

ADMISSIBILITY OF EVIDENCE IN CRIMINAL CASES UNDER THE EVIDENCE ACT NO. 5 OF 2002 ST. LUCIA

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Introduction

1. In a Criminal Case the aim is to convict the guilty and acquit the innocent. There is a strong public interest and concern that those who commit crimes should not go unpunished. At the same time the innocent should be protected. The process must be perceived as being fair. Usually the prosecution is brought by the state which has very wide investigatory powers. Without safeguards, many of which are built into the rules of evidence, there would be an imbalance in most cases between the prosecution and the defence. Protection is given to a defendant through the various rules of evidence: the privilege against self incrimination and the hearsay rule (which goes to reliability of evidence) are just examples. A verdict based on unreliable evidence is not only wrong, but also unlikely to inspire public confidence in the process. A system which places a too high hurdle in its requirements for evidence, whereby the guilty are acquitted on technicalities or impractical evidential requirements, is also unsatisfactory. The aim should be to have rules which are fair and which can be applied fairly by the courts: (**Phipson On Evidence 16th Ed.** (2005) paras 1 – 05 to 1 – 06).

Background

2. In St. Lucia, prior to November 2005 we inherited and have been applying the common law rules of evidence in criminal matters, subject to the limited statutory provisions contained in the Criminal Code 1992 (now repealed), the Evidence Act 1958 Cap. 101 (now repealed), and the Criminal Code No. 9 of 2004 which came into force in January 2005.
3. Section 913 (2) of the Criminal Code 1992 (now repealed) stated that subject to the provisions of the Criminal Code, ***“the law of evidence administered in the Court shall be the same as the law in evidence in criminal matters administered for the time being in the said Courts of England”***.
4. With the ongoing changes in the concept of fairness and what the rules of evidence should provide, various statutory enactments have been reforming the law of evidence in criminal matters in England from 1898 to the present time.
5. Some of these English enactments include the Criminal Evidence Act 1898, the Criminal Evidence Act 1965, the Criminal Justice Act 1967, the Criminal Evidence Act 1979, the Magistrates Courts Act 1980, the Police and Criminal Evidence Act 1984 (PACE), the Criminal Justice Act 1988, the Criminal Procedure and Investigations Act 1996, the Criminal Justice and Public Order Act 1994, the Youth Justice and Criminal Evidence Act 1998 and the Criminal Justice Act 2003.
6. It would seem that although we were supposed to be applying ***“the law in evidence in criminal matters administered for the time being in England”***, the Courts in St. Lucia continued to apply the common law rules of evidence concerning hearsay evidence and other common law rules, despite statutory changes in the law in England concerning such evidence.
7. Consequently, in the Criminal Courts in St. Lucia, prior to the Evidence Act No. 5 of 2002 which came into force on the 1st November 2005, we applied common law rules which excluded certain relevant evidence, save for the common law exceptions and our local statutory exceptions, and we selectively applied only some of the U.K. statutory exceptions. The following examples illustrate how we applied the Common Law Rules relating to hearsay evidence before the 1st November 2005.
 - (i) ***A witness testifying should not tell the Court what another person told him or what another person wrote or said out of Court as this is hearsay evidence.***

- (ii) *A witness who gives evidence of a fact based upon the knowledge of another person would be giving inadmissible hearsay evidence.*
- (iii) *Former statements of any person or their conclusions inferred from certain conduct they observed, should not be given in evidence, whether or not that person is a witness, if the purpose was to tender such evidence as evidence of the truth of the matters stated therein.*
- (iv) *The evidence of a statement made to a witness though hearsay, was admissible only where it was proposed to establish not the truth of the statement, but the fact that it was made.*
- (v) *A defendant should not call a witness to testify that a person who did not testify had told this witness that the defendant did not commit the offence, and that another named person had committed the offence, since the rule against hearsay evidence applied to the defendant as well. Confessions by third parties would be inadmissible hearsay also.*
- (vi) *A Police Officer who gave evidence that he arrested the defendant as a result of a conversation he had with the Virtual Complainant, would have given inadmissible hearsay evidence under the guise of circumventing the hearsay rule.*
- (vii) *A Police Officer giving evidence about an interview he had with defendant after speaking to the Virtual Complainant, would be giving hearsay evidence, were he to state in his evidence the allegations that were made against the defendant, unless the defendant by words or conduct clearly admitted that it was true.*
- (viii) *Though evidence of what a police officer repeated to the defendant would be admissible as having been said in the presence of the defendant, it would be inadmissible if the defendant did not respond, or if the defendant made an unintelligible reply.*
- (ix) *At common law, any statement in a document would be hearsay and inadmissible if the purpose for which it was being tendered in evidence was to rely on the statement as true. A party wishing to rely upon the truth of the fact stated in the document must call the maker of the document to prove the truth of the facts stated therein.*

NB: *Section 1197 and 1198 of the Criminal Code 1992 (now repealed) and Sections 1056 and 1057 of the Criminal Code 2004 modified this common law rule. The Court may allow documentary evidence to be put in for what it is*

worth where the terms of the document are not in dispute if it is in the interest of justice to admit it.

- (x) *Where evidence of an out of Court statement made to a witness was tendered as evidence of the witness's state of mind, a Court was likely to rule that the statement was admissible.*
- (xi) *Informal admissions made out of Court by a defendant were admissible as statements against one's interests at common law where the admissions were voluntarily made, in the absence of oppressive or improper conduct by a Police Officer or a person in authority.*

8. With the enactment of the Police and Criminal Evidence Act 1984 (U.K.) we applied some of the provisions, and particularly the Police Codes to our jurisdiction, while still ignoring some of the other reforms going on in England. The Judges Rules 1964 which guided police officers in their treatment and interrogation of suspected persons and defendants, were displaced by the Police and Criminal Evidence Act 1984 Codes - Appendix 2.
9. Then came the Criminal Code No. 9 of 2004 and its provisions, repealing the Criminal Code 1992. Section 5 of the Criminal Code No. 9 of 2004 requires the Court to apply Common law procedure in criminal proceedings, with such modification or adaptation as may be necessary, in the absence of local statutory provisions for such procedure.
10. The Criminal Code No. 9 of 2004 makes no provisions for the law of evidence existing in England to be applied to criminal proceedings in St. Lucia, in the absence of local statutory provisions in it, or in The Evidence Act No. 5 of 2002. Neither is there any reference in the new Evidence Act to the English law of evidence being applicable in the absence of local statutory provisions.
11. It is evident from the provisions of the new Evidence Act that the evidential landscape in St. Lucia has changed considerably since the 1st November 2005, and we are now "*batting on a different wicket*" The effect of some of the provisions cumulatively is that some of the hurdles that the prosecution had to clear prior to 1st November 2005 have now disappeared, in my opinion. I would say therefore that the Evidence Act is now more "*prosecution friendly*". It is impossible to discuss or focus on all of the provisions in the Act for the purposes of this address. Consequently, I will deal only with the provisions that seem to be new introductions to the law of evidence for St. Lucia.

Pending Proceedings and the Evidence Act

12. Section 10 states that the Act applies to all proceedings in Court; excluding proceedings, the hearing of which began prior to the 1st November 2005; and criminal proceedings concerning the determination of the penalty to be imposed in respect of an offence. Section 171 states that the Act does not apply to proceedings, the hearing of which commenced prior to 1st November 2005, and any such proceedings may be continued or completed as if this Act had not been passed.
13. Based on sections 10 and 171, the Court will therefore have to determine, (given the nature of the proceedings before it) the following things, before applying the provisions of the Evidence Act 2002 –
 - (i) ***When does a hearing begin***
 - (ii) ***Whether or not a hearing is a trial?***
 - (iii) ***Whether or not the hearing in the particular proceedings began before November 1st, 2005.***
14. The definition of “**Hearing**” in **Blacks Law Dictionary** at page 737 includes – “**A judicial session, usually open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying, a trial . . . oral argument**”. The term “**adjudication hearing**” has also been defined to include – “**In child – abuse and neglect proceedings, the trial stage at which the Court hears the state’s allegations and evidence and decides whether the state has the right to intervene on behalf of the child . . . In a juvenile delinquency case, a hearing at which the Court hears evidence of the charges and makes a finding of whether the charges are true or not true . . .**”.
15. By virtue of section 1076 of the repealed Criminal Code 1992 and section 691 of the Criminal Code 2004, it may be argued that the hearing begins in summary matters when the case is called up and the defendant is pleaded, since those provisions state –
 - “(1) ***If both the complainant and the defendant are present when the case is called up, the Court shall proceed to hear and determine the complaint.***
 - (2) ***The Court shall inform the defendant of the substance of the complaint, and shall ask him or her what answer, if any, he or she desires to make to the complaint***”.
16. By virtue of section 933 of the repealed Criminal Code 1992 and section

887 of The Criminal Code 2004, the trial is deemed to begin for Indictable Offences when the defendant is called upon to plead to the offence on the indictment i.e. arraignment.

The Defendant's Right to Silence/Privilege Against Self-Incrimination

17. The defendant's privilege against self-incrimination has been viewed by learned judges and jurists as covering two main categories of Rules. In **R -vs- Herts CC Exp. Green Industries Limited** [2000] A.C. 412 H.L. Lord Hoffman recently explained this privilege very well. He said – "*The expression 'privilege against self-incrimination' or 'right to silence' is used to refer to several loosely linked rules or principles of immunity, differing in scope and rationale: Perhaps the best known example is the rule that a person on trial should not be compelled to undergo inquisition by the prosecution or the Court. . . . There are also associated principles which confer a right to silence or privilege against self-incrimination during pre-trial investigation such as the exclusion of involuntary confessions and the prohibition on the questioning of suspects without caution after charge. These latter prohibitions are prophylactic rules designed to inhibit abuse of power by investigatory authorities and to preserve fairness of the trial by preventing the eliciting of confessions which may have doubtful probative value. . . . There is also a general privilege not to be compelled to answer questions from people in authority, based . . . upon the common view that one person should so far as possible be entitled to tell another person to mind his own business'. All these principles are to a greater or lesser extent subject to exceptions, most of which have been created by statute. Even the principle that the accused should not be subject to interrogation at the trial was modified when the Criminal Evidence Act 1898 made him subject to cross-examination by the prosecution if he exercised his right to give evidence on oath". (See also **Phipson on Evidence** 16th ed (2005) para 24-40-46).*
18. The defendant is entitled under section 8 (1) and 9(2) (a) of The Constitution of St. Lucia (*which guarantees a fair hearing and the presumption of innocence until proven guilty*) to remain silent and not to contribute to incriminating himself. By section 21 (2) of the new Evidence Act, the Rule of law or practice which allows a defendant to make an unsworn statement at his trial has been abolished. (A similar provision existing in section 31 (1) of the Criminal Procedure Act 2000 Anguilla was upheld by our Court of Appeal to be constitutional and not a violation of section 9 (1) of the Anguilla Constitution, which is similar to our section 8 (1): **Daniel Mussington and others -vs- the Attorney**

General of Anguilla Civil Appeal No. 4 of 2001 delivered on the 11th November 2002).

19. Section 76 (1) of the new Evidence Act deals with evidence of silence, which seems to me to be referring to the privilege against self-incrimination in criminal proceedings as well. Section 76 provides –

“76 (1) An inference unfavourable to a party may not be drawn from evidence that the party or some other person failed or refused to answer a question, or respond to a representation put or made to the person in the course of official questioning.
(2) Where evidence of the kind referred to in subsection (1) may only be used to draw an inference referred to in that subsection, it is not admissible.
(3) Subsection (1) does not prevent the use of the evidence to prove that the persons failed or refused to answer the question or respond to the representation if the failure conduct or refusal is a fact in issue in the proceedings”.

20. I must confess that I have not found the style and language used by the drafter of the new Evidence Act to be easy to understand. In some instances, I have been able to interpret the meaning of some of the provisions, as I understand it, only because of repeated readings of the provisions and my knowledge of the statutory amendments in England.

21. On a close look at section 76, the use of the word “*party*”, and the absence of any reference to ‘criminal proceedings as was done in Section 77, may cause arguments as to whether this provision is referring to civil proceedings only where the term party is generally used. However, I have formed the view that section 76 applies to criminal proceedings also, despite the term ‘*party*’, because in PART III Division 3 of the Act, which deals with the manner of giving evidence generally, there is persistent use of the same term ‘*party*’ in sections 27, 29 (2) 29 (5) (a) 30 (4), 31 (1) 33, 34, 35, 37, 39, 42, (2) (c), 43, 45, 46. Section 54 also uses the term “*party*” in the context of criminal proceedings under section 52 (2) and 52 (5), and the words “**official questioning**” which includes questioning in criminal proceedings.

22. Section 76 (1) therefore seems to have modified the common law rule. At common law the prosecution was allowed to lead evidence of a statement made by a Virtual Complainant or Police Officer or another witness in the presence of the defendant and his reaction to it. The defendant’s reaction may have been an acceptance of the statement by word, conduct, action or demeanour, so the prosecutor could lead that evidence for the judge, or jury to determine whether his words, action or demeanour at the time

when the statement was made amounted to an acceptance of the statement in whole or in part. It would seem that under section 76 (1) and (2) it is only where defendant said something in response to official questioning that the prosecution can lead such evidence. It now appears to me that if he remained silent to official questioning the Court now, ought not to permit the prosecution to lead evidence from the police as to what the police said to defendant and that he remained silent. This is a departure from the current English Law.

