JAMAICA

IN THE COURT OFAPPEAL

SUPREME COURT CRIMINAL APPEAL NO. 14/00

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

R. v. BARRY WIZZARD

Ian Wilkinson and Shawn Steadman for the appellant

Anthony Armstrong Crown Counsel for the Crown

March 19, 20, 21, 22 and April 6, 2001

DOWNER, J.A.

Barry Wizzard, the appellant was convicted of capital murder on 26th January, 2000 before Marva McIntosh J, and a jury in the St. Catherine Circuit. He now seeks to have the conviction quashed and a verdict of acquittal entered, instead of the mandatory sentence imposed, which is to suffer death in a manner prescribed by law. The principal evidence against the appellant, was a statement by Emile Lundy admitted pursuant to Sec. 31D of the Evidence Act and a cautioned statement taken on 27th November 1997. The main thrust of the submissions of Mr. Ian Wilkinson for the appellant, was that the learned judge erred in law in admitting the statement of Emile Lundy and that her directions to the jury on how to treat the cautioned statement were flawed. There were also complaints that the learned trial judge failed to give specific directions on

discrepancies and inconsistencies and their relation to the standard of proof as well as a failure to give adequate directions on the issue of capital murder.

Was there a proper direction on the issue of capital murder?

The indictment reads in so far as material:

> **"The Queen vs. Barry Wizzard**
> In the Supreme Court of Judicature for Jamaica
> In the Circuit Court for the parish of St. Catherine
>
> IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the Queen:
>
> Barry Wizzard is charged with the following offence:
>
> STATEMENT OF OFFENCE
>
> Capital Murder Contrary to S2 (a) para (8) of the Offences against the Person Act.
>
> PARTICULARS OF OFFENCE
>
> Barry Wizzard, between the 24th day of November and 25th day of November 1997 in the parish of St. Catherine, murdered Howard Bredwood, by reason of the said Howard Bredwood being a Correctional Officer."

Perhaps the Crown was referring to Section 2(1)(a)(iv) of the Act to specify the offence of capital murder. Additionally, it was submitted on behalf of the appellant Wizzard, that, strict proof was required that the deceased Bredwood was a correctional officer, and that Wizzard was aware of this and participated in the murder for a 'reason attributable to the nature of his occupation.'

The relevant section of the Offences against the Person Act reads:

> "2.-(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say-
>
> (a) the murder of –
>
> (i) a member of the security forces acting in the execution of his duties or of a person assisting a member so acting;

(ii) a correctional officer acting in the execution of his duties or of a person assisting a correctional officer so acting;

(iii) a judicial officer acting in the execution of his duties; or

(iv) any person acting in the execution of his duties, being a person who, for the purpose of carrying out those duties, is vested under the provisions of any law in force for the time being with the same powers, authorities and privileges as are given by law to members of the Jamaica Constabulary Force, or the murder of any such member of the security forces, correctional officer, judicial officer or person for any reason directly attributable to the nature of his occupation;

...".

Then Section 2 of the Corrections Act in so far as material reads:

"correctional officer"-

(a) in relation to an adult correctional center, means the Commissioner and any officer subordinate to him, other than such officers as may be prescribed, carrying out functions in, or in relation to, an adult correctional center; and

(b) in relation to any other correctional institution, means the Commissioner and such other persons as may be prescribed as a correctional officer in relation to that institution."

The pertinent evidence on the issue of capital murder comes from the cautioned statement. The following passages are relevant to establish the appellant's part as a principal in the murder of Bredwood, whom he knew to be a 'warder' at the Gun Court; warder being the traditional description of a 'correctional' officer:

"You waan si, Monday gone, inna di day mi go look for mi friend Andrew Morgan at the Spanish Town lock-up. When mi go back home and reach Jones Avenue mi si Nicholas, Blacka and Outlaw pon Jones Avenue. Nicholas

> tell mi say one Warder dat live in Lauriston deh pon di Avenue and dem Bwoy deh fi dead because Lauriston man dem always a fight against wi. And when wi go a prison, dat Warder always a give wi a fight at Gun Court. Nicholas organize dat all a wi fi rush di Warder and hold him."

