Thompson v. The Queen (Saint Vincent and The Grenadines) [1998] UKPC 6 (16th February, 1998)

Privy Council Appeal No. 37 of 1997

Eversley Thompson *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF THE EASTERN

CARIBBEAN SUPREME COURT

(SAINT VINCENT AND THE GRENADINES)

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 16th February 1998

Present at the hearing:-

Lord Goff of Chieveley

Lord Jauncey of Tullichettle

Lord Lloyd of Berwick

Lord Hutton

Mr. Justice Gault

·*[Delivered by **Lord Hutton**]*

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1. On the evening of 18th December 1993 a little girl, D'Andra Ollivierre, aged four years and ten months, disappeared from her home near the sea at La Pompe, Bequia, where she lived with her family. She was never seen alive again and her body was never discovered. The appellant, **Eversley Thompson**, was charged with her murder. The Crown case against him was that on the evening of 18th December, after sexually assaulting the little girl near her home, he caused her death by throwing her into the sea.

2. The appellant was tried by Mrs. Justice Joseph and a jury in the High Court (Criminal Division) Saint Vincent and the Grenadines in June 1995. At the trial the evidence adduced against the appellant consisted principally of evidence that he was seen hiding under a tree close to D'Andra's home on the evening of 18th December 1993 after she had disappeared, and oral admissions and a written statement by the appellant that he had thrown D'Andra into the sea on that evening. The admissibility of the oral admissions and the written statement was challenged by the defence, and after a *voir dire* the learned trial judge, applying the Judges' Rules and the common law test of voluntariness, ruled that they were admissible. At the conclusion of the trial the jury convicted the appellant of the murder and he was sentenced to death. His appeal against conviction to the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) was dismissed on 15th January 1996.

3. The appellant's petition for leave to appeal to the Privy Council against the judgment of the Court of Appeal was heard by their Lordships' Board on 6th February 1997. In the course of the submissions on the application for leave to appeal a new point was raised on behalf of the appellant which had not been advanced at the trial or before the Court of Appeal. This point was that in Saint Vincent and the Grenadines at the date of the trial the admissibility of the confessions of the appellant was governed, not by the Judges' Rules and the common law test of voluntariness, but by an English Act, the Police and Criminal Evidence Act 1984 ("PACE"). As this point had not been considered by the Court of Appeal their Lordships thought it right that before hearing detailed submissions on the point they should have the benefit of the opinion of the Court of Appeal in relation to it. Accordingly, in addition to agreeing humbly to advise Her Majesty that the appellant ought to be granted special leave to appeal as a poor person, their Lordships, pursuant to their powers under section 8 of the Judicial Committee Act 1833, remitted the case to the Court of Appeal in order for that court to state its opinion on the following questions:-

"1.Whether and if so to what extent:

(i)section 3 of the Evidence Act 1988 (Cap 158 of the Laws of St. Vincent and The Grenadines) and/or

(ii)sections 5 and 6 of the Application of English Law Act 1989 (Cap 8 of the Laws of St. Vincent and The Grenadines) and/or

(iii)any other law of St. Vincent and The Grenadines import into (or exclude from) the

law of St. Vincent and The Grenadines the provisions or any of the provisions of the Police and Criminal Evidence Act 1984 applicable in England both generally and as they relate to the admissibility of evidence in criminal proceedings.

2.If and in so far as such provisions apply in St. Vincent and The Grenadines what is their effect in the present case."

4. The Court of Appeal, with commendable expedition, heard further argument on these questions in May 1997 and delivered judgment on 21st July 1997, and their Lordships therefore had the advantage of having the judgment before them on the hearing of the appeal.

The prosecution case at the trial.

Three members of D'Andra's family gave evidence that after her absence from her home was noticed a search of the surrounding area for her began shortly after 9.00 p.m. During the search they saw the appellant hiding under a tree nearby, and when he was seen he left where he was hiding and ran down the beach. The brother of D'Andra ran after him, but fell on the beach and failed to catch him. Members of the search party found blood and faeces on a rock on the beach and D'Andra's pants were also found nearby.

5. Evidence was given by police officers of going to the appellant's home, which was not far from D'Andra's home, in the early morning of 19th December 1993 and bringing him from his home to Port Elizabeth police station. It will be necessary to describe the evidence of the police officers in greater detail at a later stage in this judgment, but at this point their evidence can be summarised as follows. In the police station at 9.00 a.m. the appellant told Detective Sergeant Warrican that he had "thrown body of D'Andra into sea at La Pompe". The appellant then made further similar oral admissions to the police and between 11.45 a.m. and 12.30 p.m., after caution, he made a written statement which he dictated to Detective Sergeant Warrican and then signed. The police evidence was that no police officer had assaulted the appellant and no police officer had made any promise to him or offered any inducement to him to make a confession.

The defence case at the trial.

The appellant went into the witness box before the jury to give evidence in his own defence. He said he had nothing to do with the disappearance of D'Andra, he had not sexually assaulted her, he had not thrown her into the sea, and he had nothing to do with her death. He said that he was very seriously ill-treated by police officers from the time they arrived at his home in the early hours of 19th December and he described very grave assaults, which included blows with a shovel, assault on his genitals, and the administration of electric shocks by a black instrument. He also gave evidence of these assaults in the *voir dire*. He denied that he made any oral admissions or any written statements to the police, and he said that the signature on the written statement put in evidence by the police was not his handwriting.

6. In the main trial the appellant's father said that he visited him in the police station on the morning of 20th December 1993, and he saw that his hands and face were swollen and his eyes were red like blood. In the *voir dire* the appellant's mother gave similar evidence as to his appearance on 20th December 1993.

The first hearing before the Court of Appeal.

On the first hearing before the Court of Appeal two main grounds of appeal were advanced. These grounds were as follows:-

1.There was no proper identification of the appellant.

2.The case for the defence was not properly put to the jury.

7. The third ground of appeal was that the verdict was unsafe and unsatisfactory, but this ground was simply a combined restatement of the first two grounds.

8. In a careful judgment the Court of Appeal rejected these grounds of appeal. On the hearing of the appeal before their Lordships the appellant did not attack this judgment of the Court of Appeal, but advanced a number of new points, including the point which had not previously been raised relating to the application of PACE to Saint Vincent and the Grenadines. Accordingly their Lordships need not give further consideration to the first judgment of the Court of Appeal.

The second judgment of the Court of Appeal.

In its judgment in relation to the two questions remitted to it for its consideration the Court of Appeal in a carefully reasoned judgment delivered by the learned Acting Chief Justice answered the questions as follows:-

"Question 1:

9. PACE has been specifically imported into the Laws of St. Vincent and the Grenadines to the extent that, whenever any question arise in any criminal proceedings before any Court, touching the admissibility of any evidence, and there are no provisions in the Laws of St. Vincent and the Grenadines which regulate the determination of such questions, the provisions of PACE, subject to such modifications as are applicable and necessary, are to determine those questions, and by necessary implication to guide the conduct of the police in their investigation to the extent that it is relevant to the issue of admissibility."

10. It is clear from earlier parts of the judgment that in stating that PACE had been specifically imported into the laws of Saint Vincent and the Grenadines the Court of Appeal was referring not only to PACE but to the Codes made under it which are relevant to the admissibility of evidence.

"Question 2:

11. On the evidence adduced, it was open to a judge applying the law and practice administered in England to reach the conclusion that the admissions and confessions should have been admitted into evidence.

12. Once the learned trial Judge came to the conclusion that there was no truth in the allegations of oppressive conduct by the police made by the appellant and in my opinion there were objective reasons to reject those allegations, no unfairness could have resulted from the admission into evidence of his clear and complete confession to this heinous crime.

13. I would conclude therefore that if the provisions of PACE were applied, it is likely that the outcome would have been the same."

