[2009] CCJ 9 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CR 1 of 2008
BB Criminal Appeal No. 10 of 2005

BETWEEN

JULIAN OSCAR FRANCIS	**APPELLANT**

AND

THE QUEEN	**RESPONDENT**

Before The Right Honourable	**Mr. Justice de la Bastide, President**
And the Honourables	**Mr. Justice Nelson**
	Mr. Justice Saunders
	Madame Justice Bernard
	Mr. Justice Hayton

Appearances

Mr Bryan L Weekes, Mr Satcha Subhas-Chandra Kissoon and Mr Latchman Persaud Kissoon for the Appellant

Mrs Donna Babb-Agard and Mr Alliston Seale for the Respondent

JUDGMENT
of the President and Justices Nelson, Bernard and Hayton
Delivered by the President
The Right Honourable Mr. Justice Michael de la Bastide
on the 30th day of June, 2009
and
JUDGMENT
of the Honourable Mr. Justice Adrian Saunders

JUDGMENT

Background

[1] The appellant was charged with theft of a motor-car on the 2nd or 3rd December, 2001. After a trial before a judge and jury he was on the 7th February, 2005, found guilty of the offence charged and was subsequently sentenced to six years' imprisonment. He was tried together with another man by the name of Quimby who was charged with dishonestly receiving the motor-car knowing it to have been stolen. Quimby was also convicted and was sentenced to seven years' imprisonment. Neither accused was represented at the trial.

[2] The appellant appealed to the Court of Appeal against both conviction and sentence and on the 28th February, 2008, the Court of Appeal (Simmons CJ, Peter Williams and Connelly JJA.) dismissed his appeal and affirmed both his conviction and sentence. Quimby had earlier lost his appeal against conviction but had his sentence reduced by the Court of Appeal to four years.

[3] The appellant was granted special leave to appeal to this Court against the dismissal by the Court of Appeal of his appeal against conviction and on the 17th November, 2008, we heard and dismissed his substantive appeal. We promised then to give our reasons in writing and we now proceed to do so.

The Evidence

[4] The case against the appellant was founded on self-incriminatory statements allegedly made by him both orally and in writing. Evidence of these statements was provided by a police officer, Sergeant Frederick Catwell, who participated in the investigation. For the purpose of giving evidence of the oral admission made by the appellant, Sergeant Catwell was allowed to refer to his official police notebook in which he said he had recorded the exchange between them. With the help of his notes, Catwell testified that the appellant

said: “Truthfully speaking, I is who take up this car but I had all intentions of carrying it back. I got frighten and I give it to a mechanic fella name B”.

[5] Sergeant Catwell also testified to the giving of a written statement by the appellant in which the appellant effectively confessed to the theft of the motor-car, explaining how he had picked a door-lock with a metal hanger, bridged wires to start the car, drove it off and gave it to a ‘mechanic fella’ whom he knew as “B”. There was another police officer, PC Boyce, who was present when the oral admission was allegedly made and also when the written statement was taken from the appellant, but P.C. Boyce was not called as a witness.

[6] The appellant conducted his own defence at the trial with such help as the presiding judge, Greenidge J., was able to provide. The appellant denied making the oral admission and claimed that he was forced to sign a prepared statement put before him as a result of physical abuse inflicted by Sergeant Catwell. Accordingly, a voir dire was held to determine the admissibility of the written statement, in which Sergeant Catwell testified and the appellant made an unsworn statement. At the conclusion of the voir dire the judge rose and after some 18 minutes returned to announce his ruling, which was that the written statement was admissible.

Grounds of Appeal

[7] The appeal to this Court was based on the claim that the admission of both the oral and the written statements into evidence was wrongful. With regard to the oral statement, the challenge to its admission (as argued before us) had two limbs. The first was that the effect of the judge granting Sergeant Catwell leave to refresh his memory from his notebook, was tantamount to admitting into evidence the contents of a document which was rendered inadmissible by section 73(1) of the Evidence Act (‘the Act’) for lack of authentication by the appellant. The second limb was that the judge never considered, as he was required to by section 145 of the Act, whether it was fair to the appellant to grant leave to the Sergeant to refresh his memory from his notebook and that had he done so,

he would or ought to have come to the conclusion that the grant of such leave would in all the circumstances of the case result in unfairness to the appellant.

[8] With regard to the written statement, it was argued further that having regard to (a) the importance of the written confession to the case for the prosecution and (b) the failure of the prosecution to call P.C. Boyce, the 'back-up' policeman, as a witness, the judge ought to have held that the prosecution had not proved the voluntariness of the statement to the requisite standard, and that having regard, in addition, to (c) the failure of the prosecution to provide the defence with a statement from PC Boyce or to produce him in court and (d) the fact that the appellant was unrepresented, it was unfair and therefore contrary to section 77(1) of the Act, to admit the written statement into evidence.

