

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Cr. App. No. 37 of 2003**

**BETWEEN**

**KAMAL POORAN  
RAMZAN ASGARALI**

**APPELLANTS**

**AND**

**THE STATE**

**RESPONDENT**

**PANEL:**

M. Warner, J.A.  
S. John, J.A.  
P. Weekes, J.A.

**APPEARANCES:**

Mr. I.S. Brook for the Appellant Pooran  
Ms. D. Seetahal for the Appellant Asgarali  
Mr. B. Dolsingh for the Respondent

**DATE OF DELIVERY:** 4<sup>th</sup> October 2005

**JUDGMENT**

Delivered by S. John, J.A.

1. The appellants Kamal Pooran and Ramzan Asgarali were jointly charged for the murder of Surujbally Mohan also called Billy, which occurred on April 30, 1999. On June 06, 2003 they were convicted of the murder and sentenced to death.
2. On July 19, 2005 we granted them leave to appeal and treated the hearing of their applications for leave as the hearing of the appeals. **We allowed the appeals, quashed the**

convictions and sentences and ordered a retrial. We indicated then that we would give our reasons at a later date. This we do now.

### The facts

3. The deceased Surujbally Mohan lived at Rio Claro. On May 01, 1999, one day after he had gone missing, his body was discovered tied to a cocoa tree in some bushes off Roble Grove Road, Rio Claro. The prosecution case was that the appellants had murdered him on April 30, 1999.

4. The prosecution case was as follows: The deceased was the owner of a white Nissan motor vehicle registration number PAM 5083 which he plied for hire in the Rio Claro district. On the afternoon of April 30, 1999 Constable Cummings who knew Mohan and his vehicle well saw a man driving his vehicle along St. Croix Road, Princes Town. At an identification parade held on May 06, 1999, Constable Cummings identified the appellant Asgarali as the person he had seen driving the deceased's vehicle on April 30, 1999.

5. The vehicle was discovered on Mahabalsingh Trace, Ecclesville, Rio Claro on Saturday May 01, 1999. Later that day his body was found tied to a cocoa tree in a secluded area in a cocoa estate.

6. On Wednesday May 05, 1999, a party of police officers including Sergeant Fitzgerald George arrested the appellant Kamal Pooran at his home at Agostini Settlement Trace, Rio Claro. Sergeant George told him that someone fitting his description was seen in the vehicle owned by the deceased on Friday April 30, 1999. He cautioned the appellant who then said, ***“Officer I do not know about that but my partner Ramzan came by me yesterday, left his identification card and said he was going to Tobago because he killed Billy.”*** After being further cautioned he told Sergeant George, ***“Officer, I was really with Ramzan but is he who kill Billy and he threatened me.”*** The appellant was arrested and taken to the Mayaro Police Station.

7. Later that day Sergeants George and Wright saw the appellant Ramzan Asgarali walking along Agostini Settlement Trace near to his home. They stopped him, identified themselves to him and told him that they had information that he was one of the persons who caused the death of Surujbally Mohan. He was cautioned and he replied, ***“I go tell you the truth, my mother told me to give myself up and tell the police the truth.”*** He too was arrested and taken to the Mayaro Police Station.

8. Sometime later in the day of May 05, 1999, at the request of the appellant Pooran, a written statement was recorded by Sergeant Wright in the presence of Justice of the Peace Cyril Forde and Sergeant George. In that statement he said that it was the appellant Asgarali who killed Mohan although he was with him at the time. He further said that he and Asgarali had planned to rob the deceased and in the course of the robbery they killed him

9. The appellant Asgarali also dictated two statements. The first one was recorded by Corporal Philip and witnessed by Cyril Forde, Justice of the Peace and Sergeant Wright on May 05, 1999. He admitted striking Billy twice in his stomach but blamed Pooran for the murder. He later admitted that he and Pooran had planned to rob the deceased and during the robbery they killed him and tied him to a cocoa tree

10. Another source of evidence was Harold Ramdhan. He had given evidence at the preliminary inquiry, but at the time of the trial he was too ill to attend court. In accordance with the provisions of s. 40 of the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01 his deposition was read as evidence at the trial.

11. According to Ramdhan he was sitting in his shed at the back of his home when two East Indian men came and told him that they had a car to sell. One of them told him it was a Sunny motor vehicle. Ramdhan said he told the man to bring the car around where he could view it properly and the man obliged. Ramdhan further said that while the man went to get the car the other man stayed with him in the shed for about five minutes. When he brought the car around the man opened the bonnet and Ramdhan said that he, Ramdhan, checked the chassis. He asked the men for a certified copy of ownership which they promised to let him have the following day, but they never returned.

