

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCRA2011/0001

BETWEEN:

MITCHEL JOSEPH AKA “BAGE”

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

Appearances:

Mr. Shawn Innocent with him, Mr. Al Elliot for the Appellant

Mrs. Victoria Charles-Clarke, Director of Public Prosecutions

with her, Ms. Tina Mensah for the Respondent

2012: December 12

2013: July 8.

Criminal appeal – Murder – Evidence Act – Whether the trial judge erred in allowing evidence of confessional statements and admissions – Whether trial judge erred in failing to conduct voir dire – Whether trial judge erred in failing to give reliability warning – Whether counsel's incompetence rendered conviction unsafe – Sentence – Death penalty – Whether killing of policeman fell within the worst of the worst category

The appellant was convicted and sentenced to death by hanging for the murder of Lester Remy, a police officer. The prosecution's case was supported by eye witness evidence; statements made by the appellant at the scene of the murder to other police officers; confessional and admission statements the appellant made to the police and Glenise Kenson (Remy's girlfriend) and by the ballistics evidence of Sergeant Husbands matching the bullets recovered from Remy's body with the bullets found in the firearm recovered from the appellant. The eye witness evidence presented by the prosecution revealed that Corporal Labadie was driving an unmarked police vehicle accompanied by Constable

Phillip and Constable Remy. As they approached the appellant's mother's house, Remy exited the vehicle and alerted the appellant to the presence of the police. At some point thereafter, there was a struggle between Remy and the appellant as the appellant was trying to escape apprehension by Remy. The struggle culminated in the appellant shooting Remy and then pointing the firearm at Labadie in an attempt to shoot him. Constable Phillip did not witness the actual shooting but he heard loud noises followed by five gunshots. On approaching the scene Constable Phillip witnessed Labadie and the appellant engaged in a struggle. He helped Labadie disarm the appellant and handcuffed the appellant and informed him that he had just shot a police officer.

The appellant who had sustained an injury was transported to the Victoria Hospital where he was cautioned and arrested on suspicion of killing Remy. He replied that he understood his rights and admitted to killing Remy. The appellant however refused to sign the Rights in Custody Form which was later admitted into evidence. Remy's girlfriend, Glenise Kenson, visited the Victoria Hospital where she saw the appellant lying on a bed. Glenise testified that the appellant called out to her by her nick-name and asked whether the deceased was her boyfriend. The appellant, who was armed with a bible, went on to say that he was sorry and that it was Satan that caused him to do that. Although the statement contained an admission, it was not made in the course of official questioning.

The defence's case at the trial was that the appellant did not have or fire the gun; Remy was shot by the police and that it was the police who had the .380 firearm in their possession.

The jury returned a verdict of guilty and the trial judge sentenced the appellant to death by hanging. The appellant appealed the conviction and sentence on various grounds which included (1) the trial judge erred in permitting evidence of his confessional statements and admissions to be admitted into evidence without complying with sections 72, 73, 77 and 115 of the Evidence Act; (2) the judge erred in failing to conduct a voir dire in accordance with section 142 of the Evidence Act on the preliminary issue arising in relation to the confessional statements; (3) the judge erred in failing to exercise his discretion under section 136 of the Evidence Act in failing to give a warning with respect to the reliability of evidence given by some of the prosecution witnesses; (4) trial counsel was incompetent in conducting the appellant's case which made the trial and the verdict unsafe; and (5) the sentence was excessive in all the circumstances.

Held: dismissing the appeal against conviction and allowing the appeal against sentence to the extent that the sentence of death is quashed and a sentence of life imprisonment is substituted, that:

1. The common thread running through sections 70 and 71 of the Evidence Act is that the issue of admissibility has to be raised by the defendant. Defence counsel raised no objection or challenge to the admissibility of any admission or confession to engage the operation of sections 70 or 71 of the Evidence Act. Even if the issue of admissibility were raised under section 70, the admission and the making of the admission would not have been caught by any of the conduct proscribed by that section. The circumstances surrounding the making of the statement did not

involve any violent, oppressive, inhumane or degrading conduct towards the defendant or any other person, nor was there any threat of conduct of that kind or any promise made to the defendant to any other person. Further, in relation to section 71, the circumstances in which the confession was made were such as to make it unlikely that its truth was adversely affected. In the circumstances, the confession or admission would not be inadmissible.

Sections 70 and 71 of the Evidence Act applied.

2. The framers of the Evidence Act were clearly cognizant of the myriad of facts and varying circumstances attendant upon the criminal investigatory process and the conduct of a criminal trial which may impact upon fulfillment of the requirements of the sections. Accordingly, the Evidence Act empowers the court to admit evidence to which sections 72 and 73 apply notwithstanding lack of compliance or insufficiency of compliance with their requirements. The discretion conferred upon the court is not at large, being circumscribed by the dictates of the sections. In exercising its discretion, the court has to be satisfied of matters such as the practicability of compliance and whether in the special circumstances of the case admission would be contrary to the interest of justice. There was no challenge by the appellant to the statements and admissions being put into evidence. As such there was no preliminary question to be answered as to whether the evidence should be admitted. The learned judge rightly exercised his discretion to admit the evidence by looking at the circumstances under which the statements were made. Accordingly, it cannot be successfully argued that it would have been unfair to the appellant to admit the evidence.