14. The submissions advanced to their Lordships on behalf of the appellant were that the answer of the Court of Appeal to the first question was correct, but that its answer to the second question was erroneous, with the consequence that the conviction could not stand and the appeal should be allowed. The submissions advanced on behalf of the Crown were that none of the provisions of PACE and of its Codes had been incorporated into the law of Saint Vincent and the Grenadines and that the answer of the Court of Appeal to the first question was erroneous. In the alternative it was submitted that if the sections of PACE had been incorporated into the law of Saint Vincent and the Grenadines no relevant provisions of the PACE Codes had been incorporated. It was further submitted that if the admissibility at the trial of the appellant's oral admissions and written statement was governed by PACE and its Codes, or by PACE alone, then, for the reasons given by the Court of Appeal, the trial judge would still have admitted them in evidence, so that there had been no miscarriage of justice.

<u>The relevant statutory provisions.</u>

Before considering the answers of the Court of Appeal to the two questions remitted to it for its opinion it will be convenient to set out certain statutory provisions. Section 2 of the Evidence Ordinance 1926 of Saint Vincent and the Grenadines provided:-

"Whenever any questions shall arise in any civil or criminal cause or matter or other proceeding whatsoever in or before any Court of Justice or Justice of the Peace, or before any person having by law, or by consent of parties authority to hear, receive and examine evidence, touching the admissibility or the sufficiency of any evidence, ... or the swearing of any witness, or the form of oath or of affirmation ... or the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, every such question shall, except as provided for in this Ordinance or by any other law in force in the Colony, be decided according to the Law of England with such modifications as may be applicable in this Colony."

15. This order was repealed by the Evidence Act 1988 of Saint Vincent and the Grenadines (save in respect of several matters specified by section 63 of the 1988 Act). Section 3 of the Evidence Act 1988 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 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 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 St. Vincent and the Grenadines."

16. Section 5 of the Application of English Law Act 1989 provides:-

"5.(1) Subject to the provisions of this section, only the following Acts of Parliament of the United Kingdom shall apply in Saint Vincent and the Grenadines, that is to say -

(a)all such Acts as are specified in the Schedule, to the extent specified therein; and

(b)any such Act which applies, either specifically or by general description, by virtue of any Act of the Parliament of Saint Vincent and the Grenadines other than this Act.

(6) The Acts of the Parliament of the United Kingdom which apply by virtue of the provisions of subsection (1)(b) shall apply as they applied in England immediately before the 27th December, 1989, unless other provision as to the date of application has been made.

(7) Subject to the provisions of subsection (8), notwithstanding that any Act of the Parliament of Saint Vincent and the Grenadines which is in force on the 27th December, 1989, provides that an Act of the Parliament of the United Kingdom (whether by use of the expression `the law and practice' or otherwise) shall apply as in force in England for the time being, the provisions of subsection (6) shall apply to such Act of the Parliament of the United Kingdom and not the provisions of such other Act and, without prejudice to the generality of the foregoing, section II of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, shall be construed accordingly."

17. Section 6 provides:-

"6.(1) Any Act of the Parliament of the United Kingdom which applies in Saint Vincent and the Grenadines by virtue of the provisions of section 5 shall -

(a)be read and construed with such formal alterations and modifications as to names, localities, courts, officers, persons and otherwise as may be necessary to make the Act appropriate to the circumstances;

(b)be subject to such amendment as may have been made, or may hereafter be made, by an Act of the Parliament of Saint Vincent and the Grenadines.

(2) Where any conflict arises between the provisions of an Act of the Parliament of the United Kingdom which applies by virtue of the provisions of section 5 and the provisions of an Act of the Parliament of Saint Vincent and the Grenadines, the provisions of the latter shall prevail.

(3) Where an Act of the Parliament of the United Kingdom applies in Saint Vincent and the Grenadines by virtue of the provisions of section 5 repealed and replaced an earlier Act of that Parliament but subsidiary legislation made under such earlier Act continues in force, such subsidiary legislation shall, if otherwise applicable, for the purposes of that section, be deemed to have been made under the latter Act."

18. The provisions of the Police and Criminal Evidence Act 1984 to which it is relevant to refer are the following:-

"58.-(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time."

"66. The Secretary of State shall issue codes of practice in connection with -

(a)the exercise by police officers of statutory powers -

(i)to search a person without first arresting him; or

(ii)to search a vehicle without making an arrest;

(b)the detention, treatment, questioning and identification of persons by police officers;

(c)searches of premises by police officers; and

(d)the seizure of property found by police officers on persons or premises."

"67.-(1) When the Secretary of State proposes to issue a code of practice to which this section applies, he shall prepare and publish a draft of that code, shall consider any representations made to him about the draft and may modify the draft accordingly.

(2) This section applies to a code of practice under Section 60 or 66 above.

(3) The Secretary of State shall lay before both Houses of Parliament a draft of any code of practice prepared by him under this section.

(4) When the Secretary of State has laid the draft of a code before Parliament, he may bring the code into operation by order made by statutory instrument.

(5) No order under subsection (4) above shall have effect until approved by a resolution of each House of Parliament.

(6) An order bringing a code of practice into operation may contain such transitional provisions or savings as appear to the Secretary of State to be necessary or expedient in connection with the code of practice thereby brought into operation.

(7) The Secretary of State may from time to time revise the whole or any part of a code of practice to

which this section applies and issue that revised code; and the foregoing provisions of this section shall apply (with appropriate modifications) to such a revised code as they apply to the first issue of a code.

...

(11) In all criminal and civil proceedings any such code shall be admissible in evidence, and if any provision of such a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

"76.-(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained -

(a)by oppression of the person who made it; or

(b)in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

"78.-(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

"82.-(3) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

19. Before considering the answer of the Court of Appeal to the first question, their Lordships observe that the first question is worded in wide terms and asks whether "the provisions or any of the provisions of the Police and Criminal Evidence Act 1984" apply to Saint Vincent and the Grenadines. The answer of the Court of Appeal is that in respect of any question arising in any criminal proceedings touching the admissibility of any evidence "PACE has been specifically imported into the Laws of St. Vincent and the Grenadines". The answer also states the qualification that PACE applies where "there are no provisions in the Laws of St. Vincent and the Grenadines which regulate the determination of such questions". Their Lordships consider that questions of considerable difficulty and of varying degrees of complexity could arise as to whether, in respect of a particular question, there are provisions in the local law regulating the determination of that question. In the present case the issues raised on behalf of the appellant related to sections 76 and 78 of PACE and to Code C of PACE which sets out the code of practice for the detention, treatment and questioning of persons by police officers. Therefore their Lordships propose to confine their decision on this appeal to the issue whether sections 76 and 78 of PACE and Code C have been applied to Saint Vincent and the Grenadines.

<u>The first question remitted to the Court of Appeal.</u>

Their Lordships consider that the first question remitted to the Court of Appeal gives rise to two separate issues. The first issue is whether sections 76 and 78 of PACE apply to Saint Vincent and the Grenadines. If they do, the second issue is whether Code C of PACE, issued by the Home Secretary under section 66 of PACE, applies to Saint Vincent and the Grenadines.

20. In relation to the first issue, their Lordships think it unnecessary to decide whether, when sections 76 and 78 of PACE became law in England on 1st January 1986, these sections were applied to Saint Vincent and the Grenadines by section 2 of the Evidence Ordinance 1926, and their Lordships consider only the effect of section 3 of the Evidence Act 1988. When the defence at a trial objects to the admissibility in evidence of a confession made by the defendant and the trial judge embarks on a *voir dire*, the judge is considering a question "touching the admissibility ... of any evidence" within the meaning of section 3 of the Evidence Act 1988. Therefore their Lordships consider that after section 3 became law on 24th April 1989 and pursuant to it, a question as to the admissibility of a confession was governed in Saint Vincent and the Grenadines by sections 76 and 78 of PACE. In consequence, after section 3 of the 1988 Act became law, the common law test of voluntariness stated in *Ibrahim v. The King* [1914] A.C. 599, 609 was replaced in Saint Vincent and the Grenadines by the law set out in sections 76 and 78 of PACE (although it will be necessary for their Lordships to consider in a later part of this judgment the differences, if any, brought about by this change).

