

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCRA2016/0008

BETWEEN:

DARLINGTON NOEL

Appellant

and

THE KING

Respondent

SLUHCRA2016/0007

BETWEEN:

JAN ISIDORE

Appellant

and

THE KING

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mde. Margaret Price-Findlay

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Alberton Richelieu for the Appellant
Ms. Kelly Thomson for the Respondent

2021: June 30;
2022: December 6.

*Criminal appeal – Appeal against conviction – Admissibility of documentary evidence -
Sections 55 and 56 of the Evidence Act Chapter 4.15 of Saint Lucia - Duty to give reasons
– Trial judge’s exercise of discretion – Whether the learned judge misdirected himself in law*

by admitting witness statement which was the only evidence that sought to link appellant with the crime - Whether the learned judge misdirected and confused the jury that although the content of witness statement was not proof of the truth of its content, he went on to direct the jury that it was a cell confession, which provided evidence of his involvement in the killing - Recognition evidence- Whether the learned judge did not exercise his discretion fairly by permitting witness to admit the unacknowledged oral confession of appellant into evidence – Section 136 of the Evidence Act – Whether the learned judge failed to give a section 136 direction in relation to the evidence of witness – Test for a miscarriage of justice - Identification parade – Whether learned judge erred in admitting the evidence of the identification parade at the trial - Whether learned failed to direct the jury that little weight, if any, can be given to the parade - Whether the judge erred in failing to direct the jury on the effect of an unfair identification parade on a dock identification – Appeal against sentence - Whether the sentence of 45 years imposed on the appellants was too excessive and wholly inappropriate.

Darlington Noel (“Noel”) and Jan Isidore (“Isidore”) (together “the appellants”) were found guilty of capital murder for the killing of Anthony Edwards also known as Ali Baba, on 14th June 2009 at Bruceville, Vieux Fort. A sentence of 45 years imprisonment was imposed on the appellants respectively.

The prosecution in support of its case in the court below, relied on the evidence of several witnesses, including Sherman Mitchell (“Mitchell”), an eyewitness who also participated in an identification parade and positively identified the appellant Noel; Raul Fevriere (“Fevriere”) who had previously met the appellants at the premises he rented at Bruceville, Vieux Fort and who had been told by the appellants that they ‘killed a man’; Chris Eleuthere (“Eleuthere”), deceased, a prisoner in the holding cell at the Vieux Fort Police Station who had been told by Isidore that he killed a man named Ali Baba; and Special Police Constable Bertrus Biscette (“SPC Biscette”), who heard Isidore say to Eleuthere in the holding cell, “a man I killed in Vieux Fort there, that’s why I am in the cell”.

The appellants being dissatisfied with their convictions and sentences, appealed to this Court. In relation to Isidore, the main issues for determination before this Court are: (i) whether the learned judge misdirected himself in law by admitting the witness statement of Eleuthere which is the only evidence that sought to link Isidore with the crime; (ii) whether the learned judge misdirected and confused the jury that although the content of Eleuthere’s witness statement was not proof of the truth of its content, he went on to direct the jury that it was a cell confession, which provided evidence of his involvement in the killing; (iii) whether the learned judge did not exercise his discretion fairly by permitting SPC Biscette to admit the unacknowledged oral confession of Isidore into evidence, namely: “a man I killed in Vieux Fort, that why I am in the cell”; and (iv) whether the learned judge failed to give a section 136 direction in relation to the evidence of SPC Biscette.

In relation to Noel, the main issues for determination before this Court are: (i) whether the learned judge erred in admitting the evidence of the identification parade at the trial; (ii) whether the learned failed to direct the jury that little weight, if any, can be given to the parade; and (iii) whether the judge erred in failing to direct the jury on the effect of an unfair identification parade on a dock identification.

Both appellants also pray to this Court to determine whether the sentence of 45 years imposed on the appellants was too excessive and wholly inappropriate.

Held: dismissing the appeal of Darlington Noel against his conviction for capital murder and affirming his conviction; dismissing the appeal of Jan Isidore against conviction for capital murder and affirming his conviction; allowing the appeal of Darlington Noel and Jan Isidore against sentence to the extent that the sentence of 45 years imposed on each appellant is set aside and substituted for a sentence of 40 years imprisonment, that:

Jan Isidore's appeal

1. Sections 55 and 56 of the **Evidence Act** deal with the admissibility of documentary records as an exception to the hearsay rule. Sections 55 (1) and (2)(a)(i) provide for the admission of a statement in a document, in any proceedings, as evidence of any fact stated therein of which direct oral evidence would be admissible. This is conditioned on the document being or forming part of a record compiled by a person acting under a duty, from information supplied by another person, whether the other person was acting under a duty or not, who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and the person who supplied the information is dead. While section 56(5)(b) is an exclusionary provision which provides that the court shall not give leave to admit a statement referred to in section 56(4) unless the court is of the opinion that the statement ought to be admitted in the interest of justice having regard to the likelihood that the defendant will be prejudiced by the admission of the statement in the absence of the person who supplied the information on which the statement is based.

Sections 55 and 56 of the **Evidence Act** Chapter 4.15 of the Revised Laws of Saint Lucia, 2019 applied.

2. The learned judge in satisfying himself that all the statutory requirements were met for the admission of the statement, would have had to take account of the exclusionary provision contained in section 56(5)(b) of the **Evidence Act**. The judge was bound to admit all admissible evidence unless its probative value was outweighed by its prejudicial effect. The judge was justified in admitting the statement of the deceased Eleuthere after the voir dire was held and the Crown complied with the statutory requirements for admissibility. In addition, the trial judge was well positioned to weigh the probative value of the evidence on the one hand and its prejudicial effect on the other. Further, the evidence was not the only evidence linking Isidore to the crime. There was independent support for the hearsay statement of Eleuthere, for example, the evidence of SPC Biscette that he heard Isidore say to Eleuthere, "a man I killed in Vieux Fort there, that's why I am in the cell". The learned judge therefore did not misdirect himself in law by admitting the witness statement of Eleuthere.

