JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL NO. 61/97

COR: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

R. V. KURT MOLLISON #1

Terrence Williams for the applicant

Bryan Sykes Deputy Director of Public Prosecutions and Anthony Armstrong for the Crown

June 3, 4, 5, July 6, 1998 and February 16, 2000

DOWNER, JA.

The applicant Kurt Mollison was found guilty of capital murder at a trial before Langrin, J. and a jury on 25th April, 1997. Being under the age of eighteen when the offence was committed he was sentenced to be detained during the Governor General's pleasure pursuant to Section 29 (1) of the Juveniles Act as amended following the decision of **Baker v The Queen** 13 JLR 169. The victim was Mrs. Leila Brown the widow of the late G. Arthur Brown, a distinguished former Governor of the Bank of Jamaica. The Crown's case was based partly on circumstantial evidence and partly on cautioned statements. The defence was an alibi given in an unsworn statement.

The Crown's case as portrayed in two cautioned statements and questions and answers

How was the initial cautioned statement of 22nd March 1994 obtained? The evidence was that the accused was in custody at Constant Spring Police Station on that day. In response to a query by the Inspector in charge of crime as to why he was there,

Mollison began by relating how some men in a rent-a-car offered him some money at Mrs. Brown's home and said they wanted to get rid of her. The Inspector immediately related that account to Detective Sgt. Campbell who was investigating the case and arranged for Mrs. Gloria Miller, J.P. to attend for the taking of a cautioned statement. Mollison who was under eighteen years of age at that time was taken upstairs to Inspector Chin whom he told he wished to make a statement. It is pertinent to advert to this initial statement since the learned judge read it to the jury. Det. Inspector Donald McInnis the officer in charge of crime as well as Mrs. Miller were present when the statement was taken.

In that statement Mollison said that three men approached him while he was working as a gardener at Mrs. Brown's home on Wednesday 16th March, 1994, and told him they wished to wipe out Mrs. Brown so that they could collect some money. He further stated that they told him, that he would get a share of the money which could amount to US$600. In continuing Mollison said that two of the men left the car and entered the house through the front door stating thus:

> "Me eenah tell yuh 'bout de man dem innah de car. Now, de odder two man dem goh upstairs and de driver stay innah de car. Me hear a scream wen de man dem goh up deh and dem come down couple minutes after wid a baton."

After that Mollison said that he was given US$600 and the men drove away. No serious complaint was made about this initial statement on the issue of inducement. A feature that should be cited was that Mrs. Miller, the Justice of the Peace, specifically asked Mollison if he had been beaten by the police and he denied that he was. However, this was the necessary background to the second and more detailed cautioned statement. The specific direction on this first statement ran thus:

> "It is a matter for you to say whether the contents in this statement was true and whether the statement was given voluntarily."

Be it noted that general directions were given previously and we will return to them in due course. Also as regards this statement a charge of non-capital murder could have been preferred against Mollison on the basis of common design.

As regards this first statement it tallies with the evidence of Anthony Black and Amedio Hall who gave evidence that Mollison told them on the Saturday following the death of Mrs. Brown on the previous Wednesday that she had gone to Ocho Rios. It also implicates Mollison as being a party to a common design with two others in the killing of Mrs. Brown on March 16, 1994. He admitted that he was given US$600 by the others in the common design and he detailed how he spent it. The following admission is also of importance. It states:

> "Oh, me miss out a part. Dem give me de BMW key wen dem give me de money. Me see a Honda key pon it and some other little key. De driver give de man in de front to give – de money to give me and him give me de key wid it."

Two other passages from the first cautioned statement are important. The first is as follows:

> "From the first time me check Ripton, him look pon de car and 'seh, 'A dis yu buy,' and me tell him seh, 'No, a mi boss own."

The other runs thus:

> "This morning 'bout after eight, me goh a town fe goh up a de house, dat a up a Mrs. Brown house, but just turn back and drive come back a Spanish Town come pick up Marlon fe drop him a Linstead and gas run out pon me pon de way, me did have seventy odd dollar lef' and me just put in gas and me run a trip goh a Eltham fe get money fe put in gas and me get $30 fe de trip and me mek another $30 fe go Spanish Town and wen me a come up back, me stop fe change $50 and a yout call me and seh, police a look fe me. Me tell him seh a nuh me and me lef' and goh back innna de car and me and Marlon goh a Bog Walk goh park

> de car and lock it up and leave and drop de key innah de river by de side."

