

**PAPER ON
LEGAL UPDATES ON THE LAW OF EVIDENCE
PRESENTED BY:
HON. JUSTICE OLA MAE EDWARDS J.A. (Ag):**

**MAGISTRATE'S CONFERENCE
IN THE
COMMONWEALTH OF DOMINICA**

27TH NOVEMBER 2007

INTRODUCTION

- 1.** The law of evidence establishes rules to determine what facts may be proved in a trial; and what evidence may be called to prove these facts. Some of these rules and principles may exist in the Evidence Acts for each island: [Act No. 5 of 2002 Saint Lucia and amendments; Act No.15 of 2006 British Virgin Islands; Chapter 92 of the Laws of Grenada as amended; Chapter 157 of the Laws of Saint Vincent and the Grenadines (1990) as amended ;Chapter 2.08 of the Revised edition (2002) of the Laws of Montserrat; Chapter E 65 of the Revised Statutes of Anguilla (2000); Chapter 155 of the Laws of Antigua and Barbuda; Chapter 64 of the Laws of the Commonwealth of Dominica (1990); Chapter 166 of the Revised Laws of St Christopher Nevis and Anguilla (1964)].
- 2.** Where no such rules and principles exist in your legislation, they are adopted or derived from English statutes or common law. Usually, there is some statutory basis for the reception of the English rules and principles. In the case of St Vincent and the BVI the statutory basis is the all-embracing sections 3 and 12 of their Evidence Act respectively. They provide in substance, that matters relating to evidence, including the admissibility and sufficiency of documentary or other evidence, and the competency or obligations of witnesses to give evidence, which are not provided for by the Act or any other law, must be decided according to the law and practice administered for the time being in England, with such applicable and necessary modifications.
- 3.** In the case of Anguilla and Montserrat sections 13 and 12 respectively have provided for the adoption of the English law now in force and in

future, relating to the admissibility of DOCUMENTARY EVIDENCE in civil and criminal proceedings. Section 12 of the Montserrat Act provides;

"Every document which by any law in force or hereinafter to be in force, is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any Court in Montserrat, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence".

4. Similar provisions exist in section 12 of the relevant Acts for St Christopher (St Kitts) and Nevis, Antigua and Barbuda, and Dominica. For Grenada, it is section 167 of their original Act that states:

"Unless this Act otherwise provides, any question which shall arise in any action, suit, information, or other proceeding whatsoever in or before any Court of Justice, or before any person having by law authority to hear, receive and examine evidence touching the admissibility or the sufficiency of any evidence, or the swearing of a witness or the form of oath or of affirmation to be used by any witness or the admissibility of any question put to any witness or the admissibility or sufficiency of any document, writing, matter, or thing tendered in evidence, shall be decided according to the law of England for the time being in force"

THE DOMINICA DILEMMA

5. Despite section 12 of the 1876 Dominica Evidence Act. There is also section 12 of the Interpretation and General Clauses Act Cap. 3:01 which provides:

"Where any written law passed before the 3rd November 1978 and in force on that date applied the Law of England or the U.K. to the Commonwealth of Dominica and such application is expressly or by implication qualified by words of an ambulatory nature, including words "from time to time in force" or "for the time being in force, THE SAME SHALL BE CONSTRUED AS APPLYING THE LAW IN FORCE IN ENGLAND ON 2ND NOVEMBER 1978."

6. This provision in the Dominica Interpretation Act provides fuel for argument that Dominica may not be able to validly adopt, receive or apply any English statute or common law concerning the admissibility of documentary evidence that was enacted or decided after the 2nd November, 1978, without legislative intervention or law reform, similar to that reflected in the Evidence Acts of St Lucia, BVI and

to some extent Grenada. For now, it would seem that whenever a Magistrate is required to consider the admissibility of a written statement made by a defendant in a criminal trial, you should bear in mind that the ambulatory effect of section 12 of your Evidence Act has been curtailed by section 12 of your Interpretation and General Clauses Act, thereby ending your walk along the highway of English law, forcing you to stop at 3rd November 1978 Parkway, there your journey ends. It was the common law rules, the Criminal Evidence Acts 1965 and 1967, and in the case of civil cases, the Civil Evidence Act 1968, which governed the admissibility of documentary evidence in England in November 1978.

