

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUCRD 2013/1325

BETWEEN:

THE QUEEN

and

JOSEPH SIMON

Defendant

Appearances:

Mrs. Wauneen Louis-Harris for the Defendant

Ms. Isa Cyril for the Crown

2018: February 20;
March 8.

RULING ON VOIR DIRE

- [1] **TAYLOR-ALEXANDER, J.:** The Defendant was indicted on the 19th of March 2015, for Murder by intending bodily injury of Edward Thomas. At the Case Management Conference on the 10th of June 2016, the Court was apprised of an application filed by the Defendant a year earlier, on the 8th of June 2015, to exclude, as inadmissible, the voluntary statement, given at the Police Station on the 19th of July 2013. The statement contained certain inculpatory statements. The Crown opposed the application and filed two (2) affidavits of (i) Errands Degazon the Investigating Officer, who took the statement of the Defendant and (ii) John Daniel, the Justice of the Peace who witnessed the taking of the statement. I ordered a Voir Dire to determine the admissibility of the statement, and rendered an informal reason for my decision denying the application and ordering the evidence admissible. I have now reduced the decision to writing.

- [2] It is the Defendant's contention that the Crown is prohibited from adducing the statement he gave in the interview under caution, as such statement was taken under circumstances of oppression and was taken in breach of Section 584 (2) (d) of the Criminal Code for the following reasons:-
- (a) The circumstances of the statement being procured by the Police; in that, the Defendant gave no information in his first statement and subsequently gave a detailed second statement. The propriety of the statement is questionable and as a matter of law, should be set aside.
 - (b) The Justice of the Peace before whom such statement was taken, is a former Police Officer, and the Defendant did not feel comfortable participating in the interview, especially in the absence of his attorney/legal practitioner.
 - (c) The Defendant was induced to give the statement, which in the circumstances was involuntary.
 - (d) The Defendant felt vulnerable without his attorney present.
- [3] It is common evidence that the Defendant, Joseph Simon, was first arrested by the police in related circumstances for Burglary of the Bocage Secondary School, on the 3rd of July 2013, and for the Attempted Murder of Edward Thomas, a security guard who worked at the school, and who was critically shot during the Burglary.
- [4] The Defendant was detained in relation to these offences, on the 8th of July 2013. On the 10th of July 2013, a statement was taken from him, by Degazon, in the presence of his attorney/ legal practitioner, in which he preserved his right to silence. The Defendant was rearrested on the 19th of July 2013, when Edward Thomas had succumb to his injuries. The police had now preferred a charge of Murder. A statement was taken from the Defendant, again by Degazon, during an interview under caution, at which time, he did not have an attorney present, and at which time he made certain inculpatory statements. It is the propriety of that statement which the Defendant challenges.
- [5] The Crown's evidence in brief is that the Defendant gave an interview under caution to the Errands Degazon CPL 607, which was given voluntarily, without threats or inducements and he having been informed of his right to have an attorney of his choice present, unless he wished to voluntarily waive that right. After the rights were read, the Defendant was asked whether he understood the rights and whether he wished to exercise them to which he responded "yes" and "no" respectively.

The Viva Voce Evidence

- [6] The Crown called Errand Degazon to give evidence at the Voir Dire, who stated that on the 19th of July 2013, he met the Defendant at Custody Suites in Castries. He told him of further developments in the case, and that the Virtual Complainant had succumbed to his injuries and that he would now be preferring a charge of Murder. He told the Defendant that he wished to record a statement under caution. He asked him for his attorney and the Defendant told him, that he did not have an attorney on this charge. Degazon then made a call to John Daniel, Justice of the Peace, requesting his assistance, to record a statement. Later in the afternoon, he met John Daniel at Custody Suites and escorted him to the charge office, where he introduced him to the Defendant.
- [7] Degazon explained that the Defendant was told why the Justice of the Peace was present. He enquired of the Defendant if he was sick, hungry or uncomfortable. He informed the Defendant of his rights by use of the rights in custody form which was prepared in duplicate. He asked him if he wanted to exercise any of his rights at the time, which he did not. The Defendant signed the form, he, Degazon, signed the form and John Daniel signed the form. The Defendant was served with the original of the form and Degazon kept the duplicate whereupon he said, he asked the Defendant questions in relation to the incident. The Defendant responded to each question; and upon his response, he invited him to initial each question and answer, which he did. Prior to asking him the questions, Degazon stated that he cautioned him as per the prescribed statement under caution. The Defendant signed, he signed and John Daniel as Justice of the Peace also signed. At the end of the interview, each question read and the responses given, were read over to the Defendant. He asked him if he wanted to make changes, and he did not make any. The interview form was executed with the usual formality and the Defendant was invited to sign, which he did, the Justice of the Peace, John Daniel also signed the certificate.
- [8] Degazon stated that during the interview, he made no violent, oppressive or degrading advances nor did he make any promises or threats. The Defendant, he said, gave the statement of his own free will. He stated that at the time, the Defendant appeared to him to be ok. He appeared well and co-operated. He did not complain of any problem.