Sections 72 and 73 of the Evidence Act applied.

3. Having regard to the nature of and the reason for non-compliance with sections 72(2) and 73(1) of the Evidence Act and the surrounding circumstances, the learned judge would have properly exercised his discretion under sections 72(5) and (6) and 73(3) of the Evidence Act by admitting the Rights in Custody Form. In the special circumstances of the case, it was not contrary to the interest of justice to admit the evidence. Further, in the circumstances there was no unfair prejudice to the appellant by the admission of the evidence and the trial judge would have properly exercised his discretion under section 115 of the Evidence Act as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Sections 72, 73 and 115 of the Evidence Act applied.

4. It was not necessary to conduct a voir dire in this case as the determination of the question whether the confessional statement or oral representations should be admitted did not depend on the judge finding that a particular fact existed. The appellant did not contend that he did not make the statements neither was there any challenge to the voluntariness of the evidence. The learned judge rightly exercised his discretion to admit the evidence by looking at the circumstances

under which the statements were made, and it was not unfair to the appellant to admit the evidence.

Section 142(1) of the Evidence Act applied.

5. The failure to give a section 136 warning does not inexorably lead to the conclusion that a resulting conviction is unsafe. Much may depend on the circumstances of the case, including the nature of the evidence in question, the strength of evidence against the appellant, and whether the evidence of the witness in respect of which the warning was not given, is supported by other evidence in the case. The evidence against the appellant was most compelling. The prosecution's case did not depend solely on the admission or confession of the appellant, but was supported by other evidence in the case. Given the strength of the case, the jury would inevitably have arrived at the same verdict even if a section 136 warning had been given. In the circumstances, the failure to give a section 136 warning did not result in a miscarriage of justice.

Section 136 of the Evidence Act applied; *Andrew Milton and Dennis Campbell v R Territory of the Virgin Islands* High Court Criminal Appeal BVIHCRAP2009/0006; BVIHCRAP2009/0007 followed.

6. It is only in exceptional circumstances that the mistakes or omissions of counsel will be sufficient to set aside a guilty verdict as being unsafe or lead to a miscarriage of justice. To achieve that result, counsel's conduct must be so extreme as to result in a denial of due process to his client. In the circumstances of this case it cannot be said that counsel's omissions achieved that result. Having regard to the nature of the appellant's criticisms of his counsel, it cannot be said that the matters complained of had any adverse impact on the fairness of the trial or the safety of the verdict. The appellant's defence was always that he did not have or fire the gun which killed Remy and that Remy was shot by the police. The jury evidently believed the compelling evidence of the prosecution and rejected the appellant's defence.

Mark Teeluck et al v The State [2005] UKPC 14 applied; *Ann Marie Boodram v The State* [2001] UKPC 20 applied; *Anderson v HM Advocate* 1996 JC 29 applied.

7. For the death penalty to be imposed, two cardinal principles must be satisfied. The first principle is that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, 'the worst of the worst' or 'the rarest of the rare'. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. If the murder cannot be characterised as the worst of the worst, the first aspect of the second principle, whether there is a reasonable prospect of reform, does not arise. The killing of a police officer in the execution of his duty is no doubt a grave crime. However, on the facts, the murder cannot be categorized as the most

extreme and exceptional. It cannot fall into the category of the worst of the worst or the rarest of the rare. A killing is not to be regarded as the worst of the worst simply by reason of its inclusion in a particular type of murder category. Thus, the categorization of the killing as capital murder under the Criminal Code – as it involved the killing of a policeman in the execution of his duty – would not by itself transform the killing into the category of the worst of the worst.

Daniel Dick Trimmingham v The Queen [2009] UKPC 25 followed; Ernest Lockhart v The Queen [2011] UKPC 33 applied; Maxo Tido v The Queen [2011] UKPC 16 applied.

8. The murder of a police officer in the execution of his duty is undoubtedly a very serious crime. The use of a firearm in the execution of the crime is also a very grave matter. A sentence of life imprisonment is proportionate and appropriate in the circumstances of this case.

JUDGMENT

- [1] BAPTISTE JA: After a trial before Benjamin J and a jury, Mitchel Joseph (“the appellant”) was found guilty of capital murder – murder of police officer Lester Remy – and sentenced to death by hanging. The appellant has appealed his conviction and sentence.

