(2)

IN THE SEYCHELLES COURT OF APPEAL

Criminal Appeal Nos. SCA 1 – 4 of 2004

In the matter between

ROBERT AZEMIA	***-First Appellant***
BEDDY PAYET	***-Second Appellant***
ROLLY LESPERANCE	***-Third Appellant***
ALLEN MARENGO	***-Fourth Appellant***
JULIUS LABROSSE	***-Fifth Appellant***

and

THE REPUBLIC ***-Respondent***

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Before: RAMODIDBEDI, P., BWANA, J. A., HODOUL, J.A.

Heard on: May 2005

Judgment delivered on: 20 May 2005

Mrs. A. G. Antao for the First and Second Appellants
Mr. P. Pardiwalla for the Third Appellant
Mr. D. S. Lucas for the Fourth Appellant
No appearance for the Fifth Appellant
Mr. R. Govinden for the Respondent

JUDGMENT

RAMODIBEDI, P.

[1] The appeals in this matter have been consolidated in terms of Rule 30 (5) of the Seychelles Court of Appeal Rules 1978 as amended by S. I. 49 of 2000. That Rule provides as follows:-

> *"Where more persons than one have been jointly tried and any two or more of them desire to appeal, they may at their option file separate or joint notices of appeal. Every notice of appeal shall be deemed to institute (sic) one appeal, but where more appeals than one are brought from convictions at the same trial they shall, unless the Court otherwise orders, be deemed to have been consolidated and shall proceed as one appeal."*

For convenience, the five Appellants in this matter shall herein be referred to as First to Fifth Appellants respectively.

[2] The matter has come before us in this way. The First, Third to Fifth Appellants and two others were jointly indicted in the Supreme Court on two counts namely counts 1 and 4 couched in the following terms:-

"Count 1
Statement of Offence:
Unlawful possession *of turtle meat, contrary to Regulation 5(3) of the Wild Animals (Turtles) Protection Regulations (S.I. 46 of 1994), punishable under Section 3 of the Wild Animals and Birds Protection Act (Cap 247), as amended by Act 9 of 2001."*

The particulars of the charge alleged that all the accused, on 30 January 2003, at the Providence Industrial Estate, Mahe, had in their possession approximately 1141 kg of turtle meat.

*"**Count 4***

Statement of Offence

Killing of a protected bird contrary to Regulation 4(1) of the Wild Birds Protection Regulations of 18th April 1966, punishable under section 3 of the Wild Animals and Birds Protection Act (Cap 247) as amended by Act 9 of 2001."

It was alleged in the particulars of the charge that all the accused, in the month of January 2003, unlawfully killed approximately 40 boobies being protected birds.

[3] The Second Appellant alone faced a charge under count 6 couched in these terms:-

*"**Count 6***

Statement of Offence

Unlawful Possession of turtle meat contrary to Regulation 5 (3) of the Wild Animals (Turtles) Protection Regulations (S.I. 46 of 1994) and punishable under Section 3 of the Wild Animals and Birds Protection Act (Cap 247), as amended by Act 9 of 2001."

The particulars of the charge alleged that the Second Appellant, on 31 January 2003, at the Providence Estate, Mahe, had in his possession 58 kg of turtle meat.

[4] It is necessary to record at the onset that the trial in this matter commenced on 28 March 2003 when all the accused pleaded not guilty.

[5] On 18 May 2004 the Appellants were convicted as follows:

(1) First Appellant: Count 1: Guilty.
Count 4: Guilty.

(2) Second Appellant: Count 6: Guilty.

(3) Third Appellant: Count 1: Guilty.
Count 4: Charge withdrawn

(4) Fourth Appellant: Count 1: Guilty
Count 4: Not guilty.

(5) Fifth Appellant: Count 1: Guilty.
Count 4: Not guilty.

[6] On 19th May 2004, the Appellants received the following sentences respectively:-

(1) First Appellant: Count 1: 2 years' imprisonment.
Count 2: 1 year imprisonment.
Sentences to run concurrently.