23. In my opinion, the effect of section 76 (2) is that the tribunal of fact cannot use the defendant's silence or his failure to comment at the time the statement was made, as conduct or demeanour amounting to an acceptance of the statement; and since such evidence has no evidential value, it is inadmissible. This change in the law should now affect the words of the Caution that police officers give to suspects/defendants who are detained or arrested, before they are officially questioned. See paragraph 158 (h) below.
24. So the common law reflected in **Parke –vs- R** 64 Cr. App. R.25 P.C. (The Privy Council approved the judge's directions to the jury that the appellant's silence when confronted by the mother of the victim coupled with his subsequent conduct, was a matter from which it could be inferred that the appellant accepted the truth of the accusation) remains intact, since the mother of the victim and the appellant were on even terms, and it was not official questioning when the mother asked appellant why he had stabbed her daughter. The Privy Council applied the statement of Cave J in **R –vs- Mitchell** (1892) 17 Cox CC 503 at 508: “*Undoubtedly when persons are speaking on even terms, and a charge is made, the accused persons ought to reply, and if he does not, it is some evidence to show that he admits the charge to be true*”. (SEE **Archbold (2004)** paras. 15 – 409 to 15 – 412. Section 76 (1) and (2) only applies to police or other official questioning, regardless of whether the defendant's lawyer was present.
25. Section 76 (3) seems to apply to cases where the failure to answer or respond is itself a criminal offence E.G. –
 - (1) **A driver of a motor vehicle failing to give his name and address in certain circumstances when requested by the police under Road Traffic Law.**
 - (2) **In cases where the conduct of the defendant is a fact in issue i.e. Unlawful possession of property offences, vagrancy etc.**
 - (3) **In cases involving theft where the doctrine of recent possession applies.**

The Court Interpreter

26. Section 21 (1) of the Act has introduced a new requirement that a person may not act as an interpreter in any proceedings unless the person has sworn on oath or made an affirmation in accordance with the Oaths and Affirmations Ordinance Cap. 119. Section 28 provides for a witness to give evidence about a fact through an interpreter, unless the witness can understand and speak the English language sufficiently so as to be able to understand fully and make adequate reply to questions that may be put about the fact.
27. Section 1215 of the repealed Criminal Code 1992 had recognized 2 types of interpreters – (1) an interpreter who was an officer of the Court or an officially appointed interpreter; (2) a non-official interpreter. In the case of the non-official interpreter, he had to be sworn prior to interpreting the evidence in a language that the defendant understands. Under section 574, both the unofficial and the official interpreter could be charged for the indictable or summary offence of willfully and falsely interpreting evidence.
28. Though section 389 of the new Criminal Code No. 9 of 2004 provides that the interpreter whether sworn or not may be charged with the indictable or summary offence of willfully and falsely interpreting evidence, there is no provision comparable to section 1215 in the repealed Criminal Code creating 2 types of interpreters.
29. Section 28 of the New Evidence Act makes no reference to the evidence being interpreted in a language understood by the defendant, unlike section 1215 of the repealed Criminal Code. However, section 8 (2) (f) of the Constitution of St. Lucia guarantees the defendant's right to have the assistance of an interpreter if he cannot understand the language used at the trial, so section 28 needs to be modified to reflect this.
30. Consequently, it appears that regardless of whether the interpreter is a non-official, or an officer of the Court, or an officially appointed interpreter, he or she must be sworn or must affirm prior to interpreting the evidence of the witness in any case, or assisting the defendant in understanding the language used at the trial.

The Interpreters Oath

31. ***“I SWEAR BY ALMIGHTY GOD (OR I DO SOLEMNLY AND SINCERELY DECLARE AND AFFIRM) THAT I WILL WELL AND FAITHFULLY INTERPRET AND TRUE EXPLANATION MAKE OF***

ALL SUCH MATTERS AND THINGS AS SHALL BE REQUIRED OF ME ACCORDING TO THE BEST OF MY SKILL AND UNDERSTANDING” (SEE Archbold (1997) para. 4 – 39.

Unsworn Testimony

32. Sections 22 and 23 of the New Evidence Act create exceptions to the general rule that all witnesses must testify or affirm. These sections provide that a person called to produce a document, or a judge or counsel required to explain a case in which they have acted does not have to testify on oath or affirmation.

Judge’s Warning Before Defendant’s Testimony

33. Section 24 (3) of the Act also contains a new provision requiring the judge or Magistrate to inform an unrepresented defendant who is about to testify that it is a serious offence knowingly to give false evidence. This should be done in the absence of the jury where the defendant is being tried on an indictment.

Evidence Relating to Sexual Offences

34. In proceedings relating to sexual offences the evidential requirements have also been changed. By section 25 (2) of the Act, ***“No evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters”***. By Section 25 (3), ***“No evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complaint with the person other than the defendant”***.
35. Section 135 (3) of the Act has enacted the law that we have been applying for some time in this jurisdiction, and which abolished the former mandatory requirements for warning the jury in sexual offences cases that it is dangerous to act on uncorroborated evidence, or give a direction relating to the absence of corroboration. However, section 135 (3) is subject to section 15 (4) of the Act. It is evident that this warning must still be given where the Virtual Complainant is under 12 years and has given unsworn evidence pursuant to section 15 (3) of the Act (*SEE Paragraphs 60 to 62 below*).
- 35-A. Pursuant to section 136(i) (d) (ii) and (2), in all sexual offence cases, the Judge must warn the jury –

- a) that the evidence of this virtual complaint may be unreliable.
- b) inform the jury of the matters that may cause to be unreliable; and
- c) Warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

UNLESS THERE ARE GOOD REASONS FOR NOT DOING SO.

The Evidence of Vulnerable Witnesses

36. Pursuant to section 29 (3) of the Evidence Act, a complainant in a serious sexual offence case over 12 years old may be authorized by the judge or magistrate to give evidence in a manner described by Section 29 (5) of the Act. Such a complainant would be afforded treatment like a vulnerable witness. Section 2 defines “**VULNERABLE WITNESS** to mean –

“a witness, whose ability to give evidence or the quality of whose evidence, is likely to be affected by reason of –

- a. *age of maturity;*
- b. *physical, intellectual or psychiatric disability;*
- c. *trauma suffered by the witness;*
- d. *the witness’s fear of intimidation;*
- e. *the linguistic or cultural background of the witness;*
- f. *the nature of the proceedings;*
- g. *the nature of the evidence that the witness is expected to give;*
- h. *the relationship of the witness to any party to the proceeding;*
- i. *the absence of the witness from Saint Lucia; or*
- j. *any other ground of similar nature”.*

37. Section 29 (1) states that a virtual complainant under 12 years “*shall be taken to be a vulnerable witness and shall give evidence in a manner described in subsection 5 (a), (b) or (c) as directed by the judge, and the judge may also apply other measures outlined in subsections 5 (d) to (i) in relation to that testimony*”.

38. Pursuant to section 29 (5) (a) and (b), a witness who is taken to be a

vulnerable witness may be allowed to testify while being screened off from the defendant; or to testify from a place outside the courtroom either in St. Lucia or elsewhere, by means of technology (i.e. live television link) which allows for such a witness to see and hear certain relevant persons in the courtroom. In either case, such a witness must be seen and heard in the courtroom by the following relevant persons: the judge, jury, counsel for defendant and prosecution, the interpreter, or other person appointed to assist.

39. Pursuant to sections 29 (5) (c) and (d) the video recording of the whole or part of an interview of such a witness may be admitted as evidence in chief, and the cross-examination of such a witness and re-examination may also be video recorded and the whole or part of such recording be admitted as the evidence of such witness on cross-examination or re-examination.
40. It would seem from the provisions in section 29 (5) (c) and (d) that the Court may refuse to admit a portion of the video recorded interview, cross-examination or re-examination where the prejudicial effect of that portion outweighs its probative value.
41. The section 29 (5) provisions appear to be an adapted version of the provisions in section 32 of The Criminal Justice Act 1988 (U.K.) and section 23 to 27 of the Youth Justice Criminal Evidence Act 1999 (U.K.).
42. There are Practice Directions in England which set out the procedure to be followed on making an application to admit a video recording in evidence under section 27 (1) of the Youth Justice Criminal Evidence Act 1999 (U.K.) SEE Consolidated Criminal Practice Direction [2002] IW.L.R.2870. There is also a publication issued by the Home Office, containing guidelines for good practice in preparing for and conducting interviews of vulnerable and intimidated witnesses: **SEE ACHIEVING BEST EVIDENCE IN CRIMINAL PROCEEDINGS: GUIDANCE FOR VULNERABLE OR INTIMIDATED WITNESSES INCLUDING CHILDREN** – Available at www.cps.gov.uk.
43. In England, it has been held that a failure to follow the guidance contained in a Memorandum of Good Practice Relating to Video Recorded Interviews, was a matter to be taken into account by the judge in deciding whether as a matter of discretion, such evidence should be admitted as evidence (*SEE G -vs-DPP [1997] 2 Cr. App. R.78; Phipson on Evidence 16th ed (2005 par. 11 – 40).*
44. It has also been held in England that it was a wrong exercise of discretion for the judge to decline to exclude the video taped interview where a child retracted an accusation made in a video recorded interview before the

interview was video recorded and the prosecutor was aware of the retraction. The Court of Appeal held that in such circumstances the interview should have been abandoned and the witness called live, possibly by live television link: (**PARKER** [1996] *Crim L. R.* 511).

- 44-A. The Court of Appeal has also held in England that in determining whether it is in the interest of justice for a video recording of an interview to be admitted as part of a witness's evidence [as examination-in-chief], the judge should first make a determination on the competence of the witness to testify: (**R -vs- Hamshire** [1996] Q.B.1, 4. (C.A)). It has been opined in **Phipson** supra at para. 9 – 14, that a judge will usually have to watch the video recording before deciding if it should be admitted. By doing this the judge will be able to decide if it should be admitted. The judge should also be able to form a view as to the witness's competence from the recorded interview if it was properly conducted. Where the judge is left in doubt it may be necessary for the judge to ask the witness some general questions.
45. The discussions in **Phipson on Evidence** 16th ed (2005) at paragraph 11 – 40 to 11 – 41 should provide considerable guidance to a trial judge or magistrate in St. St. Lucia, concerning how to deal with such evidence at the trial including the transcript of the video-recorded interview, in my view.
46. At pages 1614 to 1617 in **Phipson** the Practice Directions under the Civil Procedure Rules 1998 concerning Video Conferencing Guidance and the use of this technology for taking evidence where the witness is abroad may also prove useful in our jurisdiction.
47. In England, section 20 of the Youth Justice Criminal Evidence Act 1999\ deals with applications for special measures directions similar to the special measures set out in Section 29 (5) of our Evidence Act: SEE page 1483 of **Phipson** (supra).
48. It is useful to reproduce section 20 of this English Act in this paper for easy reference –

“20 (1) Subject to subsection (2) and section 21 (8), a special measures direction has a binding effect from the time it is made until the proceedings for the purposes of which it is made are either –

(a) determined (by acquittal, conviction or otherwise); or

(b) abandoned,

in relation to the accused or (if there is more than one) in relation to each of the accused.

- (2) *The Court may discharge or vary (or further vary) a special measures direction if it appears to the Court to be in the interests of justice to do so, and may do so either –*
- (a) *on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or*
 - (b) *of its own motion.*
- (3) *In subsection (2) ‘the relevant time’ means –*
- (a) *the time when the direction was given, or*
 - (b) *if a previous application has been made under that subsection, the time when the application (or last application) was made.*
- (4) ...
- (5) *The Court must state in open Court its reasons for –*
- (a) *giving or varying*
 - (b) *refusing an application for, or for the variation or discharge of, or*
 - (c) *discharging*
- a special measures direction and, if it is a magistrates’ Court, must cause them to be entered in the register of its proceedings.*
- (6) *[Criminal Procedure Rules] may make provision –*
- (a) *for uncontested applications to be determined by the Court without a hearing,*
 - (b) *for preventing the renewal of an unsuccessful application for a special measures direction except where there has been a material change of circumstances;*
 - (c) *for expert evidence to be given in connection with an application for, or for varying or discharging such a direction;*
 - (d) *for the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to it being disclosed to, or withheld from, a party to the proceedings”.*

1999 (U.K.) states –

“Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 16 (1) (a) [i.e. being under the age of 17 at the time of the hearing;], then –

- (a) subject to subsection (9) below; and*
- (b) except where the witness has already begun to give evidence in the proceedings, the direction shall cease to have effect at the time when the witness attains the age of 17.*

(9) where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 16 (1) (a) [i.e. being under the age of 17 at the time of the hearing;] and -

(a) the direction provides -

- i. for any relevant recording to be admitted under section 27 [provision for video recorded evidence in chief] as evidence in chief of the witness, or*
- ii. for the special measure available under section 28 [provision for video recorded cross-examination or re-examination] to apply in relation to the witness, and*

(a) if it provides for the special measure to so apply, the witness is still under the age of 17 when the video recording is made for the purposes of Section 28,

then, so far as it provides as mentioned in paragraph (a) (i) or (ii) above, the direction shall continue to have effect in accordance with Section 20 (1) even though the witness subsequently attains that age”.

