

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BB/A/CR2025/002
BB Criminal Appeal No 2 of 2019

BETWEEN

BAGGIO KRISTIDI DANIEL

APPELLANT

AND

THE STATE

RESPONDENT

Before:

Mr Justice Anderson, President
Mme Justice Rajnauth-Lee
Mr Justice Jamadar
Mme Justice Ononaiwu
Mr Justice Bulkan

Date of Judgment: 24 July 2026

Appearances

Mr Marlon Markland Gordon for the Appellant

Ms Krystal C Delaney, Deputy Director of Public Prosecutions (Ag) and Mr Neville Watson, Principal State Counsel for the Respondent

Criminal law — Murder — Appeal — Confession evidence — Admissibility — Voir dire — Distinction between functions of judge and jury — Whether trial judge improperly delegated issue of admissibility to jury — Whether an ‘Edwards and Haynes’ direction was necessary — Fair trial.

Constitutional law — Fundamental rights and freedoms — Right to a fair trial — Right to counsel — Accused person — Alleged denial of access to counsel — Whether trial judge failed to rule on constitutional issue — Fair trial.

SUMMARY

This was a special leave application from Barbados and this Court directed that the hearing of the application be treated as the hearing of the appeal. The appellant was convicted of murder and sentenced to 28 years' imprisonment. His conviction, based on eyewitness testimony and a confession statement, was upheld by the Court of Appeal of Barbados. He appealed to this Court, contending that his trial was unfair due to errors relating to the treatment of his confession, an alleged breach of his constitutional right to legal counsel, and the cumulative effect of what he alleged were errors by the trial judge in summing-up.

The principal issues before this Court were whether the trial judge failed to rule on an alleged denial of the appellant's right to an attorney, improperly delegated to the jury the issue of admissibility of his confession, failed to give an appropriate *Edwards* direction, and overall whether the summing up was unfair.

The CCJ held that although the trial judge did not expressly rule on the alleged breach of the right to counsel, such a ruling could be properly implied from her detailed consideration of the evidence and her stated acceptance of the police officers' testimony. The Court reaffirmed that trial judges should ordinarily give explicit rulings on constitutional claims but found no irregularity in this case based on a holistic examination of her ruling.

On the issue of improper delegation, the Court rejected the appellant's argument that the trial judge improperly left admissibility to the jury. The Court held that the judge had already ruled on admissibility during the voir dire and that her subsequent directions were concerned with how the jury should assess the weight of the confession after defence counsel reopened the issue of voluntariness. The Court further held that the direction requiring the jury to disregard the confession if they believed it was obtained in breach of the right to counsel, which the trial judge modeled on *R v Mushtaq*, was justified as being consistent with constitutional protections, s 70 of the Evidence Act and evolving regional and universal human rights standards.

Regarding the alleged failure to give an *Edwards* direction, the CCJ found that such a direction was not strictly necessary because the prosecution's case did not depend solely on a disputed confession. In any event, the trial judge had adequately warned the jury about the dangers of relying on unacknowledged oral statements and the need for caution.

Finally, the Court concluded that overall, the summing up was fair and, in some respects, even favourable to the appellant. It emphasised that the circumstantial evidence against the appellant was strong and compelling.

Accordingly, the CCJ dismissed the appeal and affirmed the conviction and sentence.

Cases referred to:

A-G v Joseph [2006] CCJ 3 AJ (BB), (2006) 69 WIR 104; *A-G v Whiteman* (1990) 39 WIR 397 (TT PC); *Ajodha v The State* (1981) 32 WIR 360 (TT PC); *Andrewin v R* [2024] CCJ 24 (AJ) BZ; *Beuze v Belgium* (2018) 69 EHRR 1; *Cadogan v R* (No 2) [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249; *Chan Wei Keung v R* [1967] 2 AC 160; *Chase v R* (1997) 55 WIR 53 (BB CA); *Domican v R* (1992) 106 ALR 203; *Doyle v R* [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91; *DPP v Gormley* [2014] 2 IR 591; *Edwards v R* [2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115; *Gideon v Wainwright* 372 US 335 (1963); *Marin v R* [2021] CCJ 6 (AJ) BZ; *Mason v R* [2025] CCJ 6 (AJ) BZ; *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Minister of Home Affairs v Fisher* (1979) 44 WIR 107 (BM PC); *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *R v Murray* [1950] 2 All ER 925; *R v Mushtaq* [2005] 1 WLR 1513; *R v Taylor* (1930) 21 Cr App R 20; *Ramsamooj v State of Suriname* [2026] CCJ 2 (OJ); *Ramsarran v A-G* (2005) 66 WIR 280 (TT PC); *Salduz v Turkey* (App No 36391/02) [2008] ECHR 36391/02; *Satpathy v Dani* 1978 AIR 1025; *Thornhill v A-G* (1976) 31 WIR 498 (TT PC).

Legislation referred to:

Barbados – Constitution of Barbados 1966, Criminal Appeal Act, Cap 113A, Evidence Act, Cap 121; **Ireland** – Constitution of Ireland 1937; **Suriname** – Suriname Code of Criminal Procedure 1977; **United Kingdom** – Police and Criminal Evidence Act 1984.

Treaties and International Materials referred to:

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (adopted 10 December 1948, entered into force 3 September 1953) 213 UNTS 221; International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 1 January 2006) 2259 UNTS 293; UN Human Rights Committee (UNHRC), ‘General Comment No 35, Article 9 (Liberty and security of person)’ (16 December 2014) UN Doc CCPR/C/GC/35; UN Human Rights Committee (UNHRC), ‘Views: Communication No 770/1997, 69th sess, (*Gridin v Russian Federation*)’ (20 July 2000) UN Doc CCPR/C/69/D/770/1997.

Other Sources referred to:

Halsbury’s Laws of England (5th edn, 2021) vol 7; King J D, ‘Beyond “Life and Liberty”: The Evolving Right to Counsel’ (2013) 48(1) Harv CR-CL L Rev 1.