21. Sections 76 and 78 would have applied in Saint Vincent and the Grenadines at the time of the trial if section 3 of the Evidence Act 1988 had stood alone. But, in addition, their Lordships consider that the application of those sections to Saint Vincent and the Grenadines was confirmed by section 5(1) of the Application of English Law Act 1989, (particularly having regard to the reference in section 5(7) to the "expression `the law and practice'"). Therefore their Lordships are of opinion that sections 76 and 78 applied in Saint Vincent and the Grenadines at the time of the trial of the appellant.

22. The Court of Appeal was also of opinion that the PACE Codes applied in Saint Vincent and the Grenadines, and the Chief Justice stated at page 4:-

"In 1926, the Evidence Ordinance was passed. Section 2, which incorporated the English law of evidence on various matters, was clearly the precursor and precedent for section 3 of the 1988 Act.

One of the important regimes which affected the admissibility of evidence in Criminal Proceedings was the `Judges Rules' which did not have the force of rules of law but were prepared as administrative rules for the guidance of the police officers in conducting their investigations in England.

These rules have not been specifically adopted in relation to St. Vincent and the Grenadines but have been applied under section 2 of the Evidence Ordinance 1926 as being part of the Law administered in England. Then came the Evidence Act 1988. It is a fairly comprehensive treatment of the law of evidence, but the matter of relevance to these proceedings, being the admissibility in Criminal Proceedings of extra judicial confessions and admissions, is a notable omission. This is not surprising because in St. Vincent and the Grenadines there has never been any legislative regulation of these issues except by the provisions which required questions touching their admissibility to be determined according to the law or the law and practice administered by Courts in England. Prima Facie, therefore, section 3 of the 1988 Act accords with that tradition."

And at page 8:-

"The respondent contended that even if PACE itself was applied in St. Vincent and the Grenadines the Codes of Practice which were designed to regulate the conduct of persons charged with the duty of investigating offences in the United Kingdom should be excluded.

In St. Vincent and the Grenadines the Judges Rules were applied on the ground that they were the law and practice administered for the time being in England. That is no longer the case. They have been replaced by the Codes.

Like the Judges Rules the codes are not rules of law. They provide guidance to police officers in the investigation process and they establish the standard of conduct by which the investigative process will be assessed. Section 67(11) of PACE prescribes that codes are admissible in evidence and those which appear to be relevant can be taken into account in determining any question before the courts. This requires the Judges to take the codes into account but it is a matter for their discretion whether a breach of the codes will result in the exclusion of evidence.

On my reading of the Codes I find that they could be applied in St. Vincent and the Grenadines with modifications which are applicable and necessary. The modifications are

easily identifiable and determinable by a trial Judge. I do not think that it is necessary to make any pronouncement of how the codes are to be modified, this process should be undertaken at the time the law and practice in England is being applied. In time case law will build up. I do not think that approach will lead to uncertainty about the law, and it would be a fairly simple administrative exercise to send copies of the codes of practice to each police station, just as was done in respect of the Judges Rules.

There is no doubt, however, that the law and practice administered in England with regard to the admissibility of confessions and admissions include the codes of practice.

A Judge in St. Vincent and the Grenadines must, therefore, in order to comply with the legislation be prepared to approach the task of determining such questions on the basis of considering the relevant provisions of PACE and the codes, with applicable and necessary modifications."

In *Reg. v. May* (1952) 36 Cr.App.R. 91, 93 Lord Goddard C.J. stated:-

"There are certain rules known as the Judges' Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules."

23. The PACE Codes are not rules of law, but are codes issued by the Home Secretary pursuant to section 66 of PACE (save that, pursuant to section 60 of PACE, Code E relating to the tape-recording of interviews was made by statutory instrument). In England the Codes and the Act are closely linked. When a judge is considering the admissibility of a confession under section 76 or section 78 he must take into account, pursuant to section 67(11), any breach of a provision of a Code, and in his valuable book on PACE 3rd Edition (1995) Professor Michael Zander states at page 238:-

"By far the most common basis for the Court of Appeal to apply section 78 has been `significant and substantial' breaches of the PACE rules."

24. Mr. Strachan Q.C., for the Crown, advanced the argument that, even if sections 76 and 78 of PACE applied in Saint Vincent and the Grenadines, the provisions of the Codes,

designed for the very different and much larger police forces of England, are so detailed and complex that it could never have been the intention of the Parliament of Saint Vincent and the Grenadines that the Codes, even "with such modifications as may be applicable and necessary in St. Vincent and the Grenadines", should apply in Saint Vincent and the Grenadines. Mr. Strachan developed this argument by pointing to the numerous provisions of the Codes which he submitted were clearly inappropriate to Saint Vincent and the Grenadines. These included (to refer only to some of the provisions) the following provisions in Code C. Paragraph 1.1A requires that in each police station to which a person is brought under arrest to be questioned there must be a police officer designated as "a custody officer", or, under paragraph 1.9, a police officer to perform the functions of a custody officer. Under paragraph 1.2 the Code must be readily available at all police stations for consultation by police officers, detained persons and members of the public. Under paragraph 3.1 where a person is brought to a police station under arrest the custody officer must tell him clearly of specified rights, including the right to consult privately with a solicitor and, under paragraph 3.2, the custody officer must give the person a written notice setting out his specified rights. Under paragraph 6.6 the right of access to legal advice may only be delayed if an officer of the rank of superintendent or above has reasonable grounds for believing that delay in interviewing will lead to certain consequences, such as immediate risk of harm to others.

25. Mr. Strachan submitted that a breach of such provisions of Code C could give rise to an argument under section 78 that a confession had been obtained unfairly, and further submitted that it could not have been the intention of the Parliament of Saint Vincent and the Grenadines to impose upon the small police force of Saint Vincent and the Grenadines the very complex and detailed provisions of Code C which were designed to regulate the conduct of the much larger and more extensively equipped police forces of England.

26. Mr. Strachan also relied on the point that there had been a great deal of debate and discussion in England prior to the

issuing of the Codes by the Home Secretary. In his book on PACE Professor Zander states at page 168:-

"Each version of the Codes went through successive drafts as a result of comments from a wide range or organisations and individuals. By the time that Parliament considered them they had already been extensively amended and re-amended. The preliminary stage of publishing drafts therefore proved very important in practice."

27. Mr. Strachan also pointed to the Police Regulations 1948 made by the Commissioner of Police pursuant to section 74(1) of the Police Act 1947 relating to the questioning of

suspects and submitted, in reliance on the judgment of this Board in *Melville v. The King* [1946] A.C. 101, that section 3 of the Evidence Act 1988 did not operate to replace the rules laid down in Saint Vincent and the Grenadines by the Police Regulations with Code C of PACE made for the larger police forces in England.

28. In reply to this submission Mr. Guthrie Q.C., for the appellant, accepted that where a provision of the Police Regulations of Saint Vincent and the Grenadines was inconsistent with a provision of a PACE code, the former should be applied and the PACE provision would not nullify it. But he submitted that if the local provision was less extensive than the provision of the PACE code, the latter could be used to supplement it, and that a requirement of the PACE code should be applied if it made provision for the discharge of a duty not required by a local provision.

29. Whilst, as they have stated, their Lordships are of opinion that sections 76 and 78 of PACE applied at the time of the trial of the appellant, their Lordships consider, notwithstanding the close connection in England between PACE and the Codes made under it, that Mr. Strachan's submission is correct in relation to Code C and that that Code does not apply in Saint Vincent and the Grenadines. In *Melville v. The King* the Board held (reversing the decision of the Court of Criminal Appeal of Trinidad and Tobago on the point) that section 19 of the Children Ordinance of Trinidad and Tobago did not permit the reception of the unsworn evidence of young children on the trial of an accused on a charge of murder. In England section 38 of the Children and Young Persons Act 1933 permitted such evidence to be given if there was corroboration. Section 2 of the Evidence Ordinance of Trinidad and Tobago provided, in terms very similar to section 3 of the Evidence Act 1988 of Saint Vincent and the Grenadines, that whenever any question arose touching the admissibility of any evidence or the competency of any witness to give evidence, such question should be decided according to the law of England for the time being in force. It is to be noted that it appears that in Trinidad and Tobago there was no statutory provision equivalent to section 6(2) of the Application of English Law Act 1989 of Saint Vincent and the Grenadines.