The Oral Admission: the Issue

[9] Dealing first with the objections to the evidence of the oral admission, these focus on the leave that was given to Sergeant Catwell to refresh his memory from his official notebook. When Sergeant Catwell reached this point in his evidence in chief, the trial judge quite properly asked the appellant whether he had any objection to Catwell giving the evidence which he was about to give, of the oral statements attributed to the appellant. The appellant replied that he was objecting because he did not make those statements. In the light of that response, there was no need for a voir dire with respect to the oral statements, but the judge should have gone on to ask the appellant whether he had any objection to his granting the Sergeant leave to refresh his memory from his notebook, even though the appellant being unrepresented would hardly have been in a position to respond meaningfully to that inquiry. At any rate the question was not asked. In fact the judge may not have directed his mind to the sections of the Evidence Act which bear on the grant of leave to a witness to refresh his memory from a document. At least, there is nothing to indicate that he did. We must in these circumstances consider whether there is any ground on which a judge properly directed, could reasonably have refused leave for Sergeant Catwell to refresh his memory from the contents of his notebook.

Section 30 (1) and (2)

[10] The rules which govern the grant of leave to a witness to refresh his memory from a document, were originally established as part of the common law, but in Barbados they have now been incorporated to some extent and with some alterations, in the Act. At common law a witness was entitled subject to the fulfilment of certain pre-conditions, to refresh his memory from a note or record made by him. That entitlement has been converted to a discretion given to the court to grant leave to the witness to refresh his memory, this discretion to be exercised after taking into account a short but non-exhaustive list of specified matters. This conversion has been effected by section 30 of the Act which provides in part as follows:

> "(1) A witness may not, in the course of giving evidence, use a document to try to refresh his memory about a fact without leave of the court.
>
> (2) The matters that the court should take into account in determining whether to give leave include:
>
> (a) whether the witness will be able to recall the fact adequately without using the document; and
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> (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that -
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> (i) was written or made by the witness at a time when the events recorded in it were fresh in his memory, or
>
> (ii) was, at such a time, found by the witness to be accurate."

[11] The Sergeant's evidence was that he recorded the statements made to him by the appellant in his police notebook "at the time", so the note he referred to had the quality of 'freshness' which was crucial at common law and remains relevant under section 30 (2) (b). But as section 30 (2) itself makes clear, the matters to be taken into account in deciding whether to grant leave are not limited to those mentioned in that sub-section.

'Refreshing' Memory

[12] The point was made in the course of argument that Sergeant Catwell's own evidence suggests that he had no independent recollection of what was said to him by the appellant, so that what he gave in evidence was what was written in his notebook rather than what his notes helped him to remember.

[13] What Sergeant Catwell said in evidence was: "I do not recall those statements from my memory and I am seeking the court's permission to refer to my official notebook". It is true that his interview with the appellant took place nearly three years before the trial but Sergeant Catwell had in the meantime given evidence of the appellant's oral admission at the preliminary enquiry. Even if the Sergeant had not taken the precaution of re-reading his deposition before going into the witness-box at the trial, it seems unlikely that his mind would have been a complete blank with regard to what was said to him by the appellant by way of an admission. Moreover, we do not think that the Sergeant's evidence can reasonably be construed to mean that he could not remember the oral admission even when assisted by his notebook. The trial judge obviously did not construe the Sergeant's evidence in that way, as in explaining to the jury the rationale for allowing a police officer to refer to his notes when giving evidence of what a suspect said to him, he spoke of the impossibility of the officer remembering 'exactly' or 'word for word' what was said.

[14] But even if Catwell's evidence did mean that, this would not help the appellant's case as the absence of an independent recollection does not at common law (which in this respect has not been altered by the Act) debar a witness from obtaining leave to refresh his memory. The position is stated in Halsbury's Laws of England [1] (paraphrasing Lord Tenterden CJ in *Maugham v. Hubbard* [2]) in this way:

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[1] Volume 11 (1) (2006 Reissue) para.1438

[2] (1828) 108 ER 948,949

> "It is not necessary that the witness should have any independent recollection of the facts to which he testifies and of which he seeks to refresh his memory, apart from the document to which he refers".

Accordingly, this point was not well taken.

<u>Lack of authentication: section 73</u>

[15] It was also argued that because the record made of the oral admission in the notebook was inadmissible under section 73 (1) of the Evidence Act, not having been authenticated or acknowledged by the appellant, leave ought not to have been granted to Sergeant Catwell to refresh his memory from the notebook. Section 73 (1) provides as follows:

> "Where an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official, a document prepared by or on behalf of the official is not admissible in criminal proceedings to prove the contents of the question, representation or response unless the defendant has, by signing, initialling or otherwise marking the document, acknowledged that the document is a true record of the question, representation or response."

[16] We would mention en passant that we were a little puzzled by the suggestion made by the Court of Appeal (at para. [38] of the judgment) that section 73 relates to the admissibility of documentary evidence such as "a transcript of a tape recording of an accused's statement" since section 73 (2) expressly provides that a sound recording or a transcript of a sound recording is <u>not</u> to be treated as a "document" for the purposes of sub-section (1),

[17] In our view the submission that the effect of section 73 (1) is to preclude leave being given to refresh memory from an unauthenticated note of an oral admission, is clearly untenable. The use of a document by a witness to refresh his memory is totally different from putting the document in evidence, and the two are governed by different rules. The prohibition of one does not imply a prohibition of the other.

[18] The only sanction imposed by section 73 (1) for failure of a police officer to get a suspect who has made an oral admission to authenticate the note which the policeman has made of it, is to render the document containing the note inadmissible. Further, the absence (or presence) of authentication is not included by section 30 (2) as one of the matters to be taken into account in determining whether leave should be given to a witness to refresh his memory.