JUDGMENT

Reasons for Judgment:

Bulkan J (Anderson P, Rajnauth-Lee, Jamadar and Ononaiwu JJ concurring) [1] – [90]

Disposition [91]

BULKAN J:

[1] In this appeal, the right to counsel – a right long understood to be ‘fundamental and essential to [a] fair trial’¹ – assumes centre stage. The focus, however, is not so much on its substantive content as on certain procedural aspects that arose in the course of criminal proceedings. This does not mean that the appeal is trivial or somehow less consequential, and as we proceed to examine and resolve the issues

¹ *Gideon v Wainwright* 372 US 335 (1963) at 344.

arising, we remain mindful of the integral role of legal representation in ensuring that fairness obtains throughout the criminal process.

- [2] As will be explained in this judgment, there is an obligation on all Superior Courts of Record to determine claims alleging a breach of fundamental rights, howsoever they arise, which extends to appellate courts. Commensurate with this obligation is a general duty in relation to any such claims to make explicit findings, give full reasons, and to communicate these in a timely fashion.

Background Facts

- [3] The appellant, Baggio K Daniel, was convicted of the murder of Alex Romel Samuel by a jury in October 2019 and sentenced to twenty-eight (28) years in prison. His appeal from that conviction was unanimously dismissed by the Court of Appeal of Barbados. In this Court, the appellant applied for special leave to appeal against the decision of the Court of Appeal and for leave to appeal as a poor person. This Court ordered by way of case management order that the hearing of the special leave application would be treated as the hearing of the appeal.
- [4] The appellant's conviction was in relation to a killing that occurred on 1 February 2012, at about 5 pm on a minivan/bus as it was plying the Pine and Wildey route. The bus was driven by Corey Pilgrim ('the driver') and the conductor was one Keisha Jean-Baptiste ('Prim'). There were several other passengers on the bus at the time of the incident, one of whom – Hartley McCaskie – also testified on behalf of the Prosecution.
- [5] Prim, the prosecution's main witness, had known the appellant for about four years before the incident and recalled when he stopped and boarded the bus. She was sitting in the front when she heard a loud explosion, causing her to look back. The scene she described was one of chaos, with passengers screaming, 'running up and down', and trying to exit the bus. Prim saw a man whom she identified as the appellant standing by the door with what appeared to be a gun in his hand, while

another passenger seated in the third row was clutching his chest. Prim went up to the accused, having recognised him, and accosted him by name. Calling him either 'Baggio' or 'Baggie' – she could not remember exactly which version she used by the time of the trial seven years later – she spoke to him, including by telling him to 'stop... not in here... don't.' At that point, according to Prim, the appellant jumped out of the bus and ran away.

- [6] The driver's testimony confirmed several key aspects of what Prim recalled. He testified that he was driving and picking up and dropping off passengers when, in the vicinity of Caribbean Broadcasting Corporation ('CBC'), he heard 'like something went off in the van', an explosion which called to mind that of a cap gun. As he looked back, he saw the commotion in the bus, with people trying to exit, including by jumping through the windows, even though the van had not yet come to a complete stop. The driver observed a man standing and 'fidgeting' with a gun in his hand. He testified that Prim approached that man with the gun, calling him 'Baggio' as she held him by the shirt and shook him, at which point he got off the bus. The driver then went down into the bus and saw a man in the third row of seats lying down, bleeding.
- [7] A third eyewitness, a passenger named Hartley McCaskie ('the passenger'), also testified about what he saw at the time. He heard a click which sounded to him like that of an empty gun. He looked up and saw a young man standing in the bus. That man was holding a gun pointed at another young man who was sitting in the bus. There was an explosion after which the gunman began fidgeting with the gun. The passenger also saw the conductress approach the gunman, saying to him, 'Baggio don't do this.' The gunman apparently fired the gun again causing the other man to fall into the aisle, at which point the gunman exited the bus. The fallen man started to moan as the gunman re-entered the bus, pointed the gun at the man on the ground and fired a third shot. The gunman then stepped off the bus and ran away.

- [8] By this time the driver had pulled up in a lay-by, and medical personnel and the police were summoned. As the police did their investigations, securing the bus and gathering statements, a paramedic examined the fallen passenger, who was by this point unresponsive. That passenger was eventually identified as Alex Samuel ('the deceased'). The deceased was taken to the morgue under police escort, and a postmortem later confirmed that he had sustained three gunshot wounds, which caused his death. A wanted bulletin was issued for the appellant, who was arrested and taken into custody during the early morning hours of 10 February 2012. Later that same day the appellant gave a statement under caution.

Proceedings before the High Court

- [9] The appellant was charged with the murder of Alex Romel Samuel and following the Preliminary Inquiry was indicted for this offence on 7 September 2016. The trial commenced three years later in September 2019 before Cornelius J. At the trial, the statement was challenged on the basis that the appellant was mistreated and subjected to oppressive conditions. The particulars of this objection were that he was allegedly beaten and abused, denied an opportunity to speak to an attorney, and prevented from communicating with his family.
- [10] The trial judge conducted a voir dire after which the statement was ruled to have been made freely and voluntarily and was admitted into evidence. In that statement, the appellant admitted to shooting the deceased, whom he referred to as 'PG', in retaliation for the deceased's repeated failure to pay him for a motorcycle which the appellant had given to him. The appellant recounted boarding the bus after he saw the deceased sitting inside and shooting the deceased in the course of the journey.
- [11] The prosecution's case was thus built on the testimony of the three eyewitnesses on the bus along with the appellant's confession. While no one testified to seeing the appellant shoot the deceased, the cumulative effect of the eyewitness testimony pointed irresistibly in that direction. The passenger who saw the shooting, but not the shooter, confirmed that the conductress Prim accosted the gunman and called

him 'Baggio', as did the driver. Prim, who did not see the shooting, testified that she saw the appellant when she turned around immediately after hearing the explosion, at which time he was holding a gun. At all times, the witnesses spoke of only one man with a gun on the bus. Thus, the person whom the passenger saw shoot the deceased was the same person whom Prim called by name and walked up to as the drama was unfolding. Prim recognised the man with the gun and later identified the appellant as that man in a lineup at the police station.

[12] The appellant gave an unsworn statement from the dock. While admitting that he was on the bus at the time of the incident, the appellant denied shooting the deceased. He claimed that during his interrogation at the station on the day of his arrest that he was beaten and threatened by several police officers, and to avoid being killed by them he eventually wrote out a statement as dictated by one of their number, Sgt Hurdle.

