catholic Bibles and prayer books and I was doing some Lenten praying in the evening, and Mr. Labrador asked me did I think God would forgive him if he had anything to do with killing someone. And I told him that I was uncomfortable with that and he ought to talk to Father Peters who was the priest there in Road Town with Saint Williams Church. **At that point, I asked him directly did he have anything to do with killing Lois McMillan and he answered me yes.** And I asked him why. And he said that it was over money and that she was no good. And I asked him how, how did it happen. And he said that they were driving from West End and they were arguing, the argument got heated and she tried to pull into the Police Station and he prevented that and that one thing led to another, it got out of control and that he dragged her into the water and put his foot on the back of her neck and drowned her. He then went to say that the jeep, her jeep, was taken to the ferry landing and that he took a trail from there up to Mr. Spicer’s house and I believe it took about forty five minutes.”

[19] Mr. Fitzgerald accepted before this Court, that except for the incriminating aspects disclosed in the alleged confession to Plante, that Labrador, in his evidence before the jury admitted substantially the conversation with Plante.

[20] Addressing the incriminating aspects of the conversion, circumstantial support of its details, if accepted, could be had from the evidence of Beulah Romney, Jeffrey Simms, Police Officer Bobb and Dr. Carey. Also, from the cause of death, and from items belonging to the deceased found in her jeep and in the area leading to where the body was found.

[21] The evidence of Jeffrey Simms supported the view that Labrador had an eager rendezvous with someone in the West End on that fatal night. Labrador under cross examination at one stage admitted that what Simms

said was true. If accepted, that evidence could show, that Labrador intended, on the night in question, to be in the area where the body was found. It was never suggested to Simms in cross examination that he was not speaking the truth.

[22] Beulah Romney, who lives in the area near where the body of the deceased was found, testified that around midnight of the night of the incident, she heard the sound of a car from the western direction. She heard a sudden application of brakes. She heard "screaming like for mercy" for about three to four minutes from the western area. She did not call the police because she did not know what it was. In answer to a question in cross examination "And where was the screaming in relation to where you saw the body," Romney answered "It is on that same direction down so I heard the screaming."

[23] Police Officer Bobb said in his evidence that he found the jeep in the West End Ferry Dock.

[24] The evidence led by the prosecution showed that the deceased was found face up in the shallow water. One side of her shoes was by her head. Her heart shaped pendant and her necklace were found, a piece in the jeep, a piece on the street in the area, and a piece on the beach. Her "scrunchie" for her hair was also found on the beach side. Her black hair band and a can of mace were found on the shore side. Her earrings were found in the car. All these items were identified by the deceased mother as belonging to the deceased.

[25] Dr. Carey found a mark on the deceased neck which he said could have been caused by the chain being pulled off.

[26] The evidence showed the cause of death to be by drowning in shallow water by force. The pathologist found sand in the airways of the deceased.

[27] When the aforementioned circumstances are coupled with the evidence that Labrador and Plante were in the same cell, that they spent some 23 hours per day together, that they had discussions about each other's cases, about religion, that they both were men of American background. It is difficult to yield to the submission of Learned Queen's Counsel for Labrador that at the close of the case for the prosecution Labrador had no case to answer, that Plante's evidence, was so manifestly unreliable that taken at its highest, was such, that no jury properly directed, could properly convict.

[28] In my judgment, this was a case where the Crown's evidence was such, that its strength or weakness depended on the view to be taken of Plante's reliability. If Plante was found to be reliable, then a jury, properly directed, on that evidence could properly come to the conclusion that Labrador was guilty of the offence charged. From this evidence they could have found an unequivocal and vivid admission of guilt by Labrador. Credibility is always a matter for the jury.

[29] In my considered opinion, the learned trial judge was correct when he overruled the submission of no case to answer with respect to Labrador. At the close of the case for the prosecution, the learned judge had before him a case eminently fit for a jury's decision. This ground of appeal fails.

[30] For obvious reasons, I propose to deal with the issue of the verdict being unsafe or unsatisfactory, after I have dealt with the other grounds of appeal, if at that stage it became necessary. I now address the issue of **Prosecutorial Misconduct**.

PROSECUTORIAL MISCONDUCT

[31] Queen's Counsel Mr. Fitzgerald, submitted, that Prosecuting Counsel Mr. Guerra, of the Bar of Trinidad and Tobago, in his address to the jury, was guilty of making prejudicial and inflammatory remarks. Learned Queen's Counsel argued that Mr. Guerra, by his emotive and inflammatory conduct of the case, deprived the appellant of a fair trial, and failed to act as a

minister of justice laying the facts fairly before the jury. Counsel then particularized the alleged misconduct as follows:-

- I. He conducted his cross-examination of the Appellant and the defence witness Tisha Neville in a bullying and emotive fashion.
- II. In his closing speech he repeatedly dwelt on the status of the Appellant and his principal witness, Tisha Neville, as foreigners and Americans and stressed by contrast the common identity of himself and the jury as Caribbean people. The appellant refers, by way of example, to the reference to "We will not tolerate any disrespect ..." the expression "We in the Caribbean"; the exhortation "Let us use our West Indian common sense"; the references to Tisha Neville as a foreigner trying to fool "us"; and the contrast of the "American way" and the "West Indian way." Prosecuting Counsel used the expressions "we" and "us"; repeatedly throughout his speech to suggest that he and the jury were on the same side, pitted against the Defendant. This was wholly improper.
- III. Prosecuting counsel improperly criticized the Appellant's sister, who was not a witness in the case, as a liar and invited the jury to infer that "lying is a natural tendency of the Labradors." Again, this was wholly improper. Though the judge interrupted, to protest, the damage had, by that time, already been done, and the emotive denigration of the Appellant continued thereafter unchecked by the judge.
- IV. Prosecuting counsel repeatedly denigrated the Appellant in emotive and improper fashion. He denounced him as the betrayer of his childhood friend; He emotively denounced him as a liar. He attacked him as a hypocrite, and repeatedly and improperly adopted Benedetto's description of him as "Pious". Finally he described him as "unfeeling" and "cold blooded". All this was improper because it appealed to the emotions of the jury, rather than inviting their analysis of the facts.
- V. Prosecuting counsel introduced evidence that was inadmissible, from a co-defendant's statement, and persevered with it despite objection by defence counsel and the judge.
- VI. Prosecuting counsel improperly invited the jury to infer that the transcript of Plante's evidence before the Hawaiian Court produced by Tisha Neville as evidence of his modus operandi was manufactured. The Prosecution had every opportunity to verify its authenticity and had no proper basis for inviting this wholly false conclusion.