- 49. Pursuant to section 29 (5) (e) of the Evidence Act, the judge may exclude from the courtroom all person other than the jury, counsel for defendant and the prosecution, the interpreter and other persons appointed to assist.
- 50. Under section 29 (5) (f) the judge may direct that wigs or gowns be dispensed the during the giving of the evidence.
- 51. Under section 29 (5) (h) and (f) the judge may approve someone to assist the complainant in giving evidence where necessary. In case the witness has a disability, disorder or other impairment, the judge may direct that an

appropriate device be used which will enable questions and answer to be communicated to or by the witness.

52. Section 29 (7) and (8) provide for a deaf or dumb witness to be questioned and to give evidence in any appropriate manner.
53. It appears to me also from the provisions of Section 29 of our new Evidence Act, that the defendant and his witnesses can also rely on these provisions. Unlike section 32 of the Criminal Justice Act 1988 (U.K.) the defendant in St. Lucia is not expressly excluded from taking advantage of the special measures under Section 29 of our Evidence Act. In fact section 29 (2) makes that very clear in my opinion where it states – ***“In any case other than . . . [where the virtual complainant is under 12 years old] the Judge may, either on the application of a party or a witness or on the Judge’s own initiative; direct that a vulnerable witness is to give evidence in a manner described in subsection (5)”***.
54. It seems obvious from the previous discussion also, that apart from where the Virtual Complainant is under 12 years old at the date of testifying, for any witness to be afforded any of the special measures under section 29 (5) of the Evidence Act, a timely application should be made to the judge or Magistrate prior to the date of trial, so that the relevant directions can be given, particularly regarding the criteria to be met for the video-recorded interview or evidence through the television link/VCF or other technological device, in order for such evidence to be admissible. In considering such application, the material mentioned at paragraphs 42, 43,46, 47, 48 and 48-A of this paper might be of some assistance to the Court.
55. It is obvious that by virtue of section 21 (1) of the Act the evidence given by video recording and television link or VCF or other technological device, must be given under oath or affirmation unless the witness falls under a statutory exception. In England the case **R –vs- Sharman** [1998] 1 Cr. App R. 406 re-inforces my understanding of the Act.

Evidence of Children

56. A child under Section 6 of the Criminal Code No. 9 of 2004 is a person under the age of 12 years. However, the Evidence Act speaks of ***“a child who is 12 years of age or more”*** and ***“a child who is less than 12 years of age”***.
57. Section 15 (1) provides for only children over 12 years old to give

evidence on oath or affirmation; and only where they are competent. They are to be presumed competent without inquiry into their competence, unless the judge has reason to believe that a child over 12 years is unable to understand questions or provide intelligible answers.

58. Where a child over 12 years is presumed competent, by virtue of Section 14 of the Act, that child is presumed to be capable of understanding that in giving evidence; he or she is under an obligation to give truthful evidence, and knows the nature and consequences of giving false evidence. It is on this basis apparently that the child may be allowed to give evidence or oath or affirmation.

59. Section 15 (2) sets out the criteria that the judge should use when holding an inquiry to determine if a child over 12 years is competent. Section 15 (2) states –

“(2) In determining the competence of a child pursuant to subsection (1) [a child over 12 years], the Court shall consider whether –

a. the child is possessed of sufficient intelligence to justify the reception of his or her evidence; and

b. the child is competent to know the nature and consequences of giving false evidence and to know it is wrong;

and if the Court so finds, it shall permit the child to give evidence upon swearing an oath or making affirmation in accordance with the Oaths and Affirmations Ordinance Cap. 119”.

60. Children under 12 years cannot testify on oath or affirmation. The judge must first hold an inquiry under section 15 (3) of the Act to determine whether the child is of sufficient intelligence and understands that he/ she should tell the truth upon being so satisfied, the judge must permit that child to say-

“I PROMISE TO TELL THE TRUTH”. Thereafter that child will give unsworn evidence.

61. Section 15 (4) provides that where there is unsworn evidence of a child under 12 years old, the judge must warn the jury of the danger of acting on such evidence unless they find that the evidence is corroborated in some material particular by other evidence implicating the defendant.

62. This warning apparently should be given in EVERY case where there is

testimony from a child under 12 years old. The warning does not relate only to Sexual offence cases. Magistrates also should remind themselves of this in their deliberation in Summary trials.

63. A child over 12 years who is found to be sufficiently intelligent to testify, but incompetent in knowing the nature and consequence of giving false evidence, and does not know that giving false evidence is wrong will obviously be found to be incapable of understanding that in giving evidence, he or she is under an obligation to give truthful evidence. Under Section 14 (1) of the Act, such a witness is not competent to give evidence.
64. A child under 12 years who gives unsworn evidence is liable to be convicted of perjury in all respects as if he or she had given sworn evidence by virtue of section 15 (5) of the Act.

Co-Defendant As Prosecution Witness

65. Section 18 of the Act permits a co- defendant to give evidence for the prosecution with the leave of the Court, though such a co-defendant cannot be compelled by the Court to testify. Section 18 (4) and (5) requires the judge to inform the co-defendant that he is not compellable to give evidence and that he can give evidence as a prosecution witness only where the Court grants him leave to do so. In deciding whether or not to grant leave, the judge must take into account whether the Co-defendant has or appears to have a motive to misrepresent the facts that he is to testify about; and whether it is reasonably practicable for the case against him to be completed or terminated before this co-defendant testifies.

Prosecution Witnesses Related to Defendant

66. Pursuant to section 19 of the Evidence Act, where a defendant is charged with a criminal offence which is not an offence under the Children and Young Persons Act No. 11 of 1972, or the Criminal Code NO. 9 of 2004 Section 81 to 187 and Sections 614 and 619, or the Domestic Violence Act No. 7 of 1995, or Section 19 (14) of the Evidence Act, the following persons cannot be compelled to give evidence against him or her as witnesses for the prosecution –

- (a) **the spouse or common law spouse of the defendant, or his girlfriend or her boyfriend with whom the defendant is living as husband and**

- wife although they are not legally married to each other;
- (b) the mother and father of the defendant or the adopted mother and father; or
 - (c) the child or adopted child of the defendant.
67. Pursuant to section 19 (5) the judge has a duty to inform such persons related to the defendant, that they have the right to object to testifying for the prosecution against the defendant, or to giving evidence of a communication made between them and the defendant.
68. Section 19 (7) states that: “*Where, on an objection . . . the Court finds that –*
- (a) *the likelihood of the harm that would or might be caused, whether directly or indirectly, by the witness giving evidence, or giving evidence of the communication . . . to -*
 - (i) *the person who made the objection; or*
 - (ii) *the relationship between that person and the defendant concerned; and*
 - (b) *the nature and extent of any harm referred to in subparagraph (a); outweigh the desirability of having the evidence given, the person shall not be required to give evidence”.*
69. Where such a witness objects the judge shall hear and determine the objection in the absence of the jury, taking into account the following things-
- a. the nature and gravity of the offence for which the defendant is charged;
 - b. the substance and importance of any evidence that the person might give; and the weight that is likely to be attached to it;
 - c. whether any other evidence concerning the matters to which the evidence of the witness could relate is reasonably available to the prosecutor;
 - d. the nature of the relationship between the defendant and the witness;
 - e. whether in testifying the witness would have to disclose matters received by the witness in confidence from the defendant.
70. For offences under the Children and Young Person Act, the Criminal Code 2004 sections 81 to 187 and sections 614 and 619, and the Domestic Violence Act No. 7 of 1995, the wife or husband of a person charged may be called as a witness either for the prosecution or defence and without the

consent of the person charged, and is compellable as a witness: (Section 19 (11) of the Act).

Admissible Hearsay Evidence Under Statutory Provisions in St. Lucia

71. There has been considerable abrogation of the common law rules governing hearsay evidence in criminal proceedings which were primarily designed to protect the defendant from being convicted by unreliable evidence. This transformation is reflected in several provisions of the new Evidence Act, particularly sections 48 to 59, 136, 153 and 154 of the Act which have created additional statutory exceptions to the hearsay rule. These provisions in some instances, mirror some of the provisions in Sections 23 to 28 of the Criminal Justice Act 1988 (U.K.), and Sections 116 to 117 of the Criminal Justice Act 2003 (U.K.). Prior to this new Evidence Act, Section 894 of the Criminal Code No. 9 of 2004 (and, Section 942 of the repealed Criminal Code 1992) was one of the local Statutory exceptions to the hearsay rule, which made written depositions taken by the Magistrate at a Preliminary Inquiry admissible in trials on indictment, where certain conditions were satisfied.
72. Another Statutory exception to the hearsay rule has been created by Section 800 of the Criminal Code 2004 which provides for written statements of persons to be admissible as evidence to the like effect as oral evidence in committal proceedings where the required statutory conditions under Section 800 (2) are met.
73. Sections 1056 and 1057 of the Criminal Code 2004, also seem to me to have created another Statutory exception to the hearsay Rule. They dispensed with the need to call witnesses to prove the contents of any documents the terms of which are not in dispute. Under these provisions, copies of such documents can be by agreement of the parties accepted as equivalent to the originals and in the absence of express provisions all documents or writings are admissible in evidence in any criminal trial on mere production without further proof. Under section 1056 (b) of the Criminal Code 2004, the Court may allow such documentary evidence to be put in “*for what it is worth although not regularly proved, if in its opinion, it is in the interests of justice that it should be so admitted . . .*”.

Admissible Hearsay Evidence Under The Evidence Act provisions

74. Throughout the provisions of Sections 48 to 54 in the Evidence Act there is reference to the terms “*previous representation*”, and “*representation*”. A “*representation*” is defined by Section 2 to include:

“an expressed or implied representation whether oral or in writing, and a representation to be inferred from conduct”

75. It would seem that *“a representation to be inferred from conduct”* contemplates a situation where in an out of Court statement, “A” states that “B” and “C” were talking, and in reporting what they were saying, states that B nodded his head meaning “YES” in answer to a question C asked. In that case A inferred from the conduct of B (*the nod*) that B said “YES” in answer to C’s question. That, as I understand it would be a representation to be inferred from conduct.
76. Section 2 defines *“previous representation”* to mean *“a representation made otherwise than in the course of the giving of evidence in the proceedings in which evidence of the representation is sought to be adduced”*.
77. I therefore understand a previous representation to be an oral or written statement expressed or implied, made by a person out of Court, and something stated out of Court by a person as a result of an inference drawn or conclusion made from observing certain conduct.
78. Section 48 of the Act lays down the general rule against hearsay evidence. In substance, it states as I understand it, that evidence of a previous oral or written statement expressed or implied, and an inference drawn or conclusion made from observing certain conduct, is not admissible to prove the existence of a fact intended to be expressed by that statement inference or conclusion.
79. Section 49 as I understand it, restricts the admissibility of hearsay evidence to *“first hand hearsay”* only, i.e. previous oral or written statements express or implied, and conclusions made or inferences drawn from observing certain conduct, where such statements, inferences are drawn, or conclusions are made by a person who it can be reasonably supposed had personal knowledge of the facts mentioned from what he/she saw or heard or perceived. The following example demonstrates first hand hearsay that could be admissible under section 52 of the Act where the criteria are met. A witnesses an accident and tells B about it. B tells C and C tells D. B’s statement about what A told him is first hand hearsay. C’s statement and D’s statement about what A told B are 2nd hand and third hand hearsay.

The Unavailable Witness

80. Section 52 of the Evidence Act may be utilized where the maker of a

previous out of court statement, who had personal knowledge of the facts that he/she was then speaking about, is not available for specified reasons given by Section 6 of the Act, to testify at the trial.