Brunetta Festa v The Queen [2001] HCA 72 applied; **Pfennig v R** [1995] HCA 7 applied.

3. It is settled law that the duty to give reasons is a function of due process and justice. What is required depends on the nature of the case, but a judgment needs to make clear not only to the parties but to an appellate court the judge's reason for his conclusion on the critical issues. The test is: does the losing party know sufficiently why they have lost, and the other party has won? In this case, the learned judge adequately dealt with the matter and in his judgment made it clear to the parties as well as to this Court, his reason for admitting the statement was that all the statutory requirements were met. The admissibility of the statement was a matter provided for by statute. There is therefore no merit in the appellant's complaint.

Flannery v Halifax Estate Agencies Ltd [2001] 1 WLR 377 applied; **English v Emery Reimbold & Strick Ltd**; **DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd**; **Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis** [2002] EWCA Civ 605 applied; **Baird v Thurrock Borough Council** [2005] EWCA Civ 1499 applied.

4. It could not be lost upon the jury, that the statement of the deceased witness ought not to be treated as a confession and was not a confession. This is borne out in the learned judge's directions that: if the jury accepted the statement, they cannot hold it out to be a confession; that is, they cannot say that Isidore confessed to Eleuthere that he took part in the murder of Ali Baba. The learned judge placed enough emphasis on the fact that that the statement of the deceased witness ought not to be treated as a confession. The overall effect of the direction on the issue was to warn the jury that the utterances did not amount to a confession. In the circumstances, there was no material misdirection to the jury. The treatment of the evidence was fair to the appellant.
5. The learned judge in his judgment exercised his discretion fairly in admitting the oral utterance "a man I killed in Vieux Fort there, that's why I am in the cell". There is therefore no proper basis for appellate interference.
6. Section 136 (2) of the Evidence Act ordains that where there is a jury, the judge shall, unless there are good reasons for not doing so: (a) warn the jury that the evidence may be unreliable; (b) inform the jury of the matters that may cause it to be unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. Section 136 (3) states that it is not necessary that a particular form of words be used in giving the warning or information. Such warning under section 136 is to be given in terms which are appropriate to the particular case rather than in the form of a standardised direction which slavishly adheres to the terms of the section. Further, warnings are not to be approached as mere matters of ritual. What needs to be said to a jury in order to ensure that they bring a full appreciation to a case will depend upon the individual case. In this case, the learned judge warned the jury as to the weakness of Biscette's evidence in that he never confronted Isidore after he said he overheard him admitting to killing a man in Vieux Fort nor did he make any record of what he overheard. The warning was

given in terms appropriate to the circumstances of the case. Accordingly, enough was said to warn the jury of the matters that may cause Biscette's evidence to be unreliable, in terms of the section. It cannot be said there was a misdirection by the judge.

7. The identification of both appellants in court by Fevriere was not in truth a dock identification. Fevriere's evidence is properly classified as recognition evidence. The claimed basis of recognition as shown by his evidence was not tenuous. It was not a case where the appellants were unknown to Fevriere, and he subsequently pointed them out for the first time in court. Apart from being introduced to him by reason of their tenancy of his rental home, he also described a neck tattoo unique to Isidore, which also assisted in his identification to the police. Given the circumstances, it would not be reasonable to have held an identification parade. Further, where a witness has already identified a person in the absence of a parade, holding a parade is more likely to confirm the witness' previous identification than to test his ability to make an identification. Thus, the evidence of a prior identification that has been reinforced through an identification parade might in fact be more dangerous than the evidence of the prior identification alone and excluding such evidence would be consistent with the overall aim of section 114 of the **Evidence Act** to restrict the admissibility of unreliable identification evidence.

Stubbs v The Queen; Davis v The Queen; The Queen v Evans [2020] UKPC 27 applied.

Darlington Noel's appeal

The court retains a discretion in relation to admissibility of evidence. The question is whether the admission had an adverse effect on the fairness of the proceedings. In the instant case, the admission of the evidence of the identification parade did not have an adverse effect on the fairness of the proceedings.

Police and Criminal Evidence Act 1984 UK ("PACE") considered; **The State v Vibert Hodge** [1976] 22 WIR 303 considered; **The Queen v Eron Collymore and another** SLUCRD2016/0661A, 0662A, 0663A, 0664A, 0665A, 066A, 0667A (delivered 6th May 2020, unreported) considered.

8. The test for whether a miscarriage of justice has actually occurred is not simply whether an appellate court is itself persuaded of guilt. While the appellate court's satisfaction of guilt is certainly necessary, it is not by itself sufficient. The test is normally, whether the appellate court is further satisfied that any jury acting properly must inevitably have convicted the appellants if the flaws in the proceedings had not occurred. The question is fact specific and a matter of degree. In this case, there is no proper basis to set aside the conviction of both appellants.

Section 35 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act** Chapter 2.01 Revised Laws of Saint Lucia, 2019 applied; **Cassell and another v The Queen** [2016] UKPC 19 applied.

9. With respect to the appeal against sentence, the learned judge erred when he gave no reasons as to why his starting point was fifty years. In applying the now in force Sentencing Guidelines, this case falls within the category of cases where the starting point is set at 40 years with a range from 30-50 years. In considering other mitigating and aggravating circumstances of the offence and the offenders, an appropriate sentence would be 40 years imprisonment.

Eastern Caribbean Supreme Court Sentencing Guidelines for Homicide Offences re-issued 26th November 2021 applied.