- VII. Finally, prosecuting counsel improperly invited the jury to treat Ms Neville as “part of the defence team”, called her a liar, and denounced her as a “woman who can’t tell the truth about anything.” Since she had clearly told the truth about a great many highly relevant matters, this sweeping condemnation was totally unwarranted by the evidence.
- (VIII) The Prosecutor wrongly gave evidence about Roman Catholicism in his closing speech. This was despite defence counsel’s earlier complaints about his misleading assertions.
- (IX) He wrongly invited the jury to conclude that Labrador had no money and that therefore, money was a motive, as Plante had alleged. There was no evidence at all to back up this claim.
- (X) He improperly attacked the fact that the Appellant had been permitted to contact a TV station whilst on remand. This was prejudicial and unjustified.
- (XI) He improperly suggested that there might be more evidence from the prison”-
“There must have been a lot going on in the prison. How come? We have had no assistance from the prison.”

In fact, it was the Prosecutor’s duty to disclose details from the prison files which could have assisted the Defence.”

THE ROLE OF PROSECUTING COUNSEL

[32] Prosecuting Counsel, in prosecuting a case, acts as a minister of justice. He should appreciate that the Crown’s interest is not to secure a conviction at all costs but that its sole interest was to convict the right person. He should not regard himself as appearing for a party. He should lay before the Court fairly and impartially the whole of the facts which comprise the case for the prosecution, and should assist the Court on all matters of law applicable to the case. He should use his best endeavours to ensure that all evidence or material that ought properly to be made available is either presented by the prosecution or disclosed to the defence. It is the duty of prosecuting counsel to assist the Court at the conclusion of the summing up by drawing attention to any apparent errors or omissions of fact or law. He should appreciate that restraint and detachment should characterize the proper performance of his role. **[See Allie Mohammed -v- The State**

**(1998) 53 WIR 444: Archbolds Criminal Pleading 2001 Ed. Supplement
3 P. 301-302: R -v- Baldwin (1925) 18 Cr. App. R. 175. Para. 31A].**

[33] His role excludes any notion of winning or losing. His function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. This duty is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. It is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted. It is an investigation that should be conducted without feeling or animus on the part of the prosecutor, with the single view of determining the truth. **[Per Locke J in Boucher -v- The Queen {1954} 110 Canadian Council Case 263.]**

[34] **Locke J** went as far as to say that it was improper for Counsel for the Crown to express his opinion as to the guilt or innocence of the accused and he gave this reason:

“In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case.

In an address by the late Mr. Justice Rose, which is reported in 20 C.L.T. 59 at p. 62, that learned Judge referring to Mr. Rogers' article pointed out a further objection to any such practice in the following terms: “Your duty to your client does not call for any expression of your belief in the justice of his cause....The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a deciding advantage over his opponent if represented by a younger, weaker, or less well known man.”

In my opinion, these statements accurately define the duty of Crown counsel in these matters.”

[35] There is no doubt that Mr. Guerra, in his closing speech, did so in a robust manner. In applying the principles above mentioned, with which I agree, this Court will have to do so in the context of its own environment. We have intelligent juries but they are not Oxonians. They have to be spoken to, even by the judge, in the language and style that they will understand. There is nothing wrong with a prosecutor delivering a robust but respectful speech.

[36] This was a murder case, being tried in a West Indian Court, with a West Indian jury. The case involved an American accused, an American victim and American witnesses. This region is subject to the full blast of the American television stations and as a result, the American method of court procedure and justice are well known. It is not always the same as ours. The entire region would have witnessed on Television the O.J. Simpson trial.

[37] The alleged offending words of the prosecutor have to be looked at in above context. These are some of the challenged words.

“You have in the instant case a real Caricom Court, and we are all steeped in the British sense of justice and that is the jury must only act on the evidence which was heard from the witness box and the exhibits which were tendered to you. We do not know about the trial by the Press. We do not know about trial by television. We do not know about circuses such as O.J. Simpson where you can sit in your living room and see what is going on in the courtroom.

We who have been brought in the British tradition of justice have institutions which we respect, our justice system, the church, our Government, things which become sacrosanct to us and we will not tolerate any disrespect by anyone no matter who it may be or where they may come from to the laws and morales of our country.

... but we in the Caribbean know what boyhood and girlhood friends mean to us.

Members of the Jury, let us use our good West Indian common sense. And not because people come from very large countries, large metropolitan countries we are going to allow them to fool us. Look at the evidence in the circumstances in which it is being given. Is she not part of a plot to undermine Plante's evidence?

What does this witness take us for? That we have no sense? We can't understand? That she come here to the West Indies and as the English say, "pull the wool over our eyes. In Trinidad we say "bramble we."

This woman is playing with our grey matter. She figure that they can come from their big country and fool people here. If that is the American way, we in the West Indies know it is different."

[38] The criticism of the speech continued because Mr. Guerra described Labrador as a "betrayal of his childhood friend," denounced him as a liar, and a hypocrite, described him as pious, unfeeling and cold blooded. He also described defence witness Tisha Neville as a liar as part of the defence team and as a woman who can't tell the truth about anything.

[39] I agree with the submission of Mr. Fitzgerald, that the prosecutor was quite wrong to tell the jury that "lying is a natural tendency of the Labradors", when he based that opinion, on his opinion, that Labrador's sister who was not a witness in the case, was a liar.

[40] However, I also agree with the submission of Mr. Williams for the Crown, that the damage that might have been done by that statement was immediately neutralized by the prompt rebuke by the trial judge who described it as being "wholly unsatisfactory" and the acceptance of that rebuke by Mr. Guerra.

[41] Addressing the above quoted passages, the real criticism of Counsel for the appellant was the use of the pronoun "we" and "us". Learned Counsel submitted that Mr. Guerra when he thus addressed the jury was ingratiating himself with them thereby making them feel they were part of the prosecuting team.

[42] There is no merit in this criticism. It is speculative and far fetched. In my view, this could only have been Mr. Guerra's style of speech and it was the factual situation. He is a West Indian and the jurors are West Indians. I am also of the view, that learned counsel for the Crown, was quite justified in

advising the jury that the standard to be applied in the determination of the case was not the American standard but the Caricom or Caribbean Standard. Another prosecutor might have been more suave in his language, but I cannot fault Mr. Guerra, to the extent suggested by Mr. Fitzgerald. He was advising the jury to use their lay persons' experience and examine the evidence, and not to allow the O.J. Simpson scenario to influence their thinking.

