JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 120/96

COR: THE HON. MR. JUSTICE FORTE J.A.
THE HON. MR. JUSTICE GORDON J.A.
THE HON. MR. JUSTICE BINGHAM J.A.

R v ALEXANDER VON STARCK

Lord Gifford Q.C. and Norman Manley for the Applicant

Kent Pantry Q.C. and Marlene P. Malahoo for the Crown

27th, 28th November, 1997 and 16th February, 1998

FORTE J.A.

This is an application for leave to appeal the conviction of the applicant for the offence of non-capital murder. The body of the victim Michelle Kernoll was discovered on the 2nd August, 1995 lying on the floor in Room 28 which had been occupied by the applicant at the Seashells Hotel, Montego Bay, in the parish of St. James. It was discovered by Edgar Lee, a receptionist at the hotel who not having seen the applicant for two days had gone to the room to check on him. The body was wrapped in a sheet, with "one hand sticking out very stiff'. There was blood on the sheet. Mr. Lee immediately summoned the police. Detective Corporal Junior Smallhorne, responded to the call. On his arrival, he observed that the body was on the floor lying on its back. The deceased had a wound to the left side of the chest. She was

wrapped in a sheet. There was a knife on the floor beside the body. Detective Smallhome took possession of the knife.

At a postmortem examination, performed by Dr. Imani, on August 10, 1995, the following injuries were noted by the Doctor:

1) Externally, there was a deep wound to the left chest, measuring about 10 centimetres long and four centimetres deep about three feet eleven_ inches from the feet to the injury. There was skin excoriation, peeling of the skin, which was due to decomposition of the body.

2) Six ribs were broken, the second to the seventh, and there was blood in the thoracic cavity measuring about two litres. The broken ribs were in the area of the deep wound to the left chest.

3) There was multiple perforation of the left lung.

The injuries in the doctor's opinion were caused by a sharp instrument such as a knife used with "a very strong force" The cause of death was "serious bleeding due to the stab wound to the left chest". The doctor took a sample of blood which was sent to the Forensic Lab.

The applicant was a guest at the Seashells Hotel and was registered in Room 28. On the Sunday, prior to the discovery of the body, the applicant had been seen sitting in the bar of the hotel with the deceased who had come to visit with him. Mr. Lee had summoned the applicant on the arrival of the deceased.

Ms. Sarah Leslie, *the* chambermaid, at the hotel cleaned Room 28 on the Sunday (July 30, 1995) at a time when no one was in the room. At that time, the deceased and the applicant were at the poolside. Ms. Leslie had seen the deceased on the premises before that day.

After she had cleaned the room, she saw the applicant, and the deceased go into the room. The following day (Monday) at about 3:00 p.m. she again went into the room, but no one was there. Then at about 4:30 p.m. that same day, she heard coming from the room a, banging which lasted for about five minutes. The last time she had seen the applicant was at about 12:30 p.m. on that same Monday. He was then at the pool. However, she had not seen the deceased, since the Sunday.

On the night of the 3rd August, 1995, Detective Corporal Smallhome attended at the Falmouth Resort Hotel, where he saw the applicant seated in the dining room. The officer identified himself to the applicant and received the following response:

> "I have been waiting on you guys for the past few days. I killed the lady at the hotel."

The applicant is a German citizen so the Detective asked him if he spoke English. The applicant said yes. Acting upon information he had, the Detective Corporal cautioned him whereupon the applicant said, " I have the knife which I used to kill her". He then handed a pouch to the Detective. In the pouch were a knife (the longer knife of the two exhibited) and a jar with a colourless substance which resembled cocaine. These items were taken from the pouch, after which the applicant said "its cocaine that cause me to do it".

Asked why he kept the knife, the applicant answered that he wanted to kill himself. He also said: "Please don't take me pass the Seashells Hotel. It brings back terrible memories". Detective Smalihorne, then arrested and charged him for the cocaine, whereupon he said "is the cocaine what cause me to do it".

The pouch and the knives were sent to the Forensic Lab, where after analysis by Dr. Cruickshank, it was discovered that there was blood present in brown stains and a film of blood on the inside of the pouch. The blood was human- group AB.