81. Section 6 states that a person is unavailable if he or she is (a) dead; (b) not competent to give evidence about the fact; (c) it would be unlawful for the person to give evidence about the fact; (d) the evidence, under a provision of this Act, may not be given; (e) all reasonable steps have been taken to find the person or to secure his or her attendance, but without success; or (f) all reasonable steps have been taken to compel the person to give the evidence, but without success. Regarding 6 (b), an example of this in my opinion would be where at the time the previous representation was made the maker was sane, but at the time of the trial, he is suffering from amnesia or is insane. Regarding 6 (c), this appears to be probably referring to privileged information. Regarding 6 (d), if the evidence cannot be given under a provision of the Act, it is difficult to see how it would be admissible under Section 52.
82. Section 52 in my understanding is stating that where the maker of a previous oral or written statement is not available to give evidence about facts contained in his/her out of court statement, a witness may be called by the prosecutor or defendant to testify about the contents of the out of court statement where that witness saw or heard or perceived the making of the out of court statement by the unavailable person and that witness is able to give evidence about it.
83. However, the witness so called can give such evidence only where the requirements under section 52 (2) are met.
84. These requirements state that the unavailable maker of the previous statement, at the time he made the statement or conclusion must have been
- (a) **under a duty to make it, or**
 - (b) **must have made it shortly after the time when the facts mentioned occurred, and in circumstances which exclude any fabrication of the facts; or**
 - (c) **he must have made it in the course of testifying on oath in proceedings, and under circumstances where the defendant either -**
 - (i) *cross-examined the unavailable deponent; or*
 - (ii) *had reasonable opportunity to do so;*

- (d) **the previous statement or conclusion must be against his interest at the time when he made it. It is against his interest where the previous statement or conclusion tends to damage his reputation; or makes him liable in civil litigation for damages; or it shows that he has committed an offence.**
- (e) **Another requirement under Section 54 is that a party who wishes to adduce evidence about a previous statement or conclusion, must give at least 14 days notice in writing to the other party of the intention to adduce such evidence, subject to the Court varying this requirement with conditions, on the application of a party.**

85. It is useful to give an example of how section 52 would operate as I understand it E.G. **J.B.** was chopped in his head and on his 2 arms by **Tom** and died before the Preliminary Inquiry could commence against **Tom** for wounding and causing grievous harm to **J.B.** Police officer **White** had visited **JB** in the hospital 4 hours after he received his injuries. **JB** told **PC. White** that he felt he was going to die. **JB** made a statement to **PC. White** who recorded it in his pocket book contemporaneously **PC. White** had read back this statement to **JB** who agreed that it was accurate, but did not sign the pocket book because of his injuries. **PC. White** signed it, dated it, and wrote the time he did so. **Tom** was charged with murder after **JB** died, without giving **PC. White** a written police statement. At the Preliminary Inquiry the prosecutor contemplated how he could adduce this evidence from **PC. White**.
86. It would seem that Section 52 of the new Evidence Act can be used. **PC. White** can testify about what **JB** told him at the hospital and also tender as evidence the relevant page of his pocket book where he recorded what **JB** told him. **PC. White** is a witness who saw, heard and perceived the making of **JB's** out of court statement. **JB's** out of court statement is first hand hearsay since **JB** had personal knowledge of the facts he orally stated to **PC. White**, and which were recorded in **PC. White's** pocket book. **JB** is unavailable, being a dead person under Section 6 (1) (a) of the Evidence Act. The out of court statement meets the requirement under Section 52 (2) (b) of the Act in that it was made shortly after the time when the asserted facts occurred and in circumstances that made it unlikely that the representation is a fabrication. **PC. White's** pocket book shows the date and time when the statement was recorded.
87. A Court is likely to rule, in such circumstances, that **JB's** out of Court

statement is admissible to prove the existence of the facts that **JB** intended to assert by his out of Court statement. The Court is likely to permit **PC. White** to testify about the contents of the statement and also tender his pocket book as an exhibit. The Court will rule in favour of the prosecution only if evidence is led to satisfy the requirements under section 6, and section 52 (2) (a).

- 87-A. I am further of the view that Counsel for **Tom** at his trial, could challenge the admissibility of **JB's** out of Court statements where he has evidence that **JB** would not be a competent witness had he been alive, within the definition of Section 14 (2) of the Evidence Act. Though the Evidence Act does not make this a requirement for the admissibility of first hand hearsay evidence, in my opinion the competency of the maker of the out of Court statement is a matter to be considered by a jury when deciding what weight to give this out of Court statement. So though **Tom's** Counsel may probably not succeed in excluding this evidence, however, the competency of the maker of the out of Court statement at the time he made the statement is a matter to be seriously considered by the jury in my opinion.
88. Section 52 (b) appears to acknowledge that a defendant may himself give evidence of a previous out of Court statement in circumstances where the requirements under Section (52 (2) (a) to (d) have been met. It appears that once those requirements are met the defendant himself may be allowed to give such evidence.

Witnesses who Gave Police Statements Testifying at Trial/Hearing

89. Section 53 seems to be saying that where a person who made a previous out of Court statement and made it at a time when the facts were fresh in his mind, he can testify about the asserted facts in the out of Court statement.
90. Under Section 53 (4), where the witness who has testified, gave a previous written out of Court statement about facts at a time when they were fresh in his mind, the Court may give leave for the previous written out of Court statement of that witness to be tendered in evidence before the conclusion of examination-in-chief. I am of the view that Section 53 (4) covers the situation where the witness is hostile. Section 35 deals with Hostile Witnesses.
- 90-A. It would seem from section 136 (1) (d) (i) and (2) of the Evidence Act that a prosecution witness who appears to have been concerned or involved in the events giving rise to the proceedings is to be treated as a witness with an interest whose evidence is deserving of a special warning to the jury.

Unless there are good reasons for not doing so, the Judge should warn, the jury that such a witness' testimony may be unreliable, identify for the jury the matters that may cause it to be unreliable and warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

Former Hearsay Documentary Evidence now Admissible

91. Now Section 55 of the Act allows hearsay documentary statements to be admitted into evidence to prove the facts stated in it where the person who supplied the information in the documents is unavailable. In such a case there must be direct oral evidence given by the maker of the documents and the document may be tendered as evidence.
92. Section 2 defines document to mean “***anything on which information of any description is recorded***”. This definition will allow records, reports, invoices, bills, receipts etc. to be admissible. Section 55 (6) relates to computer generated documents and Section 55 (8) refers to micro fiche or other photograph images.
93. Section 55 (1) sets out the criterion for admitting into evidence a statement contained in a document which is part of a record compiled in the course of duty. It says that such a document can contain first hand hearsay evidence i.e. it can contain information given directly or indirectly to the maker of the document by a person who had personal knowledge of the subject matter in that document [SEE Sect. 56 also] **OR** where the maker of the document is the person who had personal knowledge and supplied that information himself/herself.
94. Section 56 (9) explains who is a person acting in the course of duty. It states that such persons include a person acting in the course of any trade, business, profession or other occupation in which he or she is engaged or employed, or for the purposes of any paid or unpaid office held by him or her.
95. Section 56 (2) states that where the informant supplied the information to the maker of the document indirectly, then the document is admissible only if each person through whom the information was supplied was also acting under a duty.
96. Statements in documents containing evidence which are prepared for pending or contemplated proceedings shall not be tendered in evidence without leave of the Court. (Section 56 (4))
97. Section 56 (5) requires the Court not to give leave to admit the statement in such a document in evidence unless the Court is of the opinion that the statement ought to be admitted in the interest of justice having regard to –

- (a) **the circumstances in which leave is sought and in particular to the contents of the statement; and**
- (b) **the likelihood that the defendant will be prejudiced by the admission of the statement in the absence of the person who supplied the information on which the statement is based.**
- (c) **Evidence may be led tending to prove that that absent person after supplying the information, made an oral or written statement that is inconsistent with the information document tendered in evidence.**

98. In deciding whether or not to admit the statement contained in the document, the Court will draw reasonable inferences from the circumstances in which the statement was made or otherwise came into being; and also from other circumstance including the form and contents of the document in which the statement is contained (*SEE Section 58 (2) of the Act*).

99. Where the Court Rules that the document is admissible in evidence it may be proved by the production of the original or copy or of the material part of it which is authenticated in a manner approved by the Court (*SEE Section 58 (1)*). Section 120 (2) states that where the document is not an exact copy of the document in question but is identical to the document in question in all relevant respects, it may be taken to be a copy of the document in question.

100. Now in order to put the document containing the relevant statement in evidence notice must be given. Section 57 (1) deals with the nature of the notice. The prosecutor has to file and serve a Certificate or lead oral evidence if the Court so requires, establishing the following things –

- (a) **identifying the document containing the statement and describing the manner in which it was produced;**
- (b) **giving such particulars of any device involved in the production of the document as may be appropriate for the purpose of showing that the document was produced by a device. [This provision no doubt contemplates the use of the various modern day technology in the preparation of documents including computers];**
- (c) **Address any matters referred to in Section 55 (1);**
- (d) **This certificate must be signed by a person occupying a responsible position in relation to the operation of the device.**

NB: Making false statements in such a certificate is criminalized by Section 57 (3), and whoever does this may be fined or imprisoned.

101. So the prosecution would have to prove 4 things before such a document Could be tendered-
- 1) **that it forms part of a record;**
 - 2) **that that record was compiled by a person who had a duty to do so;**
 - 3) **that the information in the document was supplied by another person to the maker of the document;**
 - 4) **that the person who supplied it had personal knowledge of the subject matter.**
102. Section 55 (2) gives the circumstances under which such a document will be admissible. The person with personal knowledge who supplied the information in the document to the maker of the document must either be dead, physically or mentally unfit to attend Court as a witness, is a broad and unable to attend Court, has no memory of the matter owing to lapse of time, unidentifiable, or his/her whereabouts are unknown. Section 56 (8) provides that the Court may accept a certificate purported to be signed by a registered doctor as proof that a person is physically or mentally unfit.
103. By virtue of Section 55 (2) (b) and (c), the prosecution must show that reasonable steps have been taken to identify the supplier of the information without success, and that reasonable steps were also taken to locate the supplier of the information without success.

Impeaching credibility of Person who supplied information in Document

104. Section 56 (6) states that where in any proceedings a statement based on information supplied by any absent person is given in evidence by virtue of Section 55-
- (a) ***any relevant evidence relating to the credibility of the absent person is admissible;***
 - (b) ***with the leave of the Court a witness may be called to testify about any matter which could be put to that absent person under cross examination relevant to his/her credibility, if he/she had been called as a witness.***
105. Section 56 (10) states that in estimating the weight, if any to be attached to

a statement admissible in evidence under Section 55, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and in particular -

- (a) *to the question whether or not the supplier of the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information; and*
- (b) *to the question whether or not that person, or any other person concerned with compiling or keeping the record containing the statement, has any incentive to conceal or misrepresent the facts.*

- 106. It is obvious from Section 56 (10) that the prosecution must lead evidence concerning the time when the occurrence or existence of the facts took place and the time when the information was supplied to the maker of the record or document.
- 107. Evidence regarding motive of the maker or compiler of the record to conceal or misrepresent the facts is also very important and should be adduced.
- 108. Section 57 (4) deals with the weight that the tribunal of fact can attach to a document containing first hand hearsay evidence. The Court will have regard to circumstances from which it can draw inferences as to the accuracy of the statement, the source of the information in the statement, the reason for the record, the device or process used, the time it was supplied to the device in relation to the existence or occurrence of the facts, and extent of contemporaneity.
- 108-A. Section 56 (7) enacts the rule against narrative in my opinion. It states that a statement that is admissible in a document containing first hand hearsay evidence is not capable of corroborating the evidence given by the supplier of the information on which the statement is based.
- 109. Section 55 (2) (a) relates to tendering such a document where the person is dead or physically or mentally unfit to attend Court as a witness. At first blush, a prosecutor might want to utilize this provision when faced with a dilemma where the deponent; of a deposition taken at the Preliminary Inquiry is not “*so ill as not able to travel or is not mentally ill so as to be incapable of testifying*” [SEE Sections 894 1 (a) and (1) (d) of The Criminal Code No. 9 of 2004;], but is physically or mentally unfit to attend Court.
- 110. In such a situation, the prosecutor cannot rely on Section 55 (2) (a)

because despite Section 55 (3), Section 55 (4) (a) (i) rules it out.

111. Section 55 (3) states that “*where oral evidence in respect of a matter would be admissible in proceedings, a statement made in a document that was created or received by a person in the usual or ordinary course of business is admissible as evidence of the truth of its contents in proceedings, upon production of the document*”. This is subject to Section 55 (4).
112. Section 55 (4) (a) (i) states that “*Nothing in the section renders admissible in evidence in any legal proceeding (a) such part of any record as is proved to be – (i) a record made in the course of an investigation or inquiry*”.
113. So a deposition taken at a Preliminary Inquiry is not covered by Section 55.
114. Now even where the prosecutor satisfies all of the requirements mentioned at paras. 19 and 20 above and seeks to put in the document containing “*first hand*” hearsay evidence, the maker of the document must attend Court. As a matter of fact, it is the maker of the document who is required to tender any document satisfying the requirements under Section 55 (1) and (2) in a criminal case, in my opinion.
115. This is because of Section 55 (5) of the Act 55 which states that Section 55 (3) does not apply to statements made by defendants or suspects to police officers or persons in authority, in the course of criminal investigations, or the materials created or received in the course of such criminal investigations.
116. In my view, the effect of this provision (*Section 55 (5)*) therefore means, that a statement made in a document that was created or received by a person in the usual or ordinary course of business is not admissible as evidence of the truth of its contents in criminal proceedings, unless such a statement is also covered by Section 52 of the Evidence Act.
117. Records made in the course of obtaining legal advice, records made in contemplation of legal proceedings are privileged records, and records containing statements made by deceased persons who when alive, were not competent and compellable to testify about such matters in the records – these are all inadmissible as provided by Section 55 (4) (a) (ii), (iii) and (iv).
- 117-A. Section 55 (6) of the Evidence Act governs the admissibility of the statements in computer generated documents to prove the truth of the facts stated in such documents. It states that the document must be excluded where there are reasonable ground to suspect that the information it is

inaccurate because of improper use of the computer or where the reliability of the information is doubtful. The Court should also exclude the document where there are reasonable grounds for believing that the computer was malfunctioning and that the accuracy of the information in the document was affected by this circumstance.