12. Ramdhan attended an identification parade on May 06, 1999 and made a positive identification of Asgarali. However, at the preliminary enquiry he purported to make a dock identification of Pooran.

### **Pooran's defence**

13. Pooran elected to give evidence on his own behalf. He denied being involved in the killing of Mohan. He said that on April 30, 1999 he was at the San Fernando market. He admitted being arrested at his home in the early hours of May 05, 1999 and taken to the Rio Claro police station where he was made to sit on a box with his hands handcuffed to each other. He said that he felt very uncomfortable and his back was hurting. He further said that he was slapped and cuffed by Sergeant George who kept telling him that it was he who had killed Billy. He denied dictating any statement. He said that he was taken into a room where he met Sergeant Wright who told him that he had received instructions not to charge him and he would be allowed to go home if he signed some papers and copied something from a book. He accordingly complied. He also said that he had no conversation with the Justice of the Peace Cyril Forde, and he received no breakfast as alleged by the police. He also denied telling the police that Asgarali had come by him the day before and left his identification card.

### **Asgarali's defence**

14. Asgarali also gave evidence on his own behalf and raised the issue of alibi. He stated that he was at home in his garden at the time of the killing. He stated that the conditions under which he was kept at the Mayaro Police Station were inhumane. He had to sleep on the floor of the cell. He also complained that he was not fed. He denied that he gave any statements to the police or told them that his mother had told him to tell the

truth. He said Corporal Phillip told him that there was no evidence to charge him but once he signed some papers showing he was at the station he would be allowed to go home. Accordingly, he signed the papers.

### **Pooran's Grounds of Appeal**

15. Seven grounds of appeal were filed on behalf of Pooran. Since only the first ground of appeal was argued before this Court we do not propose to rehearse the other grounds. Under this ground Mr. Stuart-Brook for the appellant contended that the failure and/or omission by trial counsel to lead evidence of the good character of Pooran amounted to flagrant incompetence and resulted in a miscarriage of justice and rendered unsafe the jury's verdict.

16. It was an undisputed fact that Pooran had no previous convictions and was a person of good character. There was also no dispute that his counsel took no instructions from him on that issue and consequently counsel led no evidence about his good character.

### **The Legal Position**

17. It is an established principle that, where the credibility or propensity to commit an offence of a defendant of good character, ie with no previous convictions, is in issue in a criminal trial the trial judge should give a direction as to the relevance of his good character to his credibility or likelihood of having committed the offence charged, whether or not he has testified or made pre-trial answers or statements at trial which he relies on. It is for the trial judge in each case to decide how directions as to character are to be tailored to the particular circumstances. See *R v Vye*<sup>1</sup>

18. In February 1989 in *R v Berrada*<sup>2</sup> the court considered, amongst other grounds, an alleged misdirection about good character. The defendant had given evidence. Waterhouse J, giving the judgment of the court, said at 134:

*“In the judgment of this Court, the appellant was entitled to have put to the jury from the judge herself a correct direction about the relevance of his previous good character to his credibility. This is a conventional direction and it is regrettable that it did not appear in the summing-up in this case. It would have been proper also (but was not obligatory) for the judge to refer to the fact that the previous good character of the appellant might be thought by them to be one relevant factor when they were considering whether he was the kind of man who was likely to have behaved in the way that the prosecution alleged... We have no doubt, however, that the modern practice is that, if good character is raised by a defendant, it should be dealt with in the summing-up. Moreover, when it is dealt with, the direction should be fair and balanced, stressing its relevance primarily to a defendant's credibility.*

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<sup>1</sup> [1993] 3 AER @ 241

<sup>2</sup> (1989) 91 Cr App R 131

19. In *Aziz*<sup>3</sup> Lord Steyn stated:

*“It has long been recognized that the good character of a defendant is logically relevant to his credibility and the likelihood that he would commit the offence in question.....Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance.”*

**Defendant of good character but evidence not led**

20. In *Sealey and Headley and the State* a decision of the Privy Council from this jurisdiction, the majority of the Board applied the principles in *Vye* and *Aziz* in a case where counsel had failed to raise the appellant’s good character. In that case, both Sealey and Headley had clean records, a fact which was not disputed by the State. They informed their counsel about the matter, but she failed to lead evidence of their good character. On appeal the appellants contended that they suffered a miscarriage of justice as a result of inadequate representation. The Court of Appeal rejected the submission. The court said that the complaint could not be attributed to the judge since good character evidence was not adduced and the omission was counsel’s. The Court of Appeal further considered the strength of the identification evidence against the appellants and commented that it was inconceivable that evidence of the appellants’ clean record backed by a *Vye* direction, could have resulted in a different verdict.

