

TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE**

Crim. No. 113 of 2003

**THE STATE**

**V**

**PHILLIP PLACID**

Before the Honourable Mr. Justice Volney

Mr. Jerron Joseph and Miss S. Murray  
On behalf of the State

Mr. Larry Williams for the Accused

**J U D G M E N T**

Delivered the 10<sup>th</sup> day of November 2004.

Skepticism over the admission in evidence of oral confessionary statements has for some time fueled in the criminal court a profound sense of caution and challenge. The architect of this is to be found in the court's sense of upholding the justice by denying the self-damnation of an

utterance in the face of unscrupulous authority. Emboldened by a duty cast upon it to secure a fair trial, the Court in a jury trial is at times required to determine whether, on balance, a statement said to have been given voluntarily, is to be excluded for want of the due process. In the instant case, the challenge derives from a wanton disregard of both the letter and spirit of the Judges' Rules.

The Constitution of Trinidad and Tobago affirms that the nation is founded upon principles that acknowledge, among others, faith in fundamental human rights and freedoms, and that there exists the right of the individual to life, and liberty and the right not to be deprived thereof except by the due process of law. In this regard, it is expressly provided that Parliament may not, by law, abrogate or authorize the abrogation of the right of the individual to life, and liberty nor, in that regard, authorize or countenance the deprivation of a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to these rights.

In **Mukesh Chandradath and Zanna Andrews** (Unreported) Crim. No.S67 of 2001, I expressed the view that-

“ Both before and after the arrival of national independence, the Judges' Rules have been recognized guidelines and with the emergence of the concept of fairness and civility towards persons undergoing a deprivation of liberty while at Police Stations, an acceptable balance between the respect for the rule of law and its preservation on the one hand and civil liberties on the other may only be struck with an observance of measured courses of

behaviour as set out in the Judges' Rules. It is in the background of a Constitution that recognizes the paramountcy of the rule of law and protection of the citizenry from arbitrary and oppressive behaviour by those in authority that has come the exaltation of the Judges' Rules by judgment of the Court".

The exaltation of the Judges' Rules into that of law and, in particular, their recognition as a compendium of procedures set out to safeguard the privilege against self-incrimination was restated in **Glenroy Ishmael** (1997) 52 W.I.R. 444 following a genesis in **Thornhill v The Attorney General for Trinidad and Tobago** [1981] A.C. 61 and **Attorney General v Whiteman** (1991) 39 W.I.R. 397. From these authorities emerged a way of thinking that the significant settled practices of the common law are to be acknowledged as protective procedural mechanisms of due process in the Constitution of Trinidad and Tobago. One such practice is the caution against self-incrimination of which in **Lam Chi Ming** [1991] 2 A.C. 212 Lord Griffith's stated-

" ... it is surely just as reprehensible to use improper means to force a man to give information that will reveal he has knowledge that will ensure his conviction as it is to force him to make a full confession".

Clearly it has come around to be understood that the denial of the privilege against self-incrimination stands on par with the use of force to extract an admission that might not otherwise be forthcoming. It is trite

law that evidence so obtained would be inadmissible. By parity of reasoning with that of the court in the Thornhill and Whiteman decisions, it would seem to follow that the deprivation of the safeguards against self-incrimination by a failure of an interrogator as a person in authority over a person under arrest to follow the injunctions of the Judges' Rules would be a denial of due process unauthorized by the Constitution.

In **Jason Banfield**, (Unreported) Crim. Action S34 of 2001, I alluded to the circumstances whereby even police conduct that initially was authorized became undone by events emerging in the course of the investigation. It was there reiterated that a blanket caution in accordance with Rule II of the Judges' Rules would be insufficient to serve the stage of an interrogation post of an admission founding the basis of a criminal charge. In such a situation the clear and mandatory injunction in Rule III is that the suspect be advised that in view of his admission he would be charged and cautioned de novo in terms of that set out in the rule. Evidence following upon non-compliance with the letter of this rule may only, in the judgment of this Court, be saved by a timely caution that in effect would serve to purge any advantage thereby derived. Hence in **Banfield** evidence of the prisoner taking the police into the forest and pointing out the exact spot where the body had earlier been discovered and removed was refused. In **Samuel Boney** (Unreported) Cr. Action No. 201 of 1999, the response to the hearsay statement of the deceased identifying the accused was also disallowed as was the subsequent conduct of the

accused purporting to identify the assault weapon with accompanying incriminating oral admissions without any caution being administered. Support for this judicial mind set has been forthcoming. In **Timothy, Reid and Lewis v The State** (Privy Council Appeal No. 18 of 1998), incriminating conduct arising from a rejected utterance whereby a spot therein referred to as where the weapon had been thrown was itself found to be inadmissible.