Then describing his role he said:

> "So, wi walk like wi a go pass him and as wi reach him, wi grab him. Outlaw take a piece of big stick and lick him out in his head and mi take mi knife and stab him in the hands. In his two hands. Him couildn't use him hands after dis. All a wi draw him go inna di Race horse room, Pal Pal house. Him, Pal Pal did deh bout out a di front of Shit Lane. A di same Shit Lane Pal Pal house deh."

Continuing his narrative, the appellant said:

> "Mi have three sisters dat live pon Shit Lane to. Wi put him fi sit down on the floor of the house and we tie him hands behind him with wire and stuff one rag into him mouth. We take turn and guard him till night come. When night come Nicholas say a time fi kill di bwoy. Blacka him stab him inna his chest and mi stab him inna him chest too. All a wi stab him up but a Nicholas cut him throat. When him dead, mi take one sheet from off di bed and wrap him up."

Part of the gang went to secure a taxi while the appellant and Blacka were left in the house of death. The account ran thus:

> "Nicholas and Outlaw lef mi and Blacka a di yard and lef say dem a go ask a taxi man name Natty dat live up on di hill fi come help wi dump di body. Nicholas and Blacka and Natty came in a Natty taxi wid him a drive. Dem drive come right dung inna Shit Lane and reverse inna Shit Lane. A reverse him reverse di car and top right a di gate."

Since the name of the identity of the driver became an issue on appeal, it is important to point out as counsel for Crown stressed that it was Nicholas and Outlaw who knew Natty.

The appellant continued thus:

> "Mi nuh remember a what make. Nicholas sit down in di front seat beside the driver and, Blacka and Outlaw sit in the back seat. Nicholas tell Natty fi drive for a Lauriston

> mek wi go dump di body so dem can say a Lauriston man dem kill him. We drive go a Lauriston. When we reach a spot on one road, Nicholas tell Natty fi stop and him stop di car. We come out di car. Lift out the body in the sheet and dump it in the road. We go back in the car and drive back to Jones Avenue where Natty let wi out and all a wi go a wi yard."

After further details he concluded thus:

> "When we kill di Warder, mi did a wear one cutoff foot jeans pants and one red and white t-shirt with F I L A write pon di front. Blood catch di pants and the shirt so mi tek dem off fi wash at mi sister house. Beside di house wi kill the Warder. The Police dem come hold mi at the same house."

Elaine Thompson, Bredwood's partner and the mother of his son gave unchallenged evidence that he was a correctional officer at the Gun Court. Kenneth Gibson, Bredwood's brother-in-law gave evidence to like effect. Gibson knew that Bredwood worked with the Correctional Services and that at one stage of his career Bredwood trained prison warders at Runaway Bay. It was in light of the above evidence that the learned trial judge gave the following directions in the early part of her summing-up:

> "In this instance of Capital Murder, the Prosecution must prove to you that the deceased, Howard Bredwood was killed by virtue of the fact that he was a Correctional Officer."

Then in her final charge to the jury the learned trial judge said:

> "If, as I said before, you are satisfied from the evidence that Mr. Howard Bredwood was killed because he was a Correctional Officer, then it would be open to you to convict this accused of Capital Murder. If however, you find that the accused killed or took part in the killing but you are not sure whether Mr. Bredwood was killed because he was a Correctional Officer, or because he was a man from Larriston area, that always fighting against them as was disclosed in the caution statement, if you are not sure about it, then it is open to you to convict the accused of the lesser offence of Non-capital Murder. So, those are the two verdicts you can give. Guilty of Capital Murder or in the circumstances that I have related guilty of Murder or

> you can find that he is guilty of nothing at all. It depends entirely on what you make of the evidence and what you decide. So, please retire and consider your verdict."

We think that on this aspect of the case the learned judge cannot be faulted. Therefore grounds 4, 5, 7 and 9 which alleged that there was a failure to prove that Bredwood was a Correctional Officer, and that the jury was not given a proper direction on the issue of capital or non-capital murder, cannot be supported.

Was the statement of Emile Lundy properly admitted pursuant to Section 31D of the Evidence Act?