- 7.** The Criminal Procedure Acts or other statutes for the various Islands may also contain provisions allowing for matters of procedure including evidence which is not expressly provided for, to be regulated by the laws of England, common law, and the practice of the Superior Courts of England. Section 48 of the British Virgin Islands (BVI) Criminal Procedure Act: Cap. 18 states: "All other matters of procedure, not herein nor in any other Act expressly provided for, shall be regulated as to the admission thereof by the laws of England, and the practices of the Superior Courts of Criminal Law in England." Section 39 of the Interpretation and General Clauses Act Cap. 3:01 of Dominica provides; "All other matters of procedure not herein nor in any other Ordinance expressly provided for, shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England."
- 8.** Before the 1992 Criminal Code (St Lucia) was repealed, section 913 provided that: "Subject to the provisions of this Code and of any other statute, the practice and procedure of the Court shall be the same as the practice and procedure for the time being in force in criminal causes and matters in the High Court of Justice, and the Courts of Assize created by Commission of Oyer and Terminer of Goal Delivery, in England, so far as such practice and procedure are applicable to the circumstances of the State. (2) Subject also as herein provided, the law of evidence administered in the Court shall be the same as the law in evidence in criminal causes and matters administered for the time being in the said Courts in England". However, sections 5 and 1083 of the new Criminal Code 2004 state:

"5. Without prejudice to section 1083 where no provision is made in this Code with respect to the procedure concerning any criminal proceedings before a Court such procedure at common law as appropriate shall be applied with such modification or... adaptation as may be necessary.

1083 (1) *The Chief Justice may make rules of practice for regulating proceedings in criminal proceedings in criminal causes and matters, whether in the High Court or District Court, and in all matters of criminal procedure not provided for by this Code or any other enactment.*

(2) *Without prejudice to subsection (1) in all cases of procedure not provided by this Code or any rules of practice or form in matters of criminal proceedings shall be such as may be directed or approved for the purpose and occasion by the Judge in the case of the High Court or by the Magistrate in the case of a District Court."*

9. The new Evidence Act of St. Lucia does not contain any provision, that permits the application of the rules and principles concerning the admissibility of documentary, or other evidence in English statute law in force after this Act came into operation, or in the future, absent a domestic statutory provision. However, existing provisions in the Criminal Procedure Acts for each island, similar or comparable to section 48 of the BVI Criminal Procedure Act, or section 39 of the Interpretation Act and General Clauses Act of Dominica, or sections 5 and 1083 of the Criminal Code (2004) of St. Lucia, arguably are elastic, and the word "PROCEDURE", may include evidence, despite the absence of a statutory definition of the word "procedure". At paragraph 1 of PHIPSON ON EVIDENCE, it is stated that "The rules of *PROCEDURE* regulate the general conduct of litigation; the object of *PLEADING* is to ascertain for the guidance of the parties and the court the material facts in issue in each particular case; *PROOF* is the establishment of such facts by proper legal means to the satisfaction of the court and in this sense includes disproof. The first mentioned term is, however, often used to include the other two."
10. Apart from this, where local legislation exists in the same or comparable terms as an English statute which has been construed by a Superior Court in England, such construction is usually adopted by our Courts, subject to any necessary modifications.

LAW REFORM

11. At common law the first question is to determine if the evidence sought to be adduced is in fact hearsay or not. It is hearsay when John tells you the Magistrate what Mark wrote or told him out of Court and the object of this evidence is to establish the truth of what is contained in this statement. This rule was relaxed in civil proceedings with the introduction of the Civil Evidence Act 1968. Section 2 of this Act provided for the admissibility of out of court statements made by a

person whether orally or in a document or otherwise, regardless of whether that person is being called as a witness in civil proceedings, to be evidence of the facts stated therein of which direct oral evidence would be admissible, subject to certain statutory conditions, and in some cases with the leave of the court. The Act also provided for hearsay evidence to be admissible by agreement of the parties. By this Act statements produced by computers were also made admissible.