In **Chandradath and Andrews** the evidence disclosed that no caution was administered in conformity with rule II of the Judges' Rules even after there emerged from the interview evidence, for the first time, to reasonably suspect the involvement of the prisoner in the commission of the crime. He went on to expand on his initial incriminating admission before he was cautioned. He then compounded his admissions by taking the police to the scene of the crime where he pointed out damning spots, and later, gave a written confessionary statement under caution. It should be noted that in that case the investigators had no evidence against the prisoner at the start of the interview and no basis for a reasonable suspicion that he had been involved in the commission of the crime for which he was questioned. In the case of **Glenroy Ishmael** the prisoner admitted in an interview of a motor accident case of homicidal death that he had been driving well over the speed limit and the Court ruled that this triggered the need for the caution. This Court also ruled in **Chandradath and Andrews** that the latter's admission of an engagement by the co-

accused to tie up a man, and of conduct, if true, that would give rise to a reasonable suspicion of involvement, likewise triggered the need for the timely advice against self-incrimination. These admissions suggested an intimate knowledge of the crime scene as found by the police. I also expressed the view that rule II only becomes triggered on there already being evidence upon which the prisoner might reasonably be suspected of a hand in the commission of the crime. It would follow that if the police make an unauthorized arrest and caution the prisoner without even a reasonable basis to sense the scent of guilt, the advice thereby given is for all intents and purposes no more than a hollow misuse of the Judges' Rules capable of luring the prisoner into an unmerited sense of insecurity. Telling an arrested person that he is a suspect where there is no basis for doing so is itself conduct that in the judgment of this Court is unauthorized at law, is arguably trickery, and may legitimately be considered unfair and/or oppressive. Such conduct by a person in authority is not only to be deprecated by right thinking citizens but may well tilt the balance against inclusion of any confessionary statement offered by the prisoner in the view of these circumstances. In the case of the impugned conduct of the then Cpl. Harry in relation to the recording of the Andrews statement, this Court decided that the failure to caution a person being interviewed attracts censure only when there are reasonable grounds for suspecting that the interviewee is implicated in the commission of the crime. This would be a matter for the judgment of the

Court after taking into account all the evidence and its own assessment of whether the evidentiary threshold for such a reasonable belief has been met.

In all cases a flagrant breach of the injunctions of the Judges' Rules is an affront to, and blatant disregard of the careful guidelines set out for the guidance of the police and must attract the censure of the Court. In deciding upon the sanctions necessary to meet with the justice of any case, a court is to be mindful of the nature, context, and extent of the breach, and, the steps taken, if any, to distill the investigation of the non-compliance. The approach must be both pragmatic but just and in accordance with the principle of the law both in its letter and spirit. This may only be achieved by exercising an exorcism of the wrongfully extracted benefit, no matter how fatal this may be to the prosecution, and no more. In so doing a court would be doing no more than following the advice of Lord Hodson in **King v Regina** [1969] 1 A.C. 304 and adopted on advice of the Judicial Committee in the local case of **Allie Mohammed v The State** [1999] 2 A.C. 111:

“ On the one hand, the judge has to weigh the interest of the community in securing relevant evidence bearing on the commission of serious crime so that justice can be done; and on the other hand, the judge has to weigh the interest of the individual who has been exposed to an illegal invasion of his rights”.

Mr. Williams has taken objection to the admissibility of an oral statement said to have been given by Placid to Inspector Cyril Harry in terms of that recorded by police constable Flaviney in his seven-page contemporaneous note. The circumstances surrounding the giving of this oral statement arouses the suspicion and disquiet of the Court. It has its genesis in the report of the untimely homicidal death of Godhan Jagessar at his Cunupia home on or about May 4, 2001. As a result of information, the source of which is the subject of a claim to privilege, Inspector Cyril Harry swore to and obtained a search warrant that he executed at the home of the prisoner at 5.15 o'clock in the forenoon of March 13, 2003. Nothing sought in the warrant was found or seized. The prisoner was advised of Harry's involvement in the on-going investigation and of information that he was one of the persons responsible for the death. It is given in evidence that the prisoner was cautioned. For unexplained reasons, the prisoner was thereafter far removed to the office of the Homicide Bureau in San Fernando.