(2) Second Appellant: Count 6: 2 years' imprisonment

(3) Third Appellant: Count 1: 2 years' imprisonment

(4) Fourth Appellant: Count 1: 2 years' imprisonment

(5) Fifth Appellant: Count 1: 2 years' imprisonment

[7] It is a striking and no doubt regrettable feature of this case that notwithstanding the fact that appeals were timeously noted early in June 2004, the matter could not be heard until now almost a whole year down the line. It is common cause, however, that this inordinate delay was due to circumstances beyond the parties' as well as the Court's control.

[8] The essential background facts relative to this appeal are briefly the following.

On 31 January 2003, and apparently following a certain tip-off, a large contingent of police officers from S.S.U and Adam Unit together with members of the Conservation Section of the Ministry of Environment converged at or near the resident of one Souris at the Providence Industrial Estate, Mahe. Thereat, they found the Second Appellant standing next to the door of his pick-up not far from the beach. This was a place where boats were being constructed. A bag tied with a rope was seen at the back of the pick-up. When opened, the police discovered that the bag contained "meat" which subsequently formed the subject matter of count 6. A number of gunny bags containing what the prosecution alleged to be turtle meat were retrieved from a boat moored nearby and apparently belonging to one Jean. These in turn subsequently formed the subject matter of counts 1 and 4.

[9] At the onset, it must be said that at the trial counsel for the prosecution improperly put the following question to the witness, namely, Assistant Superintendent James Matombe who led the police contingent to the scene of crime on page 175 of the record:-

"Q. Did you form an opinion at least to what was that (the meat)?

A. From the smell of it, I come (sic) to the conclusion that it was turtle meat." (My own emphasis).

[10] Now, it is trite law that, as a general rule, the opinion of a witness is irrelevant because it is the function of a court to draw inferences and form its opinion from facts. Exceptions to the rule are experts in that, because of their experience and specialised study, they have a fixed standard and can give their evidence with certainty. I shall return to this aspect more fully later. Suffice it to say that the opinion of James Matombe that the meat in question was turtle meat is plainly inadmissible since he is not an expert and so is the opinion of other police witnesses in the matter more especially as they themselves evidently relied on the evidence of one Selby Remie, whom they had specifically called to the scene of the alleged crime on 31 January 2003 for identifying the meat in question. In this regard, it is important to bear in mind the evidence of the investigating officer himself, namely S. I. Sonny Leggaie on pages 548-9 of the record. Mrs. Antao for the First and Second Appellants took him to task on his allegation that the meat in question was turtle meat. She confronted him with the following pertinent questions:-

"Q: Who told you it was turtle meat?

A: Mr. Remi (sic), the Environment Officer.

Q: Only then did you know?

A: I suspected it to be turtle meat.

Q: But you did not know until Remie came?

A: Yes."

And finally on page 551 of the record, the witness was asked the following question which must surely be the killer blow to the prosecution case:-

"Q: Until Mr. Remie appeared, nobody knew with certainty what was in the bag.

A: No one knew if it was turtle meat. I did not know."

[11] As was to be expected in these circumstances, the prosecution sought to rely on the evidence of Remie as an "expert" witness in its attempt to prove that the meat in question was turtle meat as well as bird meat. I shall deal with this evidence more fully later.

[12] Before proceeding any further it is necessary to refer to the statute on which the charges were based.

Section 3 of the Wild Animals and Birds Protection Act (Cap 247) reads as follows:-

"3. (1) Any person guilty of an offence against any regulation made under this Act shall, on conviction, be liable to the penalty prescribed by regulation, or where no such penalty is

prescribed, to a fine not less that R5000 and not exceeding R500,000 or the term of imprisonment not exceeding two years.

(2) Where a penalty is prescribed by regulation, it shall not exceed the maximum fine and imprisonment referred to in subsection (1).

(3) On convicting any person for an offence against any regulation, the Court in addition to any penalty imposed may cancel any licence issued to that person to operate any boat or vessel or motor vehicle or aircraft which is proved to have been used in the commission of the offence."

Regulation 5 (3) of the Wild Animals (Turtles) Protection Regulations (S. I. 46 of 1994) in turn provides:-

"(3) No person shall possess, sell, expose for sale, purchase or receive any meat or any part of the flesh or calipee of a turtle."

Regulation 4 (1) of the Wild Birds Protection Regulations 1966 provides as follows:-

"4. No person shall –

(1) shoot, kill or take

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(2) any bird declared to be protected under regulation 3."