- 12.** At common law hearsay evidence is inadmissible in criminal proceedings, unless it falls within one of a number of common law or statutory exceptions. The chief justification for the exclusion of hearsay is that since the evidence is presented to the Court second hand by someone other than the original statement maker or eye witness, there is no opportunity for the other side to test the reliability of the evidence by cross-examining the original statement maker or eye witness as to what was actually said or seen or heard. Some of these common law hearsay rules were enacted in the Evidence Act of Grenada. See for example section 58 of their original Act, Cap.92. Regrettably, I have not been able to obtain a copy of the amendment to this Act at the time of preparing this paper. I have been reliably informed by brother Judges that it introduced some reforms to the hearsay evidence law for Grenada, including admissibility of "first hand hearsay" documentary evidence.
- 13.** The common law hearsay rules of evidence obviously are to be applied by Judges and Magistrates to all other forms of evidence, that cannot be regarded as documentary evidence under section 12/13 of the Evidence Acts, for the islands of Anguilla, Montserrat, Antigua and Barbuda St Kitts and Nevis.
- 14.** A major criticism of the hearsay rule is that it is too strict and inflexible, and very often it results in the exclusion of evidence which by ordinary every day experience, we would regard as reliable and accurate. Also, the numerous exceptions to the rule are usually uncertain, obscure and complex. There is widespread perception from litigants, witnesses, the society, and even legal luminaries that far too often the guilty are acquitted, and justice works in favour of the least deserving, and the unjust because of technicalities, and impractical evidential requirements. It was such concerns among others that eventually sparked the evidence law reforms in England and other Commonwealth States.
- 15.** Several common law jurisdictions have from time to time recognised the need for a fairer evidential process, and have over the years made piece-meal amendments to the law of evidence both in civil and criminal proceedings. It took the House of Lords decision in MYERS v DPP[1965] AC 1001 for Parliament to provide for certain records of trade or business to be admissible, only when direct oral evidence of the

recorded facts was unavailable for specified reasons, by enacting the Criminal Evidence Act 1965. The Courts in England grappled with the undefined words: "TRADE", "BUSINESS", and "RECORD" in the Act, and its applicability to documents stored in machines. These words have been the source of many appeals for nearly 20 years. I note that section 23 of the Evidence Act of St Vincent, is a replica of section 1(1) of the Criminal Evidence Act 1965 [See CROSS ON EVIDENCE 5TH EDITION at page 570-571 where this provision is reproduced]. The 1965 Act was replaced by section 68 of the Police and Criminal Evidence Act 1984 (PACE).

- 16.** The Criminal Justice Act 1988 has also made significant contribution to the reform process. It repealed section 68 of PACE, replacing it with sections 23 and 24 which have effectively broadened considerably the scope of admissibility of documentary hearsay evidence in criminal cases. This Act has made hearsay statements contained in documents generally admissible for the first time, in cases where it would be impossible, impracticable or pointless to call the maker as a witness. There are also provisions in the Act which provide a cross-examiner with methods for attacking the credit of the maker of the statement. The Court has latitude to exclude admissible hearsay evidence. There are provisions dealing with weight of hearsay evidence, and also corroboration.
- 17.** It would seem that the ongoing reform process in England has been conveniently ignored by some if not most of the practicing lawyers in our relevant Courts. They object to documentary hearsay statements as a matter of course, having no regard to section 12/13 of the relevant Evidence Acts. It is business as usual, and the common law hearsay rules are still being systematically applied by some of our Courts in civil cases in the absence of specific statutory provisions covering the matter, with scant regard for the applicable English law that hearsay documentary statements are admissible, and that the Court has the duty to see to it that the conditions required for their admissibility under the Civil Evidence Acts 1968, 1972 (in the case of Dominica), and The Civil Evidence Act 1995, are satisfied. Except for the islands which have comprehensive Evidence Acts or express provisions dealing with the admissibility of hearsay evidence in criminal cases, issues relating to the admissibility of documentary hearsay statements in criminal proceedings should be determined with reference to the relevant provisions in PACE 1984, and the Criminal Justice Acts 1988 and 2003.
- 18.** Now St Vincent enacted sections 1 to 5, and 7 to 9 of The Civil Evidence Act 1968 as sections 46 to 55 of their Evidence Act. Section 50 of the St. Vincent Act covers documents produced by computers. The Civil Evidence Act 1968 has now been repealed by the Civil Evidence Act