30. The Board rejected the argument that, by virtue of section 2 of the Evidence Ordinance, section 38 of the English Act of 1933 nullified section 19 of the Children Ordinance and stated at page 106:-

"The argument then is that s.38 of the English Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), generalizes the admission of unsworn testimony by a child of tender years who is considered by the court to have the qualities of mind and morals before-mentioned, but subject to a proviso requiring corroboration, and that consequently the same latitude of admissibility of such evidence must now prevail in Trinidad. Their Lordships agree with the

Court of Criminal Appeal in Trinidad that this argument is unsound. Section 2 of the Evidence Ordinance applies only in cases where there is no specific provision to the contrary in Trinidad law. It refers mainly to rules about hearsay, corroboration, and the like, and does not purport to make the provisions of an English statute a master code which automatically nullifies the express law enacted for Trinidad and Tobago."

31. Regulation 86 of the Police Regulations 1948 made pursuant to the Police Act 1947 of Saint Vincent and the Grenadines provides:-

"86. **Questioning prisoners**. (1) When a member of the Force is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks useful information may be obtained.

(2) When a member of the Force has made up his mind to charge a person with a crime, he shall first caution such person before asking any questions or any further questions as the case may be.

(3) Persons in custody shall not be questioned without the usual caution being first administered.

(4) If a prisoner wishes to volunteer any statement the usual caution shall be administered.

(5) The caution to be administered to a prisoner when he is formally charged, shall be in the following words: `Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence'.

(6) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, such statements shall not be read to the other person or persons charged, but each of such person shall be furnished with a copy of the statements made by the other person or persons, and nothing shall be said or done or invite a reply thereto. If the person charged desire to make a statement in reply, the usual caution shall thereupon be again administered.

(7) Any statement made in accordance with the above rules shall, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish. The statement shall also be certified and signed by the person by whom it was taken down."

32. Regulation 155 relates to legal advice and provides:-

"155. **Legal adviser of prisoner**. A legal practitioner, or his clerk if duly authorised in writing to act for him, shall be allowed to communicate with a prisoner in custody at a station. Such communication shall take place within sight of but out of hearing of a member of the Force."

33. Therefore prior to PACE being enacted in England and Code C being made pursuant to it, there was what was, in effect, a code made under statutory authority relating to the questioning of suspects and their right to receive legal advice which existed in Saint Vincent and the Grenadines. This code, set out in regulations 86 and 155 of the Police Regulations, laid down rules broadly similar to the Judges' Rules in England.

Having regard to the existence of the code laid down in regulations 86 and 155, to the words of section 6(2) of the Application of English Law Act 1989, and following the decision in *Melville v. The King*, their Lordships consider that section 3 of the Evidence Act 1988 did not operate to make the provisions of Code C a master code which took the place of the express provisions contained in regulations 86 and 155 of the Police Regulations made under the provisions of the Police Act 1947.

34. Where there is a statute or statutory regulation of Saint Vincent and the Grenadines relating to a particular subject matter and there is an English statute or statutory regulation or code made pursuant to statute relating to the same subject matter, their Lordships recognise that a difficult question can arise as to whether there is a conflict between the law in Saint Vincent and the Grenadines and the law and practice in England, so that the English provision does not apply, or whether the English provision can be regarded as supplementing, but not conflicting with, the local provision so that the English provision applies in Saint Vincent and the Grenadines. In this case their Lordships are of opinion, as they have stated, that where the Police Regulations lay down a code for the questioning of prisoners, it is not permissible to regard the more detailed provisions of Code C as merely supplementing the local code, and their Lordships are fortified in this conclusion by the consideration that, in practice, an obligation on the police to observe regulation 86 of the

Police Regulations and whatever provisions of Code C as could be regarded as supplementing regulation 86, would inevitably give rise to uncertainty and confusion.

35. However there is no provision of a statute of the Parliament of Saint Vincent and the Grenadines or of a local statutory regulation relating to the admissibility of a confession obtained by oppression or unfairness - these matters were dealt with by the common law rule of voluntariness. Therefore, because of this absence of a local statutory provision, sections 76 and 78 of PACE did apply to the admissibility of confessions in Saint Vincent and the Grenadines for the reasons which their Lordships have stated. The fact that regulations 86 and 155 of the Police Regulations 1948 laid down a code for the questioning of suspects in Saint Vincent and the Grenadines was not adverted to by the Court of Appeal in its judgment. The Court of Appeal stated that the Judges' Rules were applied in Saint Vincent and the Grenadines on the ground that they were the law and practice administered for the time being in England. It does appear that, in practice, the Judges' Rules were applied in trials in Saint Vincent and the Grenadines, and their Lordships assume they may have been adopted and applied by the judges prior to 1948; and in the trial of the appellant the trial judge treated them as being applicable. But their Lordships consider that, when the Police Regulations came into force in 1948, the Judges' Rules, for the reasons stated in *Melville v. The King*, were not applicable under section 2 of the Evidence Ordinance 1926 and subsequently under section 3 of the Evidence Act 1988, even though in practice it appears that they were applied.

36. Therefore their Lordships consider that in the context of this appeal the answer to the first question which was remitted to the Court of Appeal should be that sections 76 and 78 of PACE apply to Saint Vincent and the Grenadines, but that Code C does not. Accordingly the issue which has to be considered in relation to the second question which was remitted to the Court of Appeal is whether, if the tests of absence of oppression, unreliability and unfairness contained in sections 76 and 78 of PACE had been applied at the trial, the trial judge would have been entitled to admit the confessions in evidence.

<u>The second question remitted to the Court of Appeal.</u>

In order to consider this question it is necessary to refer in a little more detail to what occurred after the police took the appellant from his home to the police station on the morning of 19th December 1993. The evidence of Detective Sergeant Warrican was that his first contact with the appellant was in the police station at 9.00 a.m. He saw the appellant in a cell. He opened the door of the cell and told him about the report (presumably about D'Andra's disappearance) and told him that he was making enquiries into the same. The appellant then told him that "he had thrown body of D'Andra into the sea at La Pompe". Although the transcript is not entirely clear and may in error repeat an answer by the officer,

it appears that Detective Sergeant Warrican told him again that he was making enquiries into the disappearance of D'Andra Ollivierre and that he would like him to assist him into investigations into the matter. The appellant then repeated that he had thrown the body into the sea and said he would point out the area where he had thrown the body. Detective Sergeant Warrican then cautioned the appellant, and decided to take him to show the area where he had thrown the body.

37. Detective Sergeant Warrican and other officers then took the appellant on board a coastguard vessel which went to the area of La Pompe. As the vessel approached La Pompe the appellant pointed to the area just below the Ollivierres' home and said he had thrown the body of D'Andra in that area. After a search of the sea Detective Sergeant Warrican asked the appellant to point out from the land where he had thrown D'Andra's body and the appellant agreed to do so. Detective Sergeant Warrican and the appellant then went onto the land and the appellant went down to the beach below the Ollivierres' home, and as they got on the beach the appellant said that he had held D'Andra by one hand and he had put his other hand on her back and had thrown her into the sea. He pointed out an area and said she had dropped in that area.

38. The appellant was then taken back to the police station and at 11.45 a.m. Detective Sergeant Warrican cautioned the appellant formally in the presence of Sergeant Adams and told him that he was not obliged to say anything unless he wished to do so and whatever he said would be put in writing and given in evidence. The appellant replied that he would like to give a statement as to what had happened. Detective Sergeant Warrican told him that he (the appellant) could write the statement or he (Detective Sergeant Warrican) could write the statement for him. The appellant told him that he wanted him to write the statement for him. The appellant then dictated a statement and Detective Sergeant Warrican wrote it down. The appellant then signed the statement and his signature was witnessed by Sergeant Adams. Before the statement was dictated by the appellant he (Detective Sergeant Warrican) did not mention to him that maybe he ought to see counsel.