On one of the knives - a black handle steak knife, blood was present in brown stains and film on the blade. This blood was also human Group A B. The sample of blood taken from the body of the deceased and the smaller knife were also analyzed and both found to be group A B. This smaller knife also had on it a strand of human hair. Both knives, the one taken from the pouch, and the one taken from beside the body were found with Group A B blood, the same group blood as that of the deceased. The analyst also testified that if the knife had blood on it, it would have had to be placed in the pouch about five minutes afterwards, otherwise it would be dry.

On the night of August 3, 1995 at about 7:30 p.m., the applicant was interrogated by Detective Sergeant Calbert Bowen, at the Criminal Investigation Branch of the Police Force in Montego Bay. After the interrogation, the applicant told the Sergeant that he would like to tell him what happened. The Sergeant cautioned him, and thereafter summoned Mr. Lopez James, a Justice of the Peace for the parish of St. James to be present during the taking of the statement.

A matter worthy of note, is that the Sergeant who took the statement from the applicant is conversant in German and testified in the voire dire that he spoke with the applicant in German merely to determine whether he was in fact German. The interrogation and the taking of the statement were conducted in English, as the applicant had a "fair command of English".

Before the statement was taken from the applicant he asked if he could get a lawyer to be present. As a result of his request, the Sergeant tried to locate one for him, but was unable to do so, having tried the offices of two well known attorneys in the area. The Sergeant. told him that he had failed in his attempt to locate an Attorney, and then proceeded in the presence of Mr. James, the Justice of the Peace to take the

statement. As the contents of the statement have become an important issue in the case it is set out in full hereunder:

> "Sunday afternoon, Michelle came to visit me. It was the second time or so, third time I mean, we went to my room and had conversation. She wanted to stay with me for the time I spent in Jamaica, I was not sure and I told her at this time I was not sure I wanted to do it and then she was very nice to me and then we start to have a party and took drugs. We take it a long time, after which she slept and I went to the pool. When I came back, I organized something for her to eat, because she was hungry and then started partying again. The whole time I didn't stop taking drugs, after a few hours we both were very high and then I don't know why I suddenly had this knife in my hand and then I don't know what happen exactly, but I remember seeing her on the ground full of blood and I think she was dead and then the only thing I wanted was to go away. I took the knife the Police found in my bag with me because I want to kill myself.

In his defence, the applicant gave an unsworn statement, which because of the issues raised before us is also fully set out hereunder:-

> "My name is Alexander Von Stark. I was born in Germany. I am living with my parents. My address is 30900 Wede Mark, 3,900 Wede Mark, Aintumbusch 1 , Germany. I came here as a tourist. I booked in, in the Seashells Inn. First day, spent first day at the beach. Second day I spent inside the hotel and on the Sunday evening I met a man named Mark Simon. We have a long conversation. He tell me that he is a producer from L.A. and planned to make a movie here in Jamaica. This was interesting for me so I stayed together with him. We made a tour to Black River and together with the Manager from Seashells Inn, Clinton Chin, it was the whole day.
>
> On the way back I saw some waterfalls, between Montego Bay and Milk River. I also spent some other days together with him in town and PJ's . It's a discotheque.
>
> On my second week, which was Tuesday night, I met Michelle Kernoll in PJ's. We both like us. We

liked each other from the first view. After half an hour we go to my room and spent together the night. She told me about her aunt and she had a baby. I told him about me, that I planning to take her with me back to Germany for two weeks to the wedding for my aunt. She was very happy about it. She met us again on Thursday afternoon at the pool bar. At this time Mark Simon came and I introduced her to Mark Simon. They got on well together. We made our next arrangement for Friday evening. She came to the hotel about 10:30 and we spent sometime at the bar and in my room. Then she went home.

On Monday evening, it was the second week, sorry the third week, Mark Simon came to my room where we both were at about 7:30. He asked me if we would like to go with him to PJ's because Monday, every Monday there is a big party. We went with him over there and spent couple of time with him. Some hours. We talked to the owner, Mr. Spencer.

About 11:00 o'clock, Michelle told me that she was tired and she want to go home to my hotel. I gave her my keys and told her to leave the keys outside the door because I don't want to disturb her when I come home. About twenty minutes later, Mark Simon left PJ's. He said he want to go to bed, because he had a couple of drinks. Me was still there and was talking at this time in my simple English to Mr. Spencer about the speakers at the discotheque because the sound was bad. We discussed some different speaker systems.