> "31D. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> (a) is dead;
>
> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
>
> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
>
> (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

The hearing dates in this case were January 24, 25 and 26, 2000. A statement was served on the appellant on 8th November, 1999. The notice reads:

> "TAKE NOTICE that the further evidence contained in the attached statement of Emile Lundy and Post Mortem Report of Dr. Royston E. Clifford will be adduced at your trial in the St. Catherine Circuit Court for the offence of MURDER"

So the appellant had ample notice that the Crown would seek to rely on the statement in issue. The evidence on which the court relied for admissibility came from Deputy Superintendent Laing. He recalled that he took a statement from Emile Lundy

on December 1, 1997. Be it noted that the cautioned statement was taken on 29th November, 1997. He also said that the statement was five pages long and that Lundy had signed it. He also signed a declaration at the end of the statement as well.

Under Sec. 31 D of the Evidence Act, there is no requirement for a statutory notice, but it is mandatory pursuant to sub-sections (1) and (2)(b) of Sec. 31C. Similarly there is no provision comparable to 31C(2)(d) requiring a declaration. Neither, is there a provision for a counter-notice objecting to the statement being tendered and requiring the maker to attend the hearing as a witness as in 31C (2)(c).

The significant feature of Sec 31D(d) is that the witness will not be able to attend court in person. For the document to be tendered, the Court has to be satisfied that any one of the five conditions listed in (a) to (e) of Sec. 31D is fulfilled. The statement in this case was admitted pursuant to 31D(d) and the learned judge was satisfied by the evidence of Dep. Superintendent Laing that Emile Lundy could not be found, after reasonable steps had been taken to find him.

The Deputy Superintendent made exhaustive enquiries to track down Emile Lundy. He contacted his wife, Andrea Lundy from whom he was then separated. He visited the address he had been given on more than twenty occasions. He checked the prisons and hospitals. He secured the cooperation of the security forces through radio control. He conferred with Immigration at the two international airports, and also the Registrar-General's Office to ascertain if Lundy was registered as dead. It was on the basis of this evidence that the statement was admitted in accordance with Sec. 31D(d) of the Evidence Act. All these features make it possible to distinguish **R. v. Michael Barrett** unreported SCCA 76/97 delivered 31st July 1998. Another feature of the instant case is that the learned judge directed the jury accurately on how to evaluate Lundy's statement. Here is how she put it:

> "You have heard from Deputy Superintendent Clinton Laing in respect of Mr. Emile Lundy whose statement was read in evidence. The purpose of the exercise of calling Deputy Superintendent Laing was to indicate the efforts that he had made to locate Mr. Lundy to bring him here to testify. Because as it stands, what you have is a statement from Mr. Lundy given to the police. Mr. Lundy was not here, he could not be cross-examined. His evidence could not be tested. And what you have to do is to attach the amount of weight that you think you ought to give the statement which you have heard, bearing in mind that it is not sworn evidence and it was not tested by cross-examination. You have to look at it, consider it, and attach such weight to it as you think you should.
>
> Mr. Laing told you of all the efforts he made to locate Mr. Lundy, and his failure to do so. And Mr. Lundy was not here to testify."

This statement, together with the cautioned statement, was the basis of the Crown's case so it is instructive to cite aspects which implicate the appellant and which tally with the cautioned statement. The statement which is dated 12th December, 1997, reads:

> "Emile Lundy states, I am a twenty-four years old taxi operator, residing at Jones Avenue, Spanish Town, in the parish of St. Catherine. Jones Avenue is a community. I have been living at Jones Avenue, for the past 3 years and I have been acquainted with most of the residents of this community. I share good relationship with most of these persons and I have regular dialogue with them. Some of these persons include Nicholas, Outlaw, Barry and Mawga. Nicholas is of a dark complexion, has a straight face, straight nose, full eyes and of slim built. He is about six feet tall. He does not wear hair on his face. Outlaw is of black complexion with a small face, big mouth, small eyes, straight nose and has a slim body. He is taller than Nicholas he cuts his hair low, usually has no hair on his face. Barry is about five feet six inches tall, of black complexion, of slim built. He has a round face, straight nose, and has a little beard on his chin. He has bright eyes and a tooth is missing from the top row of his mouth."

It is to be noted that there is a description of Barry and that a special feature is a missing tooth.