The case of the parties

- [2] The prosecution's case was premised on the basis that the appellant, who was armed with a .380 Glock pistol, shot and killed Remy while attempting to evade the execution of a search warrant. In support of its case the prosecution relied on the eye witness evidence of the police officers Corporal Labadie and Constable Philip; statements made by the appellant at the scene of the murder to these officers, as well as confessional and admission statements the appellant made to the police and Glenise Kenson (Remy's girlfriend) while warded at the Victoria Hospital. The prosecution also relies on the ballistics evidence of Sergeant Husbands matching the bullets recovered from Remy's body with the bullets found in the firearm recovered from the appellant. The defence case at the trial was that the appellant did not have or fire the gun. The defence as gleaned from cross-examination was that Remy was shot by the police and that it was the police who had the .380 firearm in their possession.

- [3] The prosecution's evidence was that Corporal Labadie was driving an unmarked police vehicle accompanied by Constable Phillip and Constable Remy. As they approached the appellant's mother's house, Labadie saw the appellant standing in the gateway. The appellant stepped back into the yard. Remy exited the vehicle and ran into the yard shouting "Bage", police." Upon entering the yard, Labadie saw Remy and the appellant struggling. The appellant was trying to escape apprehension by Remy.
- [4] Labadie testified that Remy was up against a set of concrete blocks with the appellant in front of him. The appellant's back was towards him. Labadie grabbed the appellant from the back and pulled him off Remy. As soon as he did that, Remy shouted "weapon". Labadie heard five shots discharge. Upon hearing the gunshots and without releasing his hold on the appellant, he leant over the appellant's shoulder and saw a black pistol in his hand. Labadie said that he saw when the last round was fired and the empty shell casing ejected from the firearm the appellant had.
- [5] According to Labadie, the appellant then brought the firearm around, up and over his shoulder and pointed it at him in an attempt to shoot him. Labadie released the hold on the appellant's left wrist and grabbed the right wrist. In the ensuing struggle, he tripped the appellant and pried the firearm out of his hand. During the struggle between the appellant and himself, he (Labadie) saw Remy fall.
- [6] Constable Phillip did not witness the actual shooting but while standing at the back of the house, he heard loud noises, followed by five gunshots. On moving to the front of the house he observed Labadie and the appellant in a struggle. The appellant was pointing a black pistol in his direction. He helped Labadie disarm the appellant; the appellant was thrown to the ground. Labadie took the pistol from the appellant and handed it to him. Remy was about six feet away lying on his back and there was blood coming from his left shoulder. There was a hole below his belly button and to his left shin. Remy (who was also known as "Five" – his number in the police force) started shouting, "Phillip that man shoot me; that

man shoot me.” Phillip handcuffed the appellant and informed him that he had just shot a police officer. The appellant shouted, “Phillip fuck that man, I eh give a fuck about ‘Five’. I eh give a fuck if that man die.” Labadie said he informed the appellant that he was arresting him for shooting the officer and cautioned him. The appellant replied twice by saying, “I dead already, fuck Remy, fuck ‘Five’, just shoot me in my head.” The deceased’s glock nine millimeter pistol was recovered with a magazine containing 14 rounds of ammunition under his (the deceased’s) head.

[7] The appellant, who had sustained an unexplained injury to his foot, was transported to the Victoria Hospital where he was warded. While there, Sergeant Defreitas and Constable Dantes visited the appellant. Sergeant DeFreitas informed the appellant of the report that was made against him. Sergeant Defreitas arrested the appellant on suspicion of killing Remy and explained his rights as a prisoner in custody. When asked whether he understood those rights he replied “Yes I understand. I did it for true”. Sergeant Defreitas recorded the response on the Rights in Custody form. When invited to sign the form the appellant declined, saying that his lawyer told him not to sign any document or say anything to the police in his absence. Sergeant Defreitas and Constable Dantes signed as witnesses. Constable Dantes testified that after Sergeant DeFreitas cautioned the appellant, the appellant said “I killed the officer”. Further, when the appellant was informed of his rights he said he understood them but refused to sign the form saying that it was because of the ordeal he had been through.

[8] Glenise Kenson, the deceased’s live-in girlfriend, also visited the Victoria Hospital where she saw the appellant lying on a bed. Glenise testified that the appellant called out to her by her nick-name and asked whether the deceased was her boyfriend. The appellant, who was armed with a bible, went on to say that he was sorry and that it was Satan that caused him to do that. Although the statement contained an admission, it was not made in the course of official questioning.

- [9] Corporal Labadie and Constable Phillip were undoubtedly key witnesses for the Crown and their evidence was pivotal to the success of the prosecution. They provided a graphic eye witness account of the events leading to the shooting of Remy and both testified to the appellant having the gun in his possession. If the jury believed their evidence – as they undoubtedly did – they were entitled to return the verdict of murder, as they did.