- [9] On Cross examination, Degazon stated that his first interaction with the Defendant was on the 5th of July 2013, on ward 9, at the Victoria Hospital. At the time, he had been assigned to investigate the Burglary and Attempted Murder of Edward Thomas. The Defendant was then nursing a gunshot wound to his leg. He was bandaged from the thigh down to his ankle.
- [10] Degazon acknowledged that when he first took a statement from the Defendant for the Burglary and the Attempted Murder, the Defendant's attorney/ legal practitioner was present. On the arrest for the first offences and the taking of the first statement, the Defendant requested his attorney and he, Degazon, contacted the attorney on the Defendant's behalf. In relation to the second and fresh offence for Murder, he denied that the Defendant requested an attorney. He stated that the Defendant told him he did not have an attorney for the fresh offence of Murder.
- [11] Cpl Degazon acknowledged that the second arrest and offence of Murder is more serious. He denied the allegation, that he told the Defendant, that his attorney refused to come because he did not pay any fees. He denied the suggestion that the Defendant was more co-operative, when his attorney was absent. He however acknowledged that he got more information out of the Defendant when he was unrepresented.
- [12] Altogether, he acknowledged that he took two (2) interviews under caution and preferred three (3) charges. He took a statement on the 10th of July 2013 at 3:12, another on the 19th of July 2013 at 3:45. He stated that when he charged the Defendant for Murder, the Defendant said nothing on the charge. It was not strange to him that the Defendant had an attorney for the Burglary charge, but did not have one for the Murder charge. He did not record that the Defendant said he did not have an attorney. He did not inform the Defendant that an attorney could be assigned to him in the instance of him being charged with Murder. He admitted that he made no attempt to contact an attorney for the Defendant. CPL Degazon admitted that at the time of the second interview under caution, the Defendant was nursing injuries to his leg and his mouth and was wearing a medical plaster.
- [13] John Daniel, the Justice of the Peace, was the next witness to give evidence at the Voir Dire. He remembered the 19th of July 2013 at Custody Suites. He was asked to assist CPL 206 Degazon in

preferring a charge against the Defendant. It was a charge of Murder. He recalls Degazon reading the Defendant his rights in custody. He thereafter witnesses a question and answer session with the Defendant, after which, Degazon preferred the charge of Murder. John Daniel did not recall how long the question and answer lasted. He recalls that the Defendant participated in the question and answer. The questions and answers were read over to him and he was asked to initial after every question and answer. The exercise he witnessed at custody suites, according to his evidence was unremarkable.

[14] John Daniel acknowledged that he is a former Police Officer who left the police force 22 years ago. On cross examination, he acknowledged that the Defendant had been nursing injuries during the interview. He could not recall where on the Defendant's body these injuries were, nor could he recall how many injuries he saw on the Defendant. He could not recall if he had a cast. Contrary to Cpl Degazon's own evidence however, he did state that he heard Cpl Degazon inform the Defendant that he could be assigned legal counsel in the matter.

[15] The Defendant was the third and last witness at the Voir Dire. He recalled the 8th of July 2013, when he said he was shot. He was at the time at Bocage. He said he was shot by the Special Services Unit, beaten and violated very badly. He was thereafter brought to Victoria Hospital to have his wounds attended to, and thereafter to Custody Suites to be charged. He stated that he was shot in his throat and that the bullet exited his jaw and his right leg.