1995." After some years of experience with it, a consensus developed that the continuation of the rule against hearsay was probably unnecessary in civil cases, and following a recommendation by the Law Commission the rule was abolished in civil cases by the Civil Evidence Act 1995..."(MURPHY ON EVIDENCE by Peter Murphy 6th ed. at page 189). Hearsay statements are generally admissible in civil proceedings in England as evidence of the truth of any relevant matter stated in them regardless of any other evidential value they may have, subject of course to certain statutory restrictions and exceptions.

PACE IN ST. VINCENT

- 19.** Section 3 of the St Vincent Evidence Act provides: "Whenever any question shall arise in any criminal or civil proceedings whatsoever in or before any court, court martial or tribunal, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, touching the Admissibility or sufficiency of any evidence, the competency or obligation of any witness to give evidence, the swearing of any witness, the form of oath or affirmation to be used by any witness, the admissibility of any question put to any witness, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided for in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in Saint Vincent and the Grenadines."
- 20.** In the Vincentian case of THOMPSON (EVERSLEY) v R (1988) 52 WIR, the Judicial Committee of the Privy Council held that this provision in the Evidence Act provided the basis for admissibility of confessions in St Vincent to be governed by sections 76 and 78 of PACE. They held that Code C of the 1984 Act (dealing with detention, treatment and questioning of persons) did not apply to the questioning of suspects which was governed by local Regulations 86 and 155 of the Police Regulations 1948, as amended. The Court of Appeal further held in THOMPSON that a judge (Magistrate) in St. Vincent must consider the relevant provisions of PACE and the Codes, with applicable and necessary modifications when determining the applicability of confessions. The Court of Appeal also stated that modifications are easily identifiable and determinable by a trial judge, and should be undertaken at the time the law and practice in England are being applied and in time case law will build up. It was held that in determining the admissibility of the written confession of the Appellant who was convicted for murder, the common law test of voluntariness was inapplicable. The test to be applied where PACE is the governing law is embodied in section 76 (2) of PACE, that is, the judge has the duty to

rule on whether the confession has been or may have been obtained by oppression, or in consequence of any thing said or done which was likely to render it unreliable. It was accepted by the Court of Appeal in TYRER (1990) 90 Cr App R 446 at page 449, that the prosecution may discharge its burden of proof under section 76(2) by showing that there is no causal link between the confession and things said or done by the police officers which might have been conducive to unreliability. Since the preparation and presentation of this paper, it has been brought to my attention that there have been statutory changes in the St Vincent Evidence Act recently so that PACE may now have limited applicability.

- 21.** In another very recent decision on appeal from St Vincent, the appellant alleged that he was denied the right to consult with a Solicitor before a caution statement was obtained from him, and so the caution statement should have been excluded based on section 78 of PACE 1984. Further, that a police officer had hit him with a fire extinguisher and another had threatened to detain his daughter, if he did not admit his involvement in the robbery for which he was in custody, before the statement was extracted from him. At the *voire dire* the judge applied the common law test of voluntariness instead of PACE. Applying the approach of the Privy Council in THOMPSON, the Court held that in ruling that the appellant had not been beaten or threatened and that the caution statement was voluntary, the judge was ruling on the issues which she would have had to consider if she had appreciated that the issue of admissibility was governed by section 76(2) (a) and (b) of PACE. The Court also opined that: "At the *voire dire* the learned trial judge should have considered: (a) whether or not the prosecution had proven beyond a reasonable doubt: that the police officer did not hit the appellant with the fire extinguisher; that Corporal Jack did not threaten the appellant to detain Indra if the appellant did not own up to the robbery; that the appellant did not make any request to Cpl Maloney to consult a lawyer privately at any time; that the police did not prevent the appellant from communicating with the lawyer at any time; (b) where there was doubt or the prosecution had not discharged this burden of proof, the court should have gone on to consider whether the prosecution had discharged its burden of proof by showing that there was no causal link between the caution statement and the things that were said and done, or may have been said and done by the police officers which might have been conducive to unreliability; (c) where the prosecution was found to have discharged its burden of proof : whether the admission of the appellant's caution statement would have such an adverse effect on the fairness of the proceedings that justice required the evidence to be excluded." (GREGORY DURRANT v THE QUEEN Cr App. No. 21 of 2005 delivered October 29).