JUDGMENT

- [1] **BAPTISTE JA:** Dressed in full black, masked and fortified with a firearm, two men opened fire on Ali Baba - whose real name is Anthony Edwards - during a robbery, killing him in the process. It was 14th June 2009. The shooting took place at Bruceville, Vieux Fort. Darlington Noel ("Noel") and Jan Isidore ("Isidore") (together "the appellants") were found guilty of capital murder and have appealed their convictions and respective 45 years sentence.
- [2] In support of its case, the prosecution relied on the evidence of several witnesses including Sherman Mitchell ("Mitchell"). Mitchell was an eyewitness who also participated in an identification parade conducted by Inspector Jn. Pierre on 10th July 2009 and positively identified the appellant Noel. In court, he also pointed out Noel as the person he identified at the identification parade and as one of the two men he saw put a mask on his face and shoot Ali Baba and wrestle him to take his chains.
- [3] Mitchell gave evidence that he had seen the two appellants in the Bruceville area two weeks before the shooting. On 14th June 2009 at about 4 pm, he saw two males dressed in all black. Someone called Sophie gave a black firearm to one of the men. He had tattoos by his neck and was tall and 'red skin'. The other male was short and muscular and 'brown skin'. They left with a white car. At about 8 pm

that night, from about three feet away, he observed both men. They passed him on a pathway. Both had stocking masks and he observed them put the masks on their face. Before putting on the stocking masks over their head, he saw their entire faces and bodies. Soon after he heard three gunshots. He observed one of the gunmen shoot Ali Baba before grabbing the chains from his neck. The men pursued Ali Baba who ran towards a nearby house. He saw Ali Baba run underneath a house. Both appellants began shooting at him. Mitchell then left the scene; on returning he found Ali Baba lying in a gutter. Mitchell observed the appellants for about thirty minutes from the time they put on the masks to the time of the shooting.

- [4] The Crown also relied on the evidence of Raul Fevriere ("Fevriere") who had previously met the appellants in early June 2009 at the premises he rented at Bruceville, Vieux Fort. Fevriere's evidence is that he lived at Dennery but also had a residence in Bruceville, Vieux Fort in which he left his brother in charge. In early June, he encountered two males staying at his Bruceville residence. One identified himself as Red Rat, the other as Des. Red Rat was 'red skin' with several tattoos, including a horseshoe tattoo on his upper body. Des was short, muscular, 'brown skin' with thick black hair. Fevriere remained in their presence for two days before returning home to Dennery. He indicated that on 13th July 2009, he returned to his premises in Bruceville where the two men were still staying at the house. On 14th July 2009 the men arrived, took some belongings and left. Thereafter, while sitting on a step he heard gunshots and returned home. On the way home he encountered Red Rat and Des in a motor vehicle who told him that they had just killed a man down the road. That conversation lasted a couple seconds. He pointed out the appellants in court.
- [5] Corporal Velma St. Catherine read into evidence the witness statement of Chris Eleuthere ("Eleuthere"), who had died before the trial started. Eleuthere was a prisoner in the holding cell at the Vieux Fort Police Station facing a charge of having sexual intercourse with a minor. Isidore was also in that cell along with other

prisoners. Isidore introduced himself to Eleuthere as Red Rat. Eleuthere asked him what he was there for, to which Isidore replied, he killed a man Ali Baba, and they were questioning him for that. Isidore also stated that he did not go to kill Ali Baba but to rob him, but the deceased was exciting himself too much.

- [6] In addition, the Crown relied on the evidence of Special Police Constable Bertrus Biscette ("SPC Biscette"), the Custody Officer at the Vieux Fort Police Station. SPC Biscette stated that he placed Isidore, Eleuthere, and one Plummer in a holding cell about ten feet from his desk. While at his desk, he heard Isidore say to Eleuthere, "a man I killed in Vieux Fort there, that's why I am in the cell".

Isidore's appeal

- [7] The issues raised with respect to each appellant will be separately considered. Isidore's appeal will be dealt with first. Mr. Alberton Richelieu, learned counsel for Isidore, contends on appeal that the learned trial judge:

- (1) misdirected himself in law by admitting the witness statement of Chris Eleuthere which is the only evidence that sought to link Isidore with the crime;
- (2) misdirected and confused the jury that although the content of Eleuthere's witness statement was not proof of the truth of its content, he went on to direct the jury that it was a cell confession, which provided evidence of his involvement in the killing;
- (3) did not exercise his discretion fairly by permitting SPC Biscette to admit the unacknowledged oral confession of Isidore into evidence, namely: "a man I killed in Vieux Fort, that why I am in the cell"; and
- (4) failed to give a section 136 direction in relation to the evidence of SPC Biscette.

- [8] The question of the admissibility of Eleuthere's statement falls to be considered. During the trial, a voir dire was held to determine its admissibility. Mr. Richelieu challenged both Cumberbatch J's decision at the voir dire to admit Eleuthere's statement into evidence, and the judge's summation as to how the jury should consider that evidence. Mr. Richelieu also argued that the learned judge failed to provide detailed reasons for the voir dire ruling although he had promised to give his full ruling later. Learned counsel further submitted that Cumberbatch J in his reasoning, failed to consider whether the prejudicial effect of admitting the statement outweighed its probative value.
- [9] Ms. Kelly Thomson, on behalf of the Crown, submitted that the learned judge was legally bound to admit all relevant admissible evidence unless it is more prejudicial than probative. In addition, the judge was justified in admitting the statement of the deceased witness after a voir dire was properly held and that the Crown complied with the statutory requirements for admissibility. Further, the lack of a detailed ruling in favour of admissibility did not detract from the correctness to admit the statement of the deceased witness.
- [10] Sections 55 and 56 of the **Evidence Act**¹ provide the convenient starting point to address Mr. Richelieu's complaint on admissibility. The sections deal with the admissibility of documentary records as an exception to the hearsay rule. Sections 55 (1) and (2) (a) (i) provide for the admission of a statement in a document, in any proceedings, as evidence of any fact stated therein of which direct oral evidence would be admissible. This is conditioned on the document being or forming part of a record compiled by a person acting under a duty, from information supplied by another person, whether the other person was acting under a duty or not, who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and the person who supplied the information is dead.

¹ Chapter 4.15 Revised Laws of Saint Lucia, 2019.

[11] Section 56 deals with the application of section 55. Subsection 4 of section 56 states:

“Where a document referred to in subsection (1) contains evidence that a person, if called as a witness, could be expected to give and the document has been prepared for the purpose of any pending or contemplated proceedings, a statement contained in the document shall not be given in evidence without leave of the court.”