39. The written statement was as follows:-

"Ah been by Kenneth Allick drinking about 8 o'clock last night Saturday 18th December 1993, ah been drinking strong rum and Guinness, about 9.30 in the night ah come out ah Kenneth Allick shop, me see a little girl way dem does call Penny on she mother Kitsy Ollivierre steps, that is in La Pompe, Penny did just come out ah the house, she had on a panty but me nah know the colour and she been bare back, so me go in ah Penny them yard lift she up and run go down pan e bay side wid she, me run down to the back of Kitsy Ollivierre house they ah way Penny live, when me been running wid Penny she been crying calling Amron, when me reach down on the bay side, me put Penny to sit down on a rock,

then ah tek off she panty and throw it on the rock, then ah use me centre finger and start to push it up in ah she vagina ah push it up in ah she vagina (2) two times, all that time Penny been screaming out and calling her brother Amron then me pull out me finger and me get frighten because ah how she been ah bawl out and me lift she up and hold she by one hand and me rest me other hand pan she back and throw she in the sea and she drop about (5) five feet away from me. I was wearing a pair of red gunslingers and they drop off my feet into the sea the same place. While I was running I get a fall and I get a bruise on right knee and the side of right foot, I run back towards the same house for Kitsy Ollivierre, after me throw Penny in the sea I did not hear her voice again when ah reach by the side of the house next to a milk wood tree, ah see some people and ah recognise Geana Ollivierre as one of them and they spot a light on me and ah run down back to the bay side, while I was running to the bay side ah hear Geanna Ollivierre asking way Penny dey. Ah been wearing a blue overall and a brown jersey. Today Sunday 19th December 1993 sometime in the morning I was at home and the police come home dey and ask me what kind of clothes I was wearing last night and I tell them I was wearing a blue overall and a jersey and I show the police and they tek them and then ah tek the police and show them where ah tek Penny and push my finger in she vagina and way ah throw she. When we get to the station the police show me ah left foot of a gunslinger and that is mine and is one foot of the gunslinger I was wearing last night."

40. As their Lordships have stated, the admissibility of the oral admissions and the written statement were challenged at the trial. The judge heard evidence from the police officers and from the appellant and his mother in the *voir dire* and ruled that the oral admissions and the written statement were admissible. The transcript note of her ruling is as follows:-

"A caution should be administered when a police officer not merely suspect an Accused of having committed an offence but what police officers has evidence to put before a Court.

41. However even where caution is not administered. (The) judge has a discretion to admit a statement unless statement was not made voluntary. So that the test to be applied is `was the statement made voluntarily'.

42. I hold that oral (and) written statement(s) are voluntary statements.

43. Accused denies making oral (and) written statement(s). That is a question of fact for jury to decide."

44. The submissions advanced on behalf of the appellant on the second hearing before the Court of Appeal on the basis that PACE and its Codes applied were summarised in his judgment by the Chief Justice as follows:-

"(1)The confession was obtained by the oppression of the police.

(2)The appellant was not offered and did not receive any legal advice whilst in police custody. DS Warrican said he was not told he ought to see counsel.

(3)No written notes were made of the verbal admissions attributed to the appellant.

(4)PS Adams and DS Warrican suspected the appellant of murder from the moment of his initial detention at 6.45 a.m. on 19th December, [1993] but he was not cautioned until both officers had asked him questions about D'Andra's disappearance."

45. The rulings of the Court of Appeal on these four issues were as follows:-

(1)Oppression.

The Court of Appeal held:-

"The allegations of misconduct by the police were so extreme in this case that it is clear that the judge did not believe the appellant at all because if she had entertained any doubt the statements would surely have been rejected on the test she applied.

It is reasonable to conclude, therefore that, the evidence given by the appellant of the use of force and threats against him must have been totally rejected by the learned trial judge. If there was any doubt about the truth of these allegations it would have been the duty of the learned trial Judge to refuse to admit the statement on the ground of lack of voluntariness.

A trial Judge applying the test under section 76(2)(a) who disbelieved the appellant would have been entitled to reject the submission that the confession was obtained by oppression. In my view, there were objective reasons to support the Judge's conclusion that the appellant's story was incredible, and untrue. In addition the judge had the advantage of seeing the appellant and the other witnesses who testified on this issue, and I would not under estimate the value of that advantage in determining the credibility of the appellant's story."

(2)Right to legal advice.

The Court of Appeal held that there was no breach of section 58 of PACE because there was no evidence that the appellant had made a request to consult a legal adviser before or during his confessions to the police.

46. The Court of Appeal referred to the provisions of Code C which require that before commencing an interview the interviewing officer must remind the suspect of his entitlement to free legal advice. Paragraph 6.1 of Code C provides:-

"Subject to the provisos in Annex B all people in police detention must be informed that they may at any time consult and communicate privately, whether in person, in writing or by telephone with a solicitor, and that independent legal advice is available free of charge from the duty solicitor."

47. The Court of Appeal observed that these provisions are supported by legal aid schemes in England, but that these provisions could not be applicable in Saint Vincent and the Grenadines because there is no law or practice, or available system, under which a suspect can avail himself of free legal aid as a matter of right during an investigation process, section 8(2)(d) of the Constitution providing that every person who is charged with a criminal offence:-

"shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice."

48. The Court further observed that the prevailing standards of police conduct that have in practice been applied are those set out in the Judges' Rules, which require that persons in custody be informed orally and by the existence of notices displayed at convenient and

conspicuous places at police stations of the rights and facilities available to them which must include the right to be represented by a solicitor of their choice at their expense. The Court of Appeal then stated:-

"Against this background I think that the codes require modification to the extent that the absence of legal aid facilities and the absence of free legal advice makes it pointless for the police to tell a suspect of his right to free legal advice. However the suspect should be informed of his right to be represented by a lawyer of his own choice. Under the law which the learned Trial Judge applied the police would have been in breach of the provisions requiring that the appellant be informed of his right to be represented by a solicitor of his choice at his expense. The effect of the omission to do so on the confessions must depend on the circumstances of the case.

The learned trial Judge would be entitled to consider the manner in which the investigations had been proceeding and other factors affecting the suspect and the surrounding circumstances in determining the legal effect on the admissibility of the confessions of the police investigator's failure to have taken special steps to assist the appellant to obtain legal advice.

This has been the law and practice that a trial Judge was required to apply under the laws of St. Vincent and the Grenadines prior to the 1988 Evidence Act and also under PACE. I would conclude that it is probable that in accordance with her duty she considered the omission of the police to advise the appellant of his right to consult a lawyer of his choice in the exercise of her discretion.

I would, therefore conclude, that the failure of the police investigators to advise the appellant to consult a lawyer is not an omission which would necessarily lead to the conclusion of oppression, unreliability or unfairness, and that the learned trial Judge was entitled to exercise a discretion to reject this omission as a basis for excluding the confessions."

(3)<u>No written notes of the oral admissions.</u>

The police made no notes of the verbal admissions alleged to have been made by the appellant before his written statement. The Court of Appeal held:-

"Under the codes the police are required to make a written record of any interview, and this could be made either contemporaneously or as soon as practicable afterwards. The record should be available to the person who made it and he should be asked to sign it.

49. Under the Judges Rules statements made after caution were required to be recorded. There is no reason why the provisions of the codes with regard to the making of a written record should not be observed. In my view the codes do not need to be modified in that regard. The requirement is not novel or new and ought to have been considered by the learned trial Judge even when applying the standards laid down in the Judges Rules. However it would still be a question for her judicial discretion whether to allow evidence of the oral confessions to be adduced in the absence of a written record, signed by the suspect, and it is reasonable to conclude that the learned trial Judge did take this into account."

(4)Failure to give caution before questions.

The Court of Appeal stated:-

"Under the codes a person whom there are grounds to suspect of an offence must be cautioned before any

questions about it are put to him for the purpose of obtaining evidence which may be given to a court in prosecution.

50. Under the Judges Rules the test was that as soon as a police officer has evidence which would afford reasonable grounds for suspicion that a person has committed an offence he shall caution that person before putting to him any questions relating to that offence.

On the evidence, the issue the learned trial Judge would have had to consider whether applying the Judges Rules or the codes of practice, was the amount of information the police had when they first picked up the appellant on 19th December. A main factor to be considered is at what stage could knowledge, that D'Andra's disappearance was the result of some criminal misconduct be imputed to the police.