The declaration of protected birds under regulation 3 is in the following terms:-

"3 (1) All birds, except as hereafter provided, are hereby declared to be protected throughout Seychelles during the whole year.

(2) The following birds shall not be protected -

(a) the Cardinal Bird or Tisserin (Foudia Madagascariensis), the African Barn Owl or Hibou, the Mynah and the House Sparrow;

(b) the Seychelles Bulbul or Merle (Ixocincla Crasirostris) on the islands of Frigate, La Digue and Praslin, from the 15th April to the 15th November (both dates inclusive);

(c) the Cattle Egret or Madame Paton (Bubulcus Ibis) and the Grey Heron or Florentin (Ardea Cinerea) on the islands where sea birds lay their eggs and listed in the Schedule to the Birds' Eggs (Collection) Regulations;

(d) the Turtle Dove or Tourterelle des Iles (Streptopelia Picturata Rostrata) on all islands except Félicité, Frigate, North Cousin or Cousin, South Cousin or Cousine and Mary Anne or Marianne;

(e) the nestling of the Wedge-tailed Shearwater or Fouquet (Procellaria Pacifica Hamiltoni) from the 1st January to the 31st March (both dates inclusive) on all islands except Beacon or Ile Séche, Les Mamelles, North Cousin or Cousin and Vache Marine."

[13] To return to the facts, it is the prosecution case that the First and Fourth Appellants were found sleeping in the hold of the boat containing the meat in question. Concerning the other Appellants,

the Crown relied on their statements which were ruled admissible following hotly contested voir dire proceedings.

[14] Against the aforementioned background, the issues that primarily arise in this appeal may be summarized as follows-

1. Was the meat forming the subject matter of counts 1 and 6 turtle meat?

2. Was the meat forming the subject matter of count 4 bird meat of boobies species?

3. Was the prosecution witness Selby Remie qualified to give evidence as an expert?

4. Do the offences charged create strict liability?

5. Were statements of the Appellants properly admitted as evidence against them?

6. Was it fair for the trial court to prevent defence counsel from cross-examining on matters arising from the voire dire proceedings simply because the court had already ruled the accused's statements in question admissible?

7. Was the inspection in loco carried out by the trial court on 31 October 2003 proper?

I should add for completeness that these issues were hotly debated in the court below but apparently found no favour with the court in so far as the Appellants were concerned. As an appellate court it is then the duty of this Court to retry the issues again.

[15] At the outset, I should point out that in the light of the conclusion I have reached in this matter as fully set out below, it is strictly unnecessary to determine all of the issues raised in paragraph [14] above. In a nutshell, this is so because, merely as an example, if the evidence of the expert witness Remie is found to be inadmissible on the issue whether the meat in question was turtle as well as bird meat, there is, in my view, no need to go further.

[16] As I have indicated previously, the evidence of Selby Remie was the main bedrock of the prosecution case. He was specifically invited by the police to identify the meat in question clearly because, as alluded to in paragraph [10] above, they themselves could not do so. In due course he told the police that the meat in question was turtle as well as bird meat.

[17] In brief, the evidence of Selby Remie discloses that he is a young man of 32 years. He has a degree in biological services having qualified in 1995 from the University of UK as he put it in his evidence in chief. Since qualifying, he has been working in the conservation section as Conservation Officer, Senior Conservation Officer and finally as Director of Conservation in the Ministry of Environment. Moreover, he testified that he has been involved in the conservation work since 1992. He further testified that he has

had several stints of training especially with the consultants that had been employed by the Ministry in terms of "turtle work and birds as well."

[18] The record further discloses on page 777 thereof that counsel for the prosecution then put the following leading and clearly suggestive question to the witness:-

> *"Q: What is the science in biology, which you are expert in?*
>
> *A: I would be more specialized in ecology but I got a lot of experience in training in respect of biology, living health, agriculture and other issues as well."*

It will be observed, however, that the witness never claimed to be an expert and that this suggestion came from the prosecution counsel himself. In my view this was improper and clearly prejudicial to the defence. Indeed this might have unduly influenced the trial court into believing that the witness was an expert as, for example, on page 836 of the record the learned trial judge is recorded as having said the following:-

> *"Court: You (to Mr. Pardiwalla for accused No. 3, now Third Appellant) did not cross-examine, re-examination is on, you challenged this <u>expert</u> when he came, now he says what is CITES in and whether it is applicable in Seychelles, this is very relevant to the evidence."* (Emphasis added).