- 117-B Section 55 (6) and other provisions in Section 55 reflect the provisions in Section 69 of the Police and Criminal Evidence Act (UK) 1984 and Schedule 3 of the Act.
- 117-C Section 55 (8) of the Evidence Act provides for copies of business documents, including computer generated information, micro fiche or other photograph images to be admissible in evidence as if they were the original of the document.
118. It seems to me however that photograph images may also be real evidence falling outside of the hearsay evidence rules. In that case, for real evidence, the negatives for the photographs would have to be tendered before the photographs could be admissible in evidence, depending on the type of camera used. I am uncertain what the position would be in the case of a digital or other computerized photograph equipment.
119. Section 137 provides for the Court to examine a document or thing and draw any reasonable inference from the document or things as well as from other matters from which inferences may properly be drawn where a question arises as to the application of a provision in the Evidence Act to the document or thing.
- 119-A Section 139 deals with Case Management matters. This provision contemplates that one party may serve notice on the other party, making a request in relation to evidence of a previous representation, to call as a witness the person who made the previous representation; or in relation to the authenticity, identity or admissibility of a document or thing; or in relation to a previous representation.
120. In such circumstances, where one party has given a reasonable request to the other party, who fails or refuses to comply with the request, the Court may make an order in terms of the following directions under Section 139 (3).
- (a) *an order directing the other party to comply with the request;*
 - (b) *an order that the other party produce a specified document or thing, or call as a witness a specified person, as requested by the other party.*

121. Section 139 (4) recognizes that where the party who has failed to comply with a request proves that the document or thing to be produced or the person to be called is unavailable, it is reasonable cause to fail to comply with the request.

Written Statement Admissible As Oral Evidence

122. Section 153 of the Evidence Act makes written statements of persons admissible as oral evidence in criminal proceedings, where the conditions under Section 153 (2) are met I have dealt with these conditions and given suggestions concerning how they should be met in the manual I prepared for Police Investigators and Prosecutors. I wish to reproduce an extract from the Consolidated Criminal Practice Direction Supreme Court [2002] IWL R, in relation to page 4 and 5, paras. 1 to 6 of the Manual, as there were some queries as to the propriety of editing witness statements.

“24.1 Where the prosecution proposes to tender written statements in evidence either under Sections 5A and 5B of the Magistrate’s Courts Act 1980 [which contain provisions similar to those in Section 153 of our Evidence Act] or Section 9 of the Criminal Justice Act 1967 [which contains in Section 9 (2) and (3) some provisions similar to Section 153 of our Evidence Act] it will frequently be not only proper, but also necessary for the orderly presentation of the evidence, for certain statements to be edited. This will occur either because a witness has made more than one statement whose contents should conveniently be reduced into a single comprehensive, statement or where a statement contains inadmissible prejudicial or irrelevant material. Editing of statements should in all circumstances be done by a Crown Prosecutor (or by a legal representative, if any, of the prosecutor if the case is not being conducted by the Crown Prosecution Service) and not by a Police Officer. (My emphasis)

Composite Statements

24.2 A composite statement giving the combined effect of two or more earlier statements or settled by a person referred to in paragraph above must be prepared in compliance with the requirements of Section 102 of the 1980 Act or Section 9 of the 1967 Act as appropriate and must then be signed by the witness.

- (a) By making copies of the statement in a way which indicates the passages on***

which the prosecution will not rely. This merely indicates that the prosecution will not seek to adduce the evidence so marked. The original signed statement to be tendered to the Court is not marked in anyway. The marking on the copy statement is done by lightly striking out the passages to be edited so that what appears beneath can still be read, or by bracketing, or by a combination of both. It is not permissible to produce a photocopy with the deleted material obliterated, since this would be contrary to the requirement that the defence and the Court should be served with copies of the signed original statement. Whenever the striking out/bracketing method is used, it will assist if the following words appear at the foot of the front is piece or index to any bundle of copy statements to be tender SULL “The prosecution does not propose to adduce evidence of those passages of the attached copy statements which have been struck out and/or bracketed (nor will it seek to do so at the trial unless a notice of further evidence is served)”.

- (b) By obtaining a fresh statement, signed by the witness, which omits the offending material, applying the procedure in paragraph 24.2. (my emphasis)*

24.4 *In most cases where a single statement is to be edited, the striking out/bracketing method will be the more appropriate, but the taking of a fresh statement is preferable in the following circumstances:*

- (a) when a police (or other investigating) officer’s statement contains details of interviews with more suspects than are eventually*

charged, a fresh statement should be prepared and signed omitting all details of interview with those not charged except, in so far as it is relevant, for the bald fact that a certain named person was interviewed at a particular time, date and place.

- (b) When a suspect is interviewed about more offences than are eventually made the subject of committed charges, a fresh statement should be prepared and signed omitting all questions and answers about the uncharged offences unless either they might appropriately be taken into consideration or evidence about those offences is admissible or the charges preferred, such as evidence of system. It may however be desirable to replace the omitted questions and answers with a phrase such as “After referring to some other matters, I then said . . .” so as to make it clear that part of the interview has been omitted.*
- (c) A fresh statement should normally be prepared and signed if the only part of the original on which the prosecution is relying is only a small proportion of the whole; although it remains desirable to use the alternative method if there is reason to believe that the defence might itself wish to rely, in mitigation or for any other purpose, on at least some of those parts which the prosecution does not propose to adduce.*
- (d) When the passages contain material which the prosecution is entitled to withhold from disclosure to the defence. (my emphasis)*

24.5 Prosecutors should also be aware that, where

statements are to be tendered under section 9 of the 1967 Act in the course of summary proceedings, there will be a need to prepare fresh statements excluding inadmissible or prejudicial material rather than using the striking out or bracketing method

24.6 *None of the above principles applies, in respect of committal proceedings to documents which are exhibited (including statements under caution and signed contemporaneous notes). Nor do they apply to oral statements of a defendant which are recorded in the witness statement of interviewing police officers, except in circumstances referred to in paragraph 24.4 (b). All this material should remain in its original state in the committal bundles, any editing being left to prosecuting counsel at the Crown Court (after discussion with defence counsel and, if appropriate, the trial judge).*

24.7 *Whenever a fresh statement is taken from a witness, a copy of the earlier, unedited statement (s) of the witness will be given to the defence in accordance with the Attorney General's guidelines on the disclosure of unused material (Practice Note[1982] 1 All E.R.734) unless there are grounds under paragraph 6 of the guidelines for withholding such disclosure”.*

123. Pursuant to Section 5 of The Criminal Code 2004, in the absence of local statutory provisions concerning the procedure to be followed in criminal proceedings' the Court shall apply the procedure at common law as is appropriate with such modification or adaptation as may be necessary.
124. It seems to me in all the circumstances therefore that the practice in the Consolidated Criminal Practice Direction 2002. (UK) should be applied to witness statements prepared in accordance with Section 153 of the Evidence Act, in order to avoid confusion and time wasting in the trial Court.

Admissibility of Expert Evidence

125. Section 59 of the Evidence Act mirrors section 30 of the Criminal Justice Act 1988 (U.K.). It allows hearsay expert evidence of a fact or opinion to

be given in trials both summary and indictable in the form of a written report or certificate. Section 2 defines “**expert report**” to mean “**a report written by a person dealing wholly or mainly with matters on which he is or would if living be qualified to give expert evidence.**”

125-A. Section 66 of the Act refers to opinions based on specialised knowledge. It states that the opinions of persons who have specialised knowledge based on their training, study or experience, are admissible in evidence where such opinions are wholly or substantially based on that knowledge. There has been some debate as to whether a crime scene officer is an expert witness.

125-B. The Act does not define who is an expert, but if we refer to section 66, I would say that an expert is a person with specialized knowledge based on their training, study or experience. Whether a witness is competent to give evidence as an expert is for the judge to determine. In **R v Bonython** (1984) 38 S.A.S.R. 45 South Australia Supreme Court referred to **Archbold 2004**, para. 10-65), guidelines for determining whether a witness should testify as an expert were formulated by King C.J. who said “**The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This... may be divided into two parts:**

- (a) **whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and**
- (b) **whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be acceptable as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”**

125-C. In determining whether or not to treat the witness as an expert, in my opinion section 65 of the Evidence Act also becomes relevant. It states that the opinion of an ordinary person based on what he/she saw, heard or otherwise noticed about a matter or event is admissible, where evidence of

the opinion is necessary to obtain an adequate account of the persons' perception of the matter or event.

125-D. It is questionable therefore, whether a police officer whose duties and training relate to observing crime scenes and collecting evidence from crime scenes without more, should be deemed to be an expert witness, where his testimony relates only to what he/she saw at or noticed about the crime scene, or did at the crime scene.

125-E. In my view, any opinion that is given by such an officer, is no more than an opinion expressed by a person based on what he saw, heard or otherwise noticed at the crime scene. His opinion can only relate to his perception of the crime scene (see section 65). I do not consider the crime scene officer's mere observations and performance of his duties as a police officer, a subject matter for expert evidence.

125-F. In the event the crime scene officer's evidence relates to his observations of e.g. "**blood spattering**" or "**powder burns on the victim**" at the crime scene, apart from describing what he saw, in my opinion, for him to give opinion evidence as an expert witness about this, the further observations of King C.J in his guidelines are relevant (see paragraph 125B above). He continued – "**An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances to the answers to both the above questions [at paragraph 125 B]. If the witness has made use of new or unfamiliar techniques or technology, the court may require to be satisfied that such techniques or technology have a sufficient scientific basis to render results arrived at by that means part of a field of knowledge which is a proper subject of expert evidence... Where the witness possesses the relevant formal qualifications to express an opinion on the subject, an investigation on the VOIR DIRE of his methods will rarely be permissible on the issue of his qualifications. There may be greater scope for such examination where the alleged qualifications depend upon experience or informal studies. Generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to the competence of the witness to express an opinion....**"

If the qualifications of a witness to give expert evidence are in issue, it may be necessary to hear evidence on the VOIR DIRE in order to make a finding as to those qualifications. If there is an issue as to whether the subject matter upon which the opinion is sought is a proper subject of expert evidence, any disputed facts relevant to the determination of that issue should be resolved by the reception of evidence on the VOIRE DIRE" (per King C. J. in **R V Bonython** (1984) 38 S.A.S.R. 45 at pages 46-48) (My Emphasis).

- 125-G. Before a court can assess the value of an opinion it must know the facts upon which it is based. So if an expert has been misinformed, or has taken irrelevant facts into consideration, or has failed to consider relevant ones, his opinion is likely to be valueless. An expert witness should therefore be asked to state the facts upon which his opinion is based: (Archbold 2004 para 10-66).
- 125-H. It appears to me that section 67 of the Act permits an expert to give his opinion on what has been called “**the ultimate issue.**” It provides that evidence of an opinion is not inadmissible by reason only that it is about a fact in issue or a matter of common knowledge.
- 125-I. Section 151 of the Act appears to relate to the Handwriting Expert’s Evidence, and is identical to the Section 8 provision in the Criminal Procedure Act 1865 (U.K.). It provides – “**In any proceedings, comparison of disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.**”
- 125-J. Section 89 of the Act permits a defendant to adduce evidence of an opinion about his co-defendant from an expert witness who has specialized knowledge based on the witnesses’ training, study or experience. The types of experts that probably would be called to testify in such circumstances may be psychologists, guidance counselors, and medical practitioners in my view. Section 89 (2) allows the other parties to the legal proceedings to adduce evidence in rebuttal of such opinion.
126. Pursuant to section 59 of the Evidence Act and section 46 of the Firearms Act No. 11 of 2001, a ballistics certificate signed by a ballistics expert may be admissible as evidence with the leave of the court without calling the ballistics expert to testify.
- 126-A. A ballistics expert as defined by section 46 (5) of Act No. 11 of 2001 means “**a person knowledgeable in the science of missiles and firearms who is recognized or certified by the Commissioner by notice published in the Gazette.**”
127. Pursuant to section 59 of the Evidence Act and section 39 of the Drugs (Prevention of Misuse) Act Cap. 3.02 of the Revised Laws of St. Lucia (2001), a certificate of an analyst purporting to be signed by him/her stating that he/she analysed or examined a substance, and stating the result of such analysis or examination, may be admissible in evidence with the leave of the Court, if it is proved by other evidence, that the seals or other

fastenings of the container of the substance were intact at the time the container was delivered to the analyst, upon proof as to the signature or qualifications of the analyst, without the analyst having to testify.