[19] The matter is put beyond doubt by section 137 of the Evidence Act. That section requires a judge sitting with a jury to give the jury certain instructions whenever certain kinds of evidence are given. Included in those kinds of evidence in section 137 (1) (ii) is the following:

> "(d) in criminal proceedings
>
> …
>
> (ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant."

One of the instructions which the judge is required to give to the jury in such a case is a warning that the evidence may be unreliable. Here we have a provision in the Act which contemplates that there may be oral evidence given of oral admissions of which an unauthenticated record has been made. The only way in which a judge and jury are likely to become aware of the existence of such a record, is as a result of it being used by a witness to refresh his memory, the record itself being inadmissible under section 73 (1).

[20] The policy of the Act appears to be to place on the trial judge the responsibility of ensuring by his directions to them that the jury are alive to the weaknesses of evidence of 'verbals' given by a police witness after reference to his unauthenticated notes.

Unfairness: section 145

[21] Another point made for the appellant was that the judge in granting leave to Sergeant Catwell to refresh his memory from his notebook failed to appreciate that he had a discretion to exercise and that in exercising that discretion he had to take into account the matters specified in section 145 (2) of the Act.

[22] Section 145 provides as follows:

"145 (1) Where, by virtue of a provision of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) In determining whether to give the leave, permission or direction, the matters that the court shall take into account include:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing;

(b) the extent to which to do so would be unfair to a party or to a witness;

(c) the importance of the evidence in relation to which the leave or permission is sought;

(d) the nature of the proceeding; and

(e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence."

[23] The specific complaint was that the judge failed to take into account the extent to which the grant of leave to Sergeant Catwell to refresh his memory was unfair to the appellant, as he was required to do by sub-section (2) (b). As already mentioned, there is nothing

on the record to indicate positively that in granting leave to Sergeant Catwell the trial judge adverted to section 145. It has been established in Australia (e.g. *R. v. Reardon* [3]) that failure by a judge to mention the factors listed in their equivalent of section145(2), does not necessarily mean that he did not taken them into account. Nevertheless, in this case we will proceed on the basis more favourable to the appellant, that is, that the judge did not consciously direct his mind to the factors mentioned in section 145(2). The question therefore is whether if he had done so, he could reasonably have found that there was some circumstance(s) which rendered it unfair to the appellant to grant to Catwell leave to refresh his memory. We answer that question in the negative.

[24] As already pointed out, the mere fact that the Sergeant failed to get the appellant to authenticate his note, would not of itself provide a sufficient basis for refusing leave. Failure to have the record of an oral admission authenticated by the person who made the admission, was never a bar at common law to using that record to refresh the memory of the person who made it. It was never suggested that using the record for that purpose in such circumstances was unfair to the accused. There is nothing in the Act which suggests that the matter should be viewed differently now.

[25] The trial judge in his summing-up drew the jury's attention to the failure of the Sergeant to ask the appellant to authenticate his note. He warned the jury several times that they should treat the evidence of the 'verbals' with great care. He also referred several times to the failure of the prosecution to call PC Boyce to 'back up' the evidence of Sergeant Catwell in relation to both the oral and the written statements, and at one point told the jury "… in the absence of supporting evidence, you may think that it might be dangerous to convict …".

[26] We do not, however, have to pass on the sufficiency of these directions, for counsel for the appellant expressly disclaimed before us any intention of challenging the directions given by the judge, saying that to do so would be 'unfair' to the judge.

[3] [2002] NSW CCA 203

[27] We do not consider that either the failure of the prosecution to call or produce PC Boyce or the fact that the appellant was not legally represented (dealt with more fully in paras [53] – [54] below) has any relevance to the question whether the grant of leave under section 30 to Sergeant Catwell to refresh his memory of the appellant's oral admission, was unfair to the appellant. In the result the judge's failure (if such it was) to advert to section 145, produced no miscarriage of justice and provides no basis for upsetting the appellant's conviction.

Section30 (3)

[28] It is important to note that separate and distinct from leave to refresh memory under section 30 (1), there is provision for leave of a different kind to be given under section 30 (3) of the Act. This sub-section provides as follows –

> "(3) Where a witness has, while giving evidence, used a document to try to refresh his memory about a fact, the witness may, with the leave of the court, read aloud, as part of his evidence, so much of the document as relates to that fact".

[29] In this case no such leave was sought or granted. It seems to us that in contrast to the case of a witness merely refreshing his memory from a document, if a witness reads aloud as part of his evidence the contents of a document, that approximates much more closely to putting the document into evidence. Nevertheless, reading a document aloud still differs from putting the document into evidence and is not subject to the section 73 requirement of authentication. *Cross on Evidence* [4] explains the subtle difference:

> "The Court also has a discretion to permit a witness who must revive memory about a fact or opinion from a document to read aloud, as part of the witness's testimony, so much of the document as relates to the fact or opinion: s 32(3). The contents of the document thus apparently come into evidence – not directly since the document is not marked as an exhibit and is

[4] (7th Australian Edition) para [17249]

> not part of the evidence in its own right, but as part of the witness's oral evidence."

One assumes that if a document containing a record of an oral admission by an accused, has been acknowledged by the accused, and is therefore admissible under section 73, it will be put into evidence. The question therefore, is whether it is ever proper to grant leave to a witness to read aloud as part of his evidence from an unauthenticated record of an oral admission and if so, in what circumstances? These questions were not canvassed before us and do not arise in this case. Accordingly, we leave the answers to them for another day.