IS VOIRE DIRE MANDATORY IN MAGISTRATES' COURT?

22. The question sometimes arises as to whether it is necessary for a Magistrate to hold a voire dire at a summary trial when the statement of the defendant is challenged. I refer you to BLACKSTONES CRIMINAL PRACTICE 2001: paragraph F1.27. There it is said in relation to a Court that is obligated to apply PACE, that Magistrates are bound by the terms of section 76(2) of PACE 1984 to hold a trial within a trial. Per Russell L.J. in **Liverpool Juvenile Court, Ex parte R [1988] QB 1:**

- "(a) *During the course of a summary trial, if the defense, before the close of the prosecution case, make a representation to the court that a confession made by the defendant was or may have been obtained by either of the improper methods set out in s. 76(2), the magistrates must hold a trial within a trial and make a ruling on the admissibility of the confession during or at the end of the prosecution case. (If the defense make an alternative submission based on the PACE 1984, s.78, this should be examined at the same trial within a trial at the same time: (HALAWA v FEDERATION AGAINST COPYRIGHT THEFT [1995] 1 Cr App R 21).*
- (b) *In such a trial within a trial, the defendant may give evidence to the question of admissibility.*
- (c) *At this stage, the magistrates will not be concerned with whether or not the confession is true.*
- (d) *If the defense does not make a representation before the close of the prosecution case, the defendant may raise the question of the admissibility or weight of the confession at any subsequent stage at the trial.*
- (e) *At this later stage, however, although the court retains an inherent jurisdiction to exclude the confession, as well as the power to exclude by virtue of the PACE1984, s. 78(See F2.13), it is not required to embark on a trial within a trial...Where the defense make a submission that the Magistrates should exercise their discretion to exclude evidence under s. 78 of the 1984 Act, they are not entitled to have that issue settled as a preliminary issue in a trial within a trial (VAL v CHIEF CONSTABLE OF NORTH WALES (1987) 151 JP 510. In HALAWA..., it was held that the duty of a magistrate, on an application under s. 78, is either to deal with the issue when it arises or to leave the decision until the end of the hearing, the objective being to secure a trial that is fair and just to both parties. Thus in some cases the accused will be given the opportunity to exclude the evidence before giving evidence on the main issues, because if denied that opportunity his right to remain silent on the main issues will be impaired, but in most cases it is better for the whole of the prosecution case, including the disputed evidence, to be heard first, because under s. 78 regard should be had to*

"ALL THE CIRCUMSTANCES" and fairness to the prosecution requires that the whole of its case, in this regard, be before the court. In deciding the court may take account of the extent of the issues to be raised by the evidence of the accused in the trial within a trial. A trial within a trial may be appropriate if the issues are limited, but not likely to be protracted and to raise issues which will need to be re-examined in the trial itself."

- 23.** The section 3 provision of the St. Vincent Act, unlike Section 12 of the Dominica Interpretation Act, is ambulatory, dependent on what the current law of England is at the time you are resolving admissibility issues arising under section 3, absent domestic law. So if such a matter arose today concerning the admissibility of hearsay evidence in a criminal case in St. Vincent, in the absence of a local statutory provision in St. Vincent covering same, a Magistrate would probably also be applying The Criminal Justice Act 2003. This Act since the 4th April 2005 has even more radically changed the law concerning hearsay, and bad character.
- 24.** The explanatory notes for this Act states that the purpose of this reform is that the "Rules on evidence will be changed...to allow the use of reported (hearsay) evidence where there is good reason why the original source cannot be present or where the judge otherwise considers it would be appropriate".
- 25.** The new definition of hearsay, I gather from sections 114(1), 115(2) and (3) is that hearsay is a representation of fact or opinion made by any means, not made in oral evidence in the proceedings, and that it may be admissible if it relates to a something said, or shown, or illustrated, and one of the purposes, of the person saying, or showing, or illustrating, what they did, was to cause someone, or something, to believe it, or act on it, as if it were accurate or correct. One of the 4 bases for admissibility under section 114(1) is that a party who is relying on what the Act now regards as hearsay may succeed where he/she persuades the court that the evidence should be received in the interests of justice. First hand oral hearsay is now automatically admissible where a witness is unavailable under section 116, and this applies to both fact and opinion.
- 26.** The reforms have changed the common law that we have been legally socialised to accept and apply for most of our professional lives. Apart from the changes under the Criminal Justice Act (2003) the reforms have abolished the "best evidence rule, and made 'first hand hearsay', documentary records, business records, expert reports, labels, computer documents, micro films, and telecommunications admissible.