The appeal

- [10] In seeking to overturn his conviction, the appellant has filed several grounds of appeal. In summary these grounds allege that: (1) the trial judge erred in permitting evidence of his confessional statements and admissions to be admitted into evidence without complying with sections 72, 73, 77 and 115 of the Evidence Act;¹ (2) the judge erred in failing to conduct a voir dire in accordance with section 142 of the Evidence Act on the preliminary issue arising in relation to the confessional statements; (3) the judge erred in failing to exercise his discretion under section 136 of the Evidence Act in failing to give a warning with respect to the reliability of evidence given by some of the prosecution witnesses; (4) trial counsel was incompetent in conducting the appellant's case.
- [11] Mr. Innocent asserts that the trial judge failed to adequately or properly direct the jury as to the absence of the appellant's initials or signature on the Rights in Custody Form, on which the appellant's oral statement was recorded. Mr. Innocent submits that the effect of the trial judge granting the prosecution leave to put into evidence the Rights in Custody Form was equivalent to putting into evidence contents of a document rendered inadmissible by section 72(2) of the Evidence Act for lack of authentication (by the appellant).
- [12] Mr. Innocent also complains that the trial judge erred in law in admitting into evidence the oral representations attributed to the appellant which statements amounted to confessions when to do so was unfair to the appellant in all the circumstances of the case, given the burden of proof and the importance of the

¹ Cap. 4.15, Revised Laws of Saint Lucia 2008.

evidence in the case. The main thrust of this complaint is grounded in sections 70 and 77 of the Evidence Act. In that regard Mr. Innocent submits that the evidence of oral representations was inadmissible as there was total non-compliance with the provisions of section 70 of the Evidence Act. In addition, the trial judge erred when he failed to conduct a voir dire to determine the issues contemplated by section 70 before admitting the evidence.

- [13] Mr. Innocent further complains that having admitted the oral statements, the judge failed to warn the jury in accordance with section 136 of the Evidence Act and or failed to address the issue of unreliability as contained in the section. Further, the trial judge never considered the provisions of section 144 of the Evidence Act as it related to the likelihood of unfairness or prejudice to the appellant.

Statutory provisions

- [14] In light of the issues raised by the appellant, it becomes necessary at this stage to consider the pertinent sections of the Evidence Act. Section 2 of the Evidence Act defines “admission” and “confession”.

“admission” means:

- “(a) previous representation made by a person who is or becomes a party to proceedings, being a representation that is adverse to the person's interest in the outcome of the proceedings; or
- (b) a confession;”

“confession” means an admission of guilt by a person charged with a criminal offence.

- [15] Section 70 of the Evidence Act provides that:

“70. EXCLUSION OF ADMISSIONS INFLUENCED BY VIOLENCE, ETC.

“Evidence of an admission where the issue of admissibility is raised by the defendant is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman, or degrading conduct, whether towards the person who made the admission, towards some other person, or by a threat of conduct of that kind,

or by any promise made to the person who made the admission to any other person.”

- [16] Section 71 of the Evidence Act deals with reliability of confessions by a defendant. The section only applies in relation to evidence of a confession made by a defendant where the issue of admissibility of the confession is raised by the defendant (section 71(1)). In such a case, the confession is not admissible unless the circumstances in which it was made were such as to make it unlikely that the truth of the confession was adversely affected (section 71(2)).
- [17] Section 72 of the Evidence Act also deals with the issue of admissions by defendants. Subsection 1 states that section 72 applies only in relation to evidence of an admission made by a defendant who, at the time of making the admission, was or ought reasonably to have been suspected by an investigating official of having committed an offence; and where the admission was made in the course of official questioning. Subsection 2 provides the conditions for admissibility of an admission. In particular subsection 2(b) provides that subject to subsections 5 and 6, (of section 72) evidence of an admission is not admissible unless: (1) the questioning of the person was conducted in the presence of a justice of the peace or an attorney-at-law acting for the person; (2) a document is prepared by or on behalf of the investigating official to prove the contents of the question, representation or response; and (3) this document has been signed, initialed or otherwise marked by the person making the admission and by the justice of peace or the attorney at law, acknowledging that the document is a true record of the question, representation or response.
- [18] It must be pointed out that non-compliance with the provisions of subsection 2 of section 72 is not necessarily fatal, for subsection 5 gives the court a discretion to admit evidence even if the provisions of subsection 2 of section 72 have not been complied with or if there is insufficient evidence of compliance with its requirements. The admission of the evidence would be predicated upon the court being satisfied that in the special circumstances of the case, the admission of the evidence would not be contrary to the interests of justice. In that regard, the court

is required to have regard to the nature of and reasons for the non-compliance or insufficiency of evidence and any other relevant factors. In similar vein subsection 6 provides that the evidence may be admitted even if a provision of subsection 2 has not been complied with if, having regard to the reason for the non-compliance and any other relevant matters, the court is satisfied that it was not practicable to comply with that provision. If a judge permits evidence to be given before a jury pursuant to subsections 5 or 6 of section 72, sub-section 7 provides that the judge shall inform the jury of the non-compliance with the requirements of the 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.