[16] The Defendant stated that at Custody Suites on the 19th of July 2013, he was harassed by CPL Degazon and he had a scuffle with him. He stated that Cpl Degazon told him that he would have his right leg amputated if he did not co-operate. He stated that he asked for his attorney, and he was told that his attorney would not be representing him because of his financial situation. He insisted that he needed his attorney present, but instead was held by the wound on his jaw. He stated that he felt vulnerable and abandoned. He wanted his attorney, but was denied his attorney, to go through the process of being charged.

[17] The Defendant stated that he had an attorney from the outset, who was present for the charges of Attempted Murder and Burglary, when he was first arrested. It was CPL Degazon who called him

his attorney. His attorney Mrs. Harris appeared shortly afterward. Once she appeared, he felt relaxed. He said that on the charges of Attempted Murder and Burglary, he had nothing to say. He said that with the charge of Murder, the process of charging took a while, about one hour and a half. He claims not to recall what he had said in that statement, as it was taken under duress.

- [18] On cross examination, the Defendant admitted that he did not know that John Daniel, Justice of the Peace was a former police officer. He admitted that John Daniel did or said nothing to him, that made him feel uncomfortable. He accepted that he had in his earlier filed affidavit, left out the information that he had been beaten and violated by the police, and that he had been threatened with amputation, if he did not cooperate. He said that his attorney told him what an affidavit was about and that he would speak of the threats in Court. He admitted that at the time of the second charge for Murder, he never complained to anyone that he was uncomfortable. This he says was because he was in a cell. He explained that at the interview on the 19th of July 2013, he did not reserve his right to silence as he had been threatened.

The Defendant's Submission

- [19] The Defendant challenged the admissibility of the inculpatory statement on the basis that he had requested the presence of his attorney, in keeping with his constitutional and legal right at the time he was being charged with Murder, but that this request was denied. The Defendant submitted that the inculpatory statement he subsequently gave was extracted by oppression.
- [20] Mrs. Harris, legal practitioner/attorney for the Defendant submitted that the express provisions of the Constitution of St. Lucia, protects against self-incrimination and provides for access to an attorney upon arrest. Further Section 584 (2) (d) of the Criminal Code affords the Defendant an attorney assistance of his choosing or one assigned where the charge is for Murder. The viva voce evidence of the officer, was that he advised the Defendant of his right to have his attorney present. This Mrs. Harris submits, is incompatible with the Criminal Code which provides a two-fold obligation on the officer (1) To inform the Defendant of his right to legal assistance of his choosing and/or (2) to inform him of the right to have state appointed legal assistance.

[21] Mrs. Harris acknowledged that there exists an inconsistency between the Evidence Act, Section 70 and 72 and the Criminal Code Section 584 (2) (d). However she submitted that Section 584 (2) (d) buttresses a constitutional provision, and as such, it is that provision that should be given effect. The Constitutional provisions to which Mrs. Harris referred are Section 3(2) and 8(1) which sections provide as follows:-

"Any person who is arrested or detained shall with reasonable promptitude and in any case no later than 24 hours after such arrest or detention be informed in a language that he or she understands of the reasons for his or her arrest or detention and be afforded reasonable facilities for private communication and consultation with a legal practitioner of his or her own choice and, in the case of a minor, with his or her parents or guardian."

Every person who is charged with a criminal offence-

(d) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal practitioner of his or her own choice;"

[22] The Defence submitted that the notation on the earlier charges that the Defendant's legal Practitioner was in fact Mrs. Wauneen Louis-Harris should have alerted the Officer when he preferred the later charge, to be prudent and call the Defendant's attorney. That the Defendant in his earlier statements reserved his right to silence, makes the statement he gave on the 19th of July 2013, highly suspicious. Further, the Defendant's impaired physical condition at the time, the intimidation he felt, in having John Daniel, a former Police Officer, perform the function of Justice of the Peace, and generally the totality of the circumstance, compounded the fact that his attorney was not present. All of these reasons compromised the reliability of the statement taken, such that it must be rendered inadmissible. The Defence in support of its contention relied on the Court of Appeal case of **Francis Willie v The Queen** Crim. App No 2 of 1997, where the Court found there to be highly suspicious circumstances disclosed in the evidence prior to a confession being obtained, that challenged the voluntariness of the confession, including the fact that the Defendant gave three exculpatory statements prior to the confession the last one being just a few hours before the alleged confession. The majority in that case, concluded that there was a "lurking doubt" in the propriety of the confession and ruled that it should be set aside.

