Caution statement
Ruling on voluntariness
of PE

LINDEN McINTOSH v. THE STATE

[Guyana. COURT OF APPEAL – CRIMINAL APPEAL NO. 28 OF 1978 (Massiah, C., Fung-a-Fatt and Kennard, JJ.A.) October 22 and 23, November 29, 1985]

Evidence – Witness statement – Whether trial judge should have ruled on statement even though Counsel for the accused withdrew his objection to its admissibility – Whether a fatal irregularity occurred.

Facts: The Appellant was convicted for a murder and sentenced to death. The prosecution's case against the Appellant depended on evidence given by the brother of the deceased. On appeal, the Court focused on two grounds which in its view, merited consideration. These were whether the trial judge misdirected the jury when he told them that the issues of self-defence and manslaughter did not arise and whether he erred when he failed to rule on the admissibility of the Appellant's statement to the police.

Held: (i) There was nothing in the evidence to suggest that the deceased ever attempted to strike the Appellant or that the deceased had any weapon on him which would have induced fear in the mind of the Appellant that he was in danger of being struck by the deceased and which would have required the use of a knife by the accused in order to defend himself. There was also no evidence that the Appellant was provoked to lose his self-control and therefore no issue of provocation to be left to the jury for their determination;

(ii) Counsel for the accused withdrew his objection to the admissibility of the Appellant's statement to the police and the issue was whether the trial judge was still under an obligation to rule on it, and if his failure to do so amounted to a fatal irregularity. Notwithstanding that a statement was both voluntary and obtained in accordance with the Judges' Rules, the judge may exclude it in the exercise of his residual discretion to exclude any evidence if the strict rules of admissibility would operate unfairly against an accused. The situation required a ruling on the part of the learned judge on the issues raised at the trial and an omission to rule, especially so far as the admissibility of the statement was concerned, was a fatal irregularity.

Appeal allowed and the conviction and sentence set aside.
New trial ordered.

Cases referred to:

Adjodha et al v. The State [1981] 2 All E.R. 193.

Chan-Wai-Keung v. R. [1967] 1 All E.R. 948.

Chun-Chuen v. R. [1963] 1 All E.R. 73.

DPP v. Walker [1974] 1 WLR 1090.

The State v. Ramsingh [1973] 20 WIR 204.

The State v. Sanichar [1981] 29 WIR 169.

The State v. Sattaur & Mohamed [1976] 24 WIR 157.

Statute referred to:

Court of Appeal Act, Cap. 3:01, s. 13(2).

B. C. De Santos for the Appellant.

L. Haynes, SC, for the State.

MASSIAH, C.: I have had the advantage of reading in draft the opinion just delivered by my learned brother, Kennard, J.A., with whose final conclusion I am in complete agreement, but since, in relation to the question of confessional statements, I have arrived at that conclusion by a route somewhat different from his I feel constrained to explain shortly the juristic passage that I pursued.

Ibrahim v. R. [1914-15] All E.R. Rep. 874 makes us familiar with the principle that a confessional statement is only admissible in evidence against the accused if it is proved by the prosecution beyond a reasonable doubt that its contents were voluntarily disclosed. Although it has become the wont of lawyers to refer to Lord Sumner's classic formulation of the principle in that case, as if the principle derived its seminal value therefrom, the principle is, as Lord Sumner himself observed at p. 877, "as old as Lord Hale" and has strong historical roots in the common law heritage. [A paradigm of earlier intellectual leadership is to be found in Baron Parke's ruling in *R. v. Warringham* [1851] 169 E.R. 575.] This principle developed as a result of the unfair and barbarous methods employed in early times to wring "confessions" out of innocent persons accused of crime. See the historical survey made by Haynes, C. in *The State v. Gobin & Griffith*, [1976] 23 WIR 256, at pp. 261-5. And so it is that in Commonwealth jurisdictions safeguards have been established to ensure as far as possible that only voluntary confessions are admitted in evidence. I believe that in Scotland some form of confirmatory proof is required even where confessions are duly admitted, and in Canada the issue of admissibility must be decided before any mention at all of a confessional statement is made in the hearing of the jury.