[30] It is sufficient for present purposes to note that leave was neither sought nor granted in this case for the Sergeant to read aloud the contents of his notebook. It has been suggested, however, that that is exactly what he did do. Indeed, when one reads the relevant part of the Sergeant's evidence, it does seem that care may not have been taken to ensure that the Sergeant merely refreshed his memory from his notebook in accordance with the leave granted and did not read aloud a portion of its contents as part of his evidence. It is quite impossible, however, to conclude from the printed page (which is all we had before us) that the Sergeant exceeded the leave which he was given. No suggestion that he had appears to have been made in the Court of Appeal. The trial judge, as already mentioned, regarded this as the usual case of a witness refreshing his memory, pure and simple.

[31] We find therefore that there was nothing irregular or improper in the use made by Sergeant Catwell of his notebook. We would urge trial judges, however, to recognise and maintain the distinction between the two procedures leave for which may be granted under sub-sections (1) and (3) respectively of section 30 i.e. the refreshing of a witness's memory and the reading aloud by a witness of the contents of a document as part of his evidence. Judges should ensure that when leave to do the former is given, the witness does not by the way in which he gives his evidence end up doing the latter.

[32] In the result, the first ground of appeal which relates to the oral admission allegedly made by the appellant, fails.

The Written Statement: Ground of Appeal

[33] Turning to the appellant's complaint about the admission of his written statement, the ground of appeal as framed in the notice of appeal reads as follows:

> "That the learned trial Judge erred in law in admitting into evidence a written statement attributed to the [appellant] which statement amounted to a confession when to do so was unfair to the [appellant] in all of the circumstances of the case, given the burden of proof and the importance of the evidence in the case: Section 77 and 135 of the Evidence Act."

The main thrust of the argument that was advanced in support of this ground was that it was unfair to the appellant to allow the written statement attributed to him to be introduced into evidence. It was argued in support of the allegation of unfairness, but also as if it had been pleaded as a separate ground, that the prosecution had failed to prove to the requisite standard the voluntariness of the statement.

[34] On the issue of fairness, the appellant relied on section 77 of the Act which provides as follows:

> "In criminal proceedings, where evidence of confession is adduced by the prosecution and, having regard to the circumstances in which the confession was made, it would be unfair to an accused to use the evidence, the court may
>
> (a) refuse to admit the evidence, or
>
> (b) refuse to admit the evidence to prove a particular fact."

[35] The requirement of voluntariness is incorporated in the Act by section 70 which provides as follows:

> "Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admissions towards some other person or by a threat of conduct of that kind, or by any promise made to the person who made the admission to any other person."

Voluntariness: Standard of Proof

[36] As mentioned above, although this was not pleaded as a ground of appeal, it was submitted for the appellant that the judge ought not to have been satisfied at the conclusion of the voir dire that the making of the appellant's written statement was free of the influences proscribed by section 70, and should have excluded the statement accordingly.

[37] While the ground of appeal (see para [30] above) refers to section 135 of the Act, counsel for the appellant argued that the standard of proof which the prosecution had to satisfy in order to establish that the written statement was given voluntarily, was proof beyond reasonable doubt as required by section 134 of the Act.

[38] Section 134 (1) of the Act provides:

> "(1) In criminal proceedings, the court shall not find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt."

Section 135 provides:

> "(1) Subject to this Act, in any proceeding the court shall find that the facts necessary for determining
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> (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
>
> (b) any other question arising under this Act

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is satisfied as mentioned in sub-section (1) the court shall take into account, inter alia, the importance of the evidence in the proceedings".

[39] In *Grazette v. The Queen*[5] this court held that section 135 applies in criminal cases to the proof of facts which provide a foundation for the admission of evidence, and that section 134 was limited to findings of fact based on the whole of the evidence admitted at the trial and made as part of the exercise of determining the guilt of the accused. We adhere to that view. Guilt must be proved beyond reasonable doubt but admissibility may be established on a balance of probabilities. We would point out with regard to the construction of the two sections that the words 'subject to this Act' at the beginning of section 135 (1) have nothing to do with section 134 but are necessary because several other sections of the Act formulate differently the pre-condition for the making of a finding that determines the admissibility of evidence. Some of these other sections specify that it must be 'reasonably open' to find the relevant facts[6], others require that there be 'reasonable grounds' for making the relevant finding[7].

[40] Counsel for the appellant in support of his submission that the prosecution had to prove the voluntariness of the appellant's statement beyond reasonable doubt, apart from relying on section 134, referred us to a written ruling of Denys Williams J. (as he then was) in *R. v. Brijlall* (unreported) (19th October,1983). In refusing to admit confessional statements by the accused, the learned judge said:

> "The law requires that before I can admit these statements in evidence I must be satisfied beyond reasonable doubt that they are voluntary".