[19] Subsection 1 of section 73 of the Evidence Act provides that where an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official, a document prepared by or on behalf of the official is not admissible in criminal proceedings to prove the contents of the question, representation or response unless the defendant acknowledges that the document is a true record of the question, representation or response. Such acknowledgement is given by the defendant signing, initialing or otherwise marking the document. Non-compliance with the requirements of subsection 1 of section 73 is not a bar to the reception of the evidence. Subsection 3 of section 73 gives the court a discretion to admit the evidence if, having regard to the reasons for the non-compliance and any other relevant matters, it (the court) is satisfied that it was not practicable to comply with that provision and in the special circumstances of the case it would not be contrary to the interests of justice.

[20] Section 77 of the Evidence Act empowers the court to refuse to admit evidence of a confession adduced by the prosecution if having regard to the circumstances in which the confession was made it would be unfair to the defendant to use the evidence. In like manner, section 115 provides that in criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the

danger of unfair prejudice to the defendant, the court may refuse to admit the evidence. Section 144 ordains that where under the Evidence Act, the court exercises a discretion to give leave, permission or direction, it may do so on such terms as it thinks fit. In that regard the court shall take into account matters such as the extent to which to do so would be unfair to a party or to a witness; the importance of the evidence in relation to which the leave or permission is sought and the nature of the proceedings. Section 114 also gives the court a general discretion to exclude evidence where its probative value is substantially outweighed by the danger of unfair prejudice.

- [21] In assessing the danger of unfair prejudice to a defendant, regard must be had to the whole of the evidence, particularly by the witness to whose evidence the objection is taken.² Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted. In *R v BD*,³ Hunt CJ pointed out:

‘The prejudice to which each of the sections [ss 135, 136 and 137] refers is not that the evidence merely tends to establish the Crown case; it means prejudice which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way.’⁴

Unfair prejudice would be prejudice over and above the damage to the defendant’s position caused by the probative value of the evidence.⁵

Analysis

- [22] The common thread running through sections 70 and 71 of the Evidence Act is that the issue of admissibility has to be raised by the defendant. Defence counsel raised no objection or challenge to the admissibility of any admission or confession to engage the operation of sections 70 or 71 of the Evidence Act. I agree with the Director of Public Prosecutions that the admissions and confessions are prima facie admissible unless the issue of admissibility of that evidence is raised by the defendant in accordance with sections 70 and 71. Even if the issue of admissibility were raised under section 70, the admission and the making of the

² See para. 30 of *Yusuf Aytugrul v The Queen* [2012] HCA 15.

³ (1997) 94 A Crim R 131. at p. 139.

⁴ At p. 139; see also *McHugh J in Papakosmas v R* [1999] HCA 37 at para. 91.

⁵ See *Evans v The Queen* [2007] HCA 59, para. 185.

admission would not have been caught by any of the conduct proscribed by that section. The circumstances surrounding the making of the statement did not involve any violent, oppressive, inhumane or degrading conduct towards the defendant or any other person, nor was there any threat of conduct of that kind or any promise made to the defendant to any other person. Further, in relation to section 71, the circumstances in which the confession was made were such as to make it unlikely that its truth was adversely affected. In the circumstances, the confession or admission would not be inadmissible.

[23] Earlier, I referred to sections 72 and 73 of the Evidence Act. The framers of that Act were clearly cognizant of the myriad of facts and varying circumstances attendant upon the criminal investigatory process and the conduct of a criminal trial which may impact upon fulfillment of the requirements of the sections. Accordingly, the Evidence Act empowers the court to admit evidence to which the sections 72 and 73 apply notwithstanding lack of compliance or insufficiency of compliance with their requirements. The discretion conferred upon the court is not at large, being circumscribed by the dictates of the sections. In exercising its discretion, the court has to be satisfied of matters such as the practicability of compliance and whether in the special circumstances of the case admission would be contrary to the interest of justice. Section 77 of the Evidence Act also bears out the issue of unfairness as the court may refuse to admit evidence of a confession or refuse to admit the evidence to prove a particular fact if it would be unfair to the defendant.

[24] Sections 72 and 73 of the Evidence Act assume importance primarily in respect of the Rights in Custody Form. The Rights in Custody Form was admitted into evidence notwithstanding that the appellant and his attorney at law or a justice of the peace did not sign or initial or otherwise mark the document in acknowledgement that it was a true record of the question, representation or response. In fact the appellant was not questioned in the presence of his attorney at law or a justice of the peace.

[25] The evidence reveals that the statement “yes I understand. I did it for true” was made by the appellant at the Victoria Hospital after he was cautioned by Sergeant Defreitas and informed of his rights as a prisoner in custody after he was informed that he was being arrested on suspicion of killing Remy. Sergeant Defreitas recorded the statement on a Right in Custody form and asked the appellant to sign. The appellant refused, stating that his lawyer advised him not to sign any document or say anything to the police in his absence. Sergeant Defreitas asked the appellant to consult his lawyer. Sergeant Defreitas returned to the hospital later that day but the appellant’s lawyer had not arrived. The appellant refused to sign the Rights in Custody Form in the absence of his lawyer. Sergeant Defreitas signed the form indicating the appellant’s refusal to sign and PC Dantes signed as a witness.