[43] I consider Mr. Fitzgerald's submission that the jury, because of these remarks, could be driven to convict because of prejudice against non-West Indians, to be over-sensitive. The Crown depended for Labrador's conviction of the murder of an American woman, not essentially on West Indian witnesses, but mainly on two Americans. I cannot discern any form of xenophobia in the speech of Queen's Counsel Guerra.

[44] I was somewhat disappointed, that Learned Queen's Counsel, who is of the Mother Country, where courtesies and good manners are amongst their tourist attractions, would describe as prosecutorial misconduct, and criticize Queen's Counsel Guerra, because he asked Labrador to address him as "Sir". That was only a lesson in good manners.

[45] I also can find no jurisdiction for any criticism of those parts of Mr. Guerra's speech that spoke of Labrador's alleged lies. What was spoken therein was consistent with the legal direction of the judge to the jury's approach on the issue of lies. At every stage when learned Counsel referred to lies of the appellant, he quite properly reminded the jury that they were not to convict him because he might have lied, that they would have "to go back to the evidence of the prosecution."

[46] Referring to the comment of the prosecutor as to the "pious" appearance of Labrador, I do not see misconduct therein. There was evidence from Plante about Labrador enquiring about the forgiving nature of God, and there was comment from his then lawyer Q.C. Richard Hector, in his address to the

jury, about Labrador's appearance in the witness box, trying to smile and be nice because he did not want to displease anyone despite the fact that he will have scars "under this system." Mr. Hector was there touching on demeanor and so was Mr. Guerra. In my view the comment was legally permissible.

[47] I also consider to be legally permissible, the prosecutor's question in his address "How unfeeling and cold blooded can he be." If the jury were to accept Plante's evidence, then it was open for them to so find.

[48] Queen's Counsel Mr. Guerra in his address, referred to something said by co- accused Benedetto to Labrador in the presence of Plante. This was objected to by Mr. Hector. The trial judge intervened and stopped Mr. Guerra and strongly directed the jury not to consider it. It had to do with Labrador's alleged simulation of being a pious person. I consider this lapse of Mr. Guerra to be of no significant moment to the justice of the case especially having regard to the trial judge's reaction to it.

[49] Labrador through his lawyer at the trial introduced into evidence "a transcript" of the Hawaii proceedings which tended to show that Plante had indulged in a similar exercise in Hawaii. Mr. Guerra in his address invited the jury to find that the transcript was manufactured. Mr. Fitzgerald described this comment as improper, as according to him, the prosecution had every opportunity to verify its authenticity. Mr. Williams responded that the prosecution did not receive the transcript until just before it was tendered through the last witness in the case, that it was put in to discredit Plante but that it was not put to Plante. He submitted that the defence preferred the element of surprise as a tool.

[50] In my judgment, when regard is had to the unhealthy state of Tisha Neville's evidence in cross examination as to the creation of the transcript, and the fact that the transcript had no official stamp, the prosecutor's invitation to the jury was not unjustified. I do not agree that Tisha Neville, or for that matter

Labrador, was subjected to a bullying cross examination. Tisha Neville especially from her answers in cross-examination, appeared to have been a difficult witness.

[51] The cross examination of Tisha Neville revealed her to be a witness that a jury had to be careful with before they accepted her evidence. I therefore do not agree with Mr. Fitzgerald that Mr. Guerra misconducted himself when he severely criticized her honesty of speech. I have already referred to what Mr. Guerra said.

[52] Mr. Fitzgerald further submitted that the prosecutor failed to discharge his duty as a minister of justice when he failed to adduce evidence that the deceased was present at the Jolly Roger Inn between 9.30 pm and 10.45 pm on the evening of her death. Mr. Williams, in response, submitted that evidence placing the deceased leaving the Jolly Roger over an hour before death, was not an essential part of the narrative. He said that fact was never denied and that a witness Crawford, had deposed as to this but was unavailable at the trial. He said the defence were given a revised sequential list of witnesses that the Crown intended calling, that all were called, and that the prosecution exercised its discretion fairly.

[53] The decision whether or not to call a witness for the prosecution is primarily a judgment call of the prosecutor. In general, the court will only interfere with it, if he has gone wrong in principle. The principles governing the exercise of this discretion have been settled by the **English Court of Appeal in R -v- Russell Jones [1995] Cr. App. R. 538**. These principles emerged from previous authority and from rules of practice. They were not to be regarded as a lexicon or rule book to cover all cases. I agree with them. They are as follows:

- “1. Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intends to rely), if the defence want those witnesses to attend. In deciding

- which statements to serve, the prosecution have an unfettered discretion, but must normally disclose material statements not served.
2. The prosecution enjoy a discretion whether to call, or tender any witness they require to attend, but the discretion is unfettered.
 3. The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. The dictum of *Lord Thankerton in Adel Muhammed El Dabbah .v. Att. - Gen. for Palestine* [1944] A.C. 156, PC (court will only interfere if prosecutor has been influenced by some oblique motive), does not mean that the court will only interfere if the prosecutor has acted out of malice; it means that the prosecutor must direct his mind to his overall duty of fairness, as a minister of justice. Were he not to do so, he would have been moved by a consideration not relevant to his proper task — in that sense, an oblique motive.
 4. The prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, they regard the witnesses's evidence as unworthy of belief. In most cases, the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution have discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.
 5. It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a witness has to say is at best marginal.
 6. The prosecutor is also the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one that is

less favourable to the prosecution case than that of the others.

7. A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the prosecution rely. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.

[54] Based on Mr. Williams' response to the submission and, having considered the evidence as to time of death, and having read the statement of the proposed witness, it is difficult for this court to say, without more, that the prosecutor went wrong in principle, when he exercised his above-stated discretion. The evidence of the proposed witness, in my view, would not have assisted either side and would not have interfered with the testimony of Plante.

CONCLUSION ON PROSECUTORIAL MISCONDUCT

[55] From all that I have said above, it is obvious that I am not agreeing with Mr. Fitzgerald that there was prosecutorial misconduct on the part of the prosecutor. There were other criticisms that he made of Mr. Guerra concerning his view on Catholicism, whether Labrador had no money, about Labrador being permitted to contact a TV Station and about what else might have been going on in the prison. I find nothing improper in those comments. They were fair comments on the evidence. Some might say that the attacks on the credibility of Labrador and Tisha Neville, might have raised the temperature unnecessarily with the jury, because of the strength and context of the language used, but in my judgment, those attacks were evidentially supported and therefore did not exceed the permissible limits as are recognized within the West Indian jurisdiction. In any event, even if it could be said that Mr. Guerra may have crossed the threshold, my view is there was no miscarriage. Both himself and the trial judge advised the jury, that the jury were the sole judges of the facts and any opinion on fact

expressed by Counsel on both sides and the judge, they could disregard. This ground fails. I now address the learned judge's summation to the jury.