[41] The Act was enacted in 1994 and in 1983 there was nothing in the Barbados statute book comparable with sections 134 and 135. Williams J. stated accurately in *Brijlall* the

[5] [2009] CCJ 2(AJ)
[6] Sections 46 (1), 74,75,124(2)
[7] Sections 105 (13), 110(3) & (4)

common law as it had developed in England and in Barbados. It had developed differently in Australia, where in a series of cases, beginning with *Wendo v. R.*[8] it was held that in criminal cases the prosecution need only establish on a balance of probabilities the preliminary facts justifying the admission of evidence (including in the case of confessions, their voluntariness). As was pointed out by Chief Justice Simmons in his judgment in *DPP's Reference No.1 of 2001* (unreported) (2002) at paragraph [30], the Act "is modeled after the Report of the Australian Law Commission which proposed a new Evidence Act for Australia but whose enactment was preceded by detailed study, proposals, counter-proposals and an interim report." In fact it was only in 1995, after the enactment of the Act in Barbados, that legislation to give effect to the Report was passed in Australia at the Federal and State levels. The Australian counterparts of sections 134 and 135 are (save for the inclusion of something omitted from section 135 (2)) almost identical with these two sections of the Barbados statute. It should come as no surprise, therefore, that the Report of the Australian Law Commission and the Acts to which it gave rise, should on this issue of the standard of proof in relation to the admission of evidence, reflect the common law as it had developed in Australia. Sections 134 and 135 do so and they have supplanted the common law of Barbados as enunciated by Williams J. in *Brijlall*. It should be noted that the United States Supreme Court has also held that at common law the requirements for the admission of a confession may be satisfied on a balance of probabilities – see *Lego v.Twomey*[9].

[42] We understand section 135 (2) to mean that the greater the importance of the evidence the admission of which is in question, the less easily should the court be satisfied on a balance of probabilities of the facts on which its admission depends. In this case the written statement by the appellant was crucial to the prosecution's case, so that there may not be much difference in practice between establishing the voluntariness of that statement to the standards required by sections 134 and 135 respectively.

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[8] (1963) 109 CLR 559
[9] 404 US477 (1972)

The Absence of PC Boyce from the Trial

[43] The circumstance on which the appellant relied most heavily in challenging both the voluntariness of the statement and the fairness of its admission, was the failure of the prosecution to call PC Boyce, the 'back-up' police officer, as a witness or to produce him in court or to provide the defence with a copy of a statement from him. The trial judge and the Court of Appeal confirmed that it is the practice in Barbados for the prosecution to call not only the police officer who in the course of the investigation took the written statement from the accused but also the second police officer who witnessed the taking of the statement, in order to establish that the statement was not made under any improper influence. That is what one would expect.

[44] At the end of the voir dire the trial judge was surprised to learn that PC Boyce who had not given evidence at the preliminary inquiry, was not present in court. Both the judge and prosecuting counsel expressed the view that Boyce was an essential witness. Counsel disclosed that there was no statement from Boyce in the file and he envisaged that it would be necessary to serve on the accused notice of additional evidence. Counsel reported that he had given instructions for Boyce to be present in court that day but he did not know whether those instructions had reached Boyce. In the result, the judge stood the matter down for a while and then adjourned it to the following day so that Boyce might be brought to court.

[45] The following day, however, Boyce still was not present in court. Prosecuting counsel indicated to the court that after discussion with the Director of Public Prosecutions, he had come to the conclusion that it would be unfair to spring on the accused a witness who had not given evidence in the magistrates' court and had not even provided a written statement. The judge intimated that he had been thinking along similar lines. So, the prosecution closed its case in the voir dire without calling any other witness apart from Sergeant Catwell.

[46] The appellant then made his unsworn statement from the dock explaining how he came to sign the statement. He did not call any witness to support his account of being forced to sign a prepared statement after he had been detained for many hours and had suffered some physical violence at the hands of Sergeant Catwell.

[47] It was highly unsatisfactory to say the least that PC Boyce was not called as a witness at the preliminary enquiry and indeed was never required to submit a statement or proof of evidence. No explanation for these omissions was ever given. Be that as it may, the trial judge had the duty of determining whether he was satisfied on a balance of probabilities that the written statement tendered through Sergeant Catwell (if made by the accused) was voluntary, bearing in mind in determining whether he was so satisfied the importance of that statement in the context of the case. Having heard and seen both Catwell and the appellant give their conflicting versions of what occurred, the judge, although he gave no reasons, indicated by his ruling that he was satisfied that the statement was voluntary. The learned trial judge did not state what standard of proof he applied in making that determination.

[48] The fact that PC Boyce was not called as a witness to support Sergeant Catwell could not of itself have precluded the judge from finding that the statement was voluntarily given, even if the standard of proof applicable was proof beyond reasonable doubt. As Archbold on Criminal Pleading Evidence and Practice[10] puts it:

> "At common law, one witness is sufficient in all cases (with the exception of perjury) at trial, … ."

This is reinforced by section 136(1) of the Act which provides:

> "It is not necessary that evidence on which a party relies be corroborated."

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[10] 2005 ed. para. 4-4049

[49] There is no basis on which it can be said that the judge could not or should not have been satisfied with the requisite degree of certainty by the evidence of Sergeant Catwell that the written statement taken from the appellant was made voluntarily (if made by him at all). Lack of voluntariness therefore cannot be relied on either to challenge its admissibility under section 70 or the fairness of its admission under section 77.

Unfairness: section 77

[50] I turn now to the other circumstances which it was suggested rendered admission of the statement unfair to the appellant and therefore contrary to section 77 of the Act.