Another passage in this statement has an important reference to the car key. It states:

> "We walk fe goh tek a taxi and Marlon said him a goh a Half-Way-Tree, me and him. We was going to take a taxi to get to Linstead and tek a bus from Linstead to goh to Spanish Town. We see some police a de station before we tek de taxi and we suspect seh dem see we and we mek de taxi let we off a de train line out a Bog Walk and we go up a de train line and tek a condemn road and we stop. We did hungry and Marlon seh him a goh buy something fe eat, but the police dem hold we pon de road and question we and me carry dem goh show dem de car key innah de river and dem carry we goh a Spanish Town Police Station after."

There is independent evidence supporting these aspects of the statement.

The second statement is even more important for the necessary inference is that the jury relied on it, to return a verdict of capital murder. It is also necessary to note the date it was given. It was on 23rd March, 1994, the following day after the first statement. Also relevant was the following circumstances as stated in the summing up:

> "Mr. Chin said that the accused was not induced to give the statement and the man was not even ruffled. On Wednesday, 23rd of March, 1994, Mr. Chin said they were at C.I.B. Headquarters, that is, Senior Superintendent Brown, Sergeant Johnson and the accused man, himself. The accused man's mother came there and said she would like to speak to her son. He told her that – she said to him, 'Look how me bring yuh up innah a Christian way. De Lord love de truth'. The accused said he wanted to make another statement, but did not want his mother to be present"

It is against this background that the first supplementary ground of appeal must be evaluated. It states:

> "1. The learned trial Judge failed to properly guide the jury on how to approach their duty of evaluating the oral and written admissions.".

The first issue is whether the mother's statement is capable of being an inducement and required a special direction to the jury. Two authorities were cited in this regard, namely, **R. v. Knight and Thayer 1905** 20 Cox 711 and **R. V. Patrick Joseph Cleary** (1964) 48 Cr. App. R 116. As to the latter case the gist of the decision was that it was an issue of law as to whether words used by the father in that instance were capable of being an inducement. The words said in the presence of the police officer were: "Put your cards on the table. Tell them the lot. If you did not hit him they cannot hang you" It should be noted that the cautioned statement was the only evidence against Cleary. In considering this issue everything depends on the circumstances. Cleary's father had a long conversation with his son before the words in issue were uttered.

Further, immediately after the long conversation the prisoner sensed he wanted to make a statement. The Court put the matter thus at page 120:

> "Two questions really arise in this case: first, are these words in law capable of being an inducement? Secondly, were they in fact an inducement and did the accused person, the present appellant, feel moved by them to make his statement, always remembering it is for the prosecution to prove that they were not affecting him? Indeed the onus of proof is on the prosecution all the way through."

The Court of Criminal Appeal decided that the father's words were capable of amounting to an inducement and required a special direction. As no such direction was given the conviction was quashed. Langrin, J. gave no special directions on the mother's words and he was correct in so doing. The words were not capable in law of being an inducement. As Mollison specifically requested that his statement was not to be taken in his mother's presence it was clear that in these circumstances there was no inducement.

In the first case of **Rex v. Knight and Thayer** Channel J. ruled that the prolonged questioning which lasted in one instance over three hours with Knight and in another instance over six hours with Knight and Thayer amounted to oppression and so

made the answers elicited inadmissible as they were not voluntary. The circumstances of the first cautioned statement, and even the second, in this case were markedly different.

The relevant part of the second cautioned statement implicating Mollison with capital murder states:

> "The man dem ask mi if mi mix up in gang and if mi know nothing 'bout badness and mi tell them say mi was in a little gang but mi never do anything bad yet and them say dem a goh leave and check mi back Wednesday. The man dem left.
>
> Wednesday them come and check me back little after two. Now, this is Wednesday the` 16th that we are dealing with. 'That a little after Mrs. Brown come, and them ask me fi her and mi tell them say she inside and them ask me if mi have noh money and if mi ever kill anybody yet and mi tell them no. Them tell mi say if mi just do something fi dem me would a get a whole heap a money. Dem say that dem want fi kill Mrs. Brown and one of them say him going to use a gun and them say it going to make too much noise. That time now them ask me if mi have a knife and mi tell them yes and mi goh eena mi room fi mi long knife and mi carry it come give them. Them say mi noh fi worry, is whole heap of money mi going to get and them give me back the knife and mi ask them how much and them tell me Six Hundred U.S. Dollars.
>
> Mi take the knife and them say mi fi go up deh goh deal with it. Mi tek the knife from them and go upstairs and when mi go up there she was into her living room and mi go into her room and tek up the baton and mi hide behind the wall with the baton and she come eena her room and mi use it and lick her in a her neck and she mek a funny sound and she drop and then me stab her in her side and me come out a the room and go outside to the man dem."