At about 12:00 o'clock midnight, I left PJ's because I was very exhausted and tired. I don't sleep the whole day so I went straight back to my hotel room. The key was outside, also the sign. **'Do not disturb'.** I opened the room. Made light. Turn on the lights in the corridor, looked in the room and I saw that nobody was lying in the bed. The light in the corridor, the light in the passage was not bright and didn't light up the entire room. I thought Michelle was gone because she don't live at my hotel and I knew she had a baby. I turned off the light, went to my bed and fell on my bed with my clothes and fell asleep because I was very tired. After one hour I woke up because I needed to go to use the toilet. I made the light on the bedside lamps. Stand up from my bed and saw what happened. The right bedside

> was full of blood at the side and Michelle was lying on the floor. Everything was full of blood at her side. On her side and on her body. She had a big wound in her chest. She looked real terrible. I was shocked, upset and confused because I didn't know what happened. I was afraid also because I thought everybody would think I did it. I took the sheets from my bed, covered her because I couldn't take the sight anymore. It was so horrible then I left the room. Before I left the room, I put my pouch from the floor. Went to my bed and put a small knife out of my bag."

In answer to the learned trial judge:

> "'Picked up the -put it frord the floor. Picked up the pouch from the floor'.
>
> Put it (the knife) in my pouch, because I plan at this moment to kill myself because I didn't want to live anymore.
>
> I love Michelle a lot and we were starting to fall in love that was the reason for the idea to kill myself. I went out of the hotel and hire a taxi. I try to reach the German Embassy. The driver robbed me about One Hundred and Fifty United States dollars (US$150.00) and brought me to a guest house in Montego Bay where I spent the night and day. On Tuesday morning I went tb Falmouth and booked in a hotel, Falmouth Resort Hotel. I had no more money so I couldn't go any further. At this point I want to make it known to the Jury that in the caution statement I gave there are two mistakes - the first one is I didn't say 'on Sunday', I said, 'On Monday' when I started. The second one is I never said something like 'after this we were both high' and suddenly I had a knife in my hand.
>
> I can remember I said 'after that I fell asleep and when I woke up I can remember seeing Michelle lying on the floor or ground full of blood and I couldn't realise what happen.
>
> I made a mistake. I used the wrong English word it should be imagine."

Then the learned trial judge asked:

> 'What is the wrong English word?.'

In response the applicant continued:

> "Realise. I also had a conversation with Mr. Bowen in German before I gave the caution statement. I told him about the Sunday night at PJ's, but he said it would not be so important, because my English was not good we should make short summary".

The applicant continued, stating that he had a problem with his shoulder, which had been dislocated five times before he came to Jamaica, and four times since his arrest and gave a scant account of Corporal Smalihome coming to the hotel in Falmouth and arresting him. He continued:

> "..... I said I didn't kill Michelle Kemoll and I said I didn't cut off her left breast. I have no reason at all to kill Michelle, we had plans and I love her a lot".

Before us the issues were reduced to the following:

i) Did the applicant have an absolute right to have an Attorney present during the taking of the caution statement from him. If so, the statement having been taken without an Attorney present, did the learned trial judge apply his mind to the exercise of his discretion before admitting the statement into evidence; and

ii) In the circumstances, of this case, was the learned trial judge in error, when he omitted to direct the jury that the applicant would not be guilty of murder, but of manslaughter if *he* killed the deceased while he was in such a state of self-induced intoxication through the taking of drugs that he was incapable of forming the requisitecriminal intent [for murder].

1. DID THE APPLICANT HAVE A RIGHT TO HAVE AN ATTORNEY PRESENT DURING THE TAKING OF THE CAUTIONED STATEMENT?

The basis for this contention (at i) is an Appendix to the Judges Rules in England, which Lord Gifford submitted to be a declaration of a common law

right vested in an accused person. The Appendix A in the introduction before the terms of the rules are set out, states inter alia:

> "These Rules do not affect the principle:
>
> (a)...
>
> (b)...
>
> (c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so".

The English Judges Rules were adopted by the judges of the Supreme Court of Jamaica, and came into operation on the 1st May, 1964, under practice direction issued by the then Registrar of the Supreme Court.

A note at the end of the Rules made reference as does the Appendix to the English Rules, to principles which the rules would not affect and the wording in paragraph (c) (supra) of the English Appendix are repeated verbatim in para (c) of the note.