THE JUDGES SUMMING UP

DIRECTION ON LIES

[56] Despite the submission of Mr. Williams to the contrary, I agree with the submission of Mr. Fitzgerald that the Crown to a certain extent, relied on the alleged lies of Labrador to bolster its case against Labrador. In his address to the jury, Mr. Guerra stated that **"Plante's evidence finds support in the lies told by William Labrador:" "if William Labrador is innocent what is he lying for." Why is he lying."** Given this fact, generally speaking, one can say that it may have been prudent for the judge to have given the **Lucas Direction (1981). 73 Cr. app. R159.** The trial judge did not give such a direction. Mr. Fitzgerald submitted, that this was a non direction which amounted to a misdirection, and asked that the conviction be quashed.

[57] A **Lucas** direction is not required in every case where a defendant gives evidence and he may have lied. The warning is only required if there is a danger that the jury may regard the defendant's lies as probative of his guilt of the offence which they are considering. How far a direction is necessary will depend upon the circumstances of the case. **In Burge and Pegg [1996] 1 Cr. App. R. 163,** the Court of Appeal of England gave the following circumstances where a **Lucas** direction will usually be required.

"1 Where the defence has raised an alibi. 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support of corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant. 3. Where the prosecution seek to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved. 4. Where, although the prosecution have not adopted the approach in category three above, the judge reasonably

envisages that there is a real danger that the jury may do so.

The direction should, if given, so far as possible be tailored to the circumstances of the case, but it will normally be sufficient if it makes two basic points — first, that the lie must be admitted or proved beyond reasonable doubt; second, that the mere fact that the defendant lied is not of itself guilt since defendants may lie for innocent reasons, so that only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case.”

[58] In **Middleton, March 23, 2000, CA {THE TIMES April 12, 2000}** the Court of Appeal in England expressed the opinion that “generally it is inherently unlikely that a direction would be needed where the lies were told during the defendant’s evidence. Where that was the case, the consequences of the rejection of his evidence by the jury would usually be covered by the general directions on the burden and standard of proof, and a **Lucas** direction would be circular and therefore confusing.” (See also **Lincoln Defour -v- The State of PC 32/1998**) delivered on 21 July 1999.

[59] Having perused the closing speeches of both sides and the trial judge’s summing up as a whole, whilst I consider that **ex abundante cautela**, it might have been more prudent for the trial judge to have given the **Lucas** direction, I do not feel that any injustice was done to Labrador by the absence of such a direction.

[60] I have come to the conclusion because the alleged lies that Labrador may have told would have been during his evidence. Also, both Mr. Guerra and the learned judge, advised the jury on more than one occasion, that they could not convict Labrador merely because he may have lied.

[61] It has been said, that the last few words of a summing up, are the words that would remain ringing in the ears of jurors as they retire to consider their verdict. In my view, the last words uttered by **Benjamin J** to the jury before they initially retired was so favourable to Labrador on the issue of **lies** that they negated any injustice that the lack of a **Lucas** direction might have attracted. This is how the trial judge sent the jury out:

"Now, Madam Foreman and Members of the Jury, you must consider all aspects of the accused's defence very carefully, every aspect of his defence. Do not make up your minds beforehand. You must carefully consider what the accused has told you in his defence and in the evidence of Miss Neville. He exercised his right to give sworn testimony and he was thoroughly cross-examined, and your function is to have regard to all his answers and to decide whether he is telling you the truth. He purported to give you his side of the story. He is in fact saying that he was not there. If you believe his story, you must acquit him and find him not guilty. If you think his story can be believed, you must give him the benefit of the doubt and return a verdict of not guilty. **However, if at the end of the day you do not believe him, maybe because you feel that he is telling you lies, that is not a ground upon which you can convict him. If you disbelieve what the accused has told you, then you must go back to the prosecution's case and examine the prosecution's evidence as a whole.** After a careful examination of the prosecution's case, if you are satisfied that the accused is guilty to the extent that you feel sure, only then you must return a verdict of guilty. You must not convict the accused purely because you might find his defence is weak or it consists of lies. You can only convict on the strength of the prosecution's case."

This sub-ground fails.

PLANTE'S EVIDENCE [NON DIRECTION OF CAUTION]

- [62] Learned Q.C. Mr. Fitzgerald next submitted that the trial judge erred when he failed to direct the jury that they must treat the evidence of Plante with great caution.
- [63] It was accepted that because of Plante's vile and dishonest character, and the fact that when he gave his evidence he may have had an interest to serve, that his evidence was suspect and required care and caution before acceptance. Learned Queen's Counsel suggested that a strong warning to treat his evidence with caution was necessary. Interestingly enough, during the summing up, and at the request of the trial judge for assistance on the issue, both Mr. Guerra for the Crown and Mr. Hector for Labrador, advised the judge that no special direction was necessary.
- [64] It is always a matter for the discretion of the trial judge whether or not to give the warning. The nature of the warning and whether or not to give it would depend

upon the circumstances of the case, the issues raised and the content and quality of the witness' evidence. If the question arose, as it did in the instant matter, it was desirable that the question be resolved by discussion with Counsel in the jury's absence before final speeches. The question was so resolved in the instant matter, against giving the jury such a warning, albeit during the summing up. If the warning was to be given, it should be done as part of the judge's review of the evidence and his comments as to how the jury should evaluate it, rather than a set-piece of legal direction. Where some warning is required, it does not have to be invested with the whole florid regime of the old corroboration rules. This Court will only interfere with the judge's exercise of his discretion if it is unreasonable in the **Wednesbury** sense. [See **Associated Provincial Picture Houses -v- Wednesbury Corpn. (1948) 1K.B. 223**] I adopt these principles taken from **MAKANJUOLA -v- R [1995] 2 Cr. App. R. 469 [C.A.Eng]** and apply them to the instant matter.

- [65] **Phipson on Evidence 15th Ed.** Para 13-10 at p. 305 also adopts **MAKANJUOLA** and states that a warning will only be appropriate where there is evidential basis for suspecting that it is dangerous to rely on the particular witness' testimony.