[51] The first thing to note about section 77 is that the fairness or unfairness to an accused of using evidence of confession must be determined by reference to "the circumstances in which the confession was made". The circumstances (apart from lack of voluntariness) on which the appellant relied as making the introduction in evidence of his written statement unfair, were the lack of an opportunity to cross-examine or call as a witness PC Boyce and the appellant's lack of legal representation. These were circumstances which related to the trial and did not exist when the statement was taken. Therefore they were not "circumstances in which the confession was made" and could not provide a basis for the judge refusing to admit the statement in reliance on section 77. They could not trigger the discretion to exclude provided by that section.

[52] But even if these other circumstances fell to be considered, they could not serve to make the reception of the written statement into evidence unfair. With regard to the omission of PC Boyce from the prosecution's case and his absence from court at the trial, it is impossible to assume without entering the realm of pure speculation, that the appellant would have benefited from any evidence which PC Boyce might have given or any information he might have provided with regard to the taking of the written statement from the appellant. It was for the jury to determine the impact on the prosecution's case of its failure to call PC Boyce to support Catwell's evidence, and in doing so, they would

have been assisted by the directions given by the judge, the adequacy of which was not challenged.

[53] So far as the appellant's lack of legal representation is concerned, that cannot serve to render unfair the admission into evidence of a statement properly obtained from him. It cannot be that different rules govern the admission of a confession depending on whether an accused is legally represented or not. Where the court has a discretion to exclude evidence, lack of legal representation may be a relevant factor, but it cannot of itself create such a discretion or render evidence otherwise admissible, inadmissible.

[54] The submission that the trial judge should of his own motion have recommended the issue to the appellant of a legal aid certificate, was made unsuccessfully by the appellant before the Court of Appeal. The appellant was not given special leave by us to appeal that aspect of the Court of Appeal's decision and so this issue is not before us. We take this opportunity nonetheless of endorsing the view which Chief Justice Simmons expressed in *Cumberbatch v. R*[11] that in cases where the only evidence incriminating the accused consists of admissions allegedly made by him, it is desirable that the accused should be legally represented.

[55] It follows therefore that there is no ground on which a judge properly directed could in the circumstances of this case have refused to admit the appellant's written statement in evidence on the ground that it would be unfair to the appellant to admit it. Accordingly, even though there is nothing on the record to indicate that the learned trial judge directed his mind to section 77 and the question of unfairness before admitting the written statement, his inadvertence, if such it was, did not result in any miscarriage of justice and provides no basis for interfering with his conviction.

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[11] (2004) 67 WIR 46

[56] Since we found no merit in any of the grounds of appeal pleaded or argued, we dismissed the appellant's appeal against the Court of Appeal's decision and affirmed his conviction and sentence.

JUDGMENT OF THE HONOURABLE MR. JUSTICE ADRIAN SAUNDERS, JCCJ

[57] I agreed that this appeal must be dismissed and that the conviction and sentence should be affirmed. It was open to the trial judge, having conducted a *voir dire* on the voluntariness of the confession statement signed by the appellant, to admit the same into evidence. Neither the failure of Police Officer Boyce to give evidence at the *voir dire* to support the voluntary nature of that statement nor the fact that Francis was unrepresented nor indeed a combination of those matters was fatal to the admissibility of the written statement. That statement, along with evidence given by Quimby from the witness stand, provided a sufficient basis to warrant the conviction of the accused. Quimby had said in his evidence-in-chief that on the night in question he had seen Francis with the vehicle and had actually received the vehicle from Francis. I write this separate opinion to address only the oral statements that were allegedly made to Sergeant Catwell by the accused.

The statements in question

[58] Those oral statements were introduced and admitted into evidence during the testimony of the Sergeant. The transcript of the trial proceedings discloses the following exchange:

> **SERGEANT CATWELL**: …The accused Francis made a statement to me and other statements during the course of my interview with him. I recorded those statements in my official police notebook at the time. I do not recall those statements from my memory and I am seeking the court's permission to refer to my official notebook.
>
> **MR SEALE**: Application, My Lord, for the witness to be able to refresh his memory.

THE COURT: Mr. Francis, you have the depositions before you and you will have read them. We are at the point now where the officer is going to continue his evidence and seek to give in evidence statements which he attributes to you, saying that you made them. I want to know if you are objecting?

ACCUSED FRANCIS: Yes, Sir, 'cause I did not make them.

THE COURT: Okay. That is going to be – there are a number of statements, so you are making a formal objection to them?

ACCUSED FRANCIS: All of them.

THE COURT: All right. Let me note that. Yes, noted your objection.

MR SEALE: Much obliged, My Lord.

SERGEANT CATWELL: When I told the accused of his right to consult with an attorney-at-law, he said, "Talk to me sir, I will get a lawyer if I got to go to court". I again told the accused of the report made by Rhonica Hinds, that sometime between the 2nd and the 3rd December 2001, someone stole her motor vehicle M-9391, a green Suzuki Fronte motor car valued $4500 from parked outside her residence. I told the accused that I had reason to believe that he could assist me in this matter and I cautioned him. The accused Francis replied, "Truthfully speaking, I is who take up the car but I had all intentions of carrying it back. I get frighten and I give it to a mechanic fellow..."