It should be noted that these notes are not part of the Judges Rules, but merely a statement of principle which was deemed to have existed prior to the carrying into effect of the Rules. In Jamaica, while it has always been recognised that in fairness an accused if he so desires, may have his attorney representing him at all stages of the investigation, it has never been the law that he has a common law right to such representation. Any such rights that he may have had, had always been limited to his right to be so represented at the trial of his case. The provisions of the Constitution of Jamaica (Section 15) which deal with the citizen's rights in respect of deprivation of his liberty, are silent as to representation before trial.

Section 20(6) speaks to representation by an Attorney at the trial of the accused. It states:

> "Every person who is charged with a criminal offence -
>
> (c) shall be permitted to defend himself in person or by a legal representative of his choice"

And even in relation to that right, it has been held that the accused has no absolute right to legal representation, and depending on the circumstances may have to proceed to trial without such representation (See ***Frank Robinson v R*** [1985] 32 WIR 330).

In our view, a person under investigation has never had a common law right to have an attorney present when he is being interrogated or at the time when he is giving a statement under cautioned. An accused however, if he so requests, should ordinarily be given the opportunity to consult his attorney, and to have him present during the interrogation and the taking of the statement except in the circumstances detailed in the note to the Rules i.e "provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice in doing so".

Lord Gifford's attempt to elevate the content of note (c) to a right to be present during the taking of the statement, is in our view unacceptable. The statement of principle, as has already been pointed out, is not a part of the Judges Rules, which even when breached, will not necessarily result in the rejection of the evidence so obtained, as it would still be within the discretion of the judge to admit it, into evidence. The question as to whether a statement taken in the absence of a requested attorney and which is held to be voluntary should be rejected, would necessarily depend on the

trial judge's view as to the fairness or propriety in proceeding to take the statement in the absence of the attorney, given the particular circumstances of each case.

In the case of ***R v Lemsatef*** [1977] 2 All ER 825, on which Lord Gifford relied and which dealt with similar provisions in Administrative Directions attached to the English Judges Rules, customs officers investigating a case against the accused as suspect in pursuance of the Misuse of Drugs Act 1971, refused to allow him to make contact with his named solicitor before proceeding to interrogate him and thereafter taking a statement from him. Inspite of the fact that the solicitor attended at the place where the suspect was being interrogated, the suspect was still refused the opportunity to see him. Nevertheless, the Court of Appeal held that :

> "Although the fact that a suspect under detention had not yet made any oral or written admission was not a good reason for refusing to allow him to consult his solicitor, there was nothing to indicate that the judge had exercised his discretion wrongly in admitting in evidence the oral admissions and the written statements, and the appeal could not succeed on that ground..."

This point, however, was really laid to rest in the case of ***Regina v Chief Constable ex p. Begley*** (1997) 4 All ER 833 (HL) the reference to which was kindly supplied to us by Lord Gifford after the arguments in the appeal had been concluded. In giving the judgment of the House of Lords in respect of the same complaint as in this case, Lord Browne-Wilkinson said at (p 837) with specific reference to para (c) in the Appendix to the English Judges Rules:-

> "But this case is concerned with the separate and independent question whether every accused person has an established common law right to have a solicitor present during police interviews, regardless of the nature of the offence in which he was arrested. Needless to say, there is no decision or dictum in support of such a right. Indeed no such argument has ever been placed before a Court. There is no academic support for the existence of such a right. Counsel invokes the principle already recited from the Judges Rules as wide enough

> to embrace such a right. The passage in question, read in the context of the rules as a whole, is not capable of bearing the meaning that counsel seeks to put into it. If the Judges Rules had been formulated in the supposition that the suspect already had a legal right to have his solicitor present during interview, it is inconceivable that such a right and the necessary qualifications to it would not have been spelt-out in the elaborate statement of the rights of a suspect in the Judges Rules."(emphasis supplied).

The above dicta is consistent with our own views that no common law right ever existed, and indeed points out the simple fact that the principle stated in para (c) of the Appendix, relates not to a right to the presence of an attorney at an interview of the suspect, but merely to a right to consult an attorney at any stage of an investigation.