- [66] In a criminal trial where the trial judge believes that a witness might have an interest to serve, the judge is not required to treat the witness as an accomplice nor to warn the jury as if he was one. The overriding requirement is that the defence must be put fairly and adequately to the jury. Where a witness's evidence might be tainted by improper motive, the trial judge had a discretion, depending on the facts of the individual case whether or not to give the jury some adequate caution or warning [**Wanzar -v- The State [1994] 46 WIR 439**].

- [67] In the instant matter, the learned trial judge read Plante's evidence to the jury, highlighting the confession, his criminal activities, his convictions, and exposed every other aspect of his evidence which may be likely to put his evidence in doubt. He told the jury that Plante was cross examined at great length in a cross examination which was aimed towards his credibility and he said "**you must have**

regard to the cross examination in that light whether Plante can be believed, whether he is a believable person.” The learned judge then recounted the cross examination fully, again exposing everything that could put his evidence in doubt. He then dealt with the evidence of Labrador and then his witness Tisha Neville. **Benjamin J** then directed the jury...**“you must ponder deeply on the matter and see whether it affects your assessment of Plante’s credibility.”**

[68] Jurors are presumably, intelligent people. They would have seen and heard Plante. They would have heard Mr. Hector’s closing address, exposing the considerations which could have put Plante’s veracity in doubt, and then they would have heard the learned judge doing the same. It must have been obvious to them, even without any warning that they had to tread with caution on Plante’s evidence. However, the judge, in addition did warn them as above mentioned in language they would have understood.

[69] Given the legal requirements and the circumstances that prevailed at the trial, abovementioned, I conclude that the warnings given by the trial judge were adequate and that there could not have been any miscarriage of justice. The sub-ground of appeal is also devoid of merit.

MISDIRECTION OF FACT

[70] As part of the confession, Plante testified that Labrador told him that the deceased met her death by drowning. The trial judge directed the jury that at that time, even the Pathologist Dr. Landron, had not reached the conclusion that the cause of death was drowning and he continued:

“so that you may well conclude that Mr. Plante was right when he was saying that he did not know the deceased drowned because even Dr. Landron had not reached that conclusion.”

[71] The submission of Queen’s Counsel Fitzgerald, was that this was a misdirection of an important issue of fact, that directly bolstered the credibility of the prosecution’s claim that Labrador had revealed to Plante the manner by which the deceased met her death. He suggested that Plante would have read the cause of death from the newspapers.

- [72] It appears from Dr. Landron's evidence that at the end of his examination of the deceased body, he was of the view that the cause of death was consistent with drowning but as to the manner of death he had to await the finding of toxicology.
- [73] This was obviously a misdirection of fact. However, the real issue behind the argument, was whether Plante knew of this finding of Dr. Landron at the time he told the police of the confession. There was evidence that the incident was given press coverage and that Plante read about the incident. Interestingly though, Plante was never questioned by Mr. Hector or anyone whether he read in the press that the cause of death was drowning. He was questioned by Mr. Dennis and his answers were that he had seen newspaper articles in relation to the case and that he was familiar with what was being published, "not everything, certainly."
- [74] To accede to the request of the learned Queen's Counsel to quash the conviction because of this misdirection would be to quash the conviction on speculation.
- [75] It is my considered opinion, that there is not enough, without speculating, to saddle Plant with knowledge of the cause of death from the press and not from Labrador, at the time he recounted Labrador's confession to the police.
- [76] Therefore, even though there was this misdirection of fact, the challenged direction could not have caused a miscarriage of justice. This third sub-ground of appeal fails.

IMBALANCE

- [77] Mr. Fitzgerald then submitted that the overall effect of the summing up of **Benjamin J** was unbalanced and unfair. Learned Counsel contended: (1) that the judge dealt at length on Labrador's alleged lies. (2) he engaged in a series of adverse comments in which he invited the jury to prefer the evidence of Inspector George, Jeffrey Simms and Plante to that of Labrador (3) he posed rhetorical questions hostile to Labrador (4) he invited the jury to speculate in a number of ways adverse to Labrador (5) he engaged in a number of unfortunate and

prejudicial characterizations of Labrador's evidence and (6) he failed to remind the jury of the number of significant and important pointers to Labrador's innocence.

[78] **In Gilbert Gordon and the Queen, Criminal App. No 8 of 1995, St. Christopher and Nevis Court of Appeal May. 13, 1996**, this Court distilled from authority, this law on Judicial imbalance:

"A Judge in adversarial proceedings must always remain impartial and must at all times maintain a proper balance between the two sides. He is entitled to make comments during his summation to the jury. However, his comments must not go beyond the proper bounds of judicial comment which would make it difficult, if not practically impossible for a jury to do other than that which he was plainly suggesting. His comments must not be so weighted against an accused person as to leave the jury little real choice other than to comply with what were obviously the Judge's views or wishes. Where a trial is by jury, a judge ought not to use the jury as a vehicle for his own views. A summing up that is fundamentally unbalanced is not saved by the continued repetition of the phrase that it was a matter for the jury.

[79] In determining this issue, it is necessary to read the summing up as a whole. I have done so. What I see disclosed therein, is the trial judge reciting fully all the evidence that was led before him with interjections and comments when necessary. He dealt with the cross examination of the witnesses and the criticisms emanating therefrom with respect to the main witnesses. He left no stone unturned when he dealt with the evidence and extremely bad character of prosecution witness Plante and similarly with the evidence of Labrador and his witness Tisha Neville.

[80] In my judgment, the trial judge's handling of Labrador's alleged lies, was no greater than his handling of prosecution Plante's bad character.

[81] The submission that the trial judge engaged in a series of adverse comments against Labrador in relation to the evidence of George, Simms and Plante, I find to be totally unfounded. I have examined the comments of the trial judge referred to by Mr. Fitzgerald. I do not consider that they went beyond the proper bounds of

judicial comment or so weighted against Labrador as to leave the jury little real choice other than to comply with the judge's orders.

- [82] In my view, the summing up read as a whole, showed the trial judge, in an effort at assisting the jury, reminding the jury of the evidence and posing questions that they may need to ask themselves on the evidence during their deliberations. It did not strike me that he was at any time attempting to use the jury as a vehicle for his own views or that he had lost his sense of balance. He left the matter wholly in the hands of the jury. I cannot see the imbalance and unfairness that Mr. Fitzgerald has seen. This sub-ground lacks moisture.

OMISSION TO SUMMARIZE KEY EXCULPATORY POINTS.