21. Lord Hutton delivering the judgment of the majority of the Board said at paragraph 30:

*“Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice.”*

at paragraph 34 he further said:

*“The crucial question was one of credibility as between Corporal Holder and the two appellants: were the jury satisfied beyond reasonable doubt that Corporal Holder was telling the truth and that the two appellants were not – that Corporal Holder was not lying and that the appellants were? This was the very issue on which a direction as to credibility and propensity based on good character might have been of considerable importance. The importance of credibility may vary depending on the factual issue in dispute between the prosecution witness and the accused in a particular case, but where the issue in dispute is fundamental to the question of the guilt or innocence of the accused, then whether it relates*

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<sup>3</sup> [1996] A.C. 41, 51

*to non-participation in the crime charged or to consent or to some other defence, their Lordships consider that the good character direction is an important safeguard to the accused.”*

22. Recently in *Mark Teeluck and Jason John v The State*<sup>4</sup> the Privy Council enunciated five guidelines material to the issue of good character. They are as follows:

- (i) *When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case.*
- (ii) *The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given.*
- (iii) *The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.*
- (iv) *Where credibility is in issue, a good character direction is always relevant: **Berry v The Queen**<sup>5</sup>; **Barrow v The State**<sup>6</sup>; **Sealey and Headley v The State**<sup>7</sup>.*
- (v) *The defendant’s good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: **Barrow v The State**<sup>8</sup>, following **Thompson v The Queen**<sup>9</sup>. It is a necessary part of counsel’s duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: **Thompson v The Queen**.*

23. In *R v Kamar*,<sup>10</sup> the issue was whether the appellant had forced his wife to jump from a window by violence and threats, or whether she had jumped because she suffered from mental illness. Henry LJ described the position in relation to the appellant’s good character as follows:

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<sup>4</sup> [2005] 2 Cr. App. R.25

<sup>5</sup> [1992] 2 AC 364, 381

<sup>6</sup> [1998] AC 846, 850

<sup>7</sup> [2002] UKPC 52, para 34

<sup>8</sup> [1998] AC 846, 852

<sup>9</sup> [1998] AC 811, 844

<sup>10</sup> The Times Law Rep. 14 May 1999

*“The appellant, aged 31 at the date of the offence, did not then enjoy an entirely good character. Four months before he had been convicted of driving offences: excess alcohol and no MOT, for which he had been fined and disqualified. However, given that the nature of those two relatively minor convictions was so totally divorced from the charges laid in the indictment, it seems to us clear that if application had been made to the judge in this regard, the judge would have directed that the appellant be treated as a man of good character. He gave evidence at the trial, and so on that basis he would have been eligible for both the credibility and propensity direction. In the event, the standard double-barrelled credibility/propensity direction was not given, because no application for such a direction was made to the judge.”*

24. In the present case the appellant’s credibility was of paramount importance because he was saying that he had not given any statement to the police. Therefore, it followed that if his good character had been established the judge would have had a duty to direct the jury on the relevance of his good character in relation to his credibility and a direction in relation to the likelihood of his having committed the offence for which he was charged.

25. As the court said in *Thompson v The Queen* it is a necessary part of counsel’s duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. It is the duty of the defence to raise the issue not the judge’s, and if the defence does not raise the issue, the judge is under no duty to raise it himself. Therefore, the omission of the direction in this case, was the fault of Pooran’s counsel and not that of the trial judge.

26. In the circumstances, because the major issue at stake was the appellant’s credibility, where the jury had to determine the crucial question of whom they believed, the appellant’s counsel should have led evidence of his good character to make him eligible for the standard double-barrelled direction in accordance with the law. Perhaps, the evidence of his clean record in conjunction with the full character/propensity direction could have resulted in a different verdict. It cannot be denied that a proper direction as to character does have value, and therefore, can have an effect in every case in which it is appropriate for such a direction to be given. This, clearly, was one such case. In the particular circumstances of this case, we found merit in this ground and allowed the appeal.