Emile Lundy states the date of the incident and continues thus:

> "On Tuesday the 25th of November, 1997, after one a.m., I was asleep, at my home, I was awakened by a knocking on a neighbour's door on the same building I live. I heard a male voice say, driver, driver. I then heard my neighbour 'Natty' say, is not this, is the next one. I then heard a knocking on my door and the same driver, driver. I opened my door and I saw Barry and another man at my door. Electric light was on inside my house and it shone outside and I could see both men clearly. Barry told me that his brother was sick and he wanted me to take them to the hospital. I then put on a merino and my shoes and I left my house with both men. The 3 of us left my yard for a nearby premises where my cream Lada station wagon was parked. We all went in the car, and I started the car and reversed into the lane. As soon as the vehicle went into the road, the two back door open and the roof light in the car came on. I then look in the direction of the rear seat and I saw Nicholas and Outlaw enter the car. I said what a gwaan and both Nicholas and Outlaw said, a no nutten. Just drive. I drove down the road and as I did so, I turned on my headlight but Barry told me to turn them off. I then switched them off but I turned on my four-way flasher because of the bad conditions of the road."

It is clear from this passage that the person who knocked on the door as well as the person who said 'driver, driver' did not know Emile Lundy's apartment or that Natty was Lundy's neighbour. It was Natty who indicated where Lundy's apartment was. Then the statement continued to show the role Barry played in the enterprise:

> "Barry sat beside me in the front of the car. On reaching Shit Lane, Barry told me to stop and put the back of the car in the lane and I did just that. All four men then came out of the car and went to a nearby premises. Shortly after, I saw them dragging something toward the car. I hear Outlaw say, bring the cardboard come. When the men reached to the car, one of them open the trunk and they all lifted up the body of a human and threw it in the car back. I know that it was a human body because I heard Outlaw say to hold the foot and two hold the hand. I then became afraid but I tried to remain calm. Outlaw then sat in the front passenger seat while the 3 others namely Nicholas, Barry and the man whose name I don't know returned to the car. Blacka also came in the car at this point. Outlaw sat in the front and the other four sat in the back seat. Outlaw told me to drive and as I reached to the intersection to the road leading from Spanish Town to Twickenham Park, he told me to go across the road into Greendale."

Then the statement described the action of the four men and the continuation of the journey thus:

> "The four men in the back came out and opened the trunk and lifted the body on the road. They then returned to the car. Outlaw instructed me to drive back to Jones Avenue. As I drove back towards Jones Avenue, Outlaw said to me, driver, everything criss, a we run the place because we a bad man. Nutten caan gwaan. When we reach to Shit Lane, I stopped and all men came out of the car. One of them opened the trunk and took out the cardboard. I then drove off to the premises where I keep the car and parked it. I then went to my house where I lay in my bed and waited until daylight. When I got up in the morning, and went to my car, I opened the trunk and I saw a little blood. I used a chamois to wipe it up and then threw it away in nearby bushes I then went to work."

In the light of this statement the jury was asked to find that Barry was the appellant Barry Wizzard. At the end of the statement there was a declaration which reads thus:

> "This statement consisting of five pages, each signed by me is true, to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable for prosecution if I have willfully stated in it anything which I know to be false, or don't believe to be true."

In the light of the foregoing, grounds 3, 10, 11 and 13 which challenged the admissibility of Emile Lundy's statement must fail.

The cautioned statement

There are grounds of appeal which challenged the admissibility of the cautioned statement and the directions to the jury on how they ought to determine its weight. Some comments on admissibility are pertinent to put the issue in context. **Seeraj Ajodha v The State** (1981) 32 WIR 361 clarified the issues. At page 370 Lord Bridge said:

> "It has to be remembered that the rule requiring the judge to be satisfied that an incriminating statement by the accused was given voluntarily before deciding that it is admissible in evidence is anomalous in that it puts the judge in a position where he must make his own findings of fact and thus creates an inevitable overlap between the fact-finding functions of judge and jury. In a simple case, where the sole issue is whether the statement, admittedly

> made by the accused, was voluntary or not, it is a commonplace that the judge first decides that issue himself, having heard evidence on the *voire dire*, normally in the absence of the jury. If he rules in favour of admissibility, the jury will then normally hear exactly the same evidence and decide essentially the same issue albeit not as a test of admissibility but as a criterion of the weight and value, if any, of the statement as evidence of the guilt of the accused."