In the appeal before us, it was at 7:30 p.m. when the applicant volunteered to give the cautioned statement. He, however, asked if he could be allowed to have an attorney present. He did not request a specific attorney, but only sought the assistance of the Detective Sergeant in trying to locate an attorney for him. The police officer made unsuccessful attempts to contact two of the well known attorneys in the area. He, however, contacted a Justice of the Peace who attended, and remained to witness the statement. There were complaints by the applicant, at the trial that he was induced to give the statement, by promises to be put in a cell by himself and of securing for him medication which he needed. These complaints were aired before the learned trial judge in a voire dire, and were ruled to be untrue. The statement therefore was found by the learned trial judge to be voluntary. The applicant was cautioned before he made the statement, so that he would be well aware that he need not have said anything in the absence of an attorney. Nevertheless, he proceeded to give the statement, the effect of which was to give the details of oral statements he had already made, but which he denied making at the trial. In the oral statements he

admitted that he had "killed the lady, and stated that it was the cocaine that made him do it;" whereas in the cautioned statement, he gave more details in respect of consumption of cocaine, the fact that he was 'high' on it, and that he had the knife, did not know what happened, but saw the deceased lying on the floor in blood. It was in these circumstances that the learned trial judge ruled as follows:

> "Now it is of note that the accused is a German national and the officers who took the statement conversed with him in German. No complaint has been made that there was any misunderstanding at any stage of their intercourse, any misunderstanding of the language. As regards to the inability to obtain counsel, the evidence is that the officer says he tried to obtain the services of two attorneys and he was not able to do so at that hour of the afternoon. I do not think there was any denial of his rights of an attorney, in the circumstances he was not treated unfairly".

In our view given the particular circumstances of the case, the learned trial judge was correct in coming to the conclusion that there was no unfair treatment of the applicant, and for the reasons already adumbrated heretofore, we see no reason to interfere with his decision to admit the statement, which he ruled to have been given voluntarily. This ground therefore fails.

2. **SHOULD THE JURY HAVE BEEN DIRECTED AS TO THE EFFECT ON THE VERDICT AS A RESULT OF A FINDING OF SELF-INDUCED INTOXICATION?**

This question arose during the summing up when an unusual interruption was made by counsel for the defence, to suggest that the cautioned statement of the applicant was consistent with his statement at the trial, since he had corrected what he said were two mistakes made by the Sergeant when taking the caution statement. Remarkable as it may seem this resulted in a debate between counsel and the bench

as to what was the proper directions for the learned trial judge to give to the jury in respect of both statements.

In the end the learned trial judge directed the jury as follows:

> "Members of the jury when we adjourned we were looking at the statement - in respect of the statement made by the accused and his evidence, his defence in this Court. Members of the jury, I stand by what I said. I repeat what the Court of Appeal said:
>
> > 'Where, however, the defence not only fails to develop the issue but virtually kills it by raising a defence wholly incompatible with the exculpatory parts of the statement, then that issue is no longer a 'live one' meriting the Jury's consideration".
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> The exculpatory part was the use of cocaine. Even in the statement which he said he gave, he said that what the officer said , 'After a few hours we both were very high and then I don't know but I suddenly have this knife in my hand and then I don't know what happened exactly, but I remember seeing her on the ground full of blood.' In a statement to us yesterday, he said that was one of the mistakes. he said, 'At this point I would like to make it known that in the caution statement I gave, there are two mistakes. The first one is, I said on Monday not on Sunday.'
>
> That is of no importance, but he goes on, I never said something like after then we both were very high and I never have a knife in my hand. I remember I said after that I felt sleepy and when I woke up I remember seeing Michelle on the floor full of blood. I couldn't realize...'Then he said he made a mistake, he used the wrong English word, he should use the word imagine instead of realize. What he is saying is, he woke up and saw her dead. I stand by what I said, he kills the defence. I was shocked and confused I did not know what happened. I was afraid because they would say I did it, I didn't do it and I did not want to stay.' The defence is not before you and you should not consider it because he has killed it because of Mr. Justice Kerr's ruling."

In those words, the learned trial judge effectively withdrew from the jury any consideration as to whether the killing took place as a result of intoxication of the applicant due to the consumption of cocaine. As such a finding would have resulted in an acquittal for murder and a conviction of the lesser offence of manslaughter (see ***Director of Public Prosecutions v Majewski*** [1976] 2 All ER 142), the issue has been forcefully presented by Lord Gifford for the applicant.