#### **Asgarali’s Grounds of Appeal**

27. Five grounds of appeal were filed on behalf of the appellant Asgarali. However, since only the first ground of appeal was argued before the court we do not propose to rehearse the other grounds. Under this ground, counsel for appellant contended that:

*“The learned judge improperly exercised his discretion in admitting into evidence the written statement allegedly given by the appellant to the*

*police on May 05, 1999 when at the same time he did not admit the statement allegedly given in like circumstances on May 07, 1999.”*

In support of the contention the following submissions were made:

1. The case for the State rested largely on two confessions allegedly given by Asgarali following upon his arrest on May 05, 1999. The first statement was recorded on May 05, 1999 and the other on May 07, 1999. The defence objected to both statements on similar grounds; they were as follows:
  - (i) The statements were not dictated by the accused.
  - (ii) The accused was beaten by Sergeant Phillip prior to affixing his signature to the statements.
  - (iii) The accused was not fed as alleged by the police.
  - (iv) The accused was promised that upon signing the documents he would be allowed to go. He was never allowed to read them nor were they read to him.
  - (v) No caution was administered to him nor was he told of his constitutional rights.
  - (vi) The conditions under which he was kept were oppressive in that the cells at Rio Claro and Mayaro Police Stations were very filthy and there was no place for him to sit or lie.
  - (vii) He was constantly moved in and out of the cells for the purpose of interrogation.
2. At the end of the voir dire the judge admitted into evidence the statement of May 05, 1999 but refused to admit the one of May 07, 1999.
3. The judge gave no written reasons for his decision. If, therefore, the judge found that the prosecution had failed to show that the May 07 statement was voluntarily given then one or more of the appellant's grounds would have been sustainable.

28. In the absence of written reasons it was difficult for us to discern the basis on which the judge admitted into evidence the statement of May 05 and rejected the other when the Justice of the Peace Cyril Forde and Sergeant Wright were present for both statements although the first statement was recorded by Corporal Phillip.

29. In the case of *Thongjai v The Queen*<sup>11</sup>, the trial judge ruled two written statements inadmissible but gave no reasons for so ruling. In delivering the opinion, the Privy Council observed that it was desirable that a trial judge should give brief reasons for ruling that a confession is inadmissible, as his reasons may assist in clarifying issues if there should be an appeal.

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<sup>11</sup> [1997] 3 W.L.R. 667

30. In *Wallace and Fuller*<sup>12</sup> the appellants appealed to the Privy Council against the dismissal by the Court of Appeal of Jamaica against their convictions for murder. The only evidence against them consisted of written statements under caution, alleged to have been made by them after they had been in police custody for several days. A voir dire was conducted to determine the admissibility of the statements and at the end thereof they were admitted into evidence. One of the grounds of appeal advanced before the Board was that the trial judge gave no reasons for his decision to admit the statements beyond saying that they were voluntarily given.

31. At the hearing before the Board, counsel placed heavy reliance on two cases decided in the Criminal Courts of Appeal of Western Australia and New Zealand respectively, namely *R v Webb*<sup>13</sup> and *R v Atkinson*<sup>14</sup>.

32. The case of Webb concerned the admissibility of a confession by a person of Aboriginal descent, to which special conditions were applied by the Aboriginal Affairs Planning Act 1972 (Western Australia). The appellant's confession was quashed on the ground that the judge had given no reasons for admitting his confession in evidence. In delivering the judgment of the court Malcolm C.J. said:

*“In certain circumstances it may be undesirable for a judge to give detailed reasons for his decision on a voir dire. This may be the case where the judge has decided that confessional evidence is admissible because the allegations which have been made by the accused to the effect that it was involuntary are incredible, or the judge has otherwise reached an unfavourable conclusion about the credibility of the accused as a witness. There is a natural reluctance to say too much in case the views expressed are communicated to the jury, even if only after the trial has been concluded. Given that a degree of circumspection may be required, I am nonetheless of the opinion that there is an obligation on a judge to give reasons for ruling on the admissibility of evidence following a voir dire. The obligation applies whether the issue raised is voluntariness or fairness at common law or is referable to the statutory criteria specified in the Aboriginal Affairs Planning Authority Act. Not to give such reasons would unfairly deprive the accused of his or her right of appeal or at least unjustly circumscribe it.”* (emphasis mine)

33. The Board did not agree that such a general rule was desirable but agreed that there would be occasions when good practice required a reasoned ruling. For example, where the judge decided a question of law, sufficient but no more, must be displayed of his reasoning to enable a review or appeal. Again, on a mixed question of law and fact the judge should state his findings of fact so that the law can be put in context. Similarly, the exercise of a discretion will often call for an account, (however brief) of the judge's reasoning, especially where the issue concerns the existence of a discretion as well as the

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<sup>12</sup> [1996] 50 W.I.R. 387

<sup>13</sup> [1994] 74 Crim R 436

<sup>14</sup> [1984] 2 NZLR

way it should be exercised. In every case it will depend on the circumstances whether reasons should be given, and if so with what particularity.