[23] Mrs. Harris also submitted on a Botswana authority of The **State v Fly** 2008 3 BLR 258 HC, that the burden of establishing the voluntariness of the statement, lies on the Crown. She relied on the dicta of Masuku J at pg 4 of **Fly** wherein he states:-

"All the accused has to do and no more, is to allege that it was not made freely and voluntarily and give grounds upon which the statement may be impugne"d

- [24] The Defendant has submitted that the matters in issue on this hearing are:-
- a. Whether the statement under caution and the interview under caution were extracted from the Defendant under oppression; and/or in circumstances that make the statement inadmissible;
 - b. Whether the statement was taken in breach of Section 584 (2) (d) of the Criminal Code and in violation of the Defendants rights.

I agree these as the issues for determination.

The Crown's Submissions

- [25] The Crown submits that the threshold for the admissibility of the Defendant's statement under caution, is legislated under Section 70 of the Evidence Act. The Crown's burden is to prove that the taking of the statement was not influenced by violent, oppressive, inhumane or degrading conduct toward the Defendant, or by any promises made to the person who made the admission.
- [26] In the case of **R v Fulling** [1987] Q.B 426, the Court of Appeal adopted the oxford dictionary meaning of oppression as being " the exercise of power in a tyrannical manner, cruel treatment of subjects, inferiors etc." This definition of oppression was applied in this jurisdiction by Benjamin J (as he then was) in the case of the **Queen v Elian Phillip** SLUCRD2008/1216 &1217.
- [27] The Crown submitted that the interview under caution was conducted in keeping with the threshold standard set by section 70 and was done in accordance with Section 72 (2) (b) of the Evidence Act Cap 4.15. The Defendant was also informed of his right to have his attorney present under section 584 (2) (d) of the Criminal Code.
- [28] The Crown submitted that although issue is taken with the voluntariness of the statement taken on the 19th of July 2013, the Defendant in fact signed and initialed all his responses to the questions posed on the interview. In so far as the Court's suspicion is aroused by the statement of the investigating officer, that the Defendant stated that he did not have an attorney, the Crown submits that circumstances can easily have changed between the 10th of July 2013, when the first

statement was taken, and the 19th of July 2013, when the subsequent statement was taken, such that the officer was entitled to believe the Defendant, that he no longer had an attorney for the fresh charge of Murder. All in all, the legislated, accepted procedure, was followed in that the rights in custody form was read to the Defendant and it was signed by him. The law places no further obligation on the investigating officer. There was no reason for Cpl Degazon to assume that the Defendant's attorney on the earlier charges continued to represent him on the fresh charge preferred. In so far as the Defendant stated that he did not have an attorney for the fresh charge, Cpl Degazon ensured that Section 72 of the Evidence Act, created for the protection of the Defendant, was complied with. He ensured a Justice of the Peace was present.

[29] The Crown invited the Court to note the vast inconsistencies between the Defendant's affidavit evidence and his viva voce evidence. For instance, the Defendant in his affidavit evidence filed prior to the voir dire alleged that he felt vulnerable and intimidated at the time he gave the interview under caution, as the Justice of the Peace who was present during the interview, was a former police officer. Yet in his viva voce evidence he admitted that he did not know at the time that the Justice of the Peace was a former police officer. The inconsistencies in the evidence must cause the Court to question the credibility of the Defendant, and to treat with suspicion, his allegation that he was beaten and harassed by the police, and that he was operating under the fear that his right leg would be amputated.

[30] In contrast the Court was asked to consider the consistent evidence of Cpl Degazon, which evidence was supported by the independent testimony of the Justice of Peace. Their evidence did not disclose the use of any violence, oppression or inhumane treatment. Both the officer and the Justice of the Peace, confirmed that the Defendant was advised of his rights and that the Defendant, of his own accord, was at all times co-operative.