At their outset, the investigations were into D'Andra's disappearance. The failure to find her, and the findings of blood and faeces on the beach were clues pointing to her death, which however required further investigation because the body was not located. It is

reasonable to conclude that the police would delay reaching a conclusion that her disappearance resulted from criminal misconduct until further searches and further lapse of time had eliminated or at least reduced the possibility of other explanations for her disappearance being revealed.

In my view therefore, there are rational grounds for hesitating to conclude that the police were conducting investigations into the crime of murder until the appellant had made the oral statement that he had thrown D'Andra into the sea. Sgt. Warrican's evidence was that he gave him the caution at that time.

In my view, a trial Judge determining the question according to the law and practice administered in England could have decided to admit the confessions into evidence."

51. The Court of Appeal concluded its judgment by stating:-

"On the evidence adduced, it was open to a judge applying the law and practice administered in England to reach the conclusion that the admissions and confessions should have been admitted into evidence.

52. Once the learned trial Judge came to the conclusion that there was no truth in the allegations of oppressive conduct by the police made by the appellant and in my opinion there were objective reasons to reject those allegations, no unfairness could have resulted from the admission into evidence of his clear and complete confession to this heinous crime.

53. I would conclude therefore that if the provisions of PACE were applied, it is likely that the outcome would have been the same."

54. Mr. Guthrie submitted that the judgment of the Court of Appeal was erroneous in a number of respects. He submitted that in ruling on the four issues specified by the Chief Justice the Court of Appeal went beyond the scope of the second question remitted to it by

their Lordships' Board, and that the Court of Appeal ought to have limited its consideration to the question whether there had been breaches of the provisions of PACE at the trial, and whether the conduct of the trial (including the *voir dire*) would have been different if the trial judge had appreciated that PACE applied. Mr. Guthrie submitted that the Court of Appeal should not have embarked on considering what the judge's ruling would have been if she had realised that PACE did apply and that the consideration of this aspect of the case should have remained exclusively part of the subject matter of the appeal to their Lordships' Board. Their Lordships do not accept that submission, and consider that it was appropriate and helpful for the Board to have the benefit of the Court of Appeal's opinion on those issues.

Oppression.

The issue before the trial judge was whether she should exclude the confessions. The most important question arising on this issue was whether the confessions of the appellant had been obtained by the grave physical ill-treatment alleged by him. It is clear that both the judge and the jury rejected these allegations and were of the opinion that the appellant had not been physically ill-treated. It is also clear that the jury were satisfied that the appellant had made and signed the written statement. The findings by the judge and jury that the appellant had not been physically ill-treated were not dependent upon whether the issue of admissibility was governed by the Judges' Rules and the common law test of voluntariness or by the provisions of PACE. Therefore the Court of Appeal was right to hold that the trial judge would have been entitled to reject a submission under section 76(2)(a) of PACE that the confessions had been obtained by oppression constituted by physical ill-treatment. Mr. Guthrie criticised this part of the judgment of the Court of Appeal on the ground that before that court the appellant had not relied on oppression as constituted by physical ill-treatment but on oppression as constituted by breaches of Code C of PACE. Their Lordships do not accept that criticism as being valid and consider that the allegations of grave physical ill-treatment lay at the heart of the issue of admissibility at the trial and that, in the particular circumstances of this case, once that allegation was rejected the risk of injustice to the appellant by the admission in evidence of the confessions was eliminated, unless the appellant can point to unfairness which would be a ground for exclusion of the confessions under section 78 of PACE.

55. There are a number of further considerations which are relevant to the present appeal before the Board. One consideration is that, whilst there can be debate as to the principles which underlay the common law test of voluntariness, it appears that one reason for the test was to guard against the risk that a confession might be unreliable: in *Wong Kam-ming v. The Queen* [1980] A.C. 247, 261 Lord Hailsham of St. Marylebone, referring to the common law test of voluntariness, stated:-

"... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions."

56. Therefore, in ruling that the appellant had not been physically ill-treated and that the confessions were 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. In *Daley v. The Queen* [1994] 1 A.C. 117, 129B Lord Mustill referred to:-

"... the long-standing duty of the judge, now embodied in section 76(2) of the Police and Criminal Evidence Act 1984, to rule on whether a confession by the accused has been, or may have been, obtained by oppression, or in consequence of anything said or done which was likely to render it unreliable."

Fairness.

In relation to the issue of fairness under section 78 it is also relevant to note that under the rules of the common law before PACE the trial judge had a discretion to exclude a confession unfairly obtained (see *Reg. v. Sang* [1980] A.C. 402, 435G), and in her ruling Mrs. Justice Joseph referred to this discretion of the trial judge and stated: "However even where caution is not administered. The judge has a (discretion) to admit a statement unless statement was not made voluntary". In *Reg. v. Christou* [1992] Q.B. 979, 988E Lord Taylor of Gosforth C.J. stated:-

"The judge held that the discretion under section 78 may be wider than the common law discretion identified in *Reg. v. Sang* [1980] A.C. 402, the latter relating solely to evidence obtained from the defendant after the offence is complete, the statutory discretion not being so restricted. However, he held that the criteria of unfairness are the same whether the trial judge is exercising his discretion at common law or under the statute. We agree. What is unfair cannot sensibly be subject to different standards depending on the source of the discretion to exclude it."

57. Therefore it appears that in the present case the trial judge was directing her mind to the issue of fairness and decided in the exercise of her discretion not to exclude the confessions on that ground.

The exercise of the discretion under section 78 and the function of the Court of Appeal.

It is also relevant to note a further consideration in relation to the exercise by the trial judge of the discretion to exclude

a confession under section 78 of PACE and the function of the Court of Appeal in respect of the exercise of that discretion. The Court of Appeal does not set aside the exercise of the trial judge's discretion under section 78 unless it concludes that the decision to admit the confession was unreasonable in the *Wednesbury* sense. In *Christou (supra)* at page 989F Lord Taylor of Gosforth C.J. stated:-

"The judge's exercise of his discretion could only be impugned if it was unreasonable according to *Wednesbury* principles."

See also *Reg. v. O'Leary* (1988) 87 Cr.App.R. 387, 391.

58. The more recent judgment of the Court of Appeal in *Reg. v. Middlebrook and Caygill* (unreported, 18th February 1994), Court of Appeal (Criminal Division) transcript No. 92/6701/Z2 cited by Mr. Guthrie, does not constitute a change in the law stated in *Christou* and *O'Leary*. The judgment in that case points out that the discretion operates at the stage where the trial judge decides whether the admission of the evidence would so affect the fairness of the proceedings that it should not be admitted:-

"This is the judicial exercise that has been referred to as a discretion in the cases. It may involve the finding of facts on a voir dire, but once the facts are found it is an exercise of judgment carried out by the Judge in the light of all the circumstances known to him in the immediacy of the trial. Since that is its nature, it is a task or function whose discharge by the trial Judge will not readily be interfered with in this court. If, of course, the material in the case discloses a state of affairs in which a reasonable Judge must have concluded that the admission of the evidence would produce unfairness, this Court will set aside a ruling which goes the other way. We think that this is what is meant by the references to *Wednesbury* in the cases."

59. In that case the Court of Appeal held that the trial judge was entitled to admit evidence notwithstanding that there had been breaches of paragraphs 2.3 and 2.13 of Code D of PACE.

60. In the light of the considerations which they have stated above their Lordships turn to consider the specific criticisms which Mr. Guthrie made of the judgment of the Court of Appeal. Their Lordships also observe that Mr. Guthrie's submissions now have to be considered on the basis of the Board's ruling that sections 76 and 78 of PACE apply in Saint Vincent and the Grenadines but that Code C does not. As the trial judge, in accordance with the practice in Saint Vincent and the Grenadines, applied the Judges' Rules, their Lordships will also consider the points made by Mr. Guthrie on the basis that the Judges' Rules, as well as the Police Regulations 1948, applied in Saint Vincent and the Grenadines at the time of the appellant's trial, even though the legal basis for their application appears uncertain.