[19] I pause here to say that it is clear, as it seems to me, that the trial court was led to unduly prejudge the issue whether Selby

Remie was an expert and that once that was so, the court formed a hardened view of the matter and never allowed itself to be persuaded otherwise. With respect, this approach cannot be right and has in my view, led to a miscarriage of justice in the special circumstances of this case.

[20] In my view, the limitations of Selby Remie as a so called expert were fully exposed under cross-examination. In this regard the cross-examination of the witness by Mr. Lucas for accused No. 1 and now Fourth Appellant produced the following devastating results as gleaned from pages 788 to 805 of the record:-

It turned out that the witness's degree in question is only a general "degree" and that he has no university degree as such. He produced no papers to prove the certificates he claimed he had. He has no diplomas or certificates from the association of the consultants. Indeed he was asked:-

> *"Q: So you have no papers to present with regards to your qualifications?*
>
> *A: No."*

Amazingly, the witness further conceded that he had no instruments to use to identify the meat in question. He did not even have a ruler to measure the lengths of the parts of the alledged turtle as well as bird meat. He relied entirely on visual observation.

As if these shortcoming were not enough, the witness conceded more. He further conceded that he did not take any notes at the scene of the crime. Surprisingly, he did not count the birds in question yet the accused were charged with having killed 40 birds. Accordingly, he conceded that he was asking the trial court to accept that the birds in question were the protected boobies purely based on his visual observation. This, in circumstances where the "birds" in question did not even have any heads or "feet" for him to identify them with.

[21] Because this Court's approach to expert evidence is obviously diametrically different from that of the trial court, it is no doubt necessary to quote at length Selby Remie's evidence under cross-examination starting from page 797 to 799 of the record:-

"Q: *What sort of boobies are we talking about?*

A: *There are three species in Seychelles and all three of them are basically the same size.*

Q: *Which species do we have in the Seychelles?*

A: *We have the mass booby red footed and brown.*

Q: *Which one is bigger?*

A: *I think the brown is bigger.*

Q: *You are not sure?*

A: *The brown is bigger.*

Q: *What about the red footed?*

A: *It would be slightly smaller.*

Q: *Slightly or considerably smaller?*

A: *Slightly.*

Q: *Are you sure that it is not the mass booby which was to be the biggest booby of the genus of the species? Do you still maintain that the brown boobies are the biggest of the species?*

A: *I do not know.*

Q: *And this is typical with the answers, which you have been given us, it would be purely speculation because you do not know. You have been with the consultants, you have visited all the islands, you know the boobies by heart and then you do not know that the mass boobies are the biggest boobies of them all and you tell us that the brown booby is the biggest booby.*

A: *(No reply).*

Q: *Do you know that there are certain chemical tests which can determine the amount of calcium glucose and uric acid in birds which can lead you to identify not only their family, not only their genus but also their species. Do you known that?*

A: *I do not know.*

Q: *In terms of chemical testing, do you know what WPC means?*

A: *No.*

Q: Do you know what PCV means?

A: No.

Q: Apart from DNA and chemical testing are there any other kind of tests which can be used to determine not only the family, not only the genus but also the species of each particular genus. Do you know of any such test, which can be undertaken to establish the species?

A: The visual tests.

Q: That is the most unreliable. You meant to say you chose the most unreliable test because when you see green, I can see blue and then it would be the question of which of us has the right colour sense. Do you agree with that?

A: Yes."

[22] It was specifically suggested to Selby Remie on page 804 of the record that a puffin has the same structure as a booby. Significantly he had no knowledge of this. The questions were put as follows:

"Q: It is obvious that you do not know what you were looking at. You cannot tell a mass booby from a brown booby, red booby and you do not even know which is the biggest booby. So how can you ask us to rely on your observations?

A: What I did say was, I cannot identify the species exactly but based on the structure it was a booby.

Q: What about puffin does it not have the same structure as the booby; it comes from the same genus.

A: I cannot say.

Q: You do not know, isn't that correct?

A: I do not know.

Q: Do they come from the same genus?