[13] Testifying in support of the appellant was one Rodney Rogers, who was in the police station at the same time in connection with a robbery investigation. Rogers testified that he was in the interview room when he heard a group of police conspiring to coerce a statement from the appellant, and then witnessed the police beating the appellant when he was brought from the lockups. It was only when the police realised he ('Rogers') was still in the room that they took him back to the cell, but not before he had seen their unlawful conduct and heard the appellant's screams as he was being beaten.

[14] At the close of the case the jury unanimously convicted the appellant for murder, evidently rejecting the appellant's defence and acting on the prosecution's case. As noted above, the appellant was then sentenced to 28 years' imprisonment by the trial judge.

Proceedings before the Court of Appeal

[15] The appellant appealed to the Court of Appeal of Barbados, advancing two principal grounds: first that the trial judge misdirected the jury on how to evaluate

circumstantial evidence, and second that she failed to rule on the specific claim that the appellant's constitutional right to an attorney had been violated by the police, instead leaving it to the jury to decide. Both these errors, it was alleged, rendered the verdict unsafe.

- [16] On the first ground, the Court of Appeal rejected the claim that the trial judge used the wrong approach in her directions on circumstantial evidence, validating her use of the 'strands in a cable' analogy as more suited to the facts of this case. On the second ground, the Court of Appeal concluded after reviewing the record that the trial judge impliedly rejected the claim that the appellant was denied the right to counsel. The Court of Appeal added that having admitted the confession, the trial judge erred by directing the jury to disregard it if they found it was given in breach of his right to an attorney, even if they believed it was made voluntarily and was true. That constituted, in their view, an improper delegation of her exclusive function to determine all legal issues, which included the admissibility of evidence. However, the Court of Appeal found that this error operated to the appellant's advantage and thus caused him no injustice. Along with what they described as 'overwhelming' circumstantial evidence led by the prosecution, they concluded that there was no miscarriage of justice and that the trial was conducted fairly. Accordingly, the appeal was dismissed and the appellant's conviction and sentence affirmed.

Appeal to the Caribbean Court of Justice

- [17] From this dismissal, the appellant seeks leave to appeal to this Court. Before us he did not renew the criticism of the trial judge's directions on circumstantial evidence but focused instead on the admission of the caution statement and the overall fairness of the trial in light of what were claimed to be multiple errors by the trial judge. Mr Gordon, on his behalf, repeated the complaint that the trial judge failed to rule on the claim that the appellant's right to counsel was breached, which he said was compounded by improperly delegating the determination of this issue to the jury. In those circumstances, counsel alleged, the Court of Appeal erred by

finding that there was no miscarriage of justice, as it was unclear what weight the jury may have placed on the caution statement, the admissibility of which had been improperly left to the jury to decide.

[18] In his written submissions Mr Gordon raised a further complaint related to the absence of an *Edwards* direction² by the trial judge. At the outset of the hearing, counsel indicated that he was not pursuing this ground, but as the hearing progressed, he did in fact address the Court on this point, so we will examine it fully. The crux of this submission is that since the confession was the only direct evidence of guilt, the trial judge should have warned the jury of the disadvantages faced by the appellant in trying to prove oppression, emphasising the absence of legal representation at the time of the interview compounded by the allegations of violence. All this called for a direction reminding the jury of the special need for caution before acting on unrecorded police testimony. Further, counsel added, the cumulative effect of these errors rendered the summing-up unfair and the resulting conviction unsafe. For these reasons, Mr Gordon urged this Court that the appeal should be allowed, and the appellant's conviction quashed.

[19] Ms Delaney, Deputy Director of Public Prosecutions of Barbados, contested these arguments, urging this Court to reject them and to dismiss the appeal. In short, Ms Delaney submitted that on a holistic reading of the trial judge's ruling, it is clear that she considered all the arguments raised around admissibility of the confession, so that by pointedly rejecting the allegations and accepting the evidence of the police, she would necessarily have been satisfied that the appellant's right to counsel was not breached. Further, and disagreeing with the Court of Appeal, Ms Delaney added that the trial judge did not err by directing the jury to disregard the confession if they felt it was given in breach of his right to an attorney, as that was the direction in which the law had moved since the decision of the House of Lords in *R v Mushtaq*.³ Since there was no misdirection, Ms Delaney argued, the danger

² *Edwards v R* [2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115.

³ [2005] 1 WLR 1513.

feared of not knowing which aspects of the evidence the jury relied on to convict did not arise.

[20] As to the claimed failure of the trial judge to give an *Edwards* direction, Ms Delaney pointed out that this is usually necessary only where the prosecution's case rests solely on a disputed confession statement – which was not the situation here given the cogent circumstantial evidence led by the Prosecution. In any event, Ms Delaney argued, the trial judge did in fact give an *Edwards* direction, a submission she supported by references to the summing-up where the trial judge pointed out to the jury the reasons why unsigned 'orals' are unreliable, that the police have been known to concoct evidence, and that they should therefore exercise caution in considering that evidence. Thus in all the circumstances, the position of the State was that the trial judge did not commit any errors as alleged by the appellant so that there was no overall unfairness in the trial – far from that, they submitted, if in fact the impugned direction was wrong then it was of no moment since it was in the appellant's favour. For these reasons, the State submitted that the appeal should be dismissed and the appellant's conviction affirmed.

Special Leave

[21] The test for special leave to appeal in criminal matters is well settled. In *Andrewin v R*, Anderson J summarised the jurisprudence of this Court on this issue, namely, that an applicant for special leave must establish that (a) there is a realistic possibility that a ('potentially') serious miscarriage of justice may have occurred, and/or (b) a point of law of general public importance is raised which, if not overturned, would leave a questionable precedent on the record.⁴

[22] In this case, having regard to the written submissions of the parties, duly expanded upon at the hearing, the Court was satisfied that the test for special leave was met

⁴ *Andrewin v R* [2024] CCJ 24 (AJ) BZ at [17]. See also *Cadogan v R* (No 2) [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249; *Doyle v R* [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91; *Mason v R* [2025] CCJ 6 (AJ) BZ at [24].

by the appellant, and the remainder of this judgment proceeds to examine the merits of the appeal.