128. Pursuant to section 59 and 152 of the Evidence Act and section 3 of the Medical Evidence Act Cap. 2.12 of the Revised Laws of St. Lucia 2001, a registered medical practitioner's report or certificate, from such an expert employed to the Government of St. Lucia, or Government of a colony, territory or other Commonwealth country or state, on any injuries received by a virtual complainant may be admissible in criminal proceedings with the leave of the Court, without the expert having to testify.
129. Section 3 of Cap. 2.12 and section 152 of the Evidence Act lay down the criteria for a such a report or certificate to be admissible:
- (i) **The report/certificate must have been written on the same day of, or on the day following the medical examination of the virtual complainant by the Medical Practitioner. (Sec 3 of Cap 2.12)**
 - (ii) **The report/certificate must purport to be signed by the medical practitioner who examined the virtual complainant and contain a declaration by such expert that the facts set out therein are true to the best of his/her knowledge and belief, and that the opinions expressed therein are true to the best of his or her knowledge and belief, and that such opinions are honestly held by him/her.**
 - (iii) **The medical certificate/report should state –**
 - (a) **The medical condition of the virtual complainant;**
 - (b) **The nature and extent of any injuries to that person, including the probable effects of the injury;**
 - (c) **The cause of the medical condition or injuries;**
 - (d) **The nature of the instrument, if any, with which any of the injuries were caused;**
 - (e) **The degree of force used;**
 - (f) **Any other significant aspects of the injuries. (section 152 (i) (a) of the Evidence Act)**

- 129-A. It is obvious from these provisions that a new format for the medical certificate now needs to be drafted in order to comply with the law.
130. Where the prosecution intends to tender a medical certificate/report, or a ballistics report, or an analyst's certificate in evidence without calling the expert to testify, it appears to me that the prosecutor must do the following things -
- (i) In the case of the medical certificate/report, not less than 9 clear days before the hearing at which the document is to be tendered, a copy of the document must be served on the defendant with notice as to the reasons why it is proposed not to call the expert to testify.
 - (ii) In the case of the ballistics report, not less than 16 days before the date of hearing at which the report is to be tendered, a written notice of the prosecutor's intention along with a copy of the report must be served on the defendant.
 - (iii) In the case of the Analyst's certificate, not less than 9 clear days before the date of hearing at which the report is to be tendered, a written notice of the prosecutor's intention together with a copy of the certificate is to be served on the defendant.
131. By virtue of section 59 (4) of the Evidence Act, in considering whether to grant leave to the prosecution for them to tender in evidence such expert reports as evidence of any fact or opinion therein, without the Expert testifying, the Court shall have regard to the contents of the report, the reasons why it is proposed that the person making the report shall not testify, any controversy in the report to be clarified, the probability of prejudice and unfairness to the defendant by admitting or excluding the report, and any other relevant circumstances.
132. Section 152 (2) states that the court may of its own motion, or on an application of any party, require the medical practitioner who prepared the medical certificate or report to attend before the court and testify.
133. Section 46 (3) of the Firearms Act 2001 states that a defendant within 7 days of receiving notice with a copy of the ballistics certificate, may object to the ballistics certificate being admitted in evidence, and request that the expert attend court and testify. Section 46 (4) states that the court, may within 3 days after receiving such a request, order the ballistics expert to attend and testify, where the court is satisfied that the request is

justifiable. However, the costs to be incurred for the court attendance of the ballistics expert should be paid by the defendant.

134. Section 39 (4) of the Drugs (Prevention of Misuse) Act states that the defendant may make an application for the Analyst to attend and testify, and unless the Judge/Magistrate orders otherwise, the costs of the Analyst's court attendance is to be paid by the defendant.

Business Tags, labels and manufacturer's Documents Admissible

135. Section 60 of the Evidence Act now permits documents attached to an object and writings placed on a document or object in the course of business, to be admitted in evidence and used by a party to the proceedings. **“Business”** has been defined by section 2 to mean **“any business, profession, trade, calling or undertaking of any kind carried on in Saint Lucia or elsewhere, whether for profit or otherwise including any activity or operation carried on or performed in Saint Lucia or elsewhere by (a) any government; (b) any department, branch, board, commission or agency of any government; (c) any court or other tribunal; or (d) another body or authority performing functions of government.”**

Faxed Documents Admissible To Prove Certain Representations

136. Section 61 permits documents produced by a telecommunications facility or received from an external telecommunications carrier, which record messages transmitted by telecommunications service to be admitted in evidence to prove -
- (a) The identity of the person from whom or on whose behalf the message was sent;
 - (b) The date on which, the time at which or the place from which the message was sent; or
 - (c) The identity of the person to whom the message was addressed.

Banker's Records Admissible

137. Pursuant to section 125 of the Evidence Act, a copy of an entry in the book or records of a financial institution is admissible as proof of the entry, matters, transaction and accounts recorded therein in the absence of evidence to the contrary, where it is proven that:

- (a) **The book or record at the time of making entry was one of the ordinary books or records of the financial institutions;**
- (b) **The entry was made in the usual and ordinary course of business;**
- (c) **The book or record is in the custody or control of the financial institution; and**
- (d) **The copy is a true copy thereof.**

138. However, no banker or officer of a financial institution is in any legal proceedings to which the financial institution is not a party, compellable to produce bank records or appear as a witness to prove their contents, unless by order of the court made for special cause. The “**court**” is defined by section 2 of the Act to mean “**the court, tribunal, judge, magistrate, arbitrator, body or person before whom or which proceedings are held or taken.**”
139. The Act does not define “**special cause.**” However, an Alberta Queen’s Bench Court has held that “**special cause**” may include use as exculpatory evidence in a criminal trial to which the bank is neither an accused nor a complainant. (See **Phipson (2005)** para 32 – 111 citing **Rv Moisan** (2001) 141 C.C.C. (3d) 213, Alberta Q.B. It was held in this case that a bank’s video surveillance footage was a “**copy of any entry in any book or record kept in a financial institution**” within sections 29 and 30 of the Canada Evidence Act R.S.C. (1985).
140. I am of the view that “**special cause**” may also exist in cases relating to tracing money laundering proceeds and drug trafficking proceeds.

Investigation and disclosure of Bank Records

141. Section 125 (10) of the Evidence Act recognizes that a police investigator can search the premises of a financial institution under the authority of a warrant. However sections 125 (8) and (9) of the Act provide a less intrusive way for the police investigator or any party to legal proceedings to obtain relevant information from a financial institution for the purposes of such legal proceedings.

142. On an application to the magistrate or judge before whom the legal proceedings are being heard, the court may order that the applicant party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceedings: (Section 125 (8)). It is evident from section 125 (8) that the legal proceedings must be in existence at the time the application is made (see paragraphs 146 to 149 below).
143. Section 125 (9) makes it clear that the application cannot be **ex parte** where it is the defendant's account that is the subject of the application, since this provision requires the applicant to serve notice personally on the person whose account is to be inspected at least 4 days prior to the hearing (i.e 2 clear days). Where the account holder cannot be notified personally, the court will grant leave for service of the notice by addressing it to the financial institution.
144. In the absence of local statutory guidelines in dealing with such applications, the advice of Lord Widgery in **Williams v Summerfield** (1992) 2QB, 512 should be heeded. He opined – **"I think that in criminal proceedings, justices should warn themselves of the importance of the steps which they are taking in making an order under section 7 [the equivalent of section 125 (8) of our Evidence Act No. 5 of 2002]; should always recognize the care with which the jurisdiction should be exercised; should take into account among other things whether there is other evidence in the possession of the prosecutor to support the charge; or whether the application ...is a fishing expedition in the hope of finding some material upon which the charge can be hung. If justices approach these applications with a due sense of responsibility and a recognition of the importance of that which they are being asked to do, if they are always alive to the requirements of not making the order extend beyond the true purposes of the charge before them, and if in consequence they limit the period of the disclosure of the bank account to a period which is strictly relevant to the charge before them; and if, finally, they recognize the importance of considering whether there is other evidence in the possession of the prosecution before they provide the bank account as perhaps the only evidence; if they observe those precautions and pay heed to those warnings, they will, I feel, in fact produce a situation in which the section is used properly, wisely and in support of the interests of justice and will not allow it to be used as an instrument of oppression which on its face it might very well be."** (My emphasis)
145. Police investigators, prosecutors, and magistrates must bear in mind that the High Court exercising original jurisdiction as well as the trial

judge in an indictable offence, has the authority to pass judgment on the validity of orders or warrants which authorize the collection of evidence. Where a search warrant is authorized, or an evidence gathering order is made in circumstance of knowing and conscious breach of the constitutional rights of the defendant, any evidence gathered on the basis of it may, in the absence of established exceptional circumstances, be excluded by a trial judge during the trial of an indictable offence: (**Blanchfield v Hartnett** [2002] I.E.S.C. 39) (see also section 116 of the Evidence Act)

- 145-A. It would also seem from the authority of **Listowel Urban District Council v Mc Donagh** [1968] IR. 312 that in the Magistrate's Court where the legal proceedings involve a summary criminal offence, a defendant can challenge the validity of a bankers' books order by way of a collateral challenge as part of his defence. In this case the defendant was convicted in the District Court for breach of a local authority prohibition on public health grounds concerning the erection of temporary dwellings. On appeal to the Circuit Court, the Circuit Court stated a case to the Supreme Court relating to the defendant's challenge to the validity of the prohibition order and that Court's jurisdiction to entertain such a challenge.
- 145-B. The Supreme Court stated and opined per O'Dalaigh C.J. at page 318: **"It was suggested on the complainant's behalf that the defendant's challenge could not be made in the criminal matter, but should be by way of certiorari: It cannot be doubted that certiorari would lie; nor could there be any question of the right of the defendant to litigate the matter by action in the High Court. But what is there to limit the defendant to these means of redress and preclude him from raising the matter as part of his defence. The matter arises directly out of the prosecution and I see no reason in principle why the tribunal which is trying the question of the contravention should not also try the preliminary issue of the validity of the order alleged to have been contravened. No question of inconvenience can arise here, such as might be suggested if a prosecution for a contravention of the order could be brought on indictment before a jury."**
146. In **Blanchfield v Hornett** [2002] I.E.S.C. 39, this case involved a number of orders that were obtained by the investigating officer pursuant to section 7 of the Bankers' Books Evidence Acts in Ireland relating to the appellant's bank accounts. The first of such orders was applied for and obtained before the appellant was charged for forging a cheque. Other charges were laid against him after the other bankers' books orders had been made. All of the applications for these orders

were entitled as being made in proceedings between the D.P.P. and appellant.

147. After the appellant was arraigned, but before the fixed trial date, he applied to the High Court and obtained leave to apply for judicial review for an order of certiorari to quash the first bankers' books order and other orders. He also sought an order of prohibition, prohibiting the DPP from proceeding with the trial, because of culpable delay by the authorities which "**must be presumed to be prejudicial to**" the appellant.
148. The grounds of the application for judicial review were – (1) **The Orders did not cite the section on which they were based and thus were bad on their face.** (2) **They were too broad.** (3) **There was no evidence that the District Judge gave proper consideration to the matters in issue.** (4) **Some or all of them were made either when there was no proceeding in existence or were broader than any existing proceeding or charge.** (5) **The orders were made without notice to the appellant.** (6) **In so far as they may have been made by virtue of the amendment to the Banker' Books Evidence Acts by section 131 of the Central Bank Act 1989, the application was not made by a "member of the Garda Siochàna not below the rank of Superintendent" as required by that provision.**
149. Counsel for respondent, at the hearing of the application for judicial review, conceded that there were no legal proceedings existing in the District Court until a charge was laid, and that consequently, nineteen of these banker's books orders were made without jurisdiction. It was argued by Counsel for respondent, and accepted by O' Neil J. in the High Court, that the orders, having been made and acted upon, were now spent. Further, since the trial judge in the criminal court would have jurisdiction to rule on the validity of the orders where necessary for the purpose of the trial, it would be futile to quash the orders. Furthermore, the authorities showed that the courts did not favour the interruption of criminal proceedings for the purpose of facilitating the taking of judicial review proceedings: (**DPP v Special Criminal Court** [1999] IR, 60).
150. O'Neil J. also accepted the submission that the trial court must respect constitutional rights, and that evidence obtained unlawfully though without any infringement of any constitutional right is admissible save where the trial judge exercises his discretion to exclude it. He concluded that the trial judge would have ample jurisdiction to deal with all questions related to the legality of the bankers' books orders, and that the existing delay had not prejudiced the appellant's right to a fair trial.