Earlier, Lord Bridge stated the rule of law on admissibility thus at p. 369:

> "A sound starting-point for the consideration of any question of the admissibility of confessions is the *dictum* of Lord Sumner, giving the judgment of this Board in **Ibrahim v R** [1914] AC 599 at page 609, as follows:
>
> > 'It has been long established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority.'
>
> As Lord Hailsham of Marylebone pointed out in **Director of Public Prosecutions v Ping** [1976] A C 574 at page 597, the word 'exercised' in this passage is probably a misreading for 'excited'."

It is important to grasp that this is the test for a statement being voluntary which is a matter of law exclusively for the judge. But voluntariness is also a consideration for the jury in the discharge of its function to determine whether the statement is true.

Once again Lord Sumner gives the lead. In **Ibrahim** at p. 610 he said:

> "It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of

> policy. 'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it.': **Rex v Warwickshall (1783) 1 Leach, 263.** It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: **Reg. v. Baldry (1852) 2 Den. Cr. C. 430, at p. 445.** Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight."

This issue was well put in **R v Seymour Grant** (1976) 14 JLR 240. The relevant passage was cited with approval in **R v Kurt Mollison** No. 1 unreported SCCA No. 61/97 delivered 16th February, 2000, and it reads thus at pp 10-11:

> "Then the learned President continued 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."

A similar statement of principle is to be found in **Christopher McCarthy** (1980) 70 Cr. App R 270. It was cited with approval in **Mollison No. 1** at page 16 thus:

> "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 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." (per Waller, LJ at p. 272)

It is important to emphasize that 'though the weight of the statement must be determined by the jury, the judge ought to give them some guidance. It is against this background that the claims by Mr. Wilkinson that the learned judge erred in her directions to the jury must be considered. The learned judge directed the jury thus:

> "Let me tell you about caution statements. It was suggested that the accused was beaten and it is to prevent further beating and injury why he gave the statement. This was denied by the police. It was denied vehemently by the police. And it is your duty to decide two issues in relation to the statement, that is the caution statement. First, you must decide whether or not the accused actually made the statement. That is the first thing you have to decide. If you are sure that he made the statement, then the second thing that you have to consider is whether or not what he said in it was true. In determining that, you should take into consideration all the circumstances, having regard to the allegation of the accused of threats and a beating in which you find the statement was made or may have been made. If, for whatever reason you are not sure whether the statement was made or was true, then you must disregard it. <u>If on the other hand, you are sure both that it was made and that it was true, you may rely on it even if it was made or may have been made as a result of</u>

oppression or other improper circumstances. So you will have to decide about that statement." (Emphasis supplied)

The learned judge having admitted the statement on the basis of Lord Sumner's dictum in **R.v. Ibrahim,** (supra) she was now giving the jury guidance on how to evaluate the evidence, in order to determine if it was true. On this aspect the jury heard the evidence of the police officers Sergeant Alston Walker and Deputy Superintendent Errol Grant, coupled with the unsworn statement of the appellant. The police officers denied the suggestion that the appellant was beaten or that his arms were twisted or that his teeth were punched out. Of course, the officers also gave positive evidence that the appellant gave the cautioned statement voluntarily.

The appellant on the other hand gave an unsworn statement from the dock. The relevant part reads thus:

"ACCUSED: Sergeant Walker use piece of board and 'lik' mi in mi head, knock mi out fi about fifteen minutes. When mi revive, Sergeant Walker and the rest of two policeman start to beat me, beat me. One of them thump out one of mi tooth and sey mi will have fi sign or dem a goh kill me. One of them have mi hand bend up.

HER LADYSHIP: One second. One of them 'lik' out your tooth?"

At this stage it will be recalled that the statement taken from Emile Lundy described Barry as one who had a missing tooth. In contrast the appellant stated that the police knocked out his tooth during the taking of the cautioned statement. The unsworn statement continued thus:

ACCUSED: Yes, ma'am, and one of dem have mi hand wring up behind me and sey mi will have fi sign it or dem a goh kill me, dem naw stop beat mi my Lord.

HER LADYSHIP: Him a goh kill you and what?