Issues

[23] In light of substantive arguments advanced, the following issues arise for determination:

- i. Whether the learned trial judge neglected to rule at the end of the voir dire on the claimed violation of the appellant's right to an attorney-at-law ('the ruling on the voir dire');
- ii. Whether the learned trial judge improperly delegated to the jury her responsibility to decide on the admissibility of the confession statement tendered by the prosecution ('improper delegation');
- iii. Whether there was a need for an '*Edwards*' direction, which the trial judge failed to give to the jury ('the directions on assessing credibility'); and
- iv. Whether the summing up was fair in light of the claimed errors ('the fairness of the summing-up').

The Ruling on the Voir Dire

[24] Section 13(2) of the Constitution of Barbados provides as follows:

Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and *shall be permitted, at his own expense, to retain and instruct without delay a legal adviser of his own choice, being a person entitled to practise in Barbados as an attorney-at-law, and to hold private communication with him*; and in the case of a person who has not attained the age of sixteen years he shall also be afforded a reasonable opportunity for communication with his parent or guardian.⁵

⁵ Constitution of Barbados 1966 (emphasis added).

- [25] The right of a person who is arrested or detained to consult an attorney-at-law of his or her choice is one of a slew of procedural protections for persons deprived of their liberty, and as made clear in the provision, it is one that applies ‘without delay’. Moreover, while the text speaks merely to being ‘permitted...to retain and instruct’, that language has been purposively interpreted as including the *right to be informed* of one’s right to an attorney.⁶
- [26] It might come as a surprise to learn that at one time, persons charged with serious crimes in England were actually forbidden by law from obtaining legal representation in their defence.⁷ This was justified on the basis that lawyers impeded efficient prosecution and if permitted would increase the chances of acquittal. Such potential consequences were viewed as detrimental to peace and social stability. All this gradually changed by the mid-eighteenth century as institutionalised policing and professional prosecution developed,⁸ so defence counsel became needed to balance the scales, so to speak, given the common law’s adversarial framework. The role of lawyers, therefore, evolved to ensure what is now known as ‘equality of arms’ and to promote the overall fairness of criminal trials.
- [27] The right to an attorney thus pre-existed modern human rights treaties and constitutions, and in the Anglo-Caribbean it certainly existed as a matter of settled practice,⁹ reflected for example, in the Judges’ Rules. The latter is a catalogue of procedural safeguards designed to guide police officers in the discharge of their functions when interacting with suspects, which was adopted across common law Caribbean jurisdictions. Of course, the right is now enshrined in Constitutions, along with other common law procedural protections for criminal suspects, so there is no room for disputing its application or, indeed, its pre-eminent status.¹⁰

⁶ *Chase v R* (1997) 55 WIR 53 (BB CA). See also *A-G v Whiteman* (1990) 39 WIR 397 (TT PC).

⁷ John D King, ‘Beyond “Life and Liberty”: The Evolving Right to Counsel’ (2013) 48(1) Harv CR-CL L Rev 1.

⁸ *ibid* 7.

⁹ *Thornhill v A-G* (1976) 31 WIR 498 (TT PC) at 513 (Lord Diplock).

¹⁰ *Ramsarran v A-G* (2005) 66 WIR 280 (TT PC).

- [28] The importance attached to the right to an attorney is clear from its incorporation in key international and regional human rights treaties, several of which influenced the content of Anglo-Caribbean constitutions, including that of Barbados.¹¹ Both Articles 9 and 14 of the *International Covenant on Civil and Political Rights* ('ICCPR'),¹² which guarantee the rights to liberty and a fair trial respectively, have been interpreted by the United Nations Human Rights Committee as conferring on criminal suspects and accused persons the right to prompt access to an attorney-at-law. The Committee's jurisprudence as it has developed over time justifies this guarantee on the bases that, inter alia, it forestalls torture and other forms of inhuman and degrading treatment,¹³ ensures the legality of detention,¹⁴ and equalises the asymmetrical power relationship between the police and suspect – thereby promoting equality of arms and overall fairness in the conduct of both the investigation and subsequent trial.¹⁵
- [29] The European Court of Human Rights ('ECtHR') has been equally forthright about the importance of legal representation, articulating its value in almost identical terms. In *Beuze v Belgium*,¹⁶ cited by Mr Gordon, the ECtHR affirmed that the right of everyone 'charged with a criminal offence' to be effectively defended by a lawyer, as guaranteed by Article 6(3)(c) of the European Convention on Human Rights ('ECHR'),¹⁷ is one of the 'fundamental features of a fair trial'. Significantly, although the language of the ECHR speaks to those 'charged', the ECtHR has made clear that the right applies as soon as a person is arrested – that is to say, even *before* any charges materialise.¹⁸ This expansive stance has been justified on the following bases:

¹¹ *Minister of Home Affairs v Fisher* (1979) 44 WIR 107 (BM PC) at 112 (Lord Wilberforce).

¹² International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹³ UN Human Rights Committee (UNHRC), 'General comment No 35, Article 9 (Liberty and security of person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 48.

¹⁴ See, for example, *Ramsarran* (n 10) and note the explanation at [11] (Lord Carswell).

¹⁵ UN Human Rights Committee (UNHRC), 'Views: Communication No 770/1997, 69th sess, (*Gridin v Russian Federation*)' (20 July 2000) CCPR/C/69/D/770/1997.

¹⁶ (2018) 69 EHRR 1.

¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (adopted 10 December 1948, entered into force 3 September 1953) 213 UNTS 221.

¹⁸ *Beuze* (n 16) at [124].

Access to a lawyer at the pre-trial stage of the proceedings also contributes to the prevention of miscarriages of justice and, above all, to the fulfilment of the aims of art 6, notably equality of arms between the investigating or prosecuting authorities and the accused...¹⁹

The Court has acknowledged on numerous occasions since the *Salduz* judgment that prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody. Such access is also preventive, as it provides a fundamental safeguard against coercion and ill-treatment of suspects by the police.²⁰

[30] This Court has also upheld the right to an attorney-at-law in equally strong terms, acknowledging its relevance and ‘foundational value’ throughout the criminal investigative process. In *Ramsamooj v State of Suriname*,²¹ which arose in its original jurisdiction, the claimant, a citizen of Trinidad and Tobago, was arrested in the course of a business trip in Suriname and detained in custody during pre-trial detention for more than two months. At the outset of his detention, he was denied direct access to legal counsel for two consecutive eight-day periods on the basis of Beperking orders made under art 40(2) of the Suriname Code of Criminal Procedure (‘SCCP’). He was eventually released from pre-trial detention because of the deterioration of his health, but not before he had been interrogated in Dutch through a translator and signed a statement which amounted to a confession. This Court upheld his claim that his rights under the Revised Treaty of Chaguaramas (‘RTC’)²² had been breached by Suriname.