- [83] The final submission of learned Queen's Counsel for Labrador on the summing up, was centered on certain omission in the evidence of which the judge made no mention to the jury.
- [84] In my view, this was a starved submission. Without repeating those evidential omissions here, my conclusion is that those were matters more for counsel for Labrador than for the trial judge. The trial judge reminded the jury of the evidence of all the witnesses. He did mention to them about the negative DNA findings, one of the matters complained of by Learned Counsel that he did not do.
- [85] In my opinion, to saddle him with what was suggested by Mr. Fitzgerald would be to transpose him into an advocate for Labrador. There is no obligation on a trial judge, to remind the jury of every little point that may be favourable to an accused, especially in a case where the accused is favoured with competent legal representation. Once he puts the defence fairly to the jury he would have satisfied his legal obligation.
- [86] In any event, these omissions of the trial judge were adequately dealt with by very able Queen's Counsel Mr. Richard Hector, in his address to the jury. I therefore do not see any injustice even if it could be said that Mr. Fitzgerald's submission was good. This final sub-ground of appeal fails.

CONCLUSION ON IMBALANCE

- [87] For all these reasons, I would conclude on the issue that the summing up of **Benjamin J** was fair and balanced.

THE JURY'S DELIBERATION AND VERDICT

- [88] The jury in this matter retired for their deliberations at 12:46 pm on May 10, 2001. They deliberated until 6:21 pm of the said day. At that time, they were not unanimous. They had a 7-2 verdict. The trial judge then invited them to continue their deliberations in an effort at arriving at a unanimous verdict. He asked them if they needed further directions. The foreman replied that they needed to hear once more the transcript that dealt with the evidence of Plante, specifically the alleged confession of Labrador. The judge offered to read the "important portions" back to them. The learned judge then re-read to them the portions of the transcript that dealt with the alleged confession. The judge then asked the Foreman whether a copy of those pages he just read would assist them in the jury room. He said yes. **Benjamin J** then asked the lawyers. Mr. Guerra had no objection. Mr. Hector answered "if that's all they need." The trial judge had, before that, invited the lawyers in his Chambers and enquired of them whether he should give the full transcript to the jury. All lead counsel, including Queen's Counsel Hector for Labrador, agreed that the full transcript should not be given and that the jury must specify which part they wanted to see. The foreman said they did not need anything else.
- [89] The jury then retired again at 6:36 pm. The transcript was sent to them. They returned and delivered a unanimous verdict at 8:12 pm of the said day.
- [90] The submission of Queen's Counsel Fitzgerald was that improper pressure was imposed on the jury to reach their verdict. He submitted that, they were made to deliberate too long on one day, and they should have been offered an overnight break. Learned Counsel also challenged the fairness of the judge, when, in purported compliance with the jury's request, he only read and gave them, the

examination-in-chief of Plante's evidence of the confession. He described this as improper and prejudicial.

[91] A jury is entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance would constitute an irregularity. **[Berry -v- R. 41 WIR 244.]**

[92] The request of the jury in this matter was clear and unambiguous. The help needed was to hear again the alleged confession of Labrador to Plante. This the judge read and gave them. Counsel for Labrador accepted at the trial, that if that was all they needed, that is what they should get.

[93] The case of **R -v- McQuiston (1998) 1 C.A.R. Otton LJ** in the English Court of Appeal gave this opinion:

"By parity of reasoning we take the view that where a judge exercises his discretion that the video should not be replayed and where he reads verbatim and substantially from the transcript he should still warn the jury not to give the complainant's evidence in that form disproportionate weight simply because it is repeated well after all the other evidence and to bear in mind the other evidence in the case. In particular it is still incumbent upon the judge to remind the jury of the complainant's cross-examination and re-examination from his notes and, where appropriate, any relevant part of the defendant's own evidence."

[94] I do not disagree with that opinion. That was not done in this case. However, my view is that no injustice was done and there could have been no miscarriage of justice by this omission. The lawyers for both sides recognized this at the trial. The cross examination on the confession was the attack on the character of Plante which, at the stage of the "further directions", must have been indelible in the minds of the jury. Also, Labrador's stance on the confession was simple denial.

[95] I now address the submission of undue pressure. It is a matter for the exercise by the judge of his judicial discretion, based on the circumstances of the particular case before him, how long a jury should be left if they are having difficulty with their verdict, whether he should discharge them or give them more time, or give them an overnight break.

- [96] In the instant matter the trial judge exercised that discretion. The circumstances he had before him were a lengthy trial, retirement first after midday, and a request for further directions, simply to remind the jury of the confession.
- [97] Given those circumstances, I would say that the learned judge exercised a proper judicial discretion when he did not offer the jury an overnight break. It was brought to our attention that the jury were comfortably housed and were given adequate nourishment. The transcript showed that they arrived at their verdict just about 1½ hours after being given further directions.
- [98] In **Berry -v- R.** (Supra), the **Privy Council** considered it a reasonable course of action and not undue pressure, when the trial judge sent the jury out to consider their verdict at 5:28 pm, after spending the day listening to the end of prosecuting counsel's address and the whole of the summing up. The instant matter is different from **Defour -v- State (1991) WIF 173**, where the trial judge in that case gave the jury an additional time limit of 30 minutes to arrive at their verdict. That was held to be undue pressure. It is of fundamental importance that, in their deliberations, a jury should be free to take such time as they needed. [**R -v- McKenna [1960] 1 QB 411 C.A Eng.**] That principle was not breached in the instant matter.
- [99] In my judgment, given the aforementioned circumstances, there was no undue pressure imposed on the jury during their deliberations. For these reasons, this ground of appeal fails.

ADDITIONAL EVIDENCE

- [100] During the hearing of this appeal, Counsel for Labrador asked this Court to look at statements of numerous witnesses who gave no evidence at the trial, **in order to arrive at a just decision in this matter**. These statements were all unsworn and untested. As I understood Mr. Fitzgerald, he did not intend calling these witnesses, he was not reopening the case, and he was not asking for a retrial. His sole purpose was for us to use the statements, as they were, against the case for the Crown.