[12] Subsection 5 (b) of section 56 states:

“The court shall not give leave to admit a statement referred to in subsection (4) unless the court is of the opinion that the statement ought to be admitted in the interest of justice having regard to –
(b) the likelihood that the defendant will be prejudiced by the admission of the statement in the absence of the person who supplied the information on which the statement is based.”

[13] Cumberbatch J stated that the Crown called Corporal St. Catherine who tendered into evidence the statement of Eleuthere, who is now deceased. The learned judge ruled that: ‘I am satisfied that all the statutory requirements have been met for the admission of this statement. I will allow the statement to be tendered subject to editing of inadmissible hearsay ...’

[14] Ms. Thomson submitted, and I agree, that in satisfying himself that all the statutory requirements were met for the admission of the statement, the learned judge would necessarily have had to take account of the exclusionary provision contained in section 56 (5) (b) of the **Evidence Act**. Further, the judge was bound to admit all admissible evidence unless its probative value is outweighed by its prejudicial effect.

[15] I note that evidence is not prejudicial merely because it strengthens the prosecution’s case. The prejudicial effect is ordinarily regarded as the risk that improper use might be made of the evidence. It is prejudicial only where the jury

are likely to give the evidence more weight than it deserves.² As stated in **Pfennig v R**³ at paragraphs 39 and 40:

“The proposition that the probative value of the evidence must outweigh its prejudicial effect is one that can be easily understood The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial.... If there is real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation. The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted.”

[16] In my view, the judge was justified in admitting the statement of the deceased Eleuthere after the voir dire was held and the Crown complied with the statutory requirements for admissibility. In addition, the trial judge was well positioned to weigh the probative value of the evidence on the one hand and its prejudicial effect on the other. I note that that evidence was not the only evidence linking Isidore to the crime. There was independent support for the hearsay statement of Eleuthere, for example, the evidence of SPC Biscette that he heard Isidore say to Eleuthere, “a man I killed in Vieux Fort there, that’s why I am in the cell”.

[17] Mr. Richelieu complained about the adequacy of the judge’s reasons in admitting the statement of the deceased witness. Ms. Thomson argued that the lack of a detailed ruling in favour of admissibility did not detract from the correctness of the decision to admit the statement of the deceased witness.

[18] It is settled law that the duty to give reasons is a function of due process and justice. The reach of what is required to fulfil it, depends on the subject matter.⁴ What was required depends on the nature of the case, but a judgment needs to make clear not only to the parties but to an appellate court the judge’s reason

² See *Brunetta Festa v The Queen* [2001] HCA 72 at para 51.

³ [1995] HCA 7.

⁴ See *Flannery v Halifax Estate Agencies Ltd* [2001] 1 WLR 377.

for his conclusion on the critical issues.⁵ A judge is entitled to express the reasons for his decision briefly. The reasons for decision must be sufficient to explain why he reached that decision.⁶

- [19] The issue here is really one as to the adequacy of reasons. The test therefore is: does the losing party know sufficiently why they have lost, and the other party has won? Does the judge's reason meet the test of adequacy? A judge is to give reasons for decision, not reasons for his reasons. In my view, the learned judge adequately dealt with the matter when he stated:

"On the issue of the admission of Chris Eleuthere's statement I don't think it was much of an issue, but I am satisfied that all of the statutory requirements have been met for the admission of the statement. I will allow the statement to be tendered subject to ... my directions to the jury at the appropriate time so the limited use that can be made of the purported confession which goes not to the truth of the purported confession but merely to the fact that it was made. Those are my rulings."⁷

The above passage makes it clear to the parties as well as to this Court that the judge's reason for admitting the statement was that all the statutory requirements were met. The admissibility of the statement was a matter provided for by statute. I find no merit in the appellant's complaint.

- [20] Mr. Richelieu contended that the learned judge erred in his summing up to the jury as to how to treat the admission of Eleuthere's statement. He argued that the directions were convoluted and confusing, where at one point, the judge directed the jury that the statement is a cell confession, and at the other point it is not.

⁵ Per Lord Phillip MR in *English v Emery Reimbold & Strick Ltd*; *DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd*; *Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis* [2002] EWCA Civ 605.

⁶ See *Baird v Thurrock Borough Council* [2005] EWCA Civ 1499 at para 17.

⁷ Transcript of Proceedings p. 25Q, lines 5-to12.

[21] In her submissions, Ms. Thomson conceded that the learned judge may have erred when using the term “the alleged confession”. She however posited that on at least six occasions, within the same portion of the summing up, Cumberbatch J properly directed the jury as to the weight to be attached to the statement by emphasising to them that it did not amount to a confession. Learned counsel refuted Mr. Richelieu’s contention that the defect was so confusing or convoluted as to give rise to prejudice. Further, Ms. Thomson rejected the notion that the directions were confusing and submitted that the overall effect of the direction was that the utterance did not amount to a confession on which they could convict. In the circumstances, learned counsel also submitted that there was no material misdirection to the jury.

[22] In considering the arguments raised by both counsel, it is important to examine the impugned direction in the round. The learned judge directed:

“Members of the jury, in cases of what is called a cell confession, it is being (sic) found in the past that the evidence of a prison informer is inherently unreliable, in view of the personal advantage which such witnesses think they may obtain in providing information to the authorities. Witnesses who fall into this category tend to have no interest whatsoever in the proper course of justice and they will also have strong reasons of self interest in seeking to ingratiate themselves with those who may be in a position to reward them for volunteering confession evidence ... the defendant is afforded none of the protections against the inaccurate recording or invention of words used when this witness was interviewed by the police ... Remember as well, the alleged confession was never put to the number 2 defendant for a response and the witness Chris Eleuthere is not here to be cross – examined about what he said the defendant allegedly told him. Members of the jury, I must warn you to be very cautious in your considerations of this evidence by this witness against the defendant.”⁸

[23] Additionally, Cumberbatch J directed:

“...in considering the statement of Chris Eleuthere, you must bear in mind my warnings of caution and my direction to you, before concluding whether or not you believe and accept it and rely on it; you must be cautious ... “if you accept that the statement contains

⁸ Transcript of proceedings p. 42U, lines 6 to 22.