Then the statement continues thus:

> " Dem was going to drive off and I ask them what happen and one of them come out of the car and drape me and point him finger and jook me eena mi forehead and say mi fi cool. One of the next man eena the car say him must deal with me and the driver tek out the money and give the one weh sit down side a him and him give it to me and me count it and si say a Six Hundred U.S. and him drive off

> and blow me and ask me if everything all right. Me don't answer him.
>
> Mi go back eena the house after the man dem gone and tek out the key from off the kitchen counter and tek up the component set with the video and the little T.V. and three chain and two ring."

Two other passages of this statement are of importance.

> "Mi throw weh the knife in a di yard in a one bush."

Then this admission follows:

> "Everything else is like how me tell you last night but me remember now seh Ripton have the baton, the two video and one of the component set. Yvette get one of the set and the little TV and she get the chain and the two ring. Yvette did grab one of the chain from me and burst it and me burst up the rest of them and throw give her."

Ground 2 which also takes issue with the learned judge's directions on the cautioned statements and the oral admission reads as follows:

> "2. The learned trial Judge erred in admitting the oral and written admissions in that he;
>
> " (a) failed to take into account oppression
>
> (b) ruled that there was no breach of the Judge's rules
>
> (c) did not provide a good reason to reject the crown witness's evidence of force being used to procure the oral admission."

Turning to the learned judge's directions on the cautioned statements and the questions and answers, here are his directions before he carried out an analysis of those statements. In so doing he assisted the jury by linking passages in these statements to the circumstantial evidence in the case:

> "Now, Madam Foreman and members of the jury, I come now to the caution statements, and before I read those caution statements to you again, I am going to give you some directions in law in respect of the statements. Now, it is your duty to decide two issues in relation to the statements, as well as the questions and answers. First,

> you must decide whether or not the defendant actually made the statements.
>
> Secondly, but only if you are sure that he made them, you consider whether or not what he said was true. In determining that you should take into consideration all these circumstances, having regard to allegations by the defendant of threats, of beating, or any inducement, in which you find any or all of the statements were made or may have been made. If for whatever reason you are not sure whether the statements were made or were true, then you must disregard them. If, on the other hand, you are sure both that they were made and that they were true, you may rely on them even if they were or may have been made as a result of oppression or other improper circumstances."

Mr. Terrence Williams took objection to the emphasised words and his concern on this issue will be addressed. **Prager** (1972) 56 Cr. App R 151 gives valuable assistance on the issue of oppression. At page 161 Edmund Davies L.J. said:

> "The only reported judicial consideration of "oppression" in the Judges' Rules of which we are aware is that of Sachs J., as he then was, in PRIESTLEY (1965) 51 Cr.App.R. 1, where he said: '... to my mind, this word, in the context of the principles under consideration, imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary. Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid, or an old man, or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.'
>
> In an address to the Bentham Club in 1968, Lord MacDermott described "oppressive questioning" as "questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."

Be it noted that a summing up must be tailored to the circumstances of the case and the following passage is relevant. It reads:

> "Now, the defence is saying that the police manufactured the evidence. You must bear in mind the evidence of the two justices of the peace, Mrs. Miller and Mr. Nembhard. They both have seventeen and eighteen years experience as justices of the peace, respectively. They saw the police, according to their evidence, with clean sheets of paper before the statements started. You must use your common sense and see what you make of the defence concerning the manufacturing of this evidence."

This direction was meant to alert the jury to the presence of two judicial officers as part of the circumstances surrounding the taking of the statement having regard to the age of the accused. Mollison did say in his unsworn statement "they handled me rough and hit me several times". This was in marked contrast to what he told the Justice of the Peace, Mrs. Gloria Miller, that he was not beaten.

Are these directions in conformity with the authorities cited in this case?