[26] Having regard to the nature of and the reason for non compliance with sections 72 (2) and 73 (1) of the Evidence Act and the surrounding circumstances, the learned judge would have properly exercised his discretion under sections 72(5) and (6) and 73(3) of the Evidence Act by admitting the Rights in Custody Form. In the special circumstances of the case, it was not contrary to the interest of justice to admit the evidence. Further, in the circumstances there was no unfair prejudice to the appellant by the admission of the evidence and the trial judge would have properly exercised his discretion under section 115 of the Evidence Act as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Voir Dire

[27] The appellant submits that the learned judge erred in failing to conduct a voir dire in relation to the admissibility of the confession statements and oral representations made by the appellant. The appellant contends that a voir dire should have been conducted in accordance with section 142 of the Evidence Act on the preliminary issue arising in relation to the confession statement. The respondent submits that it was not necessary to conduct a voir dire as there was no issue by the defendant that he did not make the statements and that no

objection or challenge to the voluntariness of the statements was made by the defendant pursuant to sections 70 and 71 of the Evidence Act.

- [28] Section 142(1) of the Evidence Act provides that where the determination of a question whether evidence should be admitted – whether in the exercise of a discretion or not – depends on the judge's finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question. Subsection (3) of section 142 provides for the hearing and determination of a preliminary question in the absence of the jury. I agree with the respondent that it was not necessary to conduct a voir dire in this case. The determination of the question whether the evidence should be admitted did not depend on the judge's finding that a particular fact existed. The appellant did not contend that he did not make the statements neither was there any challenge to the voluntariness of the evidence. The learned judge rightly exercised his discretion to admit the evidence by looking at the circumstances under which the statements were made and it cannot be successfully argued that it would have been unfair to the appellant to admit the evidence.

Section 136 unreliability warning

- [29] Section 136 of the Evidence Act applies, in so far as it is pertinent to this matter, to evidence given by a prosecution witness, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceedings; or oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged by the defendant.⁶ In a jury trial, unless there are good reasons for not doing so, the judge shall warn the jury that the evidence may be unreliable; inform the jury of the matters that may cause it to be unreliable; and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.⁷ The appellant complains that the trial judge erred when he failed to exercise his statutory discretion under section 136 of the Evidence Act in failing to give a

⁶ Section 136(1)(d)(i) and (ii) of the Evidence Act.

⁷ Section 136(2) of the Evidence Act.

warning in respect to the unreliability of evidence given by some of the prosecution witnesses. The Director of Public Prosecutions concedes that no such warning was given but contends that such a warning was not mandatory but discretionary. Further, even in the absence of such a warning, the jury would inevitably have arrived at the same verdict given that there was abundant other evidence which established the defendant's guilt.

[30] In *Andrew Milton and Dennis Campbell v R*,⁸ this Court considered section 146 of the Evidence Act of the Virgin Islands (the kindred section to section 136 of the Evidence Act of Saint Lucia). In dealing with the effect of the failure to give the unreliability warning, this Court held:

“The failure to give a section 146 warning does not inexorably lead to the conclusion that a resulting conviction is unsafe. Much may depend on the circumstances of the case, including the nature of the evidence in question, the strength of evidence against the appellant, and whether the evidence of the witness in respect of which the warning was not given, is supported by other evidence in the case.”⁹

[31] In this case the learned judge pointed out to the jury aspects of the evidence that could make the confession statement unreliable. He adverted to the discrepancies in the evidence given by PC Dantes with that given by Sergeant Defreitas. In particular, the learned judge told the jury that the words attributed to the appellant by Dantes was different to what Sergeant Defreitas said. It is clear that the prosecution's case did not depend solely on the admission or confession of the appellant. Quite apart from, and independent of, any confession or admission, the prosecution's case against the appellant was most compelling. It is seen in the cogent eyewitness account of police officers Labadie and Phillip in addition to the ballistic evidence matching the bullets recovered from the deceased's body to the bullets found in the firearm recovered from the appellant. From the evidence, the jury would have been in no doubt that the appellant shot and killed Remy. Given the strength of the case, the jury would inevitably have arrived at the same verdict even if a section 136 warning had been given. In the circumstances, the failure to

⁸ Territory of the Virgin Islands High Court Criminal Appeal BVIHCRAP2009/0006; BVIHCRAP2009/0007.

⁹ At para. 32.

give a section 136 warning did not result in a miscarriage of justice. In any event, this would have been an appropriate case to apply the proviso.

Incompetence of counsel

[32] The appellant complains that due to the inadvertence, negligence, incompetence and or gross ineptitude of counsel, no objection was taken to the admissibility of the confession statements and out of court statements sought to be adduced into evidence by the prosecution. Mr. Innocent contends that this resulted in a miscarriage of justice rendering the verdict unsafe.