what was told to the police officer, and that the number 2 defendant did say to Chris Eleuthere, what is contained in that statement, you cannot hold it out to be a confession . In other words, you cannot say that the number 2 defendant, Jan Isidore confessed to Chris Eleuthera, that he took part in the murder of Ali Baba. All that that utterance means if you accept it is that Chris Eleuthere said that the defendant said certain things about being involved in the killing of Ali Baba, that's all it is." Once again you cannot take it to the level of a confession and you cannot say it is a true statement by Jan Isidore of what he did, if he did anything at all, that night at Bruceville. You cannot use that evidence to convict the defendant as I said, it does not amount to a confession, it is no more than evidence by another person that the defendant said certain things to him. It does not mean that what the defendant said is true. All it means is that the defendant said something to Chris Eleuthere, it is not a confession."⁹

The learned judge further explained that:

"...if you believe he said so, you might take that into consideration and you may consider the fact that he said so, as being consistent with the evidence of Raul Fevriere and Special Police Constable Biscette ... he overheard Jan Isidore saying that he was in prison, because he killed a man in Vieux Fort; it's a matter for you. Once again , let me direct you that the statement, what is said in that statement by Jan Isidore is not a confession , you could only use it to say, it is supportive if you find it was said, because the fact of it being said is supportive of the evidence of Raul Fevriere if you believe and accept the evidence that this man stopped him on the road on the night of the fourteenth and said that they just kill a man down the road; it's a matter for you."¹⁰

[24] Looking at the impugned direction in the round, it could not be lost upon the jury, and they would have fully understood, that the statement of the deceased witness ought not to be treated as a confession and was not a confession. This is borne out in the learned judge's directions that: if the jury accepted the statement, they cannot hold it out to be a confession; that is, they cannot say

⁹ Transcript of proceedings p 43U, lines 6 to 23.

¹⁰Transcript of Proceedings p. 44U, lines 1 to 11.

that Isidore confessed to Chris Eleuthera that he took part in the murder of Ali Baba; they cannot use the evidence to convict the defendant and it does not amount to a confession. The jury could not have been confused by the direction. The learned judge placed enough emphasis on the fact that the statement of the deceased witness ought not to be treated as a confession. The overall effect of the direction on the issue was to warn the jury that the utterances did not amount to a confession. In the circumstances, there was no material misdirection to the jury. The treatment of the evidence was fair to the appellant.

- [25] Mr. Richelieu also complained that Cumberbatch J did not exercise his discretion fairly when he permitted SPC Biscette to admit into evidence the oral utterance of Isidore. SPC Biscette was the Custody Officer at the police station at Vieux Fort on 23rd July 2009. During the trial, counsel objected to the admissibility of SPC Biscette's evidence of an oral utterance by Isidore that "a man I kill in Vieux Fort, that's why I in the cell". Cumberbatch J overruled the objection on the ground that the evidence was not inadmissible. He stated:

"I find that the Crown may adduce the evidence, find it is not inadmissible, and I also find that I should not exercise any discretion to disallow it on the ground of unfairness ..."¹¹

Ms. Thomson submitted, and I agree, that Cumberbatch J recognised his exclusionary powers but exercised his discretion in admitting the oral utterance. I see no proper basis for appellate interference.

- [26] SPC Biscette's evidence was that at the time he assumed duties there were eleven prisoners in custody inclusive of Isidore and one Chris Eleuthere. After feeding the prisoners, he went to sit at the front desk where he had a proper view of the prisoners in the holding cell and was able to hear them. Eleuthere was in a holding cell with Isidore and another prisoner, when he heard Isidore say "a man I kill in Vieux Fort, that's why I in the cell". He did not caution Isidore as to what he heard him say and made no notes in his station diary.

¹¹ Transcript of Proceedings p. 16, lines 18 to 20.

[27] Mr. Richelieu complained that the learned judge failed to give a section 136 direction in accordance with the **Evidence Act**. The complaint here is that while judge pointed out the weaknesses of SPC Biscette's evidence in relation to circumstantial evidence which would destroy the inferences of guilt, he failed to direct on matters that may cause that evidence to be unreliable. That therefore was a misdirection.

[28] Ms. Thomson refuted the contention that there was a material failure to give a section 136 warning and contended that the judge's direction cannot fairly be categorised as a material misdirection. Learned counsel submitted that albeit succinct, a warning was in fact administered to exercise caution in considering the evidence of SPC Biscette in accordance with section 136.

[29] Ms. Thomson posited that the learned trial judge satisfied the requirements outlined by the Caribbean Court of Justice in **Vincent Leroy Edwards and another v The Queen**,¹² a case cited by Mr. Richelieu. In that regard, Ms. Thomson submitted that the requirement that the judge must warn the jury that such evidence may be unreliable was satisfied when he stated:

"Circumstantial evidence can be very powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the Prosecution relies in proof of its case is reliable and whether it does prove guilt." ¹³

Ms. Thomson also submitted that the second requirement that the judge should inform the jury of the matters that may cause the evidence to be unreliable was also satisfied when he stated:

"... they have raised the defence of alibi ... Biscette never confronted the number 2 defendant after he said he overheard him admitting to killing a man in Vieux Fort nor did he make any record of what he heard."¹⁴

¹² [2017] CCJ 10 (AJ).

¹³ Transcript of Proceedings p.47U, lines 21 to 24.

¹⁴ Transcript of Proceedings p.47U, lines 13 to 16.

With respect to the satisfaction of the third requirement, Ms. Thomson cited the judge's direction:

"Furthermore, I must warn you that before you could convict on circumstantial evidence, you must consider whether it reveals any other circumstances which are or may be of sufficient reliability or strength to weaken or destroy the Crown's case."¹⁵

Section 136 of the Evidence Act

[30] Having looked at the competing submissions of both counsel, it is instructive to examine section 136 (2) of the **Evidence Act** of Saint Lucia. The section ordains that where there is a jury, the judge shall, unless there are good reasons for not doing so: (a) warn the jury that the evidence may be unreliable; (b) inform the jury of the matters that may cause it to be unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. Section 136 (3) states that it is not necessary that a particular form of words be used in giving the warning or information.