To answer the question raised, it is necessary to remind ourselves of the basic rule of evidence which relates to the admission of confessions. To do so for these purposes, it is only necessary to refer to the definition of the hearsay rule as it appears in Cross on Evidence 6th edition (1958) p 38, and which was accepted by the House of Lords per Lord Mackay of Clashfern in the case of ***Regina v Sharp*** (1988) 86 Cr. App. R. 274 at p 278. It states:

> "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.".

Having accepted that definition, Lord MacKay then uttered the following words, which are appropriate - to the present question:

> "The rule is so firmly entrenched that the reasons for its adoption are of little more than historical interest but I suspect that the principal reason that led the judges to adopt it many years ago was the fear that juries might give undue weight to evidence the truth of which could not be tested by cross examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another. It is the application of this rule that has led the courts to hold that an exculpatory or, as it is sometimes called, a self-serving statement made by the accused to a third party, usually the police, is not admissible as evidence of the truth of the facts it asserts.
>
> Evidence contained in a confession is however an exception to the hearsay rule and is admissible. The

> justification for the adoption of the exception was presumably that, provided the accused had not been subjected to any improper pressure, it was so unlikely that he would confess to a crime he had not committed that it was safe to rely upon the truth of what he said. This exception became extended to include not only a full confession to the crime but also a partial confession in which the accused admitted some matter that required to be established if the crime alleged was to be proved against him..."

However, the issue arose in several cases as to whether the exculpatory part of an otherwise inculpatory statement was also admissible. This question was settled in the case of ***Regina v Sharp*** (supra) in which the following dicta of Lord Lane C.J. in ***Duncan*** (1981) 73 Cr. App. R. 359 at p 365 was accepted as correct:

> "Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explahations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should , point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate , the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence". (emphasis supplied)

Notably in the case of ***Duncan*** (supra) as well as the case of ***Sharp*** (supra), the accused had not given evidence and if for no other reason, it would be in the interest of fairness that where an accused makes an admission of committing an act and gives a reason for so doing, the jury ought to be asked to consider the whole statement in determining the question of guilt.

What therefore would be the answer, where the accused has given an unswom statement, in his trial in which he has denied making the admission, and giving the explanation but instead has set up an entirely different defence? In her arguments on this issue Miss Malahoo for the Crown relied on certain dicta of this Court in ***Regina v Trevor Lawrence*** SCCA 111/88 delivered on July 10, 1989, (unreported) and in particular on the following dicta of this Court per Kerr J.A. in ***Regina v Allan McGann*** SCCA 7/87 delivered on May 30, 1988, (unreported) as reiterated by Gordon J.A. in the ***Lawrence*** case at p11:

> "The statements in the cases of ***Caldwood, McFarquhar, Prince*** and ***Johnson*** (supra) indicate that issues are raised in court and not by extra-judicial statements, and above all, certainly not by the exculpatory part of such a statement which the accused, at his trial, not only denied making but specifically raised an issue inconsistent with that exculpatory part of the statement. There was therefore, no obligation on the trial judge to leave the exculpatory Dart of the statement as an issue for the determination of the jury. However, where the exculpatory part of the statement relates to an element or fact essential to establishing the case for the prosecution, it therefore emphasizes that the onus of proof remains on the prosecution to prove that essential."(emphasis added).

Gordon J.A. in the ***Lawrence*** case (supra) in analysing the above passage had this to say:

> "The principle to be extracted from these cases is that where at a trial a prisoner denies the contents of a mixed statement made by him and adduced by the Crown and his defence otherwise is rejected by the jury, he cannot afterwards be heard to complain that he should have had the benefit of having the exculpatory aspect placed before the jury".

The above dicta clearly states the opinion of this Court, and nothing has been advanced in this appeal to convince us that this is not a correct statement of the law.

The rationale for this conclusion has its basis in the fact that the exculpatory portion of a statement, as the cases have shown, becomes admissible in order to leave with the jury the full content of what an accused has said extra judicially. It would certainly be deceitful to for example admit that part of the statement in which the accused says "I killed him" and rule inadmissible the rest of the statement which says "because he was attacking me with a machete". If however, at the trial he states that he had made no such statement and that he was not present at the time of the death of the deceased, then the issue is no longer whether he killed in self defence, but would then be whether he killed at all. As Kerr J.A. said in the case of McGann (supra) in relation to the facts of that case.