They have also impacted several aspects of the evidential landscape, including the rules governing admissions and confessions, affidavit evidence and witness statements, evidence of children, evidence of vulnerable witnesses, and identification evidence. There are new statutory guidelines in some cases for excluding admissible evidence. Corroboration rules have been abolished and unreliable evidence warnings put in place.

THE GRENADA EVIDENCE (AMENDMENT) ACT

- 27.** Act No. 26 of 2000 was passed on the 22nd September, 2000. It defined the word "document" in terms of the 1968 Civil Evidence Act. It re-affirmed the admissibility in evidence of a statement of any fact stated therein by existing common law rules. It made a person's written statements be admissible as their direct oral evidence in criminal proceedings under certain statutory notice conditions and also where the person is either dead, unfit, cannot be found, abroad and it is not reasonably practicable to secure their attendance, or will not attend through threats of bodily harm. First hand hearsay was made admissible in civil proceedings where statutory notice conditions are satisfied, and where the person is unavailable for similar reasons as in criminal proceedings. Section 36F provides for the admissibility of business documents in civil and criminal proceedings under certain statutory conditions where the person who supplied the information or made the statement for similar reasons as stated before is unavailable.
- 28.** There are provisions establishing the criteria for estimating the weight to be attached to a statement admissible in criminal proceedings among other related provisions. Section 26G establishes the prerequisites for computer hearsay documents to be admissible. Section 36H provides that where a statement contained in a document produced by a computer does not constitute hearsay, such a statement is admissible where certain statutory conditions are satisfied. There are credibility related provisions concerning the unavailable maker of admissible statements.

THE ST LUCIA AND BRITISH VIRGIN ISLANDS EVIDENCE ACTS

- 29.** I will be very selective in my comments on these Acts. They both limit their applicability to proceedings in which the hearing commenced prior to the date that each Act came into operation. Sections 14(5) and 52(1) of the BVI Act are unique provisions. They provide that where a witness who was competent at the time he gave incomplete testimony subsequently dies, or becomes incompetent while testifying, that witness' incomplete evidence is not rendered inadmissible unless, in the interests of justice the Court decides otherwise.