[31] In **Edwards and another v The Queen**, Saunders PCCJ examined the kindred section to 136 in the Evidence Act of Barbados (section 137) and emphasised at paragraph 50 that while all three requirements are important, the second is probably the most critical because it obliges the judge to provide the jury with the essential rationale for the first and third. I respectfully agree with that observation.

[32] Section 136 of the **Evidence Act** of Saint Lucia is the kindred section to 165 of the Evidence Act of New South Wales. With respect to section 165, it is settled law that a warning is to be given in terms which are appropriate to the particular case rather than in the form of a standardised direction which slavishly adheres to the terms of the section.¹⁶ Also, warnings are not to be approached as mere matters of ritual. What needs to be said to a jury, in order to ensure that they

¹⁵ Transcript of Proceedings p.47U, lines 24 to 25 and p. 48, lines 1 to 2.

¹⁶ See *R v Lah* [2005] NSWCCA 400 at para 26 per Sully J.

bring a full appreciation to a case will depend upon the individual case.¹⁷ I would respectfully apply the above to section 136 of the **Evidence Act** of Saint Lucia.

[33] In summing up the learned judge told the jury:

“I must direct you on the weakness of the circumstantial evidence in that both defendants are saying through their witnesses that they were someplace else; they have raised the defence of alibi ... Biscette never confronted the number 2 defendant after he said he overheard him admitting to killing a man in Vieux Fort nor did he make any record of what he overheard.”¹⁸

Was this direction sufficient to satisfy the dictates of the second requirement of section 136 that the judge must inform the jury of the matters that may cause the evidence to be unreliable? Though succinct, I am of the view that the learned judge warned the jury as to the weakness of Biscette’s evidence in that he never confronted Isidore after he said he overheard him admitting to killing a man in Vieux Fort nor did he make any record of what he overheard. The warning was given in terms appropriate to the circumstances of the case. Accordingly, enough was said to warn the jury of the matters that may cause Biscette’s evidence to be unreliable, in the terms of the section. It cannot be said there was a misdirection by the judge.

[34] Mr. Richelieu’s complaint that the trial judge admitted a dock identification of both appellants by Fevriere, impermissible under the **Evidence Act**, falls to be considered. Mr. Richelieu prayed in aid section 100 of the **Evidence Act** and posited that the judge’s ruling on the voir dire recognised its legal effect. The learned judge stated that section 100 made it an almost mandatory requirement that an identification parade should be held for the admissibility of evidence of identification.

¹⁷ See R v Jacobs [2004] NSWCCA 462 at para 297.

¹⁸ Transcript of Proceedings p 47U, lines 11 to 16.

[35] Mr. Richelieu also relied on **The Queen v Shervon Ramsay and others**,¹⁹ where Edwards J stated that by virtue of section 100 (1) of the **Evidence Act**, identification evidence is inadmissible until the prosecution satisfies the statutory criteria provided therein. Learned counsel reinforced this with **Earl Hunte v The Queen**.²⁰ In **Hunte**, Edwards JA stated that identification evidence captured by section 100 of the **Evidence Act** is prohibited unless ruled admissible by the court upon being satisfied by the prosecutor that an identification parade was held.

[36] The starting assumption of section 100 that ideally, identification evidence should have been tested through an identification parade before it is given in court, is qualified in several ways. It is qualified by section 100 (1)(a)(ii) which recognises that in certain circumstances it would not have been reasonable to hold an identification parade. The expectation of an identification parade is also qualified in section 100 (1)(a) itself, which on a literal construction, has the requirement that the identification parade is held “before the identification is made.”²¹ .

[37] Fevriere’s evidence was that:

“while there I heard some ... gun shots.

A: I encountered the two gentlemen in the white car.

Q: Yes, who were these gentlemen?

A: Red rat and Des

Q: These two gentlemen that you said you met at your home, you told us about that – when you referred to Red rat and Des – do you see them in this court?

A: Yes miss.

Can you please point them out to the court?”²²

Thereupon Fevriere pointed out the appellants in the dock.

¹⁹ SLUHCR2005/0068,0069 and 0071 (delivered 26th July 2006, unreported).

²⁰ SLUHCRAP2006/0012 (delivered 19th January 2011, unreported).

²¹ See R v D [2008] ACTSC 82.

²² Transcript of Proceedings p12, line 21 to p14, line 6.

[38] Ms. Thomson argued that Fevriere’s evidence may be classified as recognition evidence. In that regard she pointed out that Fevriere testified to being introduced to the appellants by virtue of their tenancy of his rental home. This was not a case where the appellants were unknown to Fevriere who subsequently pointed them out for the first time in court. Ms. Thomson further submitted that although the lack of pre- trial formal identification procedure is undesirable, it does not necessarily invalidate the in-court identification.

[39] The authorities have drawn a distinction between cases of identification and recognition. At paragraph 79 of **Stubbs v The Queen; Davis v The Queen; The Queen v Evans**²³ the Board said:

“Where an identifying witness claims previous acquaintance with the person identified different considerations will apply. In Stewart [2011] UKPC 11, the identifying witness claimed to have known the accused and his family for a long time. In that case the Board considered that the identification in court could not properly be regarded as a dock identification at all. By the time the witness came to point out the accused in the dock she had already told the police exactly who he was. The dock identification was a “pure formality”. Similarly in *France v R* [2012] UKPC 28, another case of recognition, Lord Kerr observed that a dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified and that the dangers inherent in such an identification are clear. He continued (at para 34):

“There has been a tendency to apply the term ‘dock identification’ to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression, but it should not be assumed that the dangers when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification previously made, the witness is not saying for the first time ‘This is the person who committed the crime’. He is saying that ‘the person whom I have identified to police as the person who committed the crime is the person who stands in the dock’.”

²³ [2020] UKPC 27.