151. On appeal, Fennelley J at paragraphs 44 to 57 of his Judgment made observations and conclusions some of which are worthy of reproduction for future guidance as to how a High Court Judge or a Magistrate may deal with submissions relating to the validity of such orders. Fennelley J said – **“44... On any view, the argument for the appellant is a far-reaching one. It seeks to establish procedural exclusivity for judicial review even in the case of criminal trials. It says that the Circuit Court could not consider the validity of the orders. Where it appears that there are well – established cases in which alternative avenues may be pursued; the Court cannot close its eyes to their existence ...**
- “46... The overwhelming responsibility reposed by the law and the constitution on the trial judge is to ensure the fairness of trial. An exceptionally important aspect of this function is to adjudicate on the evidence which should be placed before the jury. It is, in my view inherent in that function that the trial judge be clothed with the power to judge the validity of legal procedures taken in order to extract, collect or gather evidence ...**
- “55... It is sufficient to say that, in a case such as the present, the Circuit Court would have the power to adjudicate on the validity of the orders made under the Bankers’ Books Evidence Acts to the extent that it considers it necessary for the propose of ruling on whether to admit evidence.**
- “56 ... It is not necessary for a party placed as the appellant is to apply by way of judicial review in advance of his trial to have the relevant orders quashed. The need for the court of trial to have any jurisdiction appropriate for the disposal of such problems is underlined by the long recognized undesirability of interrupting criminal trials to enable judicial review applications to be made”**
152. The Court quashed the bankers’ books orders though they were spent, and dismissed the appeal.
153. In Phipson at para. 32-113 it is pointed out that **“If an order is made, an undertaking is implied not to use the document [obtained from the financial institution] otherwise than for the purpose of the action in which they were discovered.**
154. The Evidence Act has no provision that the bankers’ books orders should be served on the financial institutions. In England there is a provision in the Bankers’ Evidence Act 1874 for such an order to be served upon the bank 3 clear days exclusive of Sundays and bank

holidays before it is obeyed, unless otherwise directed by the order. In my view therefore, it is prudent for the order to address the service of the order on the financial institution by a specific direction.

Proof of False Representation by Drawer of Cheque

155. To prove that the drawer of a cheque had no account at the financial institution on which the cheque is drawn, the prosecutor is now permitted to adduce such evidence by tendering in evidence an affidavit given by the manager or accountant of the financial institution, stating the official character of the deponent and the following evidence –
- a. that he/she has made a careful examination and search of the books and records for the purpose of ascertaining whether or not the drawer has an account with the financial institution or branch; and**
 - b. that he/she has been unable to find such an account.**
156. There are other provisions in the Act which deal with the proof of contents of documents – SEE section 122. Facilitating the proof of documents or things produced wholly or partly by a device or process – SEE section 124, and other documents not discussed in this paper.

Admissions and Confessions

157. Sections 69 to 73, 116, 134, and 136 (1) (c) and (d) (ii) of the Evidence Act relate to the admissibility of written and oral admissions and confessions of a defendant. It is necessary to consider the other local statutory provisions which relate to the admissibility of such evidence before discussing the provisions in the Evidence Act.
158. Pursuant to sections 3 (2), (3), (4) and 8 (2) (b) of the Constitution of St. Lucia, and sections 584 and 589 of the Criminal Code 2004 and the repealed Criminal Code 1992, sections 693 to 695 and 698; a police officer who arrests or detains a suspected person is required to do the following mandatory things in a timely manner –
- a. Inform the suspected person in a language that he understands, within 24 hours of his arrest or detention, the reason for his arrest or detention.**

- b. Provide reasonable facilities for the suspected persons to privately communicate and consult with a lawyer of his own choice within 24 hours of his arrest or detention.**
- c. Where the suspected person is a minor [section 7 of the Criminal Code 1992 (now repealed) defines a minor as a person below 16 years; section 6 of the Criminal Code 2004 defines a minor as a person below 12 years] he must be afforded reasonable facilities for private communication and consultation with his parents or guardian within 24 hours of his arrest or detention.**
- d. Upon his arrest or detention where he is not released, the suspected person must be brought before the court without delay and within 72 hours of his arrest or detention.**
- e. Where the arrested or detained persons is suspected of having committed or being about to commit an offence he must not be held in custody in connection with those proceedings or that offence after 72 hours unless the court orders his further detention.**
- f. Upon being charged with a criminal offence, the police officer must inform the defendant as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence charged.**
- g. On arresting a person, before he is taken to court, the police officer should at the person's request, have instruction sent to any lawyer, and arrange for the lawyer to privately interview the arrested person, subject to any necessary surveillance.**
- h. Prior to being questioned, and arrested person must be cautioned in terms of being informed that he has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence; and**

informed of his rights to communicate with and be interviewed by a lawyer; and of his right to be questioned in the presence of a lawyer unless he voluntarily waives the right to counsel; and also of his right to retain a lawyer of his choice or to have a lawyer assigned to him if he is charged with murder. It is important to note, that the caution that a police officer must give to the suspect prior to questioning him is no longer that in terms of the PACE code Practice. It must be given in terms of section 584 (2) (a) of the Criminal Code in light of section 76 (i) of the Evidence Act.

159. Section 5 of the Constitution states that no person shall be subjected to torture or to inhuman or degrading punishment or treatment.
160. It is against this background of the local statutory law which existed prior to the Evidence Act, that the provisions in the Evidence Act relating to the admissibility of admissions and confessions and the courts discretion to exclude such evidence; will now be considered.
161. Section 72 (2) of the Act deals with Admissions arising from police interrogation of suspects. It provides further requirements for an **“investigating official”** to comply with, where a person who was suspected, or ought reasonably to have been suspected of having committed an offence is being subjected to official questioning by the **“investigating official”**.
162. Section 2 defines **“investigating official”** to mean **“a police officer or a person whose functions or duties include functions or duties in respect of the prevention or investigation of offences”**. Based on this definition all police officers asking a suspect questions in connection with the commission of the offence, are investigating officials regardless of whether they are the investigating officer assigned to the case. **“Official questioning”** means **“questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.”**
163. Though section 2 of the Act defines **“admission”** as **“a previous representation made by a person who is or becomes a party to proceedings being a representation that is adverse to the person’s interest in the outcome of the proceedings,”** section 72 does not include a virtual complainant who in my opinion could fall under the definition; and this is because section 72 (1) states that the requirement

relates only to a defendant who was being questioned in connection with the offence.

164. Section 72 (2) requires that during the official questioning of a suspected person who may be a defendant –

- a. An attorney-at-law or a person who was chosen by the suspected person and who must not be a police officer, should be present.**
- b. The questions asked by the investigating officer and the answers given or the responses made by the suspected person/defendant must be documented and the document must be signed, initialed or otherwise marked by the suspected person/defendant and by the attorney-at-law or other person chosen by the suspected person/defendant, acknowledging that the document is a true record of the questions, representations or responses.**
- c. The course of official questioning should be tape recorded or video recorded where it is reasonably practicable to do so.**
- d. Where the document is prepared, signed, initialed or otherwise marked as a true record, the police officer must serve a copy of this document on the suspected person/defendant or his lawyer within 7 days of the preparation of the document.**
- e. Where the course of the official questioning is audio recorded only or video recorded only, the police officer must serve a copy of the audio recording or video recording on the suspected person/defendant or his lawyer within 7 days after making the recordings without charge.**
- f. Where both an audio recording and video recording were made of the course of official questioning, the police officer must serve a copy of the audio recording on the suspected person/defendant or his lawyer within 7 days of making the recording without charge. The police officer must also notify the suspected**

person/defendant that an opportunity will be provided on request for viewing the video recording.

- g. If a transcript of the tape recording is prepared, a copy of it must be served on the suspected person/defendant or his lawyer within 7 days after the preparation of the transcript without charge.**

165. Section 72 (2) (c) relates to interviews with suspected persons/defendants. The word “**interview**” is not defined under the Act. However based on the ordinary dictionary meaning of the word “**interview**” I am of the opinion that even one question asked by any police officer of a suspected person/defendant about the commission or possible commission of an offence may be capable of being an interview. Where such an interview takes place in circumstances other than those stated at paragraph 164 (a) (b) and (c) above, the following requirements should be complied with by the police officer interviewing the person suspected –

- (i) At the time of the interview of a suspected person/defendant, or as soon as practicable afterwards, the police officer must make a written record in English or in the language used by the suspected person/defendant in the interview, of the things the investigating officer said to the suspected person/defendant, and the things the suspected person/defendant said in the course of the interview**
- (ii) A copy of this record must be given to the suspected person/defendant and the proceedings thereafter concerning the reading back of the written record to him/her must be tape recorded or video recorded as soon as practicable after the written record has been made.**
- (iii) Before the reading back of the written record begins, the police officer must explain to the suspected person/defendant in terms of the Second Schedule to the Act as follows –**

“When you were interviewed by _____ I/we made a record in writing of what you said, and what we said to you in the interview. I/we made the record at the time of the interview/as soon as practicable after the interview.

(delete whichever is not applicable)

**It is in English/the language that you used in the
(delete whichever is not applicable)
interview.**

I/we will give you a copy. I am now going to read it to you in the _____ language that you used in the interview. You can interrupt the reading at any time if you think there is something wrong with the record. At the end of the reading you can tell me/us about anything else you think is wrong with the record, as well as the things you mentioned during the reading.

I/we will make a tape recording of reading the record and everything you say, or I/we say to you, during the reading and at the end.

I/we will give you a copy of that tape recording and, if a transcript is made, a copy of that transcript.”

- (iv) During the reading of the written record, the suspected person/defendant must be given the opportunity to interrupt the reading at any time to draw attention to any error, or omission in the record. At the end of the reading, the suspected person/defendant must state whether he/she is claiming that there are omissions or errors in the written record in addition to those pointed out in the course of the reading.**
- (v) The entire course of the reading back of the written record to the suspected person/defendant must be tape recorded**
- (vi) Where the reading back of a written record, of an interview made as soon as practicable after the interview with a suspected person/defendant is audio recorded only, or video recorded only by the police officer, he/she must serve a copy of that audio recording or video recording on the suspected person/defendant or his lawyer within 7 days after making the audio or video recording without charge.**
- (vii) Where both an audio recording and video recording were made of the reading back of the written record of the interview, the police officer must serve a copy of the audio recording on the suspected person/defendant or his lawyer within 7 days of making the audio recording**

without charge. The police officer must also notify the suspected person/defendant that an opportunity will be provided on request for viewing the video recording.

(viii) If a transcript of the tape recording is prepared, a copy of it must be served on the suspected person/defendant or his lawyer within 7 days after the preparation of the transcript without charge.

166. In the absence of local statutory guidelines for the audio or video recording of interviews with and/or course of official questioning of a suspected person/defendant by an investigating officer, pursuant to section 5 of the Criminal Code No. 9 of 2004, the procedure the police should apply is the common law procedure. But there is no common law procedure dealing with this, only statutory procedure under PACE 1984 (U.K.)
167. It seems to me, that though since January 2004 when the new Criminal Code came into operation, the U.K. Statutory provisions under PACE 1984 and other U.K. Statutory provisions should no longer be applied in criminal proceedings in St. Lucia, and though section 168 (b) of the Evidence Act provides for the Minister of Justice to make codes of practice respecting the detention, treatment questioning and identification of persons by police officers, until those codes of practice are made there is a void to be filled where the U.K. Criminal procedure resides in statute and not in common law. Consequently, the courts in my view may still wish to seek some guidance from Codes of Practice E and F under PACE Act 1984 (U.K.) relating to police guidelines for the tape recording and video recording of interviews with suspects – Appendix A-180. I would therefore suggest that prosecutors and police officers familiarize themselves with the relevant provisions in those Codes, bearing in mind the differences in the English law and our law, particularly relating to cautions – pursuant to section 76 (i) of the Evidence Act and section 584 (2) (a) of the Criminal Code 2004 (see **Archbold 1997** paras 15-227 to 15-240).
168. It is quite clear from section 73 (1) of the Act that the unsigned record of the interview under section 72 (2) (c) or the unsigned documentation of the official questioning under section 72 (2) (b) are not admissible in criminal proceedings as evidence of an admission by the defendant. It appears however, by virtue of section 73 (2) that the tape recording and a transcript of the tape recording may be admitted in evidence.
169. **“Where an interview is tape-recorded, a note or summary of the interview will be treated in the same way as unsigned notes of**

interview if the tape is not played to the jury. If the tape is played in court, it may be proved and explained by a witness who was present at the interview. It is a matter for the judge's discretion whether the jury are provided with a transcript of the recording; the evidence is the tape-recording and the transcript is simply an administrative convenience. The practice now is for a summary or, if necessary, a transcript of an interview to be used in a trial and for the tape-recording only to be played if that is essential. It is usual for the jury to be provided with a copy of the summary or transcript, even if the tape – recording is not played, since if the tape – recording is not played there should be no dispute about the summary or transcript. The reason for not playing a tape-recording unless it is essential is to avoid the jury having to listen to lengthy and repetitious material. There may be inadmissible material on the recording, making it necessary in any event to play only parts of the recording, a process which becomes difficult or even impossible if inadmissible material is interwoven with admissible material”: (Phipson on Evidence (2005) para 35-21)

170. In the event the suspected person/defendant makes an admission during official questioning or interview, the failure to tape record the course of official questioning, or to carry out such questioning in the presence of a lawyer acting for the suspected person/defendant, or where the person present during the official questioning was not a person chosen by the suspected person/defendant, or failure to tape record the reading of the written record of an interview or to read the written record of the interview at all or failure to make a written record of the interview in a timely manner, or to make the written record of the interview at all, all of these breaches of the law may not be fatal to the admissibility of the evidence relating to the defendant's admission.
171. Section 72 (5) of the Act gives the court the discretion to admit such evidence despite such breaches if there is an explanation giving the reason for the non-compliance, and depending on the nature of the non-compliance, whether there is insufficient evidence, and any other relevant matters, the court may admit such evidence where the court is satisfied that it was not practicable to comply with the provision in the law that was breached; or that in the special circumstance of the case, the admission of such evidence would not be contrary to the interests of justice. However, there are further requirements to be met before such evidence can be admissible.
172. Section 70 of the Act states that – **“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 admission, 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.” It is my considered opinion that this provision can also apply to a virtual complaint given the definition of the word “**admission**” under the Act.