Right to legal advice.

Mr. Guthrie submitted that the Court of Appeal erred in holding that the failure of the police to advise the appellant that he had a right to consult a lawyer did not lead to a conclusion of oppression, unreliability or unfairness and that the trial judge was entitled to exercise her discretion to admit the confession notwithstanding this omission. Their Lordships do not accept this submission. Where in England there has been a breach of PACE in respect of the provision of legal advice the trial judge has a discretion whether or not to admit a confession: see *Reg. v. Alladice* (1988) 87 Cr.App.R. 380. In this case, where the appellant told Detective Sergeant Warrican that he had thrown the body of D'Andra into the sea as soon as the Detective Sergeant told him that he was making enquiries into D'Andra's disappearance, and then went with the police and pointed out the place where he had thrown her into the sea, their Lordships consider that the trial judge was entitled to decide that it was not oppressive or unfair to admit the confessions notwithstanding that the police had not advised the appellant of his right to consult a lawyer.

No written note of the oral admissions.

Mr. Guthrie submitted that the trial judge should not have admitted the oral admissions of which no note had been made. However the judge (and also the jury in the main trial) accepted that the appellant had voluntarily made the very detailed written statement which repeated the oral admissions at greater length, and therefore their Lordships consider that it was not unfair for the trial judge to admit those admissions, and their Lordships do not accept Mr. Guthrie's submission that if the oral admissions had been excluded from evidence the jury might not have found that the appellant had voluntarily made the written statements. Failure to give a caution before questions.

Detective Sergeant Warrican did not caution the appellant when he first spoke to him in the cell of the police station and told him that he was making enquiries into D'Andra's disappearance and the appellant replied that he had thrown her body into the sea and then repeated that admission. It was after these two admissions that Detective Sergeant Warrican first cautioned him. The Court of Appeal held that there had not been a breach of the

relevant PACE Code (which was paragraph 10.1 of Code C) because it was reasonable to conclude that until the appellant made his oral admission, the police were conducting an investigation into D'Andra's disappearance and did not have grounds for suspecting the appellant of D'Andra's murder.

61. It is implicit in the ruling that the Court of Appeal also considered that there had not been a breach of Rule 2 of the Judges' Rules which requires a caution where a police officer "has evidence which would afford reasonable grounds for suspecting that a person has committed an offence". Mr. Guthrie submitted that this ruling was erroneous and that the evidence established that before the police went to the appellant's home early on the morning of 19th December they had received a report from D'Andra's family that she had disappeared, that the appellant had been in the vicinity where D'Andra disappeared, that he had hidden and run away when seen by them, that blood and D'Andra's pants had been found on the beach, and that a red slipper (a gunslinger) had been found on the beach which the appellant had said was his before he was seen by Detective Sergeant Warrican. Although he was directing his submissions primarily to paragraph 10.1 of Code C, Mr. Guthrie also submitted, with reference to Rule 2 of the Judges' Rules, that these matters established that the police had evidence which afforded reasonable grounds for suspecting that the appellant had committed an offence in respect of D'Andra, and that the appellant had been taken under arrest from his home to the police station where he was placed in a cell in custody. Mr. Guthrie further relied on express statements in evidence by Detective Sergeant Warrican and Sergeant Adams that when the appellant was brought to the police station he was a "suspect".

62. Their Lordships consider that the question whether, at the stage when Detective Sergeant Warrican first spoke to the appellant in the cell and when D'Andra's body had not been discovered, the police had evidence which would afford reasonable grounds for suspecting the appellant of an offence in relation to her is open to debate. However in *Reg. v. Osbourne* [1973] Q.B. 678, 688, referring to Rule 2 of the Judges' Rules, Lawton L.J. stated:-

"But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charge. He reaches a stage where he has got the beginnings of evidence. It is at that stage that he must caution."

63. Therefore on this point their Lordships differ from the view of the Court of Appeal and would conclude that the police did have evidence which would afford reasonable grounds for suspecting the appellant, so that there was a breach of Rule 2 of the Judges' Rules when Detective Sergeant Warrican spoke to the appellant in the cell and, by clear implication,

asked him a question about D'Andra's disappearance. As their Lordships consider that the appellant was then in custody it also appears that there was a breach of Regulation 86(3) of the Police Regulations.

64. However in deciding whether to exclude a confession pursuant to section 78 a trial judge, in the exercise of the discretion under that section, may admit a detailed confession made after caution notwithstanding that at an earlier stage in the police investigation the suspect had made an oral admission to a question from a police officer who, in breach of paragraph 10.1 of Code C, had failed to caution him before putting the question to him: see *R. v. Hoyte* [1994] Crim.L.R. 215. In the present case, where the appellant made the admission as soon as Detective Sergeant Warrican told him he was investigating D'Andra's disappearance, and subsequently, after caution, pointed out to the police the place where he had thrown D'Andra's body into the sea, and subsequently after further caution made a detailed written statement, their Lordships are of opinion that the trial judge would have been entitled to rule that the failure to caution when Detective Sergeant Warrican first spoke to the appellant and told him that he was investigating D'Andra's disappearance did not have such an adverse effect on the fairness of the proceedings that the court ought to exclude the subsequent confessions made after caution.

65. Therefore having regard to the approach stated in *Christou* and *O'Leary (supra)* their Lordships consider that the Court of Appeal was entitled in the present case to hold that if the trial judge had appreciated that the issue of admissibility was governed by sections 76 and 78 of PACE she would have been entitled to admit the oral and written confessions.

<u>The test applied by the Court of Appeal.</u>

A further criticism of the judgment of the Court of Appeal advanced by Mr. Guthrie was that, in considering what the trial judge would have done if she had appreciated that the issue of admissibility was governed by PACE, the Court in referring to the failure of the police to give advice about obtaining legal advice used the phrase that this would not "necessarily lead to the conclusion of oppression, unreliability or unfairness", and later stated that "it is reasonable to conclude" that the trial judge took into account the failure of the police to make notes of the oral admissions. And at the conclusion of its judgment the Court stated that "it was open to a judge applying the law and practice administered in England to reach the conclusion that the admissions and confessions should have been admitted into evidence", and that "if the provisions of PACE were applied, it is likely that the outcome would have been the same".

66. Mr. Guthrie submitted that this was not the appropriate test for the Court of Appeal to apply, and that the court would only have been entitled to rule that the confessions would have been admitted into evidence if it had been satisfied that it was inevitable that the trial judge would have admitted them if she had realised that PACE applied. Their Lordships do not accept this submission. The Court of Appeal was not considering the application of the proviso where the trial judge had materially misdirected the jury on an issue of law or fact. The Court of Appeal was considering a different question, namely, whether the trial judge had erred in the exercise of her discretion to exclude or admit confessions, and in deciding such a question, as was stated in *Christou*, the Court of Appeal does not interfere with the exercise of the discretion unless it considers that the trial judge acted unreasonably in a *Wednesbury* sense in admitting the confessions.

<u>The judge's statement to the jury that she had ruled that the confessions were admissible.</u>

A *voir dire* to determine the admissibility of the confessions was conducted by the trial judge in the absence of the jury. However before the jury retired they had already heard evidence from Sergeant Adams that on 19th December at 11.45 a.m. the appellant had made a written statement after caution (although at this stage the contents of the statement were not read to the jury), and the jury had also heard the commencement of the evidence of Detective Sergeant Warrican in which he said that he saw the appellant on 19th December in Port Elizabeth Police Station, and his evidence continued: "I informed him that I was making enquiries into report of disappearance of D'Andra Ollivierre of La Pompe. Accused told me that he had ...". Defence counsel, Mr. Glasgow, then objected to the statements on the grounds that they were "not made voluntarily and circumstances under which they were made were (oppressive)". The trial judge then asked Detective Sergeant Warrican to deal with the rest of the evidence, and he continued with his evidence describing how, accompanied by the appellant, he went to the area of La Pompe, on a coastguard boat, and that the appellant pointed out an area, and the divers dived for a considerable length of time but were unsuccessful in locating the body of D'Andra Ollivierre. He then described returning to the police station, and that he there cautioned the appellant and that the appellant told him that he wanted him to write a statement for him, and that he took a statement from the appellant between 11.45 a.m. and 12.30 p.m., that the appellant then signed the statement, and that the appellant was not beaten or threatened or promised anything. Detective Sergeant Warrican was then about to read the statement when defence counsel objected on the same grounds as he had previously stated, whereupon the jury retired and the *voir dire* commenced. At the conclusion of the *voir dire* after the trial judge had ruled that the confessions were admissible in evidence, the jury returned to court and Detective Sergeant Warrican continued his evidence in which he recounted the oral admission to him by the appellant and the appellant's written statement was read to the jury.