ACCUSED: Wring up mi hand my Lord, and dem start to beat me so I do, a sign what dem want me to sign because dem was beating me. Dem naw stop beat mi my Lord.

HER LADYSHIP: I am not hearing.

ACCUSED: I said dem was beating me and tell me sey if a don't sign it, dem a goh kill me so I had no choice so I have to sign it fi mek dem stop pressure mi my Lord. Yes my Lord

HER LADYSHIP: Yes, that is all?

ACCUSED: Yes, my Lord."

A telling piece of evidence came from Mr. Clifton Hoilette who found the body of the deceased, Bredwood on 25th November, 1997, covered with a sheet. He also knew the deceased Bredwood by the name of Nick. Elaine Thompson with whom Bredwood lived as man and wife also knew him as Nick. The jury also heard from the appellant's mother Theresa Fraser, who stated that from outside the police station she heard the appellant crying. However, the appellant gave no indication that he was crying that day.

In directing the jury that they "may rely on it even if it was made or may have been made as a result of oppression or other improper circumstance" the learned judge was indicating to the jury that if they accepted that there was 'pressure' as stated by the appellant they would still have to determine whether the statement was true. In order to demonstrate that the learned judge was very fair to the appellant here is part of her final charge to the jury.

> "Now, if you believe the accused, that he didn't make any statement that he was beaten to sign the statement, that he doesn't know anything about this incident at all, then you must acquit him. If you disbelieve him, that does not entitle you to convict him. You must go back to the Prosecution's case and see whether you are satisfied and feel sure about it before it's open to you to convict. If you have a reasonable doubt it must be resolved in favour of the accused and you must acquit him. It's only if you are

> satisfied so that you feel sure in respect of the case presented by the Prosecution that you are entitled to convict. If, as I said before, you are satisfied from the evidence that Mr. Howard Bredwood was killed because he was a Correctional Officer, then it would be open to you to convict."

In considering the complaint about the use of the word 'oppression' in the summing-up it must also be noted that the word is also used in directing juries to mean prolonged questioning which is oppressive. Since there was no evidence of prolonged questioning in the instant case the word oppression as used by the judge was to be equated with the term "pressure" which connotes an improper circumstance.

In **Mollison No. 1** there was reliance on oppression by the appellant in the sense of prolonged questioning as adumbrated in **R. v. Knight and Thayre** 1905 20 Cox 711. See page 5 of **Mollison**. See also **Prager** (1972) 38 Cr. App. R 151 at page 8 of the same judgment as well as **Hudson** (1981) 71 Cr. App. R 16 at pp 13-15. The passage in the judge's summing up in **Mollison No. 1** at page 8 of the judgment was identical to the passage in the summing-up in the instant case. However, it did not distinguish the aspect of oppression pertaining to questions and answers after the cautioned statement from the allegations of physical pressure which may also be described as oppression. In the future in a case where both types of oppression are alleged it might be appropriate to confine the use of the term 'oppression' to prolonged questioning only. If it is oppression because of prolonged questioning then the principle set out in **Prage**r cited at page 8 of **Mollison No. 1** should be heeded and the summing-up tailored to fit the facts. To reiterate, it reads:

> **"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 PRIESTLY(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 **Mollison** was an inexperienced youth. In the instant case there was no allegation of prolonged questioning and the use of oppression in the context of the judge's summing-up concerned the complaint of physical force administered by the police officers. In **Mollison No. 1** there was a complaint about both types of 'oppression' and one of the principal complaints was that the type of 'oppression' illustrated in **Knight and Thayre, Prager** and **Hudson** supra warranted a special direction. No such special direction was called for in the instant case.