Analysis of the Evidence

[31] During the voir dire, I had the opportunity to hear and observe the three witnesses who gave evidence. All three, gave evidence on what transpired when a statement under caution and the interview under caution were conducted. I also had the benefit of the affidavit evidence of the witnesses which was filed beforehand.

- [32] Cpl Degazon's evidence was unremarkable except that he admitted that the Defendant was not told of his right to have counsel appointed to him, should he not be able to afford one. As anticipated, he stated that what he in fact did, was to follow the standard protocol contained in the statement under caution form. His viva voce evidence was consistent with his earlier affidavit evidence, and I found no reason in his demeanour and presentation to disbelieve the evidence he gave.
- [33] The Defendant on the other hand did not present himself to be the most credible witness on the stand. On the important issue, of whether, there was violence exercised by the Investigating officer towards him, I found it incredulous, that in his earlier filed affidavit, the Defendant made absolutely no mention of any violence or threats made toward him, but that this featured prominently in his viva voce evidence I had great difficulty accepting that something as fundamental as being threatened with the loss of a limb and being earlier beaten before he gave the statement had escaped him entirely when he gave his earlier evidence on affidavit. Further, that this had not been earlier brought to the attention of the Court, the complaints commission or even the parliamentary ombudsman, all of which facilities are available to the Defendant.
- [34] The Defendant in his earlier filed affidavit, made reference to the fact that he was uncomfortable in the presence of the Justice of the Peace, given that he was a former police officer. On cross examination however, he admitted that at the time the statement was taken from him, he was unaware that the Justice of the Peace had been a former police officer. He admitted that he was not intimidated by the Justice of the Peace, nor did the Justice of the Peace who witnessed the interview, do anything to make him uncomfortable. This was a major divergence from his affidavit evidence, which forced my conclusion, that he was unaware of the evidence to which he had earlier deposed. All in all, the Defendant did not present as a credible or trustworthy witness and from his testimony during the voir dire, I found no reason to conclude that he was in fact threatened or intimidated by the CPL Degazon or by the combination of CPL Degazon and the Justice of the Peace. I simply did not accept his version of events on what transpired at custody suites.
- [35] John Daniel in his role as Justice of the Peace is, in my view, an impartial third party, there to ensure that protocols and procedures on arrest are observed. I found the fact that he was a former

Police Officer to be of no moment, because the evidence of the Defendant revealed that he, the Defendant, found nothing in the Justice of the Peace's demeanour to cause him to doubt his integrity. Reference to the Justice of the Peace's former profession without more, is insufficient justification, to question his integrity in the performance his duties. His evidence confirmed that he did not witness anything or behaviour out of the ordinary. In the round the evidence of the Crown's witnesses was preferable to the Defendant. Both were largely consistent in recalling what took place at custody suites, and I had no reason to conclude that there was collusion between them.

Was there an Obligation on Cpl Degazon to Call Mrs. Harris

[36] An important issue, raised in the evidence was whether there was an obligation or the failure to exercise prudence as it were, by Cpl Degazon in not calling Mrs. Harris the Defendant's attorney, who had appeared with him on the earlier and related charges. According to the submission ran by Mrs. Harris, the conducting of the interview under caution without her presence and when it was known that she had appeared in the earlier charges, together with the fact that the Defendant was nursing injuries caused by the police, when they had attempted to detain him; on the day of and near the location of the crime, created a vulnerable situation for the Defendant and should cause some "lurking doubt" as to the voluntariness of any admission allegedly made. An interesting submission no doubt, however, the law imposes no further obligation on the investigating officer, than to inform an accused of his rights on arrest, including his right to have his attorney present and his right to have an attorney appointed to him. It is the Defendant, who has to invoke his right to call his attorney and not the officer to call private representation for him where he makes no such request.