67. In the course of her summing up to the jury the trial judge stated:-

"Now, Sgt. Warrican was the investigating officer and he said to you that he made inquiries and during the enquiries he spoke to the Accused. And the Accused made an oral statement to him and also a written statement.

Now, defence counsel objected to the receipt of those two statements in evidence. I held that they were voluntary statements but it is for you to look into all the circumstances in which the statement was taken and the defence is saying that there was a beating and there was threatening and also that the Accused was not given anything to eat and that he did not have a meal until late the afternoon. It is for you to assess and to put what weight and value on both statements -the oral and the written statements and to attach such weight as you deem fit to the statements that had been put in evidence."

68. The trial judge also reminded the jury in detail of the allegations made by the appellant of very serious ill-treatment of him by the police, and of his father's evidence supporting these allegations.

69. Mr. Guthrie submitted that it was a serious and fundamental misdirection on the part of the trial judge to tell the jury that she had held that the confessions were voluntary statements, because such an observation by the judge meant that she had disbelieved the appellant and was likely to influence the jury in a very prejudicial way in deciding whether the appellant had made any of the confessions and whether, if he had, the confessions could be regarded as truthful and reliable having regard to his allegations that he had been very seriously assaulted and ill treated by the police.

70. It appears that it has been a common practice in the courts in the Caribbean for a trial judge to tell a jury that he or she has held that confessions are voluntary statements. However in England it is recognised that this practice should not be followed and that it constitutes an irregularity for the judge to inform the jury, which has been absent during the *voir dire*, that he or she has ruled that a confession is admissible. The reason why such a statement by the judge to the jury should not be made is because of the danger that the jury might be influenced by the judge's view on admissibility in deciding the questions which are for them alone, namely, whether the confession had been made and, if so, whether it was truthful and reliable. Therefore their Lordships are of opinion that the practice should also

cease in the Caribbean: see the judgment of the Board in *Mitchell v. The Queen* (Privy Council Appeal No. 18 of 1997; Judgment delivered 21st January 1998).

71. However in the present case the judge's statement that she had ruled that the confessions were voluntary statements was a brief observation in a lengthy summing up, and the judge did not elaborate on the statement or say that she believed that the appellant had not been ill treated by the police and disbelieved the appellant. Furthermore, after the statement that she had held that the confessions were voluntary statements, the judge immediately went on to emphasise that "it is for you to look into all the circumstances in which the statement was taken" and that "it is for you to assess and to put what weight and value on both statements - the oral and the written statements and to attach such weight as you deem fit to the statements that had been put in evidence". In addition the judge very fairly and in detail reminded the jury of the appellant's evidence that he had not made the confessions and of how he had been very seriously ill treated by the police. Therefore their Lordships are satisfied that, when viewed in the context of the whole summing up, the judge's statement did not in the event constitute a material irregularity.

<u>The appellant's previous good character.</u>

In the course of the trial the defence led no evidence in relation to the good character of the appellant. The appellant's written case on the appeal to their Lordships' Board advanced the submission that the appellant had no previous convictions and, notwithstanding that no evidence was led on this matter by the defence, the trial judge should (in the absence of the jury) have enquired whether or not the appellant had a good character, and on learning that he had, should (in accordance with the decisions of *Reg. v. Vye* [1993] 1 W.L.R. 471 and *Reg. v. Aziz* [1996] A.C. 41) have directed the jury that they should take the appellant's good character into consideration in assessing both the truthfulness of his account to them and whether he was likely to have committed the offence.

72. It was submitted that this duty, which it was suggested lay on the judge, was analogous to the duty of the judge to direct the jury to consider a possible defence arising on the evidence upon which defence counsel had not relied, and it was further submitted that the duty was particularly incumbent on the judge where the accused faced a charge of murder carrying the death penalty.

73. In fact, unknown to counsel who had prepared the appellant's written case, the appellant had one previous conviction for larceny of $112 (which had a value of about ,20 sterling) committed in August 1980. For this offence the Magistrate's Court reprimanded and

discharged the appellant. However, because this offence was of such a minor and non-violent nature, their Lordships consider that if, at the trial, the defence had sought to adduce evidence of the good character of the appellant, the trial judge would have held that the previous conviction was immaterial and that the appellant should be regarded as a man of good character. However, if it is intended to rely on the good character of the accused, that issue must be raised by calling evidence or putting questions on that issue to witnesses for the prosecution: see per Lord Goddard C.J. in *Rex v. Butterwasser* [1948] 1 K.B. 4, 6. Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge. The duty of a judge to bring to the attention of the jury a possible defence not relied on by defence counsel is not analogous, because that duty only arises where evidence which gives rise to that defence has been given in the trial and is before the jury.

<u>The Saint Vincent and the Grenadines United Nations Declaration on the Prevention of Crime and the Treatment of Offenders Act 1984.</u>

A further ground of appeal set out in the appellant's written case related to this Act which was intended to incorporate the United Nations Declaration into the laws of Saint Vincent and the Grenadines. Section 4 provides that the provisions contained in the Articles of the Declaration shall have the force of law in Saint Vincent and the Grenadines. Article 8 provides:-

"Any person who alleges he had been subjected to torture or other cruel, inhuman or degrading treatment or punishment by, or at the instigation of, a public official shall have the right to complain to, and have his case impartially examined by, the competent authorities of the State concerned."

74. The written case submitted that the allegations of ill-treatment made by the appellant whilst in police custody on 19th December clearly constituted torture or other cruel, inhuman or degrading treatment or punishment, and the provisions of article 8 were applicable. Mr. Guthrie did not advance further submissions in support of this ground before their Lordships, and their Lordships are of opinion that there is no substance in the point. Their Lordships consider that there is nothing in section 4 of the 1984 Act which required the appellant's allegations of grave physical ill treatment to be examined before his trial. Moreover it appears that there is no evidence that the appellant made a complaint of torture or other ill treatment to the competent authorities of the State before his trial. Furthermore, whilst it is unnecessary for their Lordships to express a concluded opinion on the point, it would appear that the *voir dire* conducted by the trial judge constituted an impartial examination of the appellant's complaint by a competent authority of the State.

75. For the reasons given their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

The completion of the incorporation of the PACE provisions in Saint Vincent and the Grenadines.

In conclusion there is one further observation which their Lordships desire to make. It is widely accepted that the PACE Codes have made an important and beneficial contribution to the proper administration of criminal justice in England. In England sections 76 and 78 and the PACE Codes are closely linked and operate together. Their Lordships have held that sections 76 and 78, but not Code C, apply to Saint Vincent and the Grenadines. Their Lordships also note that in its ruling that the PACE Codes applied in Saint Vincent and the Grenadines the Court of Appeal stated that the Codes would require to be modified to take account of the circumstances in that jurisdiction. In addition their Lordships have observed earlier in this judgment that questions of difficulty and complexity could arise as to whether there is a provision in the local law governing an evidential issue which appears to be in conflict with a provision of PACE or a PACE Code so that the latter would not apply, or whether an English provision would be applicable as supplementing a local provision. Therefore, whilst it is, of course, a matter for the appropriate authorities in Saint Vincent and the Grenadines to decide, their Lordships consider that it would be of great benefit to the administration of criminal justice in Saint Vincent and the Grenadines, and for the avoidance of uncertainty, if specific statutory regulations were to be made there based on the PACE Codes in England but suitably modified and adapted to take account of the different circumstances prevailing in that jurisdiction.

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