It is true that in **Prager** the following passage appears at page 163:

> "In the course of the summing-up, repeated warnings were given to the jury of the necessity of their being sure that the confessions were both true and voluntary. Nevertheless, the criticism was advanced before us that the long, detailed questioning of the applicant called for a stronger warning than those given. We find this criticism baseless."

On the other hand the first authority cited from this jurisdiction was **R v. Delroy Townsend** [unreported] SCCA 23/92 delivered 31st. May 1993 (Carey P(Ag.), Gordon and Patterson, JJA). The judgment was delivered by our esteemed brother the late Gordon J.A. The learned judge said at page 9:

> "The cautioned statement being the foundation of the Crown's case had therefore to be presented and explained to the jury by the trial judge in his summation with great care. He was required to explain to the jury that he having admitted it in evidence as being voluntarily made, it was their duty, in the light of the challenge to consider:

(a) whether it was voluntarily made,

(b) if it was true,

(c) what it meant, and

(d) what weight they should attach to it.

> The most important consideration for them was the truth of the statement. If they found it was not true, or were in doubt about it and found the appellant signed because his easily suggestible mind led him to do it, then they should reject it and acquit the appellant. If they accepted the statement as true then, whether it was voluntarily given or not they had to determine what weight they attached to it (see **R. v. Seymour Grant** 23 W.I.R. 132 and **R.v. Rohan Taylor and Others** S.C.C.A. 50, 51, 52, 53/91 (unreported) delivered March 1, 1993)."

The next case was **R. v. Seymour Grant** (1976) 14 J. L.R. 240. This Court (Leacroft Robinson, P. Robinson, J.A. and Henry J.A. (Ag.) speaking through the learned President said at page 242-243:

> "What should be borne in mind is that the judge's function in this regard is solely as to the admissibility of the evidence and for that purpose, and for that purpose only, voluntariness is a test. If the judge applies that test and concludes that the statement was not voluntary, then that is an end of that matter. The statement is not admitted in evidence, the jury are not made aware of its contents and therefore, are not concerned with its truthfulness or otherwise. On the other hand if the judge applied the test of voluntariness and, concluding that the statement was voluntary, admits it in evidence, then the jury are obliged to consider the statement, its contents and what weight and value should be given to it. In so doing, they are entitled to consider, *inter alia*, the circumstances under which it came to be obtained and to form their own opinion as to those circumstances. That opinion may well be that it was not a voluntary statement. But even if they so concluded that is not an end of the matter because voluntariness is not an absolute test of the truth of a statement. It may or may not be depending on the circumstances and they may well feel that although in their opinion it was not a voluntary statement that, nevertheless, its contents were true and may safely be acted upon."

Then the learned President continued thus at page 243:

"As stated by the Court of Criminal Appeal in England in the case of **R. v. Murray** per LORD GODDARD. C.J., ([1950] 2 All E.R. 925 at p. 927):

> '... the question of its weight and its value was for the jury, and in considering its weight and value, the jury were entitled to form their opinion on the way it had been obtained. Counsel for the appellant was entitled to cross-examine the police in the presence of the jury as to the circumstances in which the confession was obtained. At that time the confession was admissible in evidence because the recorder had ruled so, but *it was entirely within the right of the appellant or his counsel to cross-examine the police and to try again to show that the confession had been obtained by means of a promise or favour. If counsel for the appellant could have persuaded the jury of that, he was entitled to invite them to disregard the confession.*' (Italics mine.)

And why? Because, as the court proceeded to point out,

> 'if he (counsel for the defence) can induce the jury to think that the confession had been obtained by some threat or promise, its value is enormously weakened. The weight of the evidence and the value of the evidence is always for the jury'.

Be it noted, however, that the jury is not obliged to accept the invitation. They may very well agree that the statement was not voluntary and at the same time be convinced of its truth and elect to be guided accordingly."

It is true that in the instant case the learned judge used strong words by telling the jury that if they were sure the words of the confession and questions answered were made and that they were true they may rely on them even if they were, or may have been, made as a result of oppression or other improper circumstances. Mr. Sykes in his careful submissions stressed that the emphasised words were made in the context of the allegations made against the police that they manufactured evidence. He also contended that the gist of the emphasised words was a direction, albeit in strong words, that the primary function of the jury was to elect whether the words in the cautioned statement were true in the light of the challenge that was made by counsel

before the jury. However, Mr. Terrence Williams was correct, that the directions on this aspect of the case went beyond the authorities. But 'had the jury been properly directed they would inevitably have come to the same conclusion': (see **Anderson v. R.** [1972] A.C. 100). So the proviso will be applied. It is clear that the learned judge was here thinking of the principle enunciated in **Kuruma v R.** [1955] A.C. 197 which sanctioned the admission of evidence obtained by an unlawful or unfair act. This principle is illustrated in **King v. R.** [1969] 1 A.C. 304, 32. Cr. App. R 353.