It is a well settled principle that it is the function of the trial judge alone to determine whether or not the statement is voluntary before he admits it in evidence. If the trial judge is satisfied that the confession was not obtained by any of the means of inducement which the common law prohibits and as a consequence admits it in evidence, it then becomes the function of the jury to attribute to the statement what weight and probative value they conceive it deserves.

sion to rule was held to be a grave irregularity. The necessity for a ruling in all cases was emphasised. At p. 232 Haynes, C. observed as follows:

> " Although an accused denies he made any confession and makes no allegation of inducement, *the Prosecution is still bound to satisfy the trial judge that the confession was voluntary*; and it is not to be admitted as a matter of course, because he has not 'raised the issue of involuntariness'. Voluntariness is not in the true legal sense in the first instance in such a case an 'issue' to be 'raised' by the accused and considered only if 'raised'; it is a common law condition precedent to be fulfilled to authorise admissibility."

Later, on the same page, the learned Chancellor in dealing with the failure of the trial judge to rule on the question, uttered the following words that I would wish to emphasise: " (...) He had to address his mind to the question and be satisfied; *and he should have recorded that he was admitting the evidence because he was so satisfied.*"(Emphasis mine.)

I find this last statement to be of the utmost importance. How is the appellate court ever to be sure that the judge's approach was right if he made no record of what he did? There cannot be in this area any presumption of regularity; there cannot be a view that the judge must have acted properly because he ought to know the law. Indeed, there is no presumption that anyone at all knows the law. This is often confused with the principle of law expressed in the aphorism *ignorantia legis non excusat*, but they are disparate conceptions. In relation to the question of voluntariness the trial judge must ask himself certain questions and dutifully *write down the answers*, whether a *voir dire* is held or not. There is no alternative to this catechistic approach. The exercise is not a process of continual abstraction; the trial judge must think the matter out clearly, and what is required is the written manifestation of his thought processes. A failure to record his ruling may be excused (not justified) where a *voir dire* is held, inasmuch as the exercise would there have been plainly concerned with the issue of voluntariness, and the trial judge's decision to admit the confession must lead, by implication, to the conclusion that he had ruled on the issue directly raised before him. Any other conclusion would appear to be absurd. But I can see no reason to think that, by implication, the view can be reached that there must have been a ruling where a *voir dire* was not held and the trial judge made no record of his ruling, and admitted the confession.

Nor can it be said that there is no necessity to rule on the question where the confessional statement is unchallenged. Haynes, C. made this clear in *Plowell*. I agreed with him then, and I still do. It is a popular misconception which requires to be banished. It shows a complete misunderstanding of the judicial functions in this area, for there can be no implication of voluntariness deducible from the circumstance that the statement is unchallenged. On this question, Haynes, C. said at p. 232 of *Plowell*; "With the utmost respect, I must disagree with the judicial opinions that in such a case the evidence 'must be admitted'." He was

In those circumstances I find myself unable to say that the trial judge fell into error when he did not rule on the issue at the *voir dire*. As I have tried to show, that would have been an impossible task.

But the matter does not end there. Indeed, that is where it begins. One has to bear in mind the principle stated in *Plowell* to which I referred earlier in this judgment, that voluntariness is a common law precondition to admissibility of a confession, *whether or not the issue is raised by the accused.* When Counsel withdrew his objections he was no longer raising the issue of voluntariness, but the question of voluntariness should still have exercised the mind of the learned trial judge, for the trial judge, in any event, could not properly have admitted the confession in evidence until he was himself satisfied that it was given voluntarily, and *he had to record as well that he was admitting it because he was so satisfied.* (Plowell, p. 232.)

The facts do not appear to disclose that the learned trial judge addressed his mind to these importantly vital matters. It is plain that he made no record that he was admitting the confession because he was satisfied that it was made voluntarily. Nor did he say so anywhere in his summation, as some judges are wont to do when explaining to the jury the respective functions of judge and jury on this matter. I can find nothing in the record to show that the trial judge had pondered over this question.

When Counsel withdrew his objections this is what the learned trial judge recorded:

> " Mr. Wray applies for leave to discontinue objections. Mr. Wray states that he is not saying that the statement was not free and voluntary.
>
> Jury told of the implication now. That the statement would be admitted but they would have later on to consider what truth and weight they attached to that statement.
>
> END OF *VOIR DIRE*."

Immediately thereafter Sergeant James Caleb who had testified for the prosecution at the *voir dire* testified further. The record of his further testimony and of other matters is as follows: "If I see the statement the accused gave me I would recognise it. This is that statement tendered, admitted and marked Ex. 'B', (Witness reads statement aloud.)"