- 30.** Section 18 of the BVI Act provides for a child under 16 years to give un-sworn evidence where a Court conducts the preliminary inquiry according to the stipulated criteria but determines that the child is not competent to know the nature and consequences of giving false evidence and to know that it is wrong to give false evidence, but understands that he/she should tell the truth. In such a case the child should be permitted to give un-sworn evidence upon stating: "IPROMISE TO TELL THE TRUTH". This un-sworn evidence is to be regarded as a deposition. With a similarly stated criteria, section 15 of the St Lucia Act makes a distinction between a child 12 years old and more, and a child less than 12 years. Only a child over 12 years old can give sworn testimony where competency is presumed, subject to the judge having reason to believe that this child is unable to understand questions or provide intelligible answers. Children under 12 years cannot be sworn but if that child meets the same criteria set for saying 'I PROMISE TO TELL THE TRUTH' under the BVI Act, that child's un-sworn testimony may be taken.
- 31.** There is a vulnerable witness provision in the St Lucia Act which may be compared with sections 18(7) and 27(3) in the BVI Act. Section 29 of the St Lucia Act contains provisions which define who is a vulnerable witness, and the exceptional manner in which such a witness may be permitted to testify. A child under 12 years is a vulnerable witness. A child over 12 years who is a complainant in a sexual offence case may be afforded treatment as a vulnerable witness. Pursuant to Section 29(3) a vulnerable witness may be allowed to testify while being screened off from the defendant; or testify from a place outside the court room either in St Lucia or elsewhere, by means of technology (i.e. live television link) which allows for such witness to see and hear certain relevant persons in the court room. In either case, such a witness must be seen and heard in the court room by the following relevant persons: THE JUDGE, JURY, COUNSEL FOR DEFENDANT AND PROSECUTION, THE INTERPRETER, and OR THE PERSON APPOINTED TO ASSSIT. This vulnerable witnesses' provision reflects the common law combined with provisions under section 32 of the U.K. Criminal Justice Act 1988 and section 54 of the U.K. Criminal Justice Act 1991. A word of warning: a judge or magistrate has to be very careful in implementing this vulnerable witness exercise, as the defendant has a constitutional right to confront the witness against him, and be able to cross examine witnesses effectively, and must have a fair trial without prejudice. So in situations where the defendant is unrepresented, the exercise may prove very difficult to implement, On the other hand, the effect of section 18(7) and 27(3) of the BVI Act is that a child under 16 years of age may give evidence in any manner permitted by the court, including by means of technology, such as a video or television link that permits the virtual presence of the party or witness before the court and that permits the court and the parties to

hear, examine and cross-examine the witness.

- 32.** Section 31 of the BVI Act allows a police officer in criminal cases to give evidence in chief by reading or being led through a written signed statement prepared contemporaneously, provided there is timely disclosure. St Lucia does not have this provision.
- 33.** Both Acts contain elaborate provisions that substantially abrogate the common law hearsay rule. Sections 48 to 59 of the St Lucia Act and sections 55 to 62 of the BVI Act make former hearsay documentary evidence, the statement of an unavailable witness who previously made an out of court statement, the out of court statement of an available witness while testifying, expert reports and oral opinion evidence all admissible where the relevant requirements under the statute are met. These provisions reflect a combination of the law mainly in section 69 of PACE, and section 24 of The Criminal Justice Act 1988. I note that though "document" is defined by both Acts, the BVI provision does not require the creator of the document to be acting under a duty for the document to be admissible.
- 34.** Sections 76 and 78 of PACE and their relevant Codes are mirrored in the provisions dealing with the admissibility of admissions, and the reliability of confessions of defendants, made during official questioning and interviews. These provisions lay out the criteria for admissibility in keeping with requirements under relevant PACE CODES. They are sections 70 to 72, and 75 of the St Lucia Act, and sections 82 to 84 of the BVI Act.
- 35.** From sections 72 (2) (c) and 73 in the St Lucia Act, and sections 84 (4)(c) and 85 in the BVI Act, it is quite clear that the unsigned record of an interview or official questioning, are not admissible in criminal proceedings as evidence of an admission by the defendant. It appears from section 73(2) in St Lucia Act, and section 85(2) of the BVI Act that a tape recording and a transcript of the tape recording of an unsigned record of an interview or official questioning may be admitted in evidence since these are not included in the definition of "document" under sections 73(1) and 85 (1) of the respective Acts.
- 36.** It would seem from the relevant provisions in the Acts that where a defendant in response to being cautioned by a police officer, blurts out an oral admission, that this may not be regarded as an interview or official questioning. It could be argued that such an admission would be excluded from considerations under section 72(5), (6) of the St Lucia Act, and section 83(5), (6) of the BVI Act. SEE THE QUEEN vs. GEORGE LABADIE, RULING ON VOIR DIRE 12/6/06: Edwards J (St Lucia) in connection with this point.