- [101] I have never before encountered this procedure as suggested by Mr. Fitzgerald. I know that the Privy Council, within recent times, have been encouraging a procedure for the production of statements at the hearing of appeals before that body. However, if I am not mistaken, when they do so, they would purport to act under the fresh evidence rule and they would then refer the matter to the inferior tribunal to have the witnesses testify and the evidence tested. I do not subscribe to the view that a Court of Appeal could arrive at a just decision, and quash a conviction, relying on unsworn and untested statements, as submitted by Mr. Fitzgerald. To accede to such a submission would be to create a procedure of horrendous magnitude.
- [102] On this question of doing justice, I may have been persuaded by this argument of learned Queen's Counsel, if what he sought to do was e.g. to produce a legally authenticated official document, say, Plante's record of previous convictions, had Plante not admitted his dishonest and criminal "degrees". It could then have been successfully argued that the admission in evidence of such a document, which was legally permissible without more, would have assisted in determining the overall justice of the case. But I do not see how that end could have been achieved by asking us to look e.g. at two conflicting unsworn and untested statements of the Hawaii prosecuting authorities, as to why Plante was not called as a witness at the new trial of the accused there. That is a virtually impossible task and, as earlier mentioned, a bad precedent. Justice is a two way street.
- [103] Also, Plante testified that Labrador had a knife in the prison cell and as a result he was afraid of Labrador. Mr. Fitzgerald asked us to look again at an unsworn and untested statement from the Prison Authorities, which stated that they found no knife in the cell. In my view, merely looking at that statement would not assist. It was not evidence in the case. In any event, the statement is not unequivocal. The fact that no knife was found did not necessarily mean that none was there.
- [104] Mr. Fitzgerald advised the Court that he was not seeking to adduce fresh evidence as contemplated by the fresh evidence rule. He said this despite what he said in

his skeleton arguments that he was inviting the Court to admit the evidence pursuant to **S32 of the West Indies Associated States Supreme Court Virgin Islands Act Cap 80**.

[105] The provisions of this **Act** do not admit of the procedure suggested by Mr. Fitzgerald. I do not propose to use the statements in my determination of this matter. In any event, their proposed probative value related only to Plante's credibility which was within province of the jury and quite unsuited for this Court. In my opinion, even if it were legally permissible for us to use them, my conclusion would have been, that so much having already been evidenced by way of challenge to Plante's credibility, that I am certain that the jury hearing this additional evidence, would, having regard to the other circumstances of the case, have had the same opinion of Plante's credibility as they had at verdict stage.

[106] I would therefore refuse the application. Diligence of counsel for Labrador at his trial could have had that evidence displayed before the jury. No reasonable explanations has been proffered to this Court why the evidence was not given at the trial. **[See Williams Cardinal -v- R. (1998) 53 WIR 162]**.

VERDICT UNSAFE AND UNSATISFACTORY

[107] As mentioned earlier in this judgment, Plante's evidence of the confession was a vivid and unequivocal admission of the guilt of Labrador. The circumstances related in the confession were supported circumstantially by evidence of other prosecution witnesses. The jury heard all the evidence, saw the witnesses and came to their conclusion obviously accepting the testimony of Plante. The summing up could not have been seriously faulted. I have no lurking doubt in my mind as to accuracy of the verdict. I cannot therefore say that the verdict of the jury was unsafe and unsatisfactory.

CONSLUSION ON LABRADOR'S APPEAL

[108] For all these reasons, I would order that the appeal of Labrador be dismissed. The conviction and sentence are affirmed.

THE APPEAL BY THE CROWN AGAINST SPICER

[109] As mentioned at the start of this judgment, the Crown has appealed against the trial judge's ruling, upholding a no case submission in favour of Spicer. In determining the issue **Benjamin J** said:

"The present case against Spicer is riddled with imponderables and is inherently tenuous. The Jury would be left to wander in a minefield of speculation there being no framework within which to place the evidence within the Prosecution's case. I have come to the reluctant conclusion that the case against Spicer is less than thin even taking the individual bits of circumstantial evidence at their highest. Therefore, I hold that there is insufficient evidence to mandate the No 2. accused to lead a Defence to the charge of murder."

[110] In **Crosdale -v- R. (1995) 46 WIR Lord Steyn** observed at p. 285

"a judge and a jury have separate but complementary functions in a jury trial. The judge has a supervisory role. Thus the judge carries out a filtering process to decide what evidence is to be place before the jury. Pertinent to the present appeal is another aspect of the judge's supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury. Lord Devlin in *Trial by Jury* (the Hamlyn Lectures (1956, republished in 1988) aptly illustrated the separate roles of the judge and jury. He said at page 64):

"...there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examination of the sort to test the chain of evidence for weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is...The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make the verdict."

[111] The evidence led by the Crown against Spicer related to (1) his friendly association with the deceased and the other accused (2) the fact they all socialized together (3) that they were together on the night of the Murder (4) they left together to meet someone that night in the general area where the deceased was found and about the same time she was killed (5) that sand associated with his shoes was, according to Professor Pye, **highly probable** to have come from the general area where the deceased body was found (6) that there was a blood spot on the shirt that he admitted wearing on the night of January 14, 2000 (7) that he was in charge of a house where unused tampons were found similar to the brand of the tampons found in the deceased hand bag, a house that Lois McMillen would visit. (8) that he was part of a discussion with Benedetto to make taxi driver "Solo" unavailable for police investigation (9) that his fingernails were cut very low (10) that he told a lie to the police as to why his shoes were wet and sandy and (11) that despite his close association with the deceased family, he made no contact with them upon hearing of the death.

[112] The submission of Mr. Williams was, that taken cumulatively, these eleven circumstances made out a **prima facie** case for Spicer to answer.

[113] In my view, if the circumstances of the blood on Spicer's shirt and the sand on his shoes could be said to point directly to Lois McMillen and no where else, then I would agree with Mr. Williams. Without them, the other nine circumstances were of no probative value, even when taken cumulatively. It is therefore necessary to examine the forensic evidence of the sand and the blood.

[114] Forensic Scientist Michael Appleby in England, found on both the left and right shoulders of Spicer's shirt, tiny or miniscule blood stains of a millimeter or less in diameter. Forensic Scientists Cheryl Corbin in Barbados, and Sheron Brydon in Jamaica, found that a stain over the pocket on the front chest of the shirt, proved negative for the presence of blood.

- [115] Appleby testified that from the spot on the right shoulder of the shirt, his DNA (LCN) testing yielded a particular DNA character which could have been from the female sample identified to be from the deceased. It was however clarified that the DNA found might not be related to the blood at all and all that was detected was background cellular material which could have been transferred from mere touching. He said that on a standard scale used by most scientists in Britain, the evidential strength of the finding was fixed at extremely limited, which he put at between zero and 1 on a scale of one to ten.
- [116] Appleby also concluded that a biological examination of Spicer's shoes showed nothing associated with the deceased. Professor Pye had given evidence that the sand associated with these shoes was highly probable from the general area where the body was found. The sand found was approximately 15% or 0.2 grams inside one of the shoes. A mere speck.
- [117] Taking the evidence at its highest, I agree with the conclusion of **Benjamin J** mentioned above. The forensic evidence of the Blood and Sand did not reach the standard required in criminal case, and, without that evidence, the other circumstances became meaningless in the context of the offence charged.