[31] In the course of its judgment, this Court affirmed that the minimum human rights standards that must attend the exercise of Treaty-based rights include the right of an accused person to have access to legal counsel of his or her choice. The Court underscored that this right is entrenched in the constitutions of every CARICOM Member State and has accordingly crystallised into a regional customary

¹⁹ *ibid* at [125].

²⁰ *ibid* at [126].

²¹ [2026] CCJ 2 (OJ).

²² Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 1 January 2006) 2259 UNTS 293

standard.²³ Further, it invoked the reasoning of the ECtHR in *Salduz v Turkey*,²⁴ which identifies early and effective access to counsel as a structural safeguard without which the fairness of the proceedings is presumptively compromised. Informed by this principle, this Court held that art 40 of the SCCP, insofar as it authorises the deprivation of access to counsel at the investigative stage without compensatory safeguards sufficient to preserve the effectiveness of the defence, unlawfully impedes free movement and cannot be reconciled with the minimum human rights baseline required by Community law.²⁵

[32] Thus, the existence of and justification for the right to prompt legal counsel in criminal matters (and, increasingly, in civil cases as well) is settled jurisprudence in both domestic, regional and international human rights law. Simply put, the presence and advice of counsel are accepted as integral to protecting a suspect in a myriad of ways, including those of navigating complex legal areas for persons unschooled in the law, protecting the vulnerable, and forestalling violence or other forms of oppression.

[33] While enforcement of this right (and all other fundamental rights guaranteed in Chapter III of the Barbados Constitution) is specifically entrusted to the High Court,²⁶ this does not mean that a separate constitutional action must always be brought if a constitutional issue arises in the course of some other action, such as during a criminal trial. It is only courts subordinate to the High Court which are prohibited from deciding on constitutional claims, and where any such issue arises before them they are required to refer it to the High Court for determination.²⁷ Interpreting a similar constitutional framework in Belize, this Court has affirmed that similar jurisdiction to determine constitutional issues exist in courts superior to

²³ *Ramsamoj* (n 21) at [133], [161].

²⁴ (App No 36391/02) [2008] ECHR 36391/02.

²⁵ *Ramsamoj* (n 21) at [158]–[162].

²⁶ Barbados Constitution (n 5) s 24(1).

²⁷ *ibid* s 24(3).

the High Court, such as the Court of Appeal and this Court, where such issues arise before them, even if not directly connected to the substantive appeal.²⁸

[34] In *Marin v R*, the substantive appeal concerned the appellant's conviction for robbery and kidnapping. There was a nine-year delay following conviction before his appeal came up for hearing, at which point the appellant invoked his fundamental right to a fair trial within a reasonable time. However, the Court of Appeal doubted that it had jurisdiction to decide the point since it was unrelated to the substantive criminal matter, even though it agreed that the delay violated the appellant's right. On further appeal this Court held, overruling the State's objection, that the appellant was not required to file a separate constitutional action, and was entitled to raise the claimed breach of his right to protection of the law for the first time on appeal.²⁹ The relevance of this comparison is simply to confirm the jurisdiction – indeed, the obligation – of the High Court to determine claims alleging the breach of a fundamental right, howsoever they arise, which extends even to appellate courts if arising there for the first time.

[35] It stands to reason, therefore, that if in the course of a criminal trial an allegation is made as to the breach of this right, a trial judge is obliged to inquire into it fully, invariably in the absence of the jury, and after hearing the evidence on both sides to come to an explicit, reasoned conclusion which must be communicated to both parties, defendant and prosecution. Given the adversarial nature of criminal proceedings, the consequences of a conviction, and the intrinsic importance of constitutional rights, nothing less than a fully reasoned and explicit finding is ordinarily satisfactory.

[36] In this case, the appellant alleges and the respondent agrees that the trial judge made no explicit ruling at the end of the voir dire on the specific objection that the appellant was denied his right to counsel. Such an omission, the appellant argues,

²⁸ *Marin v R* [2021] CCJ 6 (AJ) BZ.

²⁹ *ibid.*

constituted a material error. This being a constitutional claim, it could not be subsumed under a general voluntariness analysis and treating it as implied, as did the Court of Appeal, was legally insufficient, undermining confidence in the judicial process.

[37] Adopting the position taken by the Court of Appeal, Ms Delaney for the State countered that while the trial judge did not explicitly say that the appellant's right to an attorney was not breached, such a finding was necessarily implicit in her ruling which first considered all the arguments and then rejected the appellant's allegations in the round.

[38] The safest way to resolve these divergent positions would be to examine exactly the terms of the ruling by the trial judge. The following is not a complete extract of all that she said on this issue, nor are obvious mis-recordings included (for example, where the judge may have slipped by saying 'prosecution' instead of defence) – and instead, some of the most relevant parts of her ruling are reproduced hereunder, as follows:

This is, I think, a little more complex than the usual voir dire for a number of reasons. So I'm going to give some brief reasons and set out my reasoning very briefly.

...

So I accept you're looking at a general scheme of fairness and I say that because the prosecution is arguing two things. The defence counsel they are arguing two things. [Here the trial judge distils the two submissions on behalf of the appellant as being the infliction on him of actual physical violence and treatment that was generally unfair.]

...

The defence says the accused man was under pressure, he was kept away from his family from the very beginning... that *he wasn't told of his rights to an attorney* and on top of that he was threatened, he was forced in the circumstances by threats and actual beatings.

... [The trial judge goes on to recount other allegations made by the appellant.]

The prosecution denies all of these allegations. [Here the arguments of the prosecution are detailed by the judge.]

[The prosecution] also point out that ... *the evidence revealed that the accused man did see an attorney* and that after he saw that attorney despite apparently his spirit having been completely broken during the course of the giving of the statement, he was then able to call on such emotional reserves, that he was able to refuse to sign oral statements in the policeman's notebook on the ground that his attorney told him not [to do so].