It is necessary to stress the challenge made for there was no evidence before the jury on this issue and the only information from the defence was an unsworn statement which amounted to an alibi. Therein it was also stated that Mollison was beaten by the police when he was arrested in St. Catherine.

Mr. Terrence Williams for Mollison laid great stress on Mollison's age and on the evidence that Mollison was arrested in St. Catherine where he made an admission which resulted in the discovery of the car keys. This feature when linked to the statements taken at Constant Spring police station, he contended, also amounted to oppression. Before adverting to the authorities, the judge's summing up on this aspect of the circumstantial evidence as summarised by the judge must be cited. It reads thus:

> "Now, Inspector Mervin Harris said that in March of 1994 he was stationed at Bog Walk Police Station and Tuesday the 22nd of March, 1994, while standing at the station he noticed two young men walking in the town in the direction of Linstead. They were walking hastily and kept looking behind them. The accused was one of the men and at the time he was dressed in a green suit while the other man was dressed in black. He walked towards them but before he got to them they went in a taxi driven by Donald Barrett. He said he failed in an attempt to stop the car but he contacted the Linstead police. However, he went to Breadfruit Gully and saw a blue B.M.W. properly parked with all four doors properly locked. He gave instructions that the car should be removed by a wrecker to Bog Walk Police Station."

Then the learned judge continues thus:

> "He went with a party of policemen to Drews Pen District where he saw the two men in the custody of the police. The men were taken to the Bog Walk Police Station and placed in the guardroom. While in the guardroom he said he heard a voice saying, 'I want to talk to Inspector', and when he enquired the accused man said, 'I want to tell you about the key.' He immediately cautioned him and he said, 'Di key fi di car in a di river. Mi drop it in there after mi park di car and lock it up. Mek mi carry you go show you'."

The Judges' Rules in part state that when a police officer in making enquiries of any person about an offence, has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence.

Further, the learned judge recounting the evidence said:

> "Inspector Harris said he took the accused along with policemen to a section of the Rio Cobre River where the accused pointed to a spot in the water under a bridge as the spot where he dropped the keys. A crowd had gathered and he saw Carlton Williams, a local diver, whom he asked for assistance. The accused pointed out the spot to Williams who dived in the river and came up with the bunch of keys. After Williams handed over the keys to him, he noticed one marked "BMW." He enquired of the accused if that was the bunch of keys he threw in the river and the accused man said yes. He took the accused back to the Bog Walk Police Station where in the presence of the accused he opened the door of the BMW with the very key and started the engine of the car by turning on the ignition with that key. When he saw the men they were coming from where the keys were found and he said that the accused man was there when he opened the car door of the BMW and turned on the ignition. The licence number of the BMW was 9378 AP. <u>He said he handed over the accused to Detective Inspector Campbell who was the investigating officer. Now, under cross-examination by defence counsel, Mr. Williams, he denied that the accused was beaten by the police</u>."[Emphasis supplied]

The principal authority relied on by the applicant to establish oppression and breach of the Judges' Rules was **Albert Charles Cornnelius Hudson** (1981) 71 Cr.

App. R 163. The facts adverted to by Waller L.J., show the marked differences between that case and the instant case. At page 165 the learned Lord Justice said:

> "On the morning of Sunday June 27, 1976, at 6.30 a.m., seven police officers led by Detective Inspector Harley arrived at the appellant's house at Farnham. The house was searched and he was arrested. Within a short time he was taken to Chelsea police station and for the next five days and four nights he was detained. He had all his personal belongings taken from him and was in every sense a prisoner, being locked in a cell each night. He was finally released at 6.30 p.m. on Thursday, having been arrested in the early hours of Sunday. By that time he had been questioned for a total of 25 hours in periods of approximately two-and-a-quarter hours each and he had spent, including that 25 hours, a total of 50 hours in custody of police officers. This was in fact because of the heat (it was the hot summer of 1976) and was not done with any improper purpose. During that time he had been asked some 700 questions. Before he was released one of the last things that happened was that he made a written confession under caution between 4 p.m. and 6 p.m. on the evening of Thursday, July 1. Throughout the time he had been treated as an ordinary prisoner"

Turning to the Judges' Rules the learned Lord Justice said at page 167:

> "The consequences of charging or informing about the possibility of prosecution are contained in Rule III which provides: "(a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms: 'Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.' (b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement." Then there is a further rule about what should be done if such questions are asked."