It seems to me from the foregoing that the trial judge never considered the question whether or not there had been a voluntary acknowledgement of guilt. Having especial regard to the trial judge's collocation of words, the conclusion is inescapable that he thought that since Counsel was no longer questioning the voluntary nature of the confession and that there was then, as is often said, no issue to try, it must be taken for granted that the statement was thereby admissible, and must be admitted. All that was left to be done, in the trial judge's view, was for the jury to assess the probative value of the confession. It was here that

he fell into grave and fundamental error, for as the cases show there can be no automatic admission of a confessional statement. There can be no abdication of these important, judicial functions.

I believe that my analysis is confirmed by that portion of the summation which reads thus:

> " Well, now, remember that during the trial you had to leave this courtroom because the accused was saying the statement which the police had then, which is this statement, was not given by him freely and voluntarily. And during the time I was trying to determine whether in fact that statement was given freely and voluntarily, the defence, the accused, withdrew objections, therefore he is saying the statement he gave to the police was free and voluntary. But what he is saying now is that 'this statement is not mine.' (...) You will have to consider when we come to that whether you believe this statement was made by him; and also if you believe it was made by him what weight you will attach to it."

The foregoing shows, as was expected, that during the *voir dire* the trial judge "was trying to determine whether in fact that statement was given freely and voluntarily." His mistake lay in not realising that at all times it was he, and no one else, who had to determine the question of voluntariness after a consideration of the evidence led, and that Counsel's withdrawal of his objections, however framed, could not serve to denude him (the trial judge) of that function.

The position is, therefore, that the confession was wrongly admitted evidence inasmuch as the learned trial judge admitted it without considering the question of its voluntariness and accordingly failed to rule on its admissibility as he ought to have done. His approach was generally in violation of the principles enunciated in *Ibrahim, Gobin & Griffith, Plowell* and *Dennan*. I sat in *Plowell* and *Dennan*, and further reflection has only deepened my conviction that they were both rightly decided. I would wish to stay within the confines of the ultimate precepts they prescribed. In the result I would uphold Mr. De Santos's arguments on this question and the appeal therefore succeeds.

I do not think that this is a fit case for the application of the *proviso*. The evidence, apart from the confession, although not weak, is not overwhelming, and consists of the testimony of an eyewitness, one Oliver Hill, a brother of the deceased. This consanguinity may influence the jury's estimate of his credibility. The case does not therefore fall in the same class with *Plowell*, where the evidence, apart from the confession, was compulsive and overpowering, and emanated from an entirely independent source. Although the evidence is by no means weak I feel unable to say that a jury if properly directed would inevitably return the same verdict in the matter under instant consideration.

The decision to order a new trial always engenders considerable apprehension, for it is not a light thing to order that a man be tried all over again. The burdens are heavy – physically, emotionally and financially. But I think the public interests,

SELF-DEFENCE

In his statement to the police the Appellant stated *inter alia*:

> " About 8 p.m. on Friday, 25th December, 1981, me and Howard Bowman was gambling. (...) Howard robbed me of forty dollars ($40,00) (...) He refused to give me the money. He run and go home. About 9 p.m. the same night I went to Compton Shop. (...) Howard had two bricks and a bottle in his hand and he tell me if I keep molesting him for any money he gone put the bricks them in me head. I went away and I returned by Compton Shop and meet Howard. This was about 10.30 p.m. the same night. I asked him for my money and he refused to give me and he tell me to do what I like. *I notice like he was going to his waist for something, and before he do me anything I bore he with a knife that I had in my pocket.*"

The defence of the Appellant, as can be gleaned from his statement from the dock, is that the statement which was produced at the trial by the prosecution and which was admitted in evidence as Exhibit 'B', was not the statement he had given to the police.

Even though the Appellant was saying that, it is clearly settled law that a 'trial judge must leave with the jury for their consideration such issues as properly arise from the evidence, whether or not they are raised by the defence. An omission to do so may result in grave miscarriage of justice. See Massiah, J.A., as he then was, at p. 391 of *The State v. Cyril Dennan* [1979] 26 WIR 384, *R. v. Hopper* [1916] 11 CAR 136, *The State v. Robert Lewis* [1976] 23 WIR 226, *R. v. Bullard*, [1957] 42 CAR 1, *Palmer v. R.* [1971] 1 All E.R. 1077, at p. 1080, *Julian v. R.* [1971] 16 WIR 395, at p. 398, *Francis v. R.* [1967] 12 WIR 375, at p. 376, *R. v. Porritt* [1961] 45 Crim. App. R. 348.