...

I have weighed these two stories and the evidence of the parties in each. ...But on a balance of probabilities I accept that the evidence of the policemen in these circumstances is credible.

...I find the evidence of the accused man in these circumstances not believable.³⁰

- [39] Having set out in detail the respective positions and arguments of the parties as well as whom she believed and why, the trial judge then proceeded to consider another defence submission, namely, that the police must do more than simply advise a suspect of the right to an attorney in a perfunctory way. This is what she added on this issue:

I do not agree that there has been any general unfairness in the taking of this statement and I refer to particularly here to the Defence's argument ... or suggestion that the police need to do more. And yes, I understand that the Defence denies that he was ever given any opportunity to see a lawyer or that he was told [of] his rights under the Constitution.

But more than that the Defence implies by their argument that the police need to do more than simply ask if he wants to see a lawyer. They must make some sort of positive steps to make sure that he does, because the logical ...conclusion for the arguments of a defence in terms of unfairness, is that someone of this age, if they say that they do not want to see a lawyer, you should not in any circumstances ... go on to take a statement, but you should wait or encourage him to get an attorney...

I don't agree that that is necessary or even desirable. But I do point out that the issue here is how to make that right to get an attorney and... to have

³⁰ Record of Appeal, 395–401 (emphases added).

communication with an attorney, a real right, as opposed to a right that may just exist in the abstract.³¹

- [40] It bears repeating that the extracts above are not an exhaustive reproduction of the judge's ruling on this issue. However, they are enough to demonstrate that the judge was mindful of all the arguments – both defence and prosecution – which she recounted at length before coming to her general conclusions.
- [41] Having expressly itemised the objections, and specifically the appellant's allegation that he was not told of his right to an attorney, noting the evidence on both sides, and then concluding immediately thereafter that she accepted the evidence of the police as credible, it can indeed be safely implied the trial judge found as a fact that the appellant was advised of his right to an attorney. That the appellant was so advised formed part of the evidence of the police, and since she expressly stated that she believed their evidence, a contrary interpretation would be unreasonable. Put another way, given the extensive references that the trial judge made to the submissions and evidence bearing upon the issue of the right to an attorney before explicitly stating her belief in the credibility of the police evidence, it cannot be said that she did not address her mind to the claimed constitutional breach or that her conclusion did not include a ruling on that point.
- [42] This conclusion is reinforced by the judge's further consideration of what seems to have been an alternative argument of the defence, namely, that it is not enough to tell a suspect of their right to an attorney, and even if one is declined, a statement should still not be taken without a lawyer present. There, the defence seemed to have been arguing for the presence of an attorney as a mandatory aspect of investigative practice, which the judge expressly rejected as not feasible, and rightly so. The inference from this is that it would have been unnecessary to examine and expressly reject an alternative argument without having already concluded that the police had done what the defence was characterising as the minimum. In other

³¹ *ibid* 401–402.

words, a decision-maker would logically only consider a further or alternative argument if s/he had already disposed of the primary one, because the alternative only arises where the primary does not apply. This is why it must be that by accepting the police evidence (as she expressly said), the trial judge implicitly accepted that the appellant was informed of his right to an attorney, which at that point he chose not to invoke. For it was only having considered and rejected this claim that he was not informed that the trial judge then needed to consider the alternative argument, which was that in the face of his refusal, the police ought to have insisted that he obtain an attorney.

[43] As stated above,³² once a constitutional objection is raised in the course of a trial in the High Court, a judge should fully consider and give a reasoned decision regarding it. Doing so promotes certainty, transparency, and fairness to all involved. The parties must be informed of the ruling and the reason for it in order to move forward intelligibly. Where for some reason this procedure is not observed, an appellate court would not lightly overlook or countenance such an omission.

[44] That said, however, inflexible rules are inimical to the attainment of true justice, and in this case we must guard against misinterpreting what actually obtained. And it is clear from a close and holistic examination of the transcript of the judge's ruling, including the portions extracted above, that the trial judge did in fact consider and reject the constitutional claim. While she did not say so in explicit terms, the extensive references to the objection, evidence and arguments bearing upon the right to counsel collectively demonstrate that the judge was considering this issue at the very moment when deciding on admissibility. By accepting the police evidence, therefore, this necessarily included their evidence that they had informed the appellant of his right to an attorney-at-law. Thus, while it behoves a judge in the course of a criminal trial to expressly articulate and set out their ruling on a claimed violation, on the specific facts of this case we find no irregularity since

³² See [33] – [35] above.

it was implicit in the judge's conclusion that she was rejecting the claimed constitutional breach. Accordingly, this first ground of appeal fails.

Improper Delegation

- [45] The appellant submitted that the trial judge improperly delegated to the jury the issue as to whether his right to counsel was breached. The impugned passage is as follows:

...even if you believe that the accused man made the statement and that he made it voluntarily, and that it was true ... that he wasn't beaten and it wasn't dictated to him, and that it was his own words and that it was true but he made it without being given his right to an attorney, even if you believe that he was not beaten or otherwise oppressed then you must disregard the statement and you cannot take it into account in considering your verdict.³³

- [46] The Court of Appeal interpreted this direction as an invitation for the jury to treat the denial of the appellant's right to a lawyer as a bar to admissibility, even if they found the statement to be voluntary and true. As such, it was felt that the direction violated both s 70 of the Evidence Act³⁴ which vests the power to determine voluntariness and fairness exclusively in the judge, as well as the common law³⁵ which mirrors this division of functions as between judge and jury, hence the finding that it was an improper delegation of the judge's exclusive function to determine a legal issue that had already been resolved. However, despite this conclusion, the Court of Appeal held that the error was in the appellant's favour since it afforded him a second opportunity to challenge the admissibility of the confession, so that the appellant suffered no injustice or unfairness. Accordingly, no miscarriage of justice flowed from this alleged misdirection.

- [47] Nonetheless, having taken this position, the Court of Appeal, acting out of an abundance of caution, applied the proviso under s 4(2) of the Criminal Appeal Act,

³³ Record, 1312.

³⁴ Cap 121.

³⁵ For this principle, the Court of Appeal relied on *Chan Wei Keung v R* [1967] 2 AC 160.