[33] It should now be regarded as established law that in some circumstances the mistakes or omissions of counsel will be sufficient grounds to set aside a guilty verdict as being unsafe; although the circumstances in which this will occur are exceptional.¹⁰ In *Kizza Sealey et al v The State*,¹¹ the Board stated at paragraph 30:

“Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty ... which lies on counsel ... can lead to the conclusion that a conclusion is unsafe and that there has been a miscarriage of justice...”

[34] The test to be applied where counsel's conduct is called into question is whether the conduct has been so extreme as to result in a denial of due process to his client. This test, which was formulated by de La Bastide CJ in the Court of Appeal of Trinidad and Tobago, was endorsed by the Board in *Ann Marie Boodram v The State*.¹² In *Mark Teeluck et al v The State*,¹³ Lord Carswell stated at paragraph 39:

“There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, ... the focus of the appeal court ought to be on the impact which the errors of counsel have had on the trial and the

¹⁰ See Lord Carswell in *Mark Teeluck et al v The State* [2005] UKPC 14 at para. 38.

¹¹ [2002] UKPC 52.

¹² [2001] UKPC 20, 39; [2002] 1 Cr App R 12.

¹³ [2005] UKPC 14.

verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude."

As stated by The Lord Justice General (Hope) in *Anderson v HM Advocate*,¹⁴ the question does not depend on a qualitative assessment of the degree of incompetency by counsel or the nature of his conduct, but upon the effect of the failure on the accused's right to a fair trial. With respect to such incompetence or conduct, Lord Justice Hope said at page 44:

"It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him."

[35] The appellant's criticisms of his lawyer are that he failed to object to the admissibility of confessional statements and out of court statements adduced into evidence by the prosecution, thereby resulting in a miscarriage of justice and an unsafe verdict. This was further compounded; it is said, by counsel's failure to advert his mind to the procedural requirements of the *Evidence Act*. Earlier in this judgment the Court dealt with the complaints regarding the admissibility of the confessional statements. The question for this Court is: Does this case fall into the exceptional category of those where the omissions of counsel had such an effect on the trial and verdict that it cannot be said with sufficient certainty that the conviction was safe? The answer clearly is no.

[36] The prosecution's case against the appellant depended critically on the eye witness account of Labadie and Phillip and their evidence was pivotal to the prosecution's case. If the jury believed their evidence, as they undoubtedly did, they were entitled to return a verdict of murder. The jury obviously rejected the defence's case at trial that the appellant did not have, or fire the gun and that

¹⁴ 1996 JC 29 at p. 43.

Remy was shot by the police. There is no question in this case of the appellant having been deprived of the opportunity to present his defence or of his being deprived of a fair trial. In my judgment the criticisms of counsel fall far short of the allegation that he deprived the appellant of his right to a fair trial.

- [37] For all the reasons above, the appeal against conviction is dismissed. I now turn to the appeal against sentence.

Sentence

- [38] The appellant appeals against the imposition of the death penalty on the grounds that it was excessive, having regard to all the circumstances of the case, and the learned judge misapplied the principles of law and the approach obtained in recently decided cases. Further, the learned trial judge failed to consider the possibility of the imposition of a discretionary life sentence upon the appellant, having proceeded purely on the basis of whether an indeterminate life sentence should be imposed as an alternative to the discretionary sentence of death.
- [39] The Director of Public Prosecutions contends that the imposition of the death penalty was appropriate having regard to all the circumstances of the case. The offence fell within the category of cases defined as capital murder under section 86(1)(a)(i) of the Criminal Code¹⁵ as it involved the murder of a member of the Police Force acting in the execution of his duties. This, the Director of Public Prosecution argues, was an exceptional circumstance contemplated by the legislature. Further, the manner and execution of the offence brought it within the category of the worst of the worst.
- [40] The two cardinal principles applicable to the imposition of the death penalty were set out by the Privy Council in *Daniel Dick Trimmingham v The Queen*¹⁶ at paragraphs 20 and 21. The first principle is that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and

¹⁵ Cap. 3:01, Revised Laws of Saint Lucia 2008.

¹⁶ [2009] UKPC 25.

exceptional, 'the worst of the worst' or 'the rarest of the rare'. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. Before it imposes the death sentence, the court must be properly satisfied that these two criteria have been fulfilled. The character of the offender and any other relevant circumstances are to be taken into account in so far as they operate in his favour by way of mitigation and are not to be weighed in the scales against him.

- [41] Deciding which cases fall within the first principle is not bereft of conceptual difficulties. It is recognised that epithets such as "the worst of the worst" and "the rarest of the rare" can give rise to conceptual difficulties as to which cases will qualify.¹⁷ The Board, however, while recognizing that "murder is always a heinous crime, was clear that a death sentence – the ultimate and final sentence – must be reserved for the wholly exceptional category of cases within this most serious class of offence." In *Ernest Lockhart v The Queen*,¹⁸ the Board was also quite clear that whatever the conceptual difficulties, only the most exceptional case will qualify. The Board stated at paragraph 7, that:

"Attempting to define which [murder] will come within this egregious category ["the worst of the worst" or "the rarest of the rare"] is not easy and one must guard against the risks that attend over-prescription in a field that defies precise classification."