[40] In my judgment, the identification in court was not in truth a dock identification. Fevriere's evidence is properly classified as recognition evidence. The claimed basis of recognition as shown by his evidence was not tenuous. The appellants were known to him. It was not a case where the appellants were unknown to Fevriere and he subsequently pointed them out for the first time in court. Apart from being introduced to him by reason of their tenancy of his rental home, he also described a neck tattoo unique to Isidore, which also assisted in his identification to the police. It is also not disputed that the appellants were known as Red Rat and Des respectively. Fevriere recognised the men whom he knew and had seen before. It was really a case of recognition. Given the circumstances, it would not be reasonable to have held an identification parade.

[41] In general terms, the reason is that if a witness has already identified a person in the absence of a parade, holding a parade is more likely to confirm the witness' previous identification than to test his ability to make an identification. Thus, the evidence of a prior identification that has been reinforced through an identification parade might in fact be more dangerous than the evidence of the prior identification alone and excluding such evidence would be consistent with the overall aim of section 114 to restrict the admissibility of unreliable identification evidence.

[42] For the reasons indicated, Isidore's grounds of appeal against conviction are dismissed.

Darlington Noel's appeal

[43] I now consider Darlington Noel's appeal. An identification parade was held in which Mitchell positively identified Noel. At the trial, Mr. Richelieu challenged the admissibility of the identification parade evidence. A voir dire was held. Cumberbatch J ruled in favour of admissibility. He stated that the evidence on the voir dire disclosed that the appellant was the shortest man on the parade and accepted that this in itself was an irregularity. The learned judge noted that

in cross - examination, Mitchell denied that he picked up Noel because he was the shortest man on the parade. Mitchell stated that he picked out Noel because he knew his face and gave evidence as to the frequency with which he had seen Noel prior to the incident and on the date of the incident itself. Cumberbatch J stated:

“I find in the circumstances that the identification parade was no more than a confirmation of his stated ability to identify the defendant whom he said he knew ... I will in the exercise of my discretion allow the evidence to be admitted. I find it admissible. I find under the circumstances surrounding the witness’ identification of the defendant to be very powerful; however, the defence may, in cross - examination in the main cause further attack the fairness of the identification parade procedure.”²⁴

[44] Mr. Richelieu complained that learned judge erred in admitting the evidence of the identification parade at the trial in that he failed to consider that: the identification parade was unfairly conducted, in that Noel was the shortest man on the parade; there were no photographs or videos of the parade; and the identification was not conducted in accordance with Code D of the **Police and Criminal Evidence Act 1984 UK** (“PACE”). Counsel also submitted that the learned judge failed to direct the jury that little weight, if any, can be given to the parade.

[45] Ms. Thomson submitted that the conduct of the identification parade was fair to Noel. She also posited that if this Court adopted the position that the parade was unfair, by virtue of **The State v Vibert Hodge**,²⁵ it is a matter of weight to be given to the evidence rather than its admissibility. At page 309 in **Hodge**, the court held:

“If the parade is fairly and properly conducted its probative value must be high; if, on the other hand, it is unfairly conducted, then little weight, if any, can be given to the identification in court.”

²⁴ Transcript of Proceedings dated 27th November 2014, at p. 24, lines 13-24.

²⁵ [1976] 22 WIR 303.

[46] The issue of Noel's height was directly addressed by the learned judge, who stated that the identification parade was no more than a confirmation of Mitchell's stated ability to identify the appellant whom he said he knew. The evidence was that Mitchell denied he picked up Noel because he was the shortest man on the parade. Mitchell stated that he picked out Noel because he knew his face. The position here is that Mitchell knew Noel's face and gave evidence as to the frequency with which he had seen him prior to and on the date of the incident itself. The deficiency identified in Noel being the shortest man on the parade, did not in the circumstances render the identification parade unfair.

[47] Inspector Jn Pierre, who conducted the identification parade, testified that he gave Noel a notice of description and inquired whether he objected to any person on the parade. The answer was no. After the completion of the parade, Noel was asked to comment and stated that some of the persons in the parade did not look like him.

[48] Mr. Richelieu relied on **Earl Hunte v The Queen**, where Edwards JA stated at paragraph 44:

"The effect of section 100 (1) (a) (i) and (b) is that there now exists the cardinal rule that before identification evidence can be admissible ...: (1) an identification parade as defined by PACE Code D paragraph 3.7 which included the accused should have been held."

Mr. Richelieu also cited Thom JA in **Kendi Canai v WPC Baptiste**²⁶ at paragraph 10:

"Where a Prosecutor seeks to adduce identification evidence before a magistrate, the magistrate must be satisfied on both limbs of Section 100 (1). The magistrate must be satisfied firstly that an identification parade was held, and that the identification parade was held, in accordance with PACE Code D ..."

²⁶ SLUMCRAP2011/0012 delivered 29th May 2012, (unreported).

- [49] Annex B of PACE Code D provides in clause 23, that a video recording must normally be taken of the identification parade. If that is impracticable, a colour photograph shall be supplied. A copy of the video recording or photograph shall be supplied, on request, to the suspect or their solicitor. A suspect must also be given an opportunity to have a solicitor or friend present, and the suspect shall be asked to indicate on a second copy of the notice, whether or not they wish to do so.
- [50] With respect to conformity with Code D of PACE, Ms. Thomson submitted that Standing Order 47 of the Police Force of Saint Lucia is the applicable regime for the procedure that regulates the police in the conduct of identification procedures, identified in the Standing Order. Ms. Thomson cited **The Queen v Eron Collymore and another**,²⁷ where Taylor - Alexander J observed at paragraph 23 that Standing Order 47 did not go as far as Code D but can be relied on as useful best practice. Ms. Thomson submitted that there was adherence to Standing Order 47, but Standing Order 47 does not specifically require photographs or videos of the identification parade. Although ideal, its absence does not, by itself, render the identification parade unfair.
- [51] Importantly, the court retains a discretion in relation to admissibility of evidence. The question is whether the admission had an adverse effect on the fairness of the proceedings. I am not of the view it had.
- [52] Mr. Richelieu also complained that the judge erred in failing to direct the jury on the effect of an unfair identification parade, on a dock identification and the dangers of relying on a dock identification generally. Counsel referred to the direction of the learned judge that the identification parade was another critical factor in the identification of the appellant by the witness. He reminded the jury that the defence attacked the fairness of the parade in the following manner: the defendant was the shortest man on the parade; the defendant said that some

²⁷ SLUCRD2016/0661A, 0662A, 0663A, 0664A, 0665A, 066A, 0667A delivered 6th May 2020, (unreported).

of the persons did not look like him; and there were no photographs or particulars of the persons who participated in the parade such as age, height and complexion. The learned judge told the jury that the defence was asking them to find that the parade was unfair. The learned judge told the jury that all they have is the evidence of the eyewitness Mitchell and Inspector Jn Pierre. They have to ask themselves whether the evidence is reliable. If they found it was not, they must reject the evidence of the parade.