The relevant legislation

[59] The Evidence Act, Chapter 121, governs issues surrounding the refreshing of memory and the treatment of admissions elicited from oral questioning. The relevant sections for present purposes are sections 30, 73 and 145 which have all already been set out. One of the purposes for enacting section 73 is to protect police officers from spurious allegations of improper conduct; the very thing which, if we believe Sergeant Catwell, has occurred here in this case. Section 72, which has not been reproduced, promotes the same objective. That latter section provides for the electronic recording and admissibility of confessions and admissions. Section 72 has not yet been brought into force. Its operation has been suspended by Parliament. We were told that the likely

reason for the suspension is to afford some time for the various police stations across Barbados to be properly outfitted with the appropriate recording systems. Section 73, however, is in full force and effect must be given to it.

<u>The grounds of appeal:</u>

Refreshing memory and reading aloud from an inadmissible document

[60] As one of his grounds of appeal, counsel for Francis complained that the trial judge wrongly permitted Sergeant Catwell "to read into evidence information contained in an inadmissible document". The document in question was the page of the Sergeant's notebook that contained the Sergeant's record of the alleged oral admissions. The page had not been initialed by Francis. In the absence of any such initialing, section 73 does indeed operate to deem that page an inadmissible document.

[61] In response to this complaint counsel for the Crown alluded to the difference between simply refreshing one's memory and/or reading aloud from a document on the one hand, and tendering the document into evidence on the other. The difference is of some significance. Indeed, section 30 of the Evidence Act goes so far as to recognise a distinction between refreshing one's memory from a document and reading aloud from the very document. The section requires the court to exercise its discretion to give leave to refresh memory separately from granting leave to read aloud from the document. Permission only to refresh memory does *not* extend to permission to read aloud from the document.

[62] One obvious difference between refreshing one's memory from a document and putting the very document into evidence is that in the former case, the document is used as a mere stimulus to revive one's present memory, while in the latter case, past recollection, as recorded in the document, is allowed to be adduced. At the trial in the instant case, no attempt was or could properly have been made to put into evidence the un-initialed page of the police officer's notebook. That page was clearly an inadmissible document. But it is useful to bear in mind that, if and when a witness is permitted to read aloud from such a

document, the impact on the jury is not very different from a situation where the inadmissible document itself is placed before the jury. Sections 73 and 145(2) of the Evidence Act introduced safeguards for accused persons and measures to strengthen the integrity of the criminal procedural process. The question naturally arises as to whether these measures would not be diminished if under the umbrella of "refreshing memory" a police officer is, willy-nilly, permitted to read verbatim to the jury from a document containing an admission in circumstances where the law specifically declares that document to be inadmissible.

[63] There is another issue to consider. The jury should not lightly be deprived of such assistance as will help them in carrying out their fact-finding function. Giving oral testimony from one's present recollection of events, as distinct from simply reciting the contents of a document, allows for potentially important observations of non-verbal communication or what is better characterized as the body language of the witness. Such observations may sometimes be important in assessing credibility. In a brief but helpful article on THE POLICEMAN'S NOTEBOOK written over 30 years ago, the author noted:

> …When the jury has the often difficult task of assessing the weight of conflicting evidence, it will tend to attach perhaps greater weight to the notebook than it was intended to have. The jury might not appreciate that the notebook itself is *not* in evidence, that it is based on memory, and that it puts the policeman under cross-examination in a defensive position which might in some cases inhibit the recollection of features which have become important in the running of the defence. There is no doubt that written evidence tends to have a strong effect on a jury: it is impossible to prove that juries are generally able to disregard this strong effect, but a mild warning from the judge might go a long way towards redressing the balance.[12]

[12] THE POLICEMAN'S NOTEBOOK, R. F. Purves, (1971) Crim. L.R. 212 @ 216

[64] There was nothing on the record before us conclusively to suggest that Sergeant Catwell had actually read aloud from his notebook and therefore Counsel's ground of appeal on this issue lacks the factual foundation necessary for it to be successfully argued. As indicated by the President, the answer to Counsel's complaint must be left for another day.

Failure to advert to section 145 in giving leave

[65] Section 145(2) of the Evidence Act comes into play whenever by virtue of a provision of the Act counsel requires the permission of the court. Permission to refresh memory, like permission to read aloud from a document, is obtained pursuant to a provision of the Act; section 30, to be exact. The provisions of section 145(2) were therefore immediately and automatically triggered when prosecuting counsel sought the leave of the court to have Sergeant Catwell refresh his memory. The trial judge was required then to take into account the matters listed in section 145(2) before granting permission. In this context, sections 30 and 145 must be read together. In effect, counsel for Francis complained that if the trial judge had adverted to section 145 of the Evidence Act when considering whether to grant Catwell leave to refresh his memory, in the circumstances of this case, the learned judge *might* have exercised his discretion in a different manner. I think this complaint was rightly made.