- [42] In *Maxo Tido v The Queen*,¹⁹ the Board opined that whatever the "worst of the worst" and "the rarest of the rare" may mean, it was satisfied that the case did not come within that wholly exceptional category. The Board noted that it was a dreadful crime, in which a young life was extinguished in brutal circumstances but was not a case that could be placed alongside the most horrific of murders of which humans are capable. The Board observed that there was no warrant for believing that it was a planned killing, nor was there unmistakable evidence that it was accompanied by unusual violence beyond that required to effect the killing.

¹⁷ See Lord Kerr in *Maxo Tido v The Queen* [2011] UKPC 16 at para. 36.

¹⁸ [2011] UKPC 33.

¹⁹ [2011] UKPC 16.

The Board concluded that though the murder was appalling it did not warrant the most condign punishment of death.

- [43] In Maxo Tido, the prosecution's case was that the appellant telephoned the 16 year old victim at about 1:20 a.m and she left her family home and went to meet him after that call. Her body was found later that day in a quarry pit next to a road. She had suffered severe head injuries. The injuries could have been caused by her being struck by a hard object such as a rock or could have been the result of a car being driven over her head. Her body had been set on fire and was partially burnt.
- [44] The facts in Trimmingham are brutal and revolting. In the course of a robbery, Trimmingham struck the elderly victim in the stomach causing him to fall on the bank of a rain water ditch. Trimmingham threw the deceased in the ditch, cut his throat, then cut off his head with a cutlass he had taken from the deceased. He removed the trousers from the body and wrapped the head with them. He positioned the body in the ditch - then slit the belly, explaining that it was to stop the body from swelling. He covered up the body and stuffed the trousers containing the head into a hole under a plant in a nearby banana field.
- [45] The Board accepted the correctness of the appellant's counsel that the crime was a brutal and disgusting murder involving the cold blooded killing of an elderly man in the course of a robbery. It however fell short of being in the category of the rarest of the rare. It did not appear to have been planned or premeditated and although the manner of killing was gruesome and violent, there was no torture of the deceased nor prolonged trauma or humiliation of him prior to death. The Board concluded that it was undeniably a very bad case of murder committed for gain but fell short of being among the worst of the worst, such as to attract capital punishment, the ultimate penalty. The Board recognised that the appellant's behavior was revolting but the case was not comparable with the worst cases of sadistic killings.

[46] The facts of the appellant's case pale in comparison to what was obtained in *Trimmingham* and *Maxo Tido*, cases which the Board held were not the worst of the worst. On the facts this murder cannot be categorized as the most extreme and exceptional. Further, a killing is not to be regarded as the worst of the worst simply by reason of inclusion in a particular type of murder category. Thus the categorization of the killing as capital murder under the Criminal Code – as it involved the killing of a policeman in the execution of his duty – would not in and of itself transform the killing into the category of the worst of the worst. It appears to me therefore that in applying the applicable law, the murder simply cannot be described as the worst of the worst or the rarest of the rare. This in itself is sufficient to allow the appeal against the imposition of the death penalty.

[47] The conditions for the imposition of the death penalty are exceptionally stringent. Both conditions imposed by *Trimmingham* must be satisfied. Satisfying one and not the other will not suffice. If the first cardinal principle is not made out, there is no need to consider the second principle. As the Board stated in *Lockhart*:

“if the murder cannot be characterized as the worst of the worst, the first aspect of the second principle, whether there is a reasonable prospect of reform, does not arise. It is only where the killing is to be regarded as occupying a place in the worst category of murder that the question of possibility of reform need be addressed.”²⁰

Thus far, the death penalty seems unable to survive the stranglehold imposed upon it by the first principle in *Trimmingham* – the worst of the worst. Undoubtedly, *Trimmingham* has severely injured the death penalty. It thus lies in a state of comatose on its death bed induced by the deathblow of the “worst of the worst”.

[48] The question which now falls for consideration is as to the imposition of the appropriate sentence. It is indubitable that the murder of a police officer in the execution of his duty is a very serious crime. The use of a firearm in the execution of the crime is also a serious matter. The learned judge had before him the pre–

²⁰ See note 18 at para. 16.

sentence or probation report and the psychiatric report. The learned judge considered the gravity and age of the appellant; his character and record; the subjective factors that may have influenced his conduct; the execution of the crime; and the possibility of reform and social re-adaptation. A sentence of life imprisonment is proportionate and appropriate to the circumstances of the case.

Disposition

- [49] The appeal against conviction is dismissed and the conviction is affirmed. The appeal against sentence is allowed to the extent that the sentence of death is quashed and a sentence of life imprisonment is substituted.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]