Cap 113A, upholding the conviction in light of what they described as the overwhelming circumstantial evidence.

[48] Before us, Mr Gordon renewed his criticism of the above direction, repeating that it violated the strict division of functions that applies in criminal trials, in which questions of law are exclusively within the province of the judge and issues of fact are for the jury. Mr Gordon submitted that the former remit includes matters touching on the admissibility of evidence and the determination of claimed constitutional breaches, so that by directing the jury that they must disregard the statement if they believe that the appellant made it without being given his right to an attorney, the judge failed to fulfil her duty and the proper judicial determination of the appellant's constitutional right was left unresolved.

[49] Relatedly, Mr Gordon argued, the judge's improper delegation of this function could not be overlooked on the basis that there was alternative evidence of a circumstantial nature because of the secrecy surrounding jury deliberations. Counsel invoked *Domican v R*, where the High Court of Australia held that if a misdirection exists in relation to one of two independent bases for conviction, then any resulting conviction cannot be upheld as it would be impossible to know if the jury acted on the evidence vitiated by the misdirection.³⁶ As it was put by the court: 'A Court of Criminal Appeal cannot apply the proviso by speculating either that the jury acted on a body of evidence which was unaffected by the misdirection or inadequate direction; nor can the Court speculate that, if the jury had acted on such evidence, they would have convicted.'³⁷

[50] In this case, counsel submitted, if the judge failed to rule on the appellant's claim of being denied his right to an attorney and then delegated this decision to the jury, the evidence was improperly admitted and it was irrelevant that this misdirection might appear to favour the appellant. Disagreeing with the approach taken by the Court of Appeal, counsel submitted in reliance on *Domican*, that an appellate court

³⁶ *Domican v R* (1992) 106 ALR 203.

³⁷ *ibid* at 214.

could not have saved the conviction on the basis that there was another route by way of the circumstantial evidence, because it could not ever be known if the jury convicted on the basis of it, or whether they would have done so if there was no confession.

[51] In response to these submissions, Ms Delaney maintained that what the trial judge told the jury did not amount to them having to decide on admissibility, but rather was a necessary direction on how to approach or assess the evidence. The State cited *R v Mushtaq*,³⁸ where the House of Lords held that even after a judge admits a confession into evidence, the jury must be told that if they find it was obtained by oppression, they must disregard it. The House justified this position on the basis of both the United Kingdom ('UK') Police and Criminal Evidence Act ('PACE')³⁹ and Article 6(1) of the ECHR⁴⁰ which guarantees the right to a fair trial, both of which, Ms Delaney pointed out, contain protections and standards replicated in Barbadian law.

[52] Ms Delaney added that this approach was even more justified in the context of Barbados given that the standard of proof for determining admissibility in a voir dire is on the balance of probabilities, in contrast to that of being satisfied beyond a reasonable doubt in the UK. Given the lower standard at the admissibility stage in Barbados, the State submitted that a '*Mushtaq*' direction possesses greater salience and would be likely to impact upon more cases than in the UK, hence its relevance. Relatedly, Ms Delaney noted that while the Court of Appeal relied upon *Chan Wei-Keung*⁴¹ to find that the trial judge had erred, that was in itself per incuriam, so to speak, since that case had in fact been overruled by the House of Lords in *Mushtaq*. On the basis of these carefully constructed arguments, therefore, the State submitted that the trial judge did not improperly delegate the question of

³⁸ *Mushtaq* (n 3).

³⁹ Police and Criminal Evidence Act 1984 (UK).

⁴⁰ ECHR (n 17).

⁴¹ See (n 35).

admissibility to the jury and that there was accordingly no merit in the appellant's submission.

[53] In evaluating the merits of these respective positions, it might be helpful to start with some basic principles. The first of these is a bedrock rule of criminal procedure, so trite that it is difficult to find direct case law in support. But there is guaranteed to be no contestation against the assertion that in a trial on indictment, issues of law are the sole province of the judge while issues of fact are for the jury.⁴² Questions of law cover a wide range of matters which include the admissibility of evidence, interpretation of statutes, determination of constitutional claims and the competence and compellability of witnesses. Questions of fact relate to the evidence, such as assessing the credibility of witnesses and more generally what parts of the testimony (or facts) are accepted or believed and what are rejected or disbelieved.

[54] Of course, this being the law where the existence of absolutes is a rarity, these are not rigid distinctions, and the procedure governing disputed confessions is a prime example of what kinds of overlaps exist between the respective roles. Where the prosecution seeks to tender in evidence a statement made by an accused person objected to on the ground that it was not freely and voluntarily made, it is for the trial judge to rule whether it is admissible.⁴³ Ordinarily, admissibility would be determined in a voir dire where the jury may be excluded,⁴⁴ and in which the judge will hear evidence presented by both parties (prosecution and defence) before coming to a decision.⁴⁵ In this exercise, the judge decides both questions of fact (whose evidence is believed or not) and law (whether to admit the statement or not). If admitted, it is then for the jury to decide what weight they will attach to the statement, which may be none at all by disregarding it altogether.

⁴² Halsbury's Laws of England (5th edn, 2021) vol 7, para 446.

⁴³ *Ajodha v The State* (1981) 32 WIR 360 (TT PC).

⁴⁴ *ibid* at 372–373 (Lord Bridge).

⁴⁵ *Mushtaq* (n 3) at [37] (Lord Rodger).