Certainly it was appropriate to elicit further information in the instant case in view of the seriousness of the charge of murder.

The learned Lord Justice further said in **Hudson** at page 170:

> "The argument on unfairness was addressed to us on the basis that if we did not find that the evidence was obtained by oppression we should find that it was obtained unfairly and that the unfairness was such that we ought to exercise our discretion to exclude it."

Then explaining the principle the learned judge said on the same page:

> "The nature of the discretion was summarised by Lawton L.J. in **HOUGHTON'S** case (1979) 68 Cr.App.R. 197, 206. He said 'Judges in criminal cases have a discretion to disallow evidence, even if in law it is relevant and admissible if admissibility would operate unfairly against an accused.' And there follows the authority. He went on: 'Evidence would operate unfairly against an accused if it had been obtained in an oppressive manner by force or against the wishes of an accused person or by a trick or by conduct of which the Crown ought not to take advantage. It follows, so it seems to us, that when considering whether to exercise his discretion to disallow alleged confessions on the grounds of unfairness a judge has to ask himself what led the accused to say what he did."

Langrin, J. admitted both the cautioned statements and the questions and answers and gave the jury sufficient directions as to how to evaluate the evidence in those statements.

The following statement in **Osbourne and Virtue** (1973) 57 Cr. App. R 297 at 307 by Lawton L.J. states with clarity the object of the Judges' Rules thus:

> "They contemplate three stages in the investigations leading up to somebody being brought before a Court for a criminal offence. The first is the gathering of information, and that can be gathered from anybody, including persons in custody, provided they have not been charged. At the gathering of information stage no caution of any kind need be administered. The final stage, the one contemplated by Rule 3 of the Judges' Rules, is when the police officer has got enough (and I stress the word 'enough') evidence to prefer a charge. That is clear from the introduction to the Judges' Rules which sets out the principle. But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charges. He reaches a stage where he has got the beginnings of evidence. It is at that stage that he must caution. In the judgment of this Court, he is not bound to caution until he

> has got some information which he can put before the Court as the beginnings of a case."

There was no breach of the Judges' Rules in this case as the police officers in St. Catherine investigated the matter of the key for the car while the investigating officer at Constant Spring was in charge of the investigation of the murder.

Another authority cited, **Christopher McCarthy** (1980) 70 Cr. App. R 270 gives directions on the dual role of judge and jury. It also emphasises that it is for the jury to determine the reliability of the cautioned statement. Waller L.J. at 272 said:

> "I deal first with the duty of the judge to give a careful direction on reliability. All questions of fact are for the jury. The judge's ruling on the ***voire dire*** only decides the question of admissibility. He may rule that the evidence should not be admitted and that is the end of the matter. If he allows the evidence to be given, then it is for the jury to consider whether or not there was an inducement and whether or not it was voluntary and it is for the jury, after a proper direction, to assess its probative value: see **CHAN WEI KEUNG v R.** (1966) 51 Cr.App.R. 257; [1967] 2 A.C. 160, a decision of the Privy Council, followed in this Court in **BURGESS** (1968) 52 Cr.App.R. 258; [1968] 2 Q.B. 112. But in both those cases a direction had been given to guide the jury to make a decision about the reliability of the confession."

Concerning the specific evidence of unfairness or oppression this is how Langrin, J. directed the jury on the evidence of Mr. Black, the delivery man who lived on the premises of the deceased:

> "Now, you will recall that under cross-examination by Mr. Williams, Mr. Black said that he saw a policeman rubbing a gun at the head of the accused man just before the men came out with the knife which he found in the bushes."

Then the learned judge continued thus:

> "Now Inspector Campbell and Detective Corporal Smith said that they never saw that at all. They never saw anybody, any policeman with any gun rubbing the head of this accused man. It is a matter for you to say whether or not you accept Mr. Black's evidence on that point. You will see later on when I come to this bit of evidence.