173. The Act does not define what is, “oppressive, inhuman or degrading conduct.” Such conduct is a violation of a person’s constitutional right under section 5 of the Constitution. In **Harding v Superintendent of Prisons and the Attorney General** (St. Lucia Civil Appeal No. 13 of 2000 at page 10), our Court of Appeal held that treatment which was not deliberate, and not intended to cause great pain and suffering, or which does not result in the deprivation of the necessities of life, does not amount to cruel and unusual treatment under section 5 of the Constitution.
174. There are also useful authorities dealing with “oppression” under the common law in my view. In **R v Priestley** (1965) 57 CR. App. R. Sachs J considered the meaning of the word oppression to import **“something which tends to sap and has sapped free will whether or not there is oppression in an individual case depends upon many elements They include such things as 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 the world may turn out not to be oppressive when one finds that the accused person is of tough character and an experienced man of the world”**
175. In **R v Prager** (1972) 56 CR. APP R. 151 the Court of Appeal adopted and applied this definition in **R v Priestly** (supra), and also the following statement of Lord Mac Dermott: **“...oppressive questioning is 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”**.
176. In **R V Hudson** (1981) 72 CR. App. R. 163. C.A. the unlawful detention of a defendant 58 years old with good character, for 5 days without any charge being laid during the interview, or at the end of the interview, and without taking him before the Magistrates’ Court within 48 hours as required by the Magistrate’s Courts Act 1952, and questioning him for a total of 25 hours, asking him 700 questions, was held by the Court of Appeal to have warranted the exclusion of an

admission that he made in a caution statement, admitting corruption, while he was unlawfully detained. He was charged 12 months after his release for corruption and the prosecutor relied on this admission, and he had been convicted. The Court of Appeal held that the circumstances of his detention coupled with some details in his written admission which did not accord with facts, would have given the word “**oppression**” a completely false meaning.

177. However in **R v Paris, Abdullah and Miller** (1993) 97 CR. App. R. 99, tape recordings revealed that one defendant had been, in the view of the Court of Appeal, bullied and tormented during 13 hours of interviews in which the police questioned him and shouted at him what they wanted him to say. After at least 300 denials, the defendant made some equivocal admissions in what was otherwise a weak case against him. This extremely hostile and intimidating questioning was found to be oppression.
178. Judicial statements in some of the more recent authorities emphasize that the word “**oppression**” is to be given its ordinary dictionary meaning. So based on the Oxford English Dictionary’s third meaning of the word “**oppression**” “oppressive conduct” within the meaning of section 70 of our Evidence Act means conduct involving “**exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, inferiors....**” In Collins English Dictionary “**oppressive**” is defined as “**cruel, harsh, or tyrannical, uncomfortable or depressing.**” In light of these meanings, it is not difficult to envisage that non compliance with the requirements of the law listed at paragraph 158 above, could result in a Court finding that this was oppressive conduct depending on the nature and degree of non compliance.
179. The words “**towards some other person**” in the provision is obviously very wide. The judicial statements in **R v Middleton** [1974] 3 All.E.R. 335 C.A. emphasize that there is no authority for the proposition that an inducement or threat sufficient to render a confession inadmissible must impinge on the defendant, a member of his family or an intimate friend; an inducement or threat affecting even a stranger may render the confession inadmissible. The more remote that person is from the defendant or close circle of the defendant the more difficult it may be to establish that the confession was improperly obtained; but that is a consideration which goes to the weight of the evidence that a threat was made.
- 179-A. In adducing evidence of an admission by the defendant, the prosecution is permitted to lead evidence of a previous representation made out of court at the time when the admission was made or shortly

before or shortly after the admission was made where that previous representation is vital to understanding the admission: (see section 69 (1))

- 179-B. Section 69 (2) of the Act, is not clear to me, but it seems to be saying that a defendant's admission is evidence only against the defendant who made the admission and it forms part of the case for the party who adduces such evidence.
- 179-C. Section 75 of the Act seems to require the court to accept that a previous representation was made by a particular person, where it is reasonably open to make such a finding, in cases where the court has to determine whether it will admit such a previous representation into evidence.
- 179-D. It is obvious from the wording of sections 70 and 72 and pursuant to section 134 of the Act that the prosecution must prove on a balance of probability that an admission is admissible.
- 179-E. Once the prosecution discharges its burden of proof, in the presence of the jury, where there is noncompliance with the statutory provisions in sections 72 (2) (b) and (c) and 72 (4) in obtaining the defendant's admission, the judge must inform the jury and give them a warning.
- 179-F. Section 72 (7) requires the judge to warn the jury about the non-compliance. Sections 136 (1) (d) (ii) and (2) state that where there is official questioning of a defendant which was recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant, unless there are good reasons for not doing so, the judge must **“(a) warn the jury that the evidence may be unreliable; (b) inform the jury of matters that may cause it to be unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it”**.

Confessions

180. Section 2 defines “**confession**” to mean “**an admission of guilt by a person charged with a criminal offence**”.
181. It seems to me that section 71 (2) has now brought a new test to the law on admissibility of confessions for St. Lucia, since it appears that the test is no longer whether or not the confession was voluntarily given but it is now – whether or not “**the circumstances in which the**

confession was made were such as to make it unlikely that the truth of the confession was adversely affected.”

182. The application of the test is evidently in 2 stages –
- (i) The court must consider the circumstances in which the confession was made; and
 - (ii) The probability or improbability that such circumstances did adversely affect the truth of the confession.
183. Section 134 of the Act requires the prosecution to prove on a balance of probability (unlike the English provision in PACE 1984 (UK) which requires proof beyond a reasonable doubt) that the circumstance in which the confession was made did not adversely affect the truth of the confession.
184. The matters which the court must consider in determining whether or not the confession is admissible are stated in section 71 (4) of the Act. The court must consider **(a) the relevant condition or characteristic of the defendant, including his/her age, personality, education and his/her mental intellectual and physical ability or disability. (b) if the confession was made in response to questions asked by a police officer, the court must consider the nature of such questions, the manner in which these questions were put to the defendant, and the nature of any threat, promise or representation made to the defendant by any police office during the course of questioning the defendant.**

It has also been held in older authorities based on the common law that the following types of statements to suspected persons/defendants by police officers during interview or questioning may result in the exclusion of their confessions at their trial –

1. **“It will be better for you if you confess” or “It will be worse for you if you do not confess.”**
2. **“If you do not give more satisfactory account I will take you before the Magistrate.”**
3. **“If you confess there will be no prosecution.”**
4. **“Tell me where the things are and I will be favourable to you”**
5. **“You had better tell all you know”**

6. **“You had better tell where you got that property”**
7. **You had better split and not suffer for all of them”**
8. **“I should be obliged to you if you would tell us what you know about it, if you will not, of course we can do nothing”**
9. **It will be best for you if you tell me how it was transacted”**
10. **It might be better for you to tell the truth and not a lie”**

185. It has also been held that there is nothing improper in saying to the defendant –

1. **“Tell the truth”**
2. **“Be sure to tell the truth”**
3. **“Be a good girl and tell the truth”**
4. **“Don’t run your soul into more sin but tell the truth.”**

186. It is unlikely now that these statements by police officers in paragraph 184 above would by themselves result in the exclusion of a confession within the context of section 71 (2) of the Act, since in my opinion, the court now has to consider the other factors stated in section 71 (4), which may lead to the confession being admissible.

Re Exculpatory Voluntary Caution Statement

187. Section 2 of the new Evidence Act defines an admission to be a previous statement made by the defendant, which is adverse i.e. against the defendant’s interest OR the previous statement is a confession.

188. Section 52 (4) of the Act states that if the previous statement tends to damage the reputation of the defendant, or shows that he committed an offence, then that statement is against his interest.

189. A voluntary statement in which the defendant **“completely”** denies the charge is not a confession, since the defendant has not admitted that he committed any offence.

190. Such a voluntary statement is not an admission since he has made no statement which is against his interest.
191. Such a voluntary statement is not admissible as evidence of the truth of its content in criminal proceedings since pursuant to section 55 (3) and (5) it is an out of Court statement made to a person in authority by the defendant in the course of criminal investigations.
192. Such a statement though admissible has little or no evidential value for the prosecution's case. It certainly is not evidence under the Evidence Act that what is stated in it is true.
193. However a prosecutor may use it in cross examining the defendant who testifies, or the defendant's witness, to establish contradictions in the defendants' version of events. Until it is being used in cross examination of a defendant who is calling no witnesses, in my opinion there is no need for a prosecutor to tender it in evidence as part of the prosecution's case. The defendant or his counsel may tender such a voluntary statement in evidence as part of their case.

Improperly obtained Evidence

194. Section 116 of the Evidence Act deals with matters which come to light as a result of contravening the law, or as a result of an excluded confession. At common law, the method by which evidence is obtained is strictly irrelevant. At common law evidence improperly obtained is admissible: **Kuruma v R (1955). 1A11 E.R. 236.**
- At common law evidence obtained as a result of an inadmissible confession must be fully and satisfactorily proved by the prosecution without referring to any part of the excluded confession from which such evidence may have been derived: **R v Warwickshell (1783) Leach 263;** and the only exception to this rule is where the account given by the defendant in his testimony is different from the account in his excluded confession, which allows the prosecution to use the excluded confession to challenge the account in his testimony: **Blackstone's Criminal Practice 2005 para F17.39.**
195. Section 116 (1) of the Act has now modified this common law where it states that improperly obtained evidence or evidence obtained in contravention of a law or as a result of impropriety shall not be admitted in proceedings unless the probative value of the evidence outweighs the prejudicial effect.
196. Section 116 (2) speaks to conduct involving trickery, entrapment and lying to a suspected person or defendant which results in a confession

being made by the suspected person or defendant. The person who engaged in such trickery, entrapment or lying does not have to be a police officer, as I understand this provision to be saying. It states that

- “where – (a) a confession was made during or in consequence of questioning; and**
- (b) the person conducting the questioning knew, or ought reasonably to have known that -**
- (i) the doing or omission of an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or**
- (ii) the making of a false statement was likely to cause the person who was being questioned to make a confession;**

but nevertheless; in the course of that questioning, the person conducting the questioning did or omitted to do the act or made the false statement, evidence of the confession, and evidence obtained in consequence of the confession, shall be taken to have been obtained improperly.”

197.

In determining whether the probative value of the improperly obtained evidence outweighs the prejudicial effect, the court has to take into account the matters stated in paragraph 116 (3) of the Act. Such matters include:

- “(a) the probative value of the evidence;**
- (b) the importance of the evidence in the proceedings;**
- (c) the nature of the relevant offence, or defence and the nature of the subject matter of the proceedings;**
- (d) the gravity of the impropriety or contravention;**
- (e) whether the impropriety or contravention was deliberate or reckless**

- (f) **whether any other proceedings, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;**
- (g) **the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.”**

Identification Evidence

198. Section 100 of the Act deals with evidence relating to the identification of defendants in criminal proceedings. It promotes the holding of identification parades where it is reasonable and practicable to hold one, for the purpose of having the witness identify the person suspected of committing the crime. Section 100 (i) states that identification evidence adduced by the prosecution is not admissible unless:

“a. Either –

- (i) **an identification parade that included the defendant was held before the identification was made; or**
 - (ii) **it would not have been reasonable to have held an identification parade and subsection (5), applies; and**
- (b) **the identification was made without the person who made it having been intentionally influenced to make it.”**

199. Section 100 (5) states that **“where it would not have been reasonable for an identification parade to be held and a group identification, video film identification or in the case where neither was practicable; a confrontation was held, the identification evidence is admissible.”**

200. It identifies the several matters to be taken into account by a court in determining whether it was reasonable and practicable to hold an identification parade.

201. Section 100 (5) prohibits identification of suspects by the use of pictures of the suspect kept for the use of police officers in certain circumstances.

202. Section 102 deals with the jury direction necessary, where identification evidence has been admitted – in terms of the well known **Turnbull** warning. Most importantly section 102 (4) mandates the trial judge or magistrate to acquit the defendant where there is no evidence of special circumstances that tend to support the identification evidence, and it is not reasonably open to find the defendant guilty except on the basis of identification evidence.
203. In addition to this, section 136 (1) (b) of the Act requires the judge to warn the jury, unless there are good reasons for not doing so in the following terms:
- “ a. that the evidence may be unreliable;
- b. inform the jury of matters that may cause it to be unreliable; and
- c. warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.”
204. It seems to me from the provision in section 102 (4) that the trial judge or magistrate must direct or order that the defendant be acquitted even when a no case submission has not been made, once the prosecutors case does not measure up according to the standards established by Section 102 (4).

Reproduced and dated this 7th day of February, 2006

OLA MAE EDWARDS
High Court Judge