CONCLUSION OF SPICER

- [118] For these reasons, I conclude that **Benjamin J** carried out a proper filtering process and did not err when he upheld the submission of no case to answer. The appeal of the Crown is dismissed. The learned judge's order of acquittal of Spicer is affirmed.

THE APPEAL OF THE CROWN AGAINST BENEDETTO

- [119] Here again, Mr. Williams argued that **Benjamin J** was wrong when he upheld the no case submission in favour of Benedetto. Additionally, Mr. Williams submitted that the judge should have called on Benedetto to answer to an alternative offence of **Accessory After The Fact**.

- [120] It is not disputed that there was no forensic or physical evidence linking Benedetto to the deceased or to the scene where the body was found.
- [121] The evidence against him were (1) scratches on his arms and legs and (2) evidence from Plante, that Benedetto and Labrador had frequent heated arguments, and in one such argument Benedetto ran up to Labrador and told him "he had better pay his father back the \$350,000.00 he owed him and stop acting so pious, that he, Labrador was more guilty than he, Benedetto, was." Plante also recounted another alleged incident where Benedetto went up to the cell occupied by Plante and Labrador, told Labrador the same thing, and that Labrador, told Benedetto that he Benedetto needed to get along and stop acting so bad and angry. An argument ensued between them and Benedetto commented that Labrador had the girl up at the house that night. Plante said they were talking about evidence and the girl but he could not remember if the girl was named.
- [122] Mr. Dennis for Benedetto argued that taking Plante's testimony at its highest, no rational conclusion of guilt could be arrived at by the jury.
- [123] I do not agree. The words that Labrador was more guilty than Benedetto, were in my view an admission by Benedetto of his complicity in the crime. Mr. Dennis after some reluctance, accepted that those words could be interpreted as a confession to the crime alleged. Plante's evidence as that when Benedetto made this statement, it was within the argument that they were having over this case.
- [124] **Benjamin J**, in dealing with this aspect of submission, expressed the opinion that taken at its highest, Benedetto could have been taken to be saying blandly and subjectively that Labrador was more guilty of the offence charged than Benedetto and that that was all that could have been imputed.
- [125] That may be so, but in my view that would have been a matter for the jury and not the judge. I do not agree with the learned judge that upon a proper direction, a jury would have been unable to properly find guilt on the part of Benedetto. What

Benedetto is alleged to have said, if accepted by the jury, could have amounted to a confession of the crime charged.

- [126] The appeal of the Crown against Benedetto is allowed. The Order of acquittal made by trial judge is set aside. A new trial is ordered.

THE ALTERNATIVE OFFENCE

- [127] There is no merit in the submission of Mr. Williams that the trial judge should have proceeded with the case against Benedetto on an alternative count of Accessory after the Fact.
- [128] I agree with the submission of Mr. Dennis, that this was a practice of ambush, especially when, at the commencement of the trial, prosecuting counsel advised the court that he was not at that stage proceeding with the prosecution of that offence, which constituted the charge in a separate indictment.
- [129] This aspect of the appeal against Benedetto is dismissed and that order of the trial Judge is affirmed.

ADMISSIBILITY OF THE EVIDENCE OF LUIS RIVIEZ

- [130] The final aspect of this judgment, concerns the appeal by the Crown, against the refusal by the trial judge, to admit the evidence of a proposed Crown witness Luis Riviez, who was alleged to have overheard a conversation between Benedetto, his father and Benedetto's lawyer. **Benjamin J** found the conversation to be privileged as between attorney and client and in the exercise of his judicial discretion excluded same.
- [131] Luis Riviez was a private investigator working in direct liaison with the Tortola police in their investigation of this case. According to his statement, the conversation he overheard, discussed the following:
- “1. They were very concerned about David Blyden's (Salo) statement and if he could change his statement to the police. The Tortola attorney advised them that he had not changed his statement and that it was unlikely that he would.

2. The person with the New York Accent asked if there was any other DNA evidence that was being tested other than the shoes and the shirt with blood. They did not appear to know if there was any other evidence.
3. They discussed of the possibility of having separate trails.
4. During the course of the conversation Alex Benedetto had the following outbursts: "He had her in his room and banged her" and "she was in the car with her the night before" It should be noted that during both outbursts Victor told Alex to shut up and would not let him finish what he wanted to continue saying. **It was apparent that Alex was referring to Labrador.**

When Mr. Chavez came to the meeting area I began asking Mr. Chavez basic questions regarding the living conditions at the Tortola Jail. Mr. Chavez stated that he was treated well but that he lacked some of the common necessities such as toothpaste, sandals and soap. I asked Mr. Chavez how his relationship was with Mr. George. He advised that he rarely speaks with Mr. George since he is not able to speak English. He knows that Mr. George is in Jail for Murder but that he does not know the details. He further stated that he did not have anything else to say regarding Mr. George."

[132] In my judgment, this evidence of Luis Riviez was inadmissible because it had no probative value in the case against Benedetto, and in relating to Labrador it was a statement of one accused against another, which was not given in sworn testimony by Benedetto and this was not a conspiracy case. Having so found, it is not necessary to address the issue of privilege.

[133] This appeal against this order of the judge is dismissed.

CONCLUSION ON THE JUDGMENT

[134] In the result I make the following orders:

1. The appeal of Labrador is dismissed. The conviction and sentence are affirmed.
2. The appeal of the Crown against Spicer is dismissed. The acquittal by the trial judge is affirmed.
3. The appeal by the Crown against Benedetto is allowed. The acquittal by the trial Judge is set aside. A retrial is ordered for the offence of Murder.
4. The appeal by the Crown against the Judge's ruling on "Accessory after the fact" is dismissed. The judge's ruling is upheld.

5. The appeal by the Crown against the judge's ruling is to disallow the evidence of Luis Riviez is dismissed. The ruling is confirmed.

Satrohan Singh
Justice of Appeal

I concur

Dennis Byron
Chief Justice

I concur

Albert Redhead
Justice of Appeal

Dated this **26th** Day of **October 2001**.