> Inspector Campbell, you will recall told you that when he found the knife in the bushes, he asked the accused man if this was the knife he used to kill Mrs. Brown and the accused man said, 'Yes'. Now, if you accept the evidence that there was a gun at the head of this accused man, as told to you by Mr. Black, then I ask you to disregard the admission which the accused man is supposed to have made, that this was the knife he used to kill Mrs. Brown.
>
> You see, if this was taken as a fact, that there was a knife (sic) at his head, then that bit of admission would be done under some duress. So, please, bear that in mind when you come to examine the evidence in relation to the finding of the knife and the admission which was made by this accused man."

We think that the judge's directions were adequate in all but one instance so grounds 1 & 2 were not successful because the proviso has been applied in the instance where the applicant has demonstrated that there was a mis-direction in law. The proviso has been applied because there has been "no substantial miscarriage of justice" within the intendment of the proviso to Sec. 14(1) of the Judicature (Appellate Jurisdiction) Act.

Circumstantial evidence

The other basis on which the Crown relies to uphold the conviction is the circumstantial evidence against Mollison. The gist of the ground of appeal on this issue reads:

> "4. The learned trial Judge failed to point out to the jury inherent weaknesses in the circumstantial evidence."

As regards general directions the learned judge said:

> "Circumstantial Evidence is evidence from which you may infer the existence of facts in issue."

Then the learned judge continues thus:

> "Circumstantial evidence goes like this. One witness is called who proves one fact and proves that fact to the extent that you are sure of it. Another witness proves another thing and, perhaps, a third witness proves something else. Collectively, all the testimonies of these

> three witnesses must lead to one inescapable conclusion. That must be that this is the accused person who did the act. Each fact standing by itself, would not necessarily prove the guilt of this accused, but taken collectively, all of them standing together, must lead to the conclusion that you are sure that this accused person did the particular act."

Further the learned judge in continuing his directions said:

> "None of the facts taken separately necessarily prove the guilt of the accused but taken together they lead to the inevitable conclusion of guilt. If that is the result of the circumstantial evidence that you have heard then it is a much safer conclusion, that is the conclusion of guilt. That method is much safer than if the Crown brought one witness who said he saw the accused man who did something, and this is so because that eye-witness may be speaking from vengeance or dislike or he may have been making a mistake, but when each witness comes with one circumstance and that is put together to prove the guilt then circumstantial evidence is perhaps a safer and better evidence on which to form a verdict of guilty."

These general directions are in accordance with **McGreevy v. D.P.P.** [1973] 1 W.L.R. 276. As for the particular directions, they cannot be faulted. In fact the circumstantial evidence in this case was powerful. It reinforced the evidence in the cautioned statement. The deceased's car keys were found at the bottom of the river on the directions of Mollison. The car was found and the keys operated the car. The deceased's electronic equipment was traced to the household of Mollison's girl friend. The postmortem examination showed that Mrs. Brown died from stab wounds and suffered abrasions from a baton. In the light of all this the Crown presented a powerful case against Mollison.

On the basis of the above reasons, which were in response to grounds 1,2, and 4, the application must be refused. There were two other grounds which were adverted to but they were not presented with any conviction. Mention is made of them only to say that they had no merit. Grounds 3 and 5 read:

"3. The learned trial Judge misdirected the jury and usurped their function in telling them that the electronic equipment found by the Police was the same seen by Olive Nicholson in her daughter's apartment.

...

5. The learned trial judge failed to direct the jury on how they ought to treat the evidence of the defendant's good character."

The application for leave to appeal against conviction is refused.

The Constitutionality of the sentence imposed

Both counsel were invited to address the Court on this issue and it was suggested that as a starting point the observations in **A and F Farm Produce Co. Ltd. and Andre Chin v. The Commissioner of Customs and Excise** [unreported] S.C.C.A. No. 40/93 delivered 7th April 1995 at pp. 31-33 might prove useful. Additionally, the Privy Council judgment of **Browne v The Queen** [1999] 3 W.L.R. 1158 is now available in Jamaica and the Registrar will fix an early date for a resumed hearing on this issue.

ORDER

(1) Application for leave to appeal against conviction refused

(2) Registrar to fix date for resumed hearing on the issue of the constitutionality of the sentence pursuant to Sec. 29(1) of the Juveniles Act.