[37] Having accepted the evidence as to what transpired at custody suites, I accepted that it was the Defendant himself who said he did not have an attorney for the fresh charges. This response for the purposes of this case ought to have triggered the officer to inform the Defendant of his right to have an attorney appointed to him, but it does not impose on him an obligation to insist on the Defendant calling his previously used private attorney, or for him, on the Defendant's behalf, to call Mrs. Harris. I disagree with Mrs. Harris's submission that the absence of the Defendant's attorney on the second charge creates a lurking doubt in the mind of the Court. I accept the evidence of the Crown that during the period of 10 days that expired between the first charges and the later charge

of Murder, the police officer was entitled to assume, based on the Defendant's statement, that he no longer had legal representation. Having assessed the facts and circumstances placed before me, I found nothing to engender a lurking doubt or uneasiness about whether an injustice had been done to the Defendant in not calling Mrs. Harris. I do however accept, that the officer breached his statutory duty in not informing the Defendant of his right to have legal assistance assigned to him.

Analysis of the Law

- [38] The statement allegedly made by the Defendant in the interview under caution, was not a confession but an admission. The dictionary to the Evidence Act under Section 2 defines the terms "admission", as (a) a previous representation made by a person who is or becomes a party to proceeding, being a representation that is adverse to the person's interest in the outcome of the proceedings; or (b) a confession. For the purposes of this voir dire, we are concerned with Section 2(a).

Onus and Burden of Proof on the Voir Dire

- [39] Rather than the authority of the **State v Fly** (*ante*) referenced by Mrs. Harris, the correct position on the burden and standard of proof is set out in Section 70, 138 and 142 of the Evidence Act. The stated position is that where the party against whom the evidence of an admission is tendered, raises an issue about whether the admission or its making was so influenced, the party tendering the evidence bears the onus of proof, that the conduct did not influence the admission or the making of the admission. The burden of proof on this issue is on the balance of probabilities. Section 70 nevertheless, places an evidentiary onus on the party raising the issue, to point to, or to produce evidence from which it could be inferred that the specified conduct took place, before the other party bears the onus of satisfying the Court that the admission or the making of the admission, was *not* influenced by that conduct. In this regard the evidential onus is on the accused to identify the conduct to be characterised as 'violent, oppressive, inhuman or degrading'
- [40] The terms used in Section 70 are not defined in the Act, but they appear to reference the circumstances in which the common law excluded evidence of admissions because of the absence of true voluntariness on the part of the person making the statement. Additionally in **Higgins v The Queen** [2007] NSWCCA 56 at 26. 'Oppressive conduct' has been held as not limited to physical violence or explicit threats, but could extend to 'mental and psychological pressure'.

[41] For reasons I have referenced above, it is my conclusion that the Defendant did not discharge the evidentiary onus placed on him. I find no reason to invoke Section 70 of the Evidence Act, nothing in the manner in which the interview under caution was taken has caused me to question the voluntariness of the interview under caution, nor can I conclude that there was any violence, inhumane treatment or oppression exercised by the police.

The Admissibility of the Statement Taken

[42] A statement admissible under Section 70, may nevertheless be subject to challenge under section 116 of the Evidence Act Cap 4.15, which provides for judicial discretion to exclude evidence obtained-

- (a) improperly or in contravention of a law; or
 - (b) in consequence of an impropriety,
- unless the probative value of the evidence outweighs the prejudicial effect of the evidence.

In the exercise of this discretion, the Court shall take into account-

- (a) the probative value of the evidence;
- (b) the importance of the evidence in the proceedings;
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings;
- (d) the gravity of the impropriety or contravention;
- (e) whether the impropriety or contravention was deliberate or reckless;
- (D) whether any other proceedings, whether or not in a Court, has been or is likely to be taken into relation to the impropriety or contravention;
- (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law."

[43] The concern here is whether the Court should exercise this discretion to exclude the statement under caution for the police failure under 584 (2) (d) to inform the Defendant, in the circumstance of a section 86 offence, that he had a right to have counsel appointed to him.