> "In our view were the trial judge to have left to the jury as a separate issue the exculpatory part of the statement, he would be presenting to them an issue which was jettisoned by the applicant. Further, the trial judge would be putting forward a theory not relied on by either side and expressly rejected by the defence. By so doing, he would obliquely be undermining the issue specifically raised by the applicant in relation to the ownership of the shirt".

Similarly if Miss Malahoo is correct that the issue raised by the defence at trial is inconsistent with that propounded in the exculpatory part of the extra-judicial statements, then it could be argued that had the learned trial judge left the issue as to the consumption of cocaine to the jury, he would have "obliquely undermined the issue specifically raised by the applicant" in his defence at the trial.

The only question remaining on this aspect of the appeal is whether on an examination of the cautioned statement vis a vis the unswom statement of the applicant, it can be said that the applicant has denied making the exculpatory portion of

his caution statement, and has in fact presented a defence which is inconsistent with that statement.

We examine firstly, the relevant portion of the caution statement, in which in relating the circumstances surrounding the death of the deceased, the applicant stated:

> we start to have a party - and took drugs. We take it a long time, after which she slept and I went to the pool. When I came back, I organised something for her to eat because she was hungry and then started partying again. The whole time I didn't stop taking drugs, after a few hours we both were high and then I don't know why I suddenly had this knife in my hand and then I don't know what exactly, but I remember seeing her on the ground full of blood and I think she was dead and then the only thing I wanted was to go away".

In this passage the applicant was admitting that the deceased and himself were the only persons in the hotel room at the time she came to her death, that he had a knife at the time and that he left her dead on the floor 'full of blood'. At the time of giving this statement, he alleged that they had been having a party, and that he had been consuming drugs for a long time before the deceased met her death . This was the explanation given then for his killing her, the latter being the only inference to be drawn from what he had said.

In his unsworn statement at the trial the applicant spoke not of having a party in his hotel room with the deceased, but of having been at PJ's with the deceased, where she left him at 11:00 p.m. to go to the hotel room, and to leave his keys outside the door for him. At about 12 midnight he left PJ's exhausted and tired and went back to his hotel room where he found the key, opened the door, entered the room, turned on the light and saw no one on the bed. Thinking that the deceased had gone, he turned off the light, lay on the bed in his clothes and fell asleep. He awoke in an hour

to go to the toilet, turned on the light and then discovered the body of the deceased lying on the floor with blood "on her side and on her body". In this statement he said " I was afraid also because I thought everybody would think I did it".

Here the applicant is clearly indicating that he took no part in anything that might have brought about the death of the deceased. He had gone to bed exhausted, only to awake one hour later to find the deceased with these terrible wounds, lying on the floor with blood all over. This was clearly a denial of killing her and more so an entirely different scenario to the account he gave in the cautioned statement. Nevertheless, so as to make it really clear the applicant went on to state in his unsworn statement, the following:-

> "...I never said something like 'after this we were both high' and suddenly I had a knife in my hand. I can remember I said 'after that I fell asleep and when I woke up I can remember seeing Michelle lying on the floor or ground full of blood and I couldn't realise what happen. I made a mistake I used the wrong English word it should be [imagine]"

Then later he said:

> "I said I didn't kill Michelle Kernoll and I said I didn't cut her breast. I have no reason at all to kill Michelle, we had plans, I love her a lot".

In this latter passage, the applicant denies what he had said in his cautioned statement, that they were both high (on cocaine), and that he suddenly had the knife in his hand. In fact, what the applicant was stating is that what he had said to the police officer was that he had gone to sleep only to get awake to see the deceased's body on the floor. The desired effect of this was to convince the jury that what he had told the police was in fact consistent with his account at the trial, in particular that he had awakened to find the deceased already dead, and did not know how she had

come to her death. At the end of this, the only defence that the applicant could have been raising for the consideration of the jury, was that he did not kill the deceased, and consequently, any excuse or justification for having done so, did not arise. He had, indeed "raised an issue inconsistent with the exculpatory part of his statement" thereby relieving the learned trial judge from any obligation to leave the exculpatory part of his cautioned statement as an issue for the determination of the jury. In those circumstances we conclude that the learned trial judge acted correctly in not leaving the issue raised in this appeal, for the consideration of the jury. The answer to this question is therefore no.

As the application for leave to appeal relates to issues of law, it is granted. The application is treated as the hearing of the appeal. The appeal is dismissed and the conviction and sentence are affirmed.