The first question the Court must ask itself is whether there was evidence which was sufficient in law to support the plea of self-defence or raise a reasonable doubt about it. If it was not, then it could be no misdirection or non-direction at all to omit to relate any of the evidence to that defence or to fail to leave the issue to the jury see *Director of Public Prosecutions v. Walker* [1974] 1 WLR 1090 and then, even if there was a wrong direction in law no miscarriage of justice could result see *Chan Kau v. R.* [1955] 2 WLR 192, (P.C.). If it was sufficient, then any such defect in the summing-up might have deprived the Appellant of a fair chance of an acquittal and this Court must allow the appeal and either discharge the Appellant or order a new trial. See *Dihal v. R.* [1950] LRBG 195.

For evidence to be "sufficient" it need not (if believed) prove self-defence conclusively or even as a reasonable probability; it is sufficient that a finding on the issues is reasonably possible, and once this is so then the issue must be left to the jury. See Haynes, C. in *The State v. Robert Lewis* [1976] 23 WIR, at p. 233.

It must be borne in mind that there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant

to strike the Appellant with bricks and made a gesture as if he was going to his (deceased's) waist for something.

What has come to be regarded as the classic direction to a jury on the issue of provocation is that given by Devlin, J., as he then was, in *R. v. Duffy* [1949] 1 All E.R. 932 and it was this:

> " Provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind."

And in *Lee Chun-Chuen v. R.* (*supra*) this, very judge said at p. 79:

> " Provocation in law consists mainly of three elements – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these elements. They are not detached. Their relationship to each other – particularly in point of time, whether there was time for passion to cool – is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The Appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct."

In *Holmes v. Director of Public Prosecutions* [1946] 2 All E.R. 124, at p. 126, Viscount Simon said:

> " If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of self-control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether in its view of the facts manslaughter or murder is the appropriate verdict."

What is essential is that there should be produced, either from as much as the Appellant's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one as it is not the duty of the judge to invite the jury to speculate as to provocative incidents of

When the deceased threatened to strike the Appellant with bricks this was around 9 p.m. and it was around 10.30 p.m. the said night when, according to the Appellant, "I notice like he was going to his waist for something, and before he do me anything I bore he with a knife that I had in my pocket."

This being so, there was an interval of about ninety minutes between the last act of the deceased (the threat by the deceased to the accused) and the "boring" of the deceased by the accused, that conduct of the Appellant (the act of "boring" of the deceased) is inconsistent with a sudden temporary loss of self-control, without which provocation can never arise.

Therefore, it seems to me the Appellant was motivated by a desire for revenge and this would serve to negative provocation. Of this Devlin, J. said at p. 932 in *Duffy's case* (*supra*);

> " Similarly, as Counsel for the prosecution has told you circumstances which induce a desire for revenge or a sudden passion of anger, are not enough. Indeed circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation."

There is another aspect of the matter which requires consideration, and it is this: Even if there was evidence of provocation the retaliation offered by the Appellant is, in my view, out of all proportion to the provocation alleged and this is fatal to the Appellant's contention.

In *Mancini v. Director of Public Prosecutions* (*supra*) the House of Lords hold that, assuming an act of provocation consisted of aiming a blow with the fist, the trial judge was right not to leave the issue to the jury since the use of a dagger in reply was disproportionate. See also *Lee Chun-Chuen* (*supra*) where the deceased had struck the accused with a stone on his left leg and the accused retaliated by batterin3g the deceased with either stones or with a hammer. It was held that the retaliation was disproportionate to the provocation.

Having regard to the state of the evidence it cannot be said that provocation properly arose in this matter.

In my view taking the evidence in the light most favourable to the Appellant, there was no material on which the jury could have found that the Appellant was provoked to lose his self-control. There was, therefore, no issue (of provocation) to be left with the jury for their determination and the trial judge cannot be faulted since no miscarriage of justice had been caused. See *Lee Chun-Chuen* (*supra*), *Julien v. Reg*, (*supra*), *R. v. Gauthier* [1944] 29 Crim. App. R. 113, *R. v. Gilbert* [1978] 66 Crim. App. R. 237, *The State v. Cyril Dennan* (*supra*).

I next move to the question whether the trial judge erred when he failed to rule on the admissibility of the statement of the Appellant to the police.

Police Constable Thomas, who witnessed the statement, also gave evidence in the presence of the jury.