- 37.** Sections 153 of the St Lucia Act and section 156 of the BVI Act both provide for written statements of persons to be admitted in evidence in criminal proceedings, once the statutory criteria under those sections are satisfied. Subsection (5) of those provisions state that although the statement may be admitted, the court may of its own motion or on the application of any party to the proceedings, require that person to attend before the court and give evidence. The Consolidated Criminal Practice Direction Supreme Court Manual [2002] 1 WLR pages 4 and 5, paras.1-6 provide guidance as to how such statements must be prepared or edited where necessary, in order to be admissible.
- 38.** Section 116 of the St Lucia Act (section 125 BVI) 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, and evidence improperly obtained is admissible: *KURUMA v R* (1955) 1ALL ER 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 para17.39.
- 39.** Section 116(1) St Lucia and 125(1) BVI have now modified this common law where these provisions state 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, or in the words of the BVI provision, "unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained". Further subsections elaborate on the extent of the modification of the common law and lay down what considerations the Court must take into account in determining whether to exclude such evidence.
- 40.** Finally, the provisions dealing with evidence relating to identification of defendants in criminal proceedings: they are section 100 to 102 of the St Lucia Act, and sections 110 to 112 of the BVI Act which are much clearer than the St Lucia provisions. Section 112 of the BVI Act enacts the *TURNBULL* criteria for summing up directions to the jury, while St Lucia has unclear provisions. Both Acts identify the several matters to be taken into account by a court in determining whether it was reasonable and practicable to hold an identification parade. It must be noted that

section 100 (1) [110(1)BVI] start off with excluding identification evidence unless an identification parade was held , or it would not have been reasonable to have held one, and the identification was made without the person who made it having been intentionally influenced to make it.

- 41.** In *THE QUEEN v SHERVON RAMSAY* and others for murder, (Saint Lucia) Cases numbers SLUHCR 0068, 0069, 0071 of 2005 delivered 26th July 2006. The trial judge at paragraph 36, after considering the implications of section 100(1) stated: "In my opinion therefore, the prosecution would have to lead evidence in the absence of the jury for the Court to determine whether or not the criteria in section 100 has been satisfied. This inquiry should apparently take the form of a *voire dire* ...The police officer's opinion as to the need for holding an identification parade is relevant for the purposes of the *voire dire*, and should be canvassed therefore at the *voire dire* in my view. Ultimately however, it is not the police officer's subjective views that matter. In my opinion the Judge has to apply an objective test in determining whether it was reasonable to hold an identification parade having regard to the criteria. 37. The requirements in section 100 were never met in this trial. I inadvertently allowed the prosecution to lead the identification evidence without any objection from either Counsel without first determining whether or not the identification evidence was admissible. The Court must be watchful to ensure that the provisions in the Act are complied with and that there are no procedural irregularities in future trials."
- 42.** Subject to appellate correction therefore, paragraphs 38 of this judgment may be a useful guide when holding the *voire dire* to determine whether to admit the identification evidence which the law states initially is inadmissible. The burden of proof at the *voire dire* is "on a balance of probabilities" for the prosecution; (section 144 BVI; section 134 St. Lucia). Magistrates may be guided also by the Court of Appeal decisions in: *GERALD JOSEPH v THE QUEEN* Cr App No, 2 of 2006 (St Lucia) 15th January 2007; paragraphs 37 to 43; *URBAN ST BRICE v THE QUEEN* Cr App No. 4 of 2006 (St Lucia) October 2007: paragraphs 49 to 50. The appellate court did not agree with Edwards J in her interpretation of section 102(3) of the Act which has now been amended in 2007 by deleting the word 'and' and substituting the word "OR" at the end of section 102 (3)(a). The BVI does not have a provision as section 102 (4) of the St. Lucia Act which seems to mandate the trial judge or the 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.

43. CONCLUSIONS

Reliance only on the provisions in the Evidence Acts of the OECS islands, which allow these islands to adopt the evidence law of England continuously, is potentially problematic in identifying what the evidence law for each island is. This does not promote a thorough understanding of the rules of admissibility at any given time. In the preface to Murphy on Evidence it is stated that Cases are probably won and sometimes lost because of evidential acumen, or the lack of it. As we all know the law of evidence presents problems from time to time in our court rooms without warning. Let us anticipate that the long overdue reforms that are necessary for the islands of St Kitts, Antigua, Montserrat, Dominica, and St Vincent will be implemented soon. This should greatly improve the quality of the administration of justice that our courts deliver in these islands.