A: I do not know.

Q: Now that you have admitted that you do not know, I will tell you, they come from the same genus. Will you accept that from me?

A: They might but I have to check."

He never did.

[23] But, what is of more concern to this Court is that in the middle of his cross-examination of Selby Remie, Mr. Lucas was abruptly and effectively stopped by the trial court from cross-examining the witness in an attempt to show that he was not an expert and that his evidence was not credible. The record on page 805 thereof reveals the following:

"Court: Mr. Lucas, you have to limit yourself on the exhibits before the court.

Mr. Lucas: I have no further questions."

Why Mr. Lucas was prevented from exposing the limitations of the "expert" witness is incomprehensible to me. Nor is it clear to me how in these circumstances the trial court could have made the following remarks as recorded on page 1199 of the record:-

> *"No objections being raised by any of the defence counsel against him (Selby Remie) being called as an expert for purposes of the exhibits in the case, he proceeded to give his evidence."*

With respect, this approach is flawed principally for two reasons. First, it is the duty of the trial court in criminal proceedings not to accept the opinion of the expert without satisfying itself that the expert is sufficiently qualified and competent in terms of skill, training or experience to give assistance. Secondly, the cross-examination of Selby Remie by all counsel concerned shows that the defence were challenging not only his claim that he was an expert but also his competence. Issues of credibility were also obviously involved. How the defence counsel were expected to challenge him before he gave evidence in chief is once again incomprehensible to me. In some jurisdictions, a proposed expert witness is required to file an affidavit indicating his expertise and special study in the field for which he is an expert as well as his opinion based on the facts. But even in such cases it has never, as far as I am aware, been said that an "expert" is precluded from giving his evidence in chief. The challenge has always come during cross-examination. This, I should add, is a procedure which this Court is happy to adopt as indeed the question whether or not a person is an expert is a question of fact to be determined on the full facts of each case. In this connection, therefore, I consider that the

facts cannot be fu[illegible] if cross-examination on the issue is precluded as happened here.

[24] As guidance in future prosecutions, it is now necessary to stress the trite principle that before a witness can offer his opinion as an expert witness, the Court must decide whether he is an expert on the matter in question. An accused person is obviously entitled to cross-examine such a witness on the issue. More importantly, a trial court should not blindly accept the evidence of an expert evidence simply because he is presented as such by the prosecution.

[25] Another disturbing feature of the trial which deserves comment here is that the record discloses on page 776 thereof that, on 4 March 2004, Selby Remie's evidence proceeded in the absence of the Fifth Appellant notwithstanding his counsel's objection. This, as I observe, was in contravention of s. 169 of the Criminal Procedure Code (Cap 54) which reads:-

> "**169.** *Except as otherwise expressly provided, all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate."*

[26] In the light of the aforegoing, I have come to the inescapable conclusion that the trial court was wrong in accepting the evidence of Selby Remie as expert evidence. Similarly, the court was wrong in relying on such evidence which in my view was inadmissible.

Indeed the word "expert" is defined as follows in Strands Judicial Dictionary:-

> *"An expert witness, is one who has made the subject upon which he speaks a matter of particular study, practice, or observation; and he must have a particular and special knowledge of the subject."*

[27] In my view, the evidence of Selby Remie fell short of proving that he is an expert. Significantly, there is no evidence on record that he had ever given evidence as an expert in a court of law before. As pointed out earlier, he failed to produce any certificates and even though it is not a sine qua non for being an expert on the subject at hand, he has apparently not written any publications. He is, on his own admission, a general "scientist" and a junior one for that matter. His limitations were ruthlessly exposed in cross-examination. Furthermore, it is clear from the record that he was not a neutral witness. He was part of the investigating team and clearly a "complainant" in the sense that he represented the line Ministry of Environment. That being so, he had personal interest in the matter. For all of these factors it would, in my view, be dangerous to rely on his evidence as to "opinion."