34. In Atkinson's case the accused was charged with sexual intercourse with a young girl. At the trial the police tendered a statement taken while he was in custody but before he was arrested. The accused claimed that the statement ought not to be admitted in evidence. After conducting a voir dire the trial judge gave a brief oral judgment stating that he intended to admit the statement. No reasons were given for that decision. The appellant was convicted. On appeal it was held that in every case it was essential for the trial judge to make it clear that he had properly applied his mind to the issues before him and had proceeded to his conclusion on the correct legal basis. Even if the issue be no more than a determination of where the truth lay, it must be made apparent that the judge had correctly directed himself on the standard of proof.

35. Recently, in *Keston Adams v The State*<sup>15</sup> this court had to comment on the practice of trial judges not giving written reasons when ruling a statement inadmissible. We accept that the absence of reasons is not a ground for appellate review in the face of evidence supporting the finding in instances where the basis for the decision is quite apparent. However, in the instant case the reasonableness of the judge's decision could not be determined in the absence of reasons for it.

36. We take this opportunity to repeat what we said in *Keston Adams*:

***“We fully accept the principles set out in the above cases and commend them for the guidance of trial judges. We are of the firm opinion that there will be everything to gain and little to lose by giving reasons, even if only brief.”***

We trust that in future trial judges will heed our advice.

### **Conclusion**

37. In view of the submissions made to us and in light of the legal principles enunciated above we were of opinion that the convictions would not have been regarded as safe and accordingly we allowed the appeals. The remaining question was whether or not we should order a retrial.

38. An order for a retrial is not to be made as a matter of course. The power to order a new trial is conferred upon the Court of Appeal by section 44(2) of the Supreme Court of Judicature Act Chap. 4:01, which is in the following terms:

***“Subject to the special provisions of this Act, the Court of Appeal shall, if it allows an appeal against conviction, either quash a conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial.”***

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<sup>15</sup> Cr. App. No. 19 of 2000

39. A line of authority has developed over recent years which succinctly details the factors to be considered in determining whether to grant a retrial. In *Reid v R*<sup>16</sup>, Lord Diplock in delivering the advice of the Board on an appeal from Jamaica set out the principles which should guide an appellate court in considering whether or not a new trial should be ordered. He stated at page 258:

*“Their lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury.”.....“.....there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial. The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica.”*

40. In *Ketwaru v The State*<sup>17</sup> a decision of the Court of Appeal of Guyana, the court said that an order for a retrial should be made only if the interests of justice so dictate, and the interests of justice comprise the interest of the appellant, the interests of those responsible for instituting criminal proceedings and the interests of public welfare.

41. In *Nicholls v R*<sup>18</sup>, Lord Steyn delivering the advice of the Board said at page 163: *“it is no bar to such an order for retrial that more than six years has elapsed since*

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<sup>16</sup> (1978) 27 WIR 254

<sup>17</sup> (1999) 59 W.I.R.

<sup>18</sup> (2000) 57 W.I.R. 154

*the killing; or that there has already been a retrial; or that about three years have elapsed since the matter was before the Court of Appeal. Cumulatively, these factors do, however, raise the question whether the matter ought to be remitted to the Court of Appeal to consider a retrial. “*

42. All the above principles were reiterated by the Privy Council in *Bennett and John v R*<sup>19</sup>. The offence for which the appellants were charged was indeed a very serious one in which the legislature prescribed death by hanging. The offence was committed on April 30, 1999. The trial began on May 06, 2003 and was concluded June 06, 2003. The appellants have been in custody for just over six years which is not an unreasonable length of time in our jurisdiction. It is widely accepted that crimes involving violence especially murder are now prevalent in our society. This court ought to take cognisance of that fact in determining whether to order a retrial.

43. After considering all the relevant factors, it was our opinion that in the interest of justice the appellants should be retried and we so ordered.

M. Warner  
Justice of Appeal

S. John  
Justice of Appeal

P. Weekes  
Justice of Appeal

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<sup>19</sup> (2001) 60 W.I.R