[44] Section 584 of the Criminal Code is generally concerned with the detention and bringing up of persons arrested. It provides:-

- (1) A person arrested for any cause, whether with or without warrant, shall be brought before the Court or the judge or a magistrate, as the case may be, as soon as is practicable but not later than 72 hours of his or her arrest.
- (2) If a person arrested is to be questioned, he or she shall be informed-
 - (a) that the person has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
 - (b) of their rights under section 589; and
 - (c) that the person has a right to be questioned in the presence of a lawyer unless the person voluntarily waives the right to counsel;**
 - (d) of their right to have legal assistance of their choosing or to have legal assistance assigned to them if the arrest is for an offence under section 86 or 87.**

(my emphasis)

(Section 86 and 87 are offences of Capital and Non Capital Murder)

[45] The current practice on arrest, it seems, is to read the Defendant the Rights in Custody Form which is an abridged version of 584 (2) (c) and (d). The form only informs the Defendant of his right to have legal assistance of his choosing, but does not inform of his right to have legal assistance assigned in the instance of Capital or non-Capital Murder.

[46] Section 584 of the Criminal Code, as I see it, aims to provide an accused person with the protections guaranteed under Section 3 (2) of the Saint Lucia Constitution Order, and goes even further to provide for legal assistance assigned to the Defendant. The general theory behind the provision of these protections is to balance the wide powers available to the Police, to arrest any person who they suspect has committed an arrestable offence. The police powers of detention and arrest are some of the most important powers available to a police officer in their investigation of criminal activity. It is also some of the most invasive powers upon a person's liberty. There is a need to strike balance between the interests of bringing offenders to justice and the rights and liberties of persons suspected or accused of crime and to avoid misuse or arbitrary use of police powers where an appropriate balance has not been achieved

The Application of 584 (2)(d)

[47] Where a person is arrested on a Murder charge, the Criminal Code provides that he/she is to be informed of his/her right to have legal assistance assigned. Presently, an assignment of State Counsel is made by the High Court on the Defendant's first appearance and not by the police.

[48] The corollary of this, is that during the early stages of an investigation which is the most crucial in evidence gathering and the time when the most instances of abuse allegedly occur, an impecunious Defendant is often unrepresented, and is therefore more susceptible to the arbitrary misuse of police power. To my mind, this was the mischief which Parliament sought to cure, and saw as fundamental, the Defendant being told that he had a right to an attorney being present, or to have assistance assigned to him.

[49] The English position under Code C para 3.1 and 6.1 of PACE is worded differently to the St. Lucia Criminal Code. It provides:-

" 3 . 1 Initial action

.....When a person is brought to a police station under arrest or arrested at the station having gone there voluntarily, the custody officer must make sure the person is told clearly about the following continuing rights which may be exercised at any stage during the period in custody: (i) the right to have someone informed of their arrest as in section 5; (ii) the right to consult privately with a solicitor and that free independent legal advice is available; (iii) the right to consult these Codes of Practice.....".

"6 .1 Right to legal advice

(a) Action 6.1 Unless Annex B applies, all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available...."

[50] **Blackstones 2015** at pg 1219 Para D 1.55 interprets the English position as follows: *"a person must be told of his right to free legal advice when he is brought to a police station under arrest or when he is arrested.....immediately before the commencement of any interview at a police station or other authorised place of detention, before a review of detention is conducted, or before a decision is made to extend detention, after charge, upon being informed that he is to be prosecuted, where he is being re interviewed etc.....,,*

[51] The language of the Criminal Code does not provide the clarity of Code C of PACE, it is inescapable however that the legislators under the Code had in mind offering protection to an accused in the instance of these two serious offences and to avoid the abuse that can take place in the investigation stages of these offences. There is no doubt in my mind, that there is an obligation on the police to inform the Defendant of his ability to access that right.

The effect of the failure to inform the Defendant of his right under 584 (2) (d)

[52] The Criminal Code offers no guidance on the Court's recourse in the event of a failure to comply with Section 584 (2) (d). Section 116 of the Evidence Act provides assistance by giving the Court the discretion to exclude such evidence. I have considered the factors to which the Court must have regard in the exercise of its discretion. I note as well that in the taking of the statement the investigating officer ensured compliance with Section 72 of the Evidence Act, which under prevailing circumstances, Section 72 makes an admission admissible, where such admission was made either in the presence of a Justice of the Peace or an attorney-at-law, and such statement was documented signed and initialed by the accused. Further a Court may admit evidence even if the requirements of this section had not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the Court is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice. Section 72 provides:-