At around 4.40 in the afternoon, the prisoner was taken into an office, advised of his right to retain and instruct Counsel of choice and "reminded of the caution". He was interviewed in the presence of Flaviney who himself testified that at around 6.05 pm the accused said that he would tell what happened "but it involve plenty people". It was the subject of challenge that the prisoner was again then cautioned in terms of rule II of the Judges' Rules. The prisoner upon stating that (he) "will

like to tell (you) what happened because (I) cannot tell lies” then proceeded to give an incriminating account of his involvement which was recorded verbatim by Flaviney. According to both Harry and Flaviney, the note was read over to the prisoner who acknowledged its accuracy. He was not asked to sign the note but was asked if he would give a written statement of what he had just said. To this he replied – “I will not give that in a written statement because that could be used against me in court”. Harry then initialed the note, which was identified in court. No attempt was thereafter made to have it authenticated in manner stipulated in the Judges’ Rules as representing by way of admission the voluntary giving of the prisoner.

In **DPP v Ping Lin** [1975] 3 All E. R. 175 the suggested approach to the issue in balance was put in this way-

“ Where an objection was raised in criminal proceedings to the admission of an alleged confession by the accused, the onus was on the prosecution to satisfy the judge beyond a reasonable doubt that the statement in question had been made voluntarily by showing it had not been obtained by fear of prejudice or hope of advantage excited or held out by a person in authority. The judge had to decide the issue as one of fact and causation, i.e. whether the Crown had proved that the statement had not been made as a result of something said or done by a person in authority...what was necessary to show, as a matter of fact, was that the statement in question had not been obtained in consequence of something said or done by him which amounted to an expressed or implicit threat or promise to the accused”.

Also, in **Sookram, Ramdass and Sahadeo v The State** (Unreported) Cr. App. Nos. 43, 45 and 46 of 1998, it was decided by the Court of Appeal that where the circumstances in which incriminatory statements are made cast a questionable light on the issue of voluntariness, the trial judge must make up his mind to admit them or not on the standard of reasonable doubt mindful that where in all the circumstances he entertained reasonable doubt it would be a miscarriage of justice to admit them or any evidence so as to allow for factual determination by the jury.

In *voir dire* proceedings held to determine the issue, this Court finds the evidence of the prosecution unworthy of belief and as raising the greatest of suspicion as to its truth. Not only have the prosecution witnesses displayed no recollection of what was said to have been told them by the prisoner but also their demeanour in the witness stand has left the Court bewildered as to their reliability. Inspector Harry was particularly evasive of questions calling for simple and straightforward answers leaving the Court to wonder if he had not been party to a concoction of evidence and a hopeless attempt to prop it up in the form of a contemporary note itself fabricated by Flaviney in a manner all too flattering to deceive. The recorded exchanges at bar would evidence what falls for the condemnation of the Court. It is no small indication of the depth of this aberration that State Counsel chose to offer no criticism of the

arguments proffered for the exclusion of the impugned oral utterances. And what is more is that in spite of volumes of judicial pronouncements on the subject of the need for compliance with the mandatory injunctions of the Judges' Rules and the likely results for the type of conduct displayed in the instant matter, judges have been challenged over and over with non-compliance, the almost inevitable rejection of vital evidence and consequential apparent travesties of justice by avoidable acquittals.

In the investigation leading up to the preferment of the charge in this case the breach of so many of the Judges' Rules by the interrogating officers has proven to be so profound that even if the Court were to find the statement otherwise voluntarily given, its sense of justice demands a clear chastisement of the offending witnesses, the rejection of their evidence and of the subject oral statement. In this regard, this Court is mindful of the unequivocal incantations of Sharma C. J. in **Boodram v The State** (Unreported) Cr. App. No. 17 of 2003 which are very direct and pointed-

“ There are many inherent dangers with which this kind of evidence (oral statements) is fraught. For instance, it is so easy to fabricate evidence of oral admissions against accused persons. Sometimes it may be done to 'gild the lily'.

Allegations that the police occasionally attributed false oral statements to accused persons have been made for years.

We would suggest that where the State's case depends substantially on oral admissions, that it would be advisable for the police officers investigating to make contemporaneous notes of them which should be read to the accused and then ask him to sign them. It would be a matter of record and evidence whether he does so or not. If the note is disputed, copies could be made to the jury.

On some occasions it may not be practical to take the notes contemporaneously because of the way in which the interrogation is conducted. In such cases the police officer should write up his pocket diary as early as possible and again ask the accused to sign it after either allowing him to read it if he can and if he cannot, it be read to him. If there are senior officials about, they should initial the notes taken.

Again, it may be very helpful and advisable that on arrival at the police station, a proper entry be made and if taken into custody duly acknowledged by the accused, by putting his initials to the entry".

This is advice that will continue to echo in the hallowed corridors of our courts until heeded by those whose sworn duty it is to protect and serve. It should not, however, be understood in the alternative, to license the type of conduct on display in the impugned interrogation and recording of incriminating utterances in flout of the clear injunctions of the Judges' Rules.

**HERBERT P.VOLNEY**

Judge