The problem in this matter is whether, having regard to the withdrawal of the objection by Counsel for the accused to the admissibility of the statement, the trial judge was still under an obligation to rule on the issue. If he was under such an obligation did he rule, whether expressly or impliedly? If he did not rule, whether expressly or impliedly, did the failure so to do amount to a fatal irregularity?

The leading case on this issue is *The State v. Oswald Gobin & Boniface Griffith* [1976] 23 WIR 256, which received the approval of the Privy Council in the Trinidad case of *Adjodha et al v. The State* [1981] 2 All E.R. 193.

In *Gobin's case* the statement of the accused was objected to on the ground that it was not made by him nor on his instructions. He alleged that the signature was elicited from him by threats of violence, and by actual violence he was forced to sign and write on the statement. The trial judge admitted the statement without holding a *voir dire* telling the jury as the accused was saying it was not his statement *its admissibility was a matter of fact for them to decide.*

In *Griffith's case* the accused had objected to the admissibility of his statement to the police on the ground that force and violence were used on him in order to obtain it from him. He alleged he had been pushed about, cuffed in the abdomen, and as a result was induced to sign the statement. At the *voir dire* it turned out that he was complaining that the statement had been prepared beforehand by the investigating officer and he was ill-treated in the manner described to sign it. Whereupon the trial judge halted the *voir dire* and ruled that as the accused was not saying he was beaten to sign a statement of which he was the author but a statement concerning which another person in fact was the author, it became a question of fact for the jury whether or not the statement was that of the accused. *He thereupon refrained from ruling on voluntariness* although he admitted the statement and caused it to be read to the jury. At p. 263 Haynes, C. said:

> " In my view it was the duty of the trial judge to do likewise; he should record that he has admitted the evidence because he is satisfied it was voluntary; or that he has rejected it because he is not so satisfied."

Haynes, C. went on to say at p. 285 B-C:

> " In each case the objection raised challenged the voluntariness of the written statement and *a ruling*, after a 'trial within a trial', *was essential upon all the evidence*; in each case the omission so to rule was a fatal irregularity, in each case, as a result, the confession was received in evidence although not shown to be voluntary; and in *Gobin's case*, additionally, it was legally impermissible to leave it to the jury to determine whether or not it was voluntary, and consequently to be considered as evidence or not."

"When an issue calls for a ruling, a ruling must be given, otherwise how would an appellate court know that the judge had addressed his mind to the material before him and exercise his function of ruling, whether rightly or wrongly."

In that very case Bollers, C.J. said at p. 318 letters G-H: "(...) the learned judge further erred when he (...) gave no ruling on the matter (...) the learned judge should have heard all the evidence on the issue and then make a ruling on the voluntariness of the statement."

I now move to the case of *The State v. Phillip Plowell* [1976] 24 WIR 215. The Appellant who was charged with the offence of robbery with aggravation was unrepresented by Counsel. After the customary prefatory evidence of a formal nature was given in the preserve of the jury that the confession was not induced by force, threats, hope of advantage, or violence by a person in authority and the Appellant, having been "told of his rights", he simply stated: "The statement was not the statement I gave to the police but I did give a statement." Thereafter, without any enquiry from the judge on a *voir dire* or otherwise as to what the accused meant, the confession statement was admitted in evidence without a ruling by the trial judge.

Haynes, C. said at p. 232 H:

> " But it seems plain that the trial judge never addressed his mind as he ought to have done, to the question whether or not he was satisfied that the prosecution had proved the evidence admissible. He felt that in the circumstances he 'must' admit it. This was wrong. He had to address his mind to the question and be satisfied, and he should have recorded that he was admitting the evidence because he was so satisfied."

In that very case Crane, J.A., as he then was, said at p. 234 I of the judgment: "(...) there can be no doubt that the trial judge erred in not ruling on whether the confession statement was free and voluntary before admitting it into evidence."

The *proviso* was applied in *Plowell's case* because, apart from the confession statement, there was evidence that the stolen property was found in the possession of the Appellant a short distance from the scene of the crime, just a few minutes after the robbery, and he was positively identified by the victim.

In *Keith Mayers v. R.*, [1966] GLR 90 the trial judge had failed to rule on an objection taken to the admissibility of a complaint in a trial. Stoby, C. had this to say at p. 92:

> " We are in no doubt about the judge's function in a criminal case where objection is taken to the admissibility of evidence. The judge must make up his mind and rule one way or the other (...) where the admissibility of evidence depends on the discretion of the trial judge and the principles to be applied in exercising that discretion, the trial judge cannot flinch from exercising his authority. (...) He refused to decide. He compromised and we are not constrained to substitute our discretion for the judge's hesitancy."