[66] The requirement to pay regard to the provisions of section 145 whenever permission is requested is a matter that has been emphasised by the courts of Australia where similar legislation exists. *See: Stanoevski v The Queen*[13]. The relevant provision in that country is section 192 of their Evidence Act. The trial judge's obligation to take into account the matters listed in section 145(2) before granting permission does not of course mean that the judge must refer explicitly to the various limbs of section 145 at every turn where the judge must give leave, permission or a direction. I would commend to trial judges the views expressed in *Regina v RTB*[14]. In that Australian case the court reaffirmed that it was unnecessary for trial judges to refer to the section number:

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[13] [2001] 202 CLR 115
[14] [2002] NSWCCA 104

> [88] …What is required, before leave is given, is that the issues relevant to the exercise of discretion, including those identified by s.192(2), are considered. The terms of the judgment may make it obvious that such matters have been taken into account. Even where the judgment is silent, it may be apparent that a particular matter was taken into account, either because of the argument which preceded judgment, or because the matter is so obvious as to not require statement.[15]

[67] The Australian courts are unequivocal about the consequence of a failure to have regard to matters relevant to the giving of leave, including matters identified by the provisions contained in section 145. Where there is a failure to have such regard, a wrong decision on a question of law would have been made. A Guilty verdict would not stand unless the prosecution can establish that the conviction has not resulted in a miscarriage of justice.[16] In my opinion the courts of Barbados ought to abide by a similar standard.

[68] In this particular case, Sergeant Catwell's request to refresh his memory must be viewed against the background that a) Francis, who had objected to the grant of leave, had denied making the statements; b) Francis also alleged that he had been mistreated by Catwell *but not by Boyce* who was present at all material times during the interview when the oral statements are alleged to have been made and c) the three following circumstances.

[69] Firstly, Boyce's failure to appear in court in order to assist the court with what was said or not said when Francis was being interviewed. The trial judge was so concerned by Boyce's absence that he stood the case down and demanded of Prosecuting Counsel to "see if you can locate this man because I don't like this situation; don't like it". In my judgment, the trial judge's unease was fully justified.

[70] Secondly, it is not entirely unreasonable to deduce that it was never intended that Boyce's version of what transpired during the interview should ever be available to the court. The

[15] See also Hodgson JA of the New South Wales Court of Criminal Appeal in *R v Reardon [2002] NSWCCA 203*@ [30] – [31]
[16] See: *Regina v RTB* [2002] NSWCCA 104 @ [89]

investigating officer in the matter had not taken the trouble to have a statement from Boyce recorded notwithstanding the importance attributed to the oral admissions.

[71] Thirdly, Francis is alleged to have made the oral admissions when being interviewed in the relative comfort of the Police Station. Sergeant Catwell's notebook entry was made there and then. But significantly, no reason was advanced why Francis was not invited to initial the entry immediately after it was made. There is no indication, for example, that Francis was unable or unwilling to initial the entry especially as he did proffer a written statement shortly afterwards in which he admitted his guilt.

[72] It may be possible to atomise these circumstances, to analyse them serially and to provide a rational explanation as to why, on its own, each provides an insufficient basis on which to hold that any of the factors listed in section 145(2) could be relevant to the exercise of the judge's discretion to grant leave to Catwell to refresh his memory. Regrettably, I cannot share that view when I assess the entire picture as a whole. The Sergeant claimed that he had no independent recollection of the making of the statements. The grant of leave had the natural consequence of admitting the statements into evidence in circumstances where there were these three opportunities to garner for the trial proceedings crucial evidence that could authenticate or disprove the fact that the oral statements were made. In each case, Sergeant Catwell and/or the prosecutorial authorities neglected to avail themselves of the opportunity presented. In each case no good reason was provided for depriving the court and ultimately the jury of this assistance. It seems to me that looked at in this way these were matters which could possibly have impacted on the exercise of the trial judge's discretion if he had first considered section 145(2)(b) and the specific issue of fairness to Francis. "Fairness" is a notoriously elusive concept. It is impossible for me to say that the trial judge might not have exercised his discretion in a different manner had he adverted to the relevant section.

[73] Further, had the trial judge adverted to section 145 he might also have considered whether, in this case, it was appropriate for Sergeant Catwell, an experienced policeman, to be granted leave to refresh his memory in such a manner that it was not even clear to

counsel appearing at the trial as to whether he was actually reading from his notebook or not. The oral admissions were neither lengthy nor complicated. Bearing in mind what is stated above at [6] and [7], the Sergeant might perhaps have been able to look at his notebook, revive his memory and put it away before giving evidence, in the normal manner, of the admissions which he says were made by the accused. In this connection, section 145(2)(e) might also have been relevant to the exercise of the trial judge's discretion.

[74] Counsel for the Prosecution cited section 137(1) of the Evidence Act in support of the proposition that there is nothing inherently wrong with presenting un-acknowledged evidence of oral responses to police questioning taken down in writing but in my judgment, the provisions of section 137 do not justify or excuse a failure to follow section 145.

Conclusion

[75] In passing The Evidence Act, Parliament intended "to reform the law relating to evidence in proceedings in courts in Barbados and provide for related matters".[17] Parliament set about this by, *inter alia*, introducing higher standards of transparency, an enhanced sense of fairness in the manner in which accused persons and suspects are interviewed, processed and tried. Those objectives call for the cultivation of new habits. If we allow the old habits, developed under the common law, to continue unabated because under this new legislative dispensation a little more effort and greater diligence are required then the intentions of Parliament shall be frustrated and the legislation will not fulfill its noble goals.

[76] In my judgment, it was a serious error on the part of the trial judge not to advert to section 145(2) when determining whether to grant leave to Sergeant Catwell to refresh his memory. There were circumstances here that rendered relevant some of the factors

[17] See Evidence Act, Cap. 121

identified in section 145(2). For my part, this error would have been fatal to the conviction if the prosecution's evidence had rested only on the alleged oral admissions.