[28] But, because all the Appellants were, apart from Selby Remie's evidence, apparently convicted on the basis of their own statements to the police, it is necessary to determine this issue. I begin by observing that at common law no statement by an accused person can be given in evidence against himself unless the prosecution proves beyond reasonable doubt that it was freely and voluntarily made. See Ibrahim v Regem [1914 – 15] All E. R. 847 (PC); DPP v Ping Lin [1975] 3 All E. R.175 (HL). The main reason

underlying this principle is that it is against public policy to convict a man out of his own mouth. Indeed experience shows that it is not uncommon for people to admit guilt where they are innocent. Thus, to obviate the danger of innocent people being convicted, the English common law evolved a principle that has stood the test of time, namely, that it is for the prosecution, and not the accused, to prove its case beyond reasonable doubt.

Similarly, the English common law has evolved a further principle that an extra-judicial confession requires corroboration as a safeguard against a wrong conviction. Such corroboration must obviously be evidence independent of the statement in question and implicating the accused in a material respect, See D.P.P. v Kilbourne [1973] A. C. 729 (HL). In Guy Robert Pool v The Republic 1974 SCAR this Court itself held that once a confession is retracted there must be corroboration showing the guilt of the accused.

[29] It will be observed at the outset that all the Appellants except the Second Appellant retracted and repudiated the statements in question on the ground that they were obtained either by force or, as in the case of the Third Appellant, a promise of an early release from custody.

The Second Appellant challenged the admissibility of the statement on the ground that the Judges Rules had not been followed when the statement was taken from him.

[30] It requires to be noted at this stage that the Appellant's respective challenges to the admissibility of the statements in question necessitated the holding of voir dire proceedings. At the end of the voir dire, all the statements were, however, ruled admissible. The correctness of that ruling is also challenged on appeal.

[31] It is no doubt convenient to commence the issue of the ruling in question with reference to the approach of the Court a quo on the matter as this has perturbed this Court. In this regard, it is common cause that counsel were not given the opportunity to address the trial court at the conclusion of the voir dire. The learned trial Judge concedes this point in his judgment and seeks to justify his approach in the following terms:-

> *"In the present case, the 1st Accused (Fourth Appellant) was given an opportunity to give evidence on oath, and the Court proceeded to make an ex tempore ruling on being satisfied that there was no merit in any of the grounds of objection raised. Neither the Counsel for the Prosecution nor the Counsel for the 1st Accused were called upon to address Court in those circumstances."*

With respect, I cannot agree with this approach which clearly flies in the face of Article 19 of the Constitution on the right to a fair hearing.

[32] For convenience, the relevant parts of this Article read as follows:

"19. (1) Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with an offence –

(a) is innocent until the person is proved or has pleaded guilty;

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(d) has a right to be defended before the court in person, or, at the person's own expense by a legal practitioner of the person's own choice, or, where a law so provides, by a legal practitioner provided at public expense;

(e) has a right to examine, in person or by a legal practitioner, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on the person's behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

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(g) shall not be compelled to testify at the trial or confess guilty." (Emphasis added).

[32] It cannot be stated strongly enough that an accused person has a constitutional right to address the Court either personally or through his counsel at the conclusion of the voir dire. Since voir dire proceedings by their very nature involve the constitutional right of an accused person to silence, it would, with respect, be idle to suggest that an accused person has no right to address the court on the issue. The fact that the Criminal Procedure Code has no requirement for submissions of counsel at the conclusion of the voir dire proceedings does not relieve the trial court from observing the accused's right under the Constitution. This is so principally because the Constitution is, in terms of Article 5 thereof, the Supreme Law. That Article provides as follows:-

> *"5. This Constitution is the Supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void."*

[33] Indeed it is hardly necessary to state that the right to be heard, otherwise known as the audi principle (audi alteram partem), is derived from the common law. It is based on natural justice and as such has ancient origins. It is for that matter deeply imbedded in English common law. That it encompasses the duty to act fairly is trite law. See for example Ridge v Baldwin [1964] AC 40. Although that was a civil case, the principle stated in that case applies with equal force to a criminal case. On this approach, therefore, the question is not whether the Criminal Procedure Code provides for submissions of counsel at the end of the voir dire but whether the Code excludes the right to be heard either expressly or by necessary implication. At any rate, and as I repeat, Article 19 of the Constitution confers the right to be heard.

[34] It is once again a matter of regret to observe that the trial court effectively prevented defence counsel from cross-examining prosecution witnesses on matters raised during the voir dire. The reason for the court's approach in this regard was that allowing cross-examination after the court had ruled the statements in question admissible was to allow counsel in a "bid to [regurgitate] the issue of voluntariness in the guise of attacking their credibility on matters relating to other evidence in the case."