In *Gobin & Griffith's case* (*supra*) this very judge said (p. 290D): "I do not think that could have been an implied ruling that Griffith's statement was voluntary either, though I think it might have been otherwise had the confession been admitted at the 'trial within a trial' without a specific ruling."

In *The State v. Phillip Plowell* (*supra*) at p. 239 that very judge referred to what he had said in *The State v. Dhannie Ramsingh.*

These pronouncements of Crane, C. in *The State v. Dhannie Ramsingh* (*supra*), *The State v. John France* (*supra*), *The State v. Gobin & Griffith* (*supra*) and *The State v. Phillip Plowell* (*supra*) would relate to cases where, in my view, there were completed *voir dires* in that evidence was led on the issue and *there were addresses in the matter.*

In these cases it can be said that the trial judge must have addressed his mind to the issues raised before admitting the statement in evidence and this would be in line with what Crane, C. said in *John Francis's case* (*supra*) when he stated: "Nevertheless seeing that he admitted the statement at the *voir dire* I cannot doubt that there was a finding that it was free and voluntary."

In the instant matter there is nothing on the record from which it can be deduced that the trial judge made an implied ruling on the issue.

There were no addresses on the issue and there is nothing on the record, especially in the judge's summation, from which it can be said that there was an implied ruling by the trial judge on the issue.

As a matter of fact, there is a passage in the summing-up at p. 52 of the record which would seem to indicate that the learned trial judge was abdicating his function as to admissibility, as was done in *Gobin's case* (*supra*), *when he told the jury: "And during the time I was trying to determine whether in fact the statement was given freely and voluntarily, the defence, the accused, withdrew the objections, therefore he is saying the statement he gave to the police was free and voluntary.*"

The facts of this case cannot compel me to the conclusion that the trial judge had ruled on the issue, whether expressly or impliedly, before he admitted the statement in evidence. In my view the passage in the trial judge's summing-up referred to earlier would seem to suggest that the trial judge made no ruling in the matter.

Even though Counsel for the Appellant at the trial had withdrawn his objection as to admissibility, the situation required a ruling by the trial judge on the issue of admissibility and he ought to have recorded that he was admitting the

An order for a new trial in accordance with s. 13(2) of the *Court of Appeal Act*, Cap. 3:01, is not to be made as a matter of course. Such an order should be made only if the interests of justice so dictate; and the interests of justice comprise the interests of the accused, the interests of these responsible for instituting criminal proceeding and the interests of the public welfare. See *The State v. Sattaur & Mohamed.*

In *The State v. Sattaur & Mohamed* (*supra*) Haynes, C., at p.170H to p.171A, sets out the various factors which must be taken into account in deciding whether or not to order a new trial, and these include the length of time the Appellant has been in custody, the length of time he might have to remain in custody awaiting the retrial, the strength of the prosecution's case and the prevalence and seriousness of the offence.

The interests of the public must be considered by seeing to it (speaking generally) that those who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the trial judge in the conduct of the trial or his summing-up to the jury. See Lord Diplock in *Reid v. R.* [1979] 2 All E.R. 904 at p. 908.

Without in any way seeking to prejudice the Appellant at a retrial, it seems to me that the case for the prosecution is indeed very strong and uncomplicated, and even though the Appellant has been in custody for nearly four years it is more than likely that he will have an early hearing (most likely at the January 1996 Criminal Sessions of the High Court) as the criminal lists are not as heavy as when the appeal in the case of *The State v. Baichandeen* was heard by this Court. When all the relevant factors are considered, I do not feel that a retrial would or might be oppressive.

Accordingly, in view of what I have said the appeal would be allowed and the conviction and sentence would be set aside. However, I feel that the interests of justice demand there should be a new trial and, therefore, I order that the Appellant face a new trial.

FUNG-A-FATT, J.A.: I have had the privilege of reading the Honourable Chancellor's decision and I agree with his reasons and conclusions for allowing this appeal. I have also had the privilege of reading my brother Kennard, JJ.A.'s decision and agree with his conclusions. I also favour the order for a new trial since, to my mind, the evidence led at the trial is sufficient to support a conviction. I will therefore allow the appeal and order a new trial.