The contents of the cautioned statement dated 27th November 1997

The learned judge correctly directed the jury that it was for them to decide whether Wizzard made the statement. Since the cautioned statement is the main evidence for the Crown, the relevant part of it, as the judge recounted it in her

summing-up must be noted to ascertain if it was capable of making the jury feel sure so as to return a verdict of guilty. It commenced:

> "Barry Wizzard said, 'Mi born at Greenwich Town, Kingston and mi parent and me come to live at Jones Avenue Spanish Town from mi small. Mi goh school at Spanish Town Primary School. I grow up same place at Jones Avenue with a whole heap of boys like Nicholas Dawkins, 'Outlaw', his right name is Jason Durrant. Mi brother Donovan Scott who also name 'Blacka' and a lot more youths. Me and them youth deh run up and down and play football together all mi life.
>
> You waan si Monday gone in a di day, mi goh look fi mi friend Andrew Morgan at the Spanish Town lock-up. When mi a goh back home and reach Jones Avenue, mi si Nickolas, 'Blacka' and 'Outlaw' pon Jones Avenue. Nicholas tell mi sey one warder that live in Lauriston deh pon the Avenue and dem bwoy deh fi dead because Lauriston man dem always a fight against we and when we goh a prison, that warder always give we a fight at Gun Court.
>
> Nicholas urge that all of we fi rush the warder and hold him soh we walk like we a goh pass him and as we reach him, we grab him. 'Outlaw' tek a piece of big stick and 'lik' him out in a him head and me tek mi knife and stab him in his two hand. Him couldn't use him hand after this. All of we draw him goh inna di race horse groom name 'Pal Pal' house. Him 'Pal Pal' did deh 'bout out a di front of Shit Lane. A di same Shit Lane 'Pal Pal' house de. Mi have three sisters that live pon Shit Lane too. Mi put him fi sit down on the floor of the house and we tie him hand behind him with wire and stuff one rag in a mouth. We take turns and guard him till night come. When night come, Nicholas say a time fi kill the bwoy. 'Blacka' him stab him in him chest and mi stab him in him chest too. All of we stab him up but a Nicholas cut him throat."

Then the statement continues, and introduces Natty as a taxi operator:

> "When him dead, we tek one sheet off the bed and wrap him up. Nicholas and 'Outlaw' left me and 'Blacka' a di yard and lef sey dem a goh ask a taximan name 'Natty' that live pon the hill fi come help wi dump the body. Nicholas and 'Blacka' and 'Natty' come in a 'Natty' taxi wid him a drive. Dem drive come down in a Shit Lane and him reverse the car and stop right at the gate. Dem come out the car and 'Natty' open the trunk and all of wi lift up the warder body and put it in the car trunk. Nicholas, 'Outlaw'

> 'Blacka' and me goh in the car with 'Natty'. 'Natty' car is a brown car. Mi noh remember a what make. Nicholas sit down in the front seat beside the driver and me, 'Blacka' and 'Outlaw sit in the back seat. Nicholas tell 'Natty' fi drive goh a Lauriston mek wi goh dump the body soh dem can say a Lauriston man dem kill him. Wi drive goh a Lauriston and when we reach a di foot a di road, Nicholas tell 'Natty' fi stop and him stop the car. We come out the car, lift out the body in the sheet and dump it in the road. We goh back in the car and drive back to Jones Avenue where 'Natty' let wi out and all of wi go a wi yard."

The concluding part of the statement reads:

> "Mi did a wear one cut off foot Kauvene jeans pants and one red and gray and white Tee shirt with F.I.L.A. write pon the front. Blood catch a part of the shirt so mi tek dem off fi wash. A mi sister house, beside the house mi kill the warder. The police dem come hold me at the same house."

The evidence in the cautioned statement was of such cogency that it should occasion no surprise that the jury returned a verdict of guilty.

Mr. Wilkinson made two criticisms of the learned judge's summing-up as regards discrepancies and inconsistencies. He pointed out that the motor vehicle in the caution statement was described as brown while in Emile Lundy's statement it was described as cream. Also the Police Officer's version was that the colour was cream. That was not a material discrepancy and required no special direction.

The second being the seemingly serious criticism concerning the driver of the motor vehicle. It does not seem that this was an issue at the trial but it was made an issue on appeal. Lundy's version was, that it was he who drove his taxi. The appellant's cautioned statement suggested in more than one passage that Natty was the driver. It must be recalled that Barry and his brother were directed to Lundy's apartment on Lundy's account. Further, Lundy stated that the voice outside said, 'driver, driver' and that Natty, his neighbour, directed them to his apartment. There was no evidence that Barry knew Lundy. So when Barry in his cautioned statement called

the driver 'Natty' it was based on the fact that earlier on he had stated that Nicholas and Outlaw said they were going to seek the assistance of a taxi-man called Natty. Both Lundy's statement and Barry's cautioned statement were in evidence and the jury took the cautioned statement with them when they retired. There was therefore no need for a special direction. In any event Mr. Anthony Armstrong for the Crown contended, the caution statement and Lundy's statement taken together made a convincing narrative. Additionally, the graphic details given by the appellant in the cautioned statement of his own role in the murder of the correctional officer, Bredwood convinced the jury of the appellant's guilt.