The following examples will serve to highlight the point:-

(1) On page 303 of the record Mr. Lucas was stopped from cross-examining the investigating officer Sonny Leggaie who had admittedly taken the statements in question. Counsel was attempting to show that the statement from his client namely the Fourth Appellant was obtained from him by the use of force and/or threats of violence by electrocution. Counsel confronted the witness with the following question:-

"Q: And you told him (the Fourth Appellant) that if he gave a statement, the electrical part would be avoided and that he would go as soon as he gave his statement.

A: No.

Court: I made a ruling on that. You need not put that to him."

(2) M. Lucas' further attempt to cross-examine on the issue arising from the voir dire, as appears from page 362 of the record, was treated in similar fashion. Mr. Lucas was heard to lament:-

"Q: So my lord is saying I cannot go to the start of the oppression?

Court: Yes. You start with the statement because we must limit the issues to the statement."

(3) On page 544 of the record, Mr. Lucas attempted to show that some facts in the Fourth Appellant's statement were added up by the witness himself. This attempt met with the court's rebuff as follows:-

"Q: It is true is it not that in the statement which you took from the 1st accused (Fourth Appellant) there are matters which were not told to you which were inserted by you?

Court: I have ruled on that. You cannot go back on it. Now you haave (sic) to go on the merits.

Mr. Lucas: Am I not entitled to cross-examine him (Sonny Leggaie) as to the manner? I insist that I am entitled.

Court: The manner has been gone (sic) to in the great detail, if you have other matters arising ... I am overruling you on that.

Mr. Lucas: My lord, I am entitled to cross-examine SI Leggaie as to how he took the statement from my client.

Court: We have gone through this and it is on record. I am overruling you.

Mr. Lucas: Then I have no cross-examination."

(4) The record further reveals on pages 573-5 thereof that Mr. Ally for the Third Appellant received similar treatment at the hands of the trial court in his attempt to confront the witness Leggaie with his "interrogation" of the Third Appellant allegedly resulting in the latter making a forced statement. The trial court stopped him from cross-examining on the issue and said this:-

"Yes that is so but I have already ruled upon that. I do not want you to re-agitate (sic) again."

On page 575 of the record the trial court once again stopped Mr. Ally in these terms:-

"Court: No I have made my ruling.

Mr. Ally: If that is the position of my lord then my hands to cross-examine this witness are tied and I cannot proceed any further. Thank you my lord."

[35] Now Adrian Keane: The Modern Law of Evidence, 4th Edition page 353, correctly, in my view, puts the position as follows:-

"On the resumption of the trial proper, Defence counsel is fully entitled to adduce evidence and cross-examine prosecution witnesses with a

> *view to impeaching the credibility of the person to whom the confession was allegedly made, and showing for example, that the confession was a fabrication in whole or in part."*

[36] In R v Sang [1979] 2 All ER 1222 (HL) at 1237 Lord Salmon said this:-

> *"I consider that it is a clear principle of the law that a trial judge has the power and the duty to ensure that the accused has a fair trial. Accordingly, amongst other things, he has a discretion to exclude legally admissible evidence if justice so requires. See Lord Reid's speech in Myers v Director of Public Prosecution"* [1964] 2 All ER 881 at 889."

I respectfully agree. I would myself lay it down as a general proposition that a ruling that is made by the trial court at the conclusion of the voir dire is obviously provisional. The trial court can and should be able to revisit it depending on the justice of the case. It would thus be unwise and certainly unfair to the litigants for the trial court to close its mind and refuse to be persuaded to the contrary view before judgment on the merits is reached.

[37] Giving due weight to all of the aforementioned considerations cumulatively, I have come to the conclusion that not only has the trial court misdirected itself in the matter but that such misdirection has actually resulted in a substantial miscarriage of justice. The convictions in question are accordingly unsafe.

In the end result, the appeals of all the Appellants are upheld. Both convictions and sentences recorded by the trial court are set aside and replaced with the following order:-

"The accused are found not guilty and are acquitted on all the counts they faced."

I concur:

I concur:

Delivered at Victoria, Mahe this 20th day of May 2005