CRIMINAL PROCEEDINGS: ADMISSIONS BY DEFENDANTS

- (1) This section applies only-
 - (a) in criminal proceedings;
 - (b) in relation to evidence of an admission made by a defendant who, at the time when the admission was made, was or ought reasonably to have been suspected by an investigating official of having committed an offence; and
 - (c) where the admission was made in the course of official questioning.
- (2) **Subject to subsections (5) and (6), evidence of an admission is not admissible unless-**
 - (a) **the questioning of the person and anything said by the person during the questioning was tape recorded; or**
 - (b) **the questioning of the person was conducted in the presence of a person, not being an investigating official, who was-**
 - (i) **a justice of the peace; or**
 - (ii) **an attorney-at-law acting for the person;****and a document prepared by or on behalf of the investigating official to prove the contents of the question, representation or response has been signed, initialed or otherwise marked by the person making the admission, and by the justice of the peace or the attorney-at-law, acknowledging that the document is a true record of the question, representation or response; or**
 - (c) in any other case-
 - (i) at the time of the interview of the person or as soon as practicable afterwards, a record in writing was made, either in English or in another language

used by the person in the interview, of the things said by or to the person in the course of the interview, and

(ii) as soon as practicable after the record was made, it was read to the person in the language used by him or her in the interview and a copy of the record was made available to the person,

(iii) the person was given the opportunity to interrupt the reading referred to in subparagraph (ii) at any time for the purpose of drawing attention to any error or omission that he or she claimed had been made in or from the record and, at the end of the reading, the person was given the opportunity to state whether he or she claimed that there were any errors in or omissions from the record in addition to any to which he or she had drawn attention in the course of the reading,

(iv) a tape recording was made of the reading referred to in subparagraph (ii) and of everything said by or to the person as a result of compliance with subparagraph (iii) and the requirements of this subsection were observed in respect of that recording and

(v) before the reading referred to in subparagraph (ii), an explanation, in accordance with the form set out in Schedule 2, was given to the person of the procedure that would be followed for the purposes of compliance with that subparagraph and subparagraphs (iii) and (iv).

- (3) In subsection (2)(b), "document" does not include a sound recording or a transcript of a sound recording.
- (4) If the question, admission, or the confirmation of an admission, of a person is recorded as required under this section or if the question, representation or response is contained in a prepared document as required under this section, the investigating official shall, without charge-
- (a) if the recording is an audio recording only or a video recording only, make the recording or a copy of it available to the person or his or her legal representative within 14 days after the making of the recording;
- (b) if both an audio recording and a video recording were made, make the audio recording or a copy of it available to the person or his or her legal representative within 14 days after the making of the recording, and notify the person or his or her legal representative that an opportunity will be provided, on request, for viewing the video recording;
- (c) if a transcript of the tape recording is prepared make a copy of the transcript available to the person or his or her legal representative within 14 days after the preparation of the transcript;
- (d) if a document is prepared, signed, initialled or otherwise marked as a true record of the question, representation and response make a copy of the document available

to the person or his or her legal representative within 14 days of the preparation of the document.

- (5) **A Court may admit evidence to which this section applies even if the requirements of this section have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the Court is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.**
- (6) A Court may admit evidence to which this section applies even if a provision of subsection (2) has not been complied with if, having regard to the reasons for the non-compliance and any other relevant matters, the Court is satisfied that it was not practicable to comply with that provision.
- (7) If a judge permits evidence to be given before a jury under subsection (5) or (6), the judge shall inform the jury of the non-compliance with the requirements of this section, or of the absence of sufficient evidence of compliance with those requirements and give the jury such warning about the evidence as he or she thinks appropriate in the circumstances.
- (8) The Minister may by order published in the Gazette amend Schedule 2." (my emphasis)

[53] It is my reasoned conclusion that the police failure to inform the Defendant of this rights to have legal assistance assigned to him, was neither deliberate or reckless, the officer in his actions had met the requirements of Section 72 of the Evidence Act and the admission is admissible pursuant to that provision.

[54] In the circumstances the application of the Defendant is dismissed on both grounds. The proceedings are remitted for trial on the 18th of June, 2018.

V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT JUDGE

BY THE COURT

REGISTRAR