[53] Mr. Richelieu posited that the learned judge had a duty to go further and warn the jury that if they found the identification parade to be unfair, such parade could have an adverse effect on other identification of the witness, in particular, his identification of the appellant - Noel - in court. Counsel contended that the learned judge failed to make the link between the identification parade and the identification at the trial. Counsel submitted that the learned judge should have gone further and direct the jury that if they found the identification to be unfair, that the dock identification was of no evidential value. In that regard, counsel relied on the judgment of Massiah J in **Hodge**.

[54] Ms. Thomson submitted that the learned judge adequately directed the jury on the issues surrounding the identification parade. The judge pointed out that Mitchell is the only eyewitness in the case. Noel was the only short 'brown skin' man on the parade, there was no one about the same height. He was 'red skin'; the others were taller than him; they were 'dark'. The judge stated that the witness gave evidence of visual identification and the case against Noel depended to a large extent on the correctness of Mitchell's evidence. The judge also warned the jury on the special need for caution before convicting on the basis of the identification evidence alone.

[55] The trial judge specifically directed the jury:

"I must direct you as well on the weakness of the identification evidence, there is no evidence of the circumstances under which the witness said he saw the number one defendant on the previous occasions, he said

he saw them every night for two weeks at about 8 o'clock. There is no evidence of the circumstances such as the lightening conditions ... the time he had them under observation or any special reason why he remembered the defendants.”²⁸

[56] Mr. Richelieu submitted that though the errors by the learned judge by themselves may not be sufficient to set aside a conviction, in the circumstances of this case, the cumulative effect was so gross that a miscarriage of justice occurred sufficient to set aside the conviction of both appellants.

[57] Ms. Thomson argued that the learned judge adequately directed the jury on the issues surrounding the identification parade and submitted that the cumulative effect of the alleged errors made by the learned judge did not have the effect of amounting to a miscarriage of justice. I agree.

[58] Learned counsel however adverted to the proviso under section 35 of the **Eastern Caribbean Supreme Court (Saint Lucia) Act**.²⁹ Section 35 (1) states that:

“Provided that the Court of Appeal may notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice actually occurred.”

[59] With respect to the proviso, in **Cassell and another v The Queen**,³⁰ at paragraphs 28 and 29, the Board stated that the test for whether a miscarriage of justice has actually occurred is not simply whether an appellate court is itself persuaded of guilt, that the appellate court is satisfied of guilt is certainly necessary but is not by itself sufficient. The test is normally, whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the appellants if the flaws in the proceedings had not occurred. The question is fact specific and a matter of degree.

²⁸ Transcript of Proceedings p. 27U, lines 10 to 16.

²⁹ Chap 2.01 Revised Laws of Saint Lucia, 2019.

³⁰ [2016] UKPC 19.

- [60] In my opinion, there is no proper basis to set aside the conviction of the appellants. A jury acting properly must inevitably have convicted the appellants if the flaws in the proceedings had not occurred.
- [61] With respect to the appeal against sentence, the appellants complained that the 45 years sentence imposed upon them on 20th July 2016, was too excessive and wholly inappropriate. In particular, the judge erred when he gave no reasons as to why his starting point was fifty years. He also erred in not considering the character and record of the appellants, nor did he consider the aggravating and mitigating circumstances of the offence and or the offender. The judge erred in not addressing the balancing of the mitigating and aggravating factors, and never applied the principles of sentencing and how it accounted for his sentence, nor was any discount given for remorse. Further, the judge should have indicated how the mitigating factors, personal to the appellants, assisted the court in their sentence.
- [62] The respondent conceded that a starting point of 50 years imprisonment was seemingly excessive, and no detailed reason was advanced for that starting point. The respondent suggested that having regard to the new guidelines, an appropriate starting point is a determinate sentence of 40 years within a range of 30 to 50 years due to the fact that the murder took place with the use of a firearm and was committed in the course of a robbery. It also involved risk of death to other persons, having been committed in the view of the public. Further, the mitigating factors of the age of the appellants and that they had no previous convictions would not carry any or much weight having regard to the serious nature of the crime.
- [63] It is noted that when sentence was passed in 2016, there was no benchmark for murder. I agree with the submission of the respondent that a starting point of 50 years is seemingly high. There are now sentencing guidelines in relation

to murder.³¹ Applying the guidelines, this case falls within the category of cases where the starting point is set at 40 years with a range from 30- 50 years. In considering the mitigating and aggravating circumstances of the offence and the offenders, an appropriate sentence would be 40 years imprisonment. The appeal against sentence is allowed to the extent that the sentence of 45 years imprisonment imposed on the appellants is substituted for a sentence of 40 years imprisonment.

Conclusion

[64] It is ordered that:

- (1) The appeal of Darlington Noel against his conviction for capital murder is dismissed and the conviction is affirmed.
- (2) The appeal of Jan Isidore against his conviction for capital murder is dismissed and the conviction affirmed.
- (3) The appeal of Darlington Noel and Jan Isidore against sentence is allowed to the extent that the sentence of 45 years imposed on each appellant is set aside and substituted for a sentence of 40 years imprisonment.

I concur
Gertel Thom
Justice of Appeal

I concur
Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar

³¹ The Sentencing Guidelines in relation to Homicide Offences were re-issued on 26th November 2021.