The practice concerning a cautioned statement is not to mention it in the Crown's opening to the jury. This practice ought to be followed where a statement is sought to be admitted pursuant to 31D of the Evidence Act. Here is how Lord Bridge put it in **Ajodha** at p. 372 in relation to a cautioned statement:

> "In the normal situation which arises at the vast majority of trials where the admissibility of a confession statement is to be challenged, defending counsel will notify prosecuting counsel that an objection to admissibility is to be raised, prosecuting counsel will not mention the statement in his opening to the jury, and at the appropriate time the judge will conduct a trial on the *voire dire* to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence: **R v Anderson** (1929) 21 Cr App Rep 178."

In the instant case, the admissibility of both statements could have been conveniently determined at a trial within a trial before opening to the jury. An instance where this was done in relation to a cautioned statement was in **Director of Public Prosecutions v Ping Lin** [1976] A.C. 576 at p.596

The correct procedure as regards cautioned statements is that the trial within the trial is heard in the absence of the jury. The same principle applies in the case of a

no case submission. See **Crosdale v R** [1995] 2 All ER 500 at 508 and **R v Lobban**(1995) 46 WIR 291 at 303. Here is how it was put by Lord Steyn in **Crosdale:**

> "That brings their Lordships to the third question, namely whether the jury should be present during the judgment on the application that the defendant has no case to answer or whether the jury should subsequently be informed of the judge's reasons for his decision. There is no reason why the jury should be privy to the judge's reasons for his decision. In order to avoid any risk of prejudice to the defendant the jury should not be present during the course of the judgment or be told what the judge's reasons were. If the judge rejects a submission of no case, the jury need know nothing about his decision. No explanation is required. If the judge rules in favour of such a submission on some charges but not on others, or rules in favour of it in respect of some defendants but not others, the jury inevitably will know about the decision. All the jury need then to be told by the judge is that he took his decision for legal reasons. Any further explanation will risk potential prejudice to a defendant or defendants." [Emphasis supplied]

Equally, if the trial judge rules in favour of admissibility then the emphasized words should be his guide. A judge may, however, give a short ruling at the trial within the trial. In this case the learned judge said at the conclusion of the trial within a trial:

> "yes, I find that the statement was given voluntarily and it is therefore admitted into evidence."

In the circumstances of this case this was the appropriate ruling: See **Director of Public Prosecutions v Ping Lin** (supra) at p. 548.

The post mortem examination was performed by Dr. Royston Clifford. He described in detail the several wounds inflicted on Bredwood. The wounds fit the description given by the appellant in his cautioned statement. Bredwood's brother-in-law, Kenneth Gibbons, identified the deceased to Dr. Clifford.

Having regard to the above analysis, grounds 2, 6, 8 and 16 which challenged the admissibility of the cautioned statement and the direction on it were without merit. The complaint about the absence of a Justice of the Peace also had no merit. Such

presence is desirable but not mandatory. It was contended that there were misdirections in law on the distinction between the functions of judge and jury. There was no such misdirection. The criticism failed to recognize that the word voluntariness is and has always been used in two ways in relation to cautioned statements. Firstly, to determine admissibility as an issue of law for the judge; secondly, as an element to be taken into account by the jury in considering what weight should be attributed to it.

The contention that the case ought not to have gone to the jury cannot be supported.

Conclusion

We would wish to pay tribute to the manner in which counsel for the appellant conducted this appeal and the spirited response by Crown Counsel. In the result having regard to the detailed evidence in the two convincing statements which formed the basis of the Crown's case, and the commendable manner in which the learned judge summed up the case to the jury, the appeal is dismissed and the conviction and sentence affirmed. We should add that, in the light of the grounds of appeal and the supplemental grounds filed, we granted leave to appeal at the commencement of the hearing.