- [55] Courts have recognised that *how* a statement is obtained could impact on its reliability, so in deciding questions of weight (as in how much of it, if any, to believe) the jury is entitled to hear about the circumstances in which the statement was taken. Defence counsel is thus free to revisit the issue of voluntariness before the jury and cross-examine the police witnesses on matters relevant thereto. Early English cases conceptualised this in terms of reliability, reasoning that a statement obtained by threats or promises was less likely to be true, with such matters (what evidence is viewed as true and on which to act) squarely within the jury's remit.⁴⁶
- [56] Thus, while the roles of judge and jury are distinct, at least in theory, in practice their boundaries may become blurred. Is there any difference between a statement that is ruled inadmissible by the judge, and one admitted into evidence but then entirely disregarded by the jury? At first blush it may seem that any difference is purely academic, since whatever the route, the end result is the same, but in fact there is an important distinction to be made, which concerns the *degree of the obligation* in deciding how to treat evidence of oppression.
- [57] To explain, if the jury is told that they *may* act on a statement they regard as true but which they feel may have been obtained by oppression or in some other improper manner, that gives them a discretion to act on evidence that the judge would have been duty bound to exclude if s/he had felt the same way. And it would appear that prior to *Mushtaq*, the jury would invariably be directed in such a way to suggest that weight was a matter for them and that they 'could' or 'should' disregard the statement depending on the view that they took of its voluntariness. This was how Lord Goddard, for example, outlined the obligation in *Murray*:

Counsel for the appellant was entitled to cross-examine the police in the presence of the jury as to the circumstances in which the confession was obtained. At that time the confession was admissible in evidence, because the recorder had ruled so, but it was entirely within the right of the appellant or his counsel to cross-examine the police and to try again to show that the confession had been obtained by means of a promise of favour. If counsel

⁴⁶ *R v Murray* [1950] 2 All ER 925.

for the appellant could have persuaded the jury of that, he was entitled to *invite them to disregard* the confession.⁴⁷

This language of ‘invitation to disregard’ would suggest that it is entirely within the discretion of the jury whether to act on a statement which they conclude was obtained in an unlawful or improper manner.

[58] If there was any ambiguity about the existence of a discretion, however, that was settled definitively by *Mushtaq*. There, the House of Lords (Lord Hutton dissenting) established that the jury *must* disregard any statement they thought was unlawfully obtained, irrespective of their view as to its reliability or truth. Lord Rodger, writing for the majority, advanced a number of reasons in support of this position. As to the point made above, as to whether a jury disregarding a statement is any different from a judge ruling it inadmissible, Lord Rodger emphasised that a jury should not be *entitled* to rely on a statement found not to be freely and voluntarily given, not simply because it may be unreliable, but as a matter of principle. This stance he justified by pointing both to the right against self-incrimination and more generally, the importance attached to proper behaviour by the police in a civilised society.⁴⁸

[59] Elaborating further, Lord Rodger examined what he discerned as the policy underpinning the statutory provisions on admissibility. Section 76(2) of PACE directs that any confession obtained by oppression or any other improper means ‘shall’ not be admitted into evidence. The logic of this position necessarily dictates, he reasoned, that if the judge is prohibited from admitting an unlawfully or improperly obtained statement, then neither should the jury be allowed to act on it if they felt that the statement was so obtained.⁴⁹ In his words, ‘It flies in the face of [Parliament’s policy as embodied in s 76(2)] to say that a jury are entitled to rely on a confession even though, as the ultimate arbiters of all matters of fact, they

⁴⁷ *ibid* at 927 (emphasis added).

⁴⁸ *Mushtaq* (n 3) at [45].

⁴⁹ *Mushtaq* (n 3) at [46]–[48].

properly consider that it was, or may have been, obtained by oppression or any other improper means.’⁵⁰

[60] Lord Rodger reinforced this conclusion by reference to Article 6(1) of the ECHR, which guarantees a fair trial. That guarantee, he noted, includes the right against self-incrimination, and it would be incompatible with that right for a jury to act on a statement which they felt was not freely and voluntarily obtained.⁵¹ For all these reasons, therefore, the House of Lords overruled the previous position laid down in *Chan Wei-Keung v R* and held that a jury cannot be allowed to act on a statement which they feel might have been obtained by oppression or some other improper means – even one they feel to be true.

[61] This brings us back to the trial judge’s direction to the jury in this case, where she told them that they ‘must disregard’ the confession if they believed it was obtained by violence or other forms of oppression, even if they felt it was true. As noted already, the Court of Appeal held, and defence counsel vigorously agreed, that this was a mischaracterisation of her role in that she was empowering the jury to revisit her ruling on admissibility, in contravention of s 70 of the Barbados Evidence Act. However, based on the principles as outlined above – both longstanding and how they have evolved in modern times – is it correct to say that the trial judge erred by improperly delegating her function to the jury?

[62] Before proceeding further, it is important to reiterate that we have found, in agreement with the Court of Appeal, that the trial judge did in fact rule on the claimed constitutional breach. As discussed in the preceding section, while the judge did not outline her conclusion in explicit language, it is clear that her ruling necessarily implied that she rejected the claim that the appellant was denied his right to an attorney. So, importantly, the trial judge did not abdicate her responsibility of ruling on a constitutional issue.

⁵⁰ *ibid* at [46].

⁵¹ *ibid* at [53].

- [63] Moreover, the trial judge included directions on the voluntariness of the appellant's statement because this issue was reopened by defence counsel in his cross-examination of the police witnesses before the jury. As we have seen, the defence was perfectly entitled to do so because in determining what weight to attach to a disputed confession, the jury has always been able to consider the circumstances in which that confession was obtained. Thus, the trial judge was not delegating her function of determining admissibility of evidence to anyone, rather, she was guiding the jury on how to assess the evidence in light of defence counsel having reopened the issue of voluntariness before them.
- [64] So, in effect, the key issue to be resolved is whether the trial judge erred by directing the jury in mandatory terms. For a number of reasons, discussed below, we are of the view that she was justified in doing so.
- [65] Given the principle of constitutional supremacy, it is appropriate to start by acknowledging the slew of procedural protections for suspects and accused persons, as guaranteed by the fundamental rights provisions of the Barbados Constitution. Already noted is s 13(2) of the Constitution which affords to persons arrested or detained the right to an attorney at law, including the right to be informed of this right, which applies 'without delay'. This is reinforced by s 18, which guarantees more broadly the right to the protection of the law and governs both criminal and civil proceedings. Section 18 contains a catalogue of procedural protections, or detailed rights, including the right of criminal defendants to be defended by a legal representative of their choice and the right not to be compelled to give evidence, alongside a more general right to a fair trial. Notably, this Court has consistently interpreted this provision generously, as necessarily ensuring a guarantee of fairness throughout the criminal justice process.⁵²

⁵² *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332. Indeed, for a sense of how expansively this Court has interpreted the right to protection of the law, in Belize the equivalent provision has been held to apply beyond the criminal sphere: *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178.

[66] It stands to reason therefore that the combination of all these provisions would militate against the use by a jury of a confession found to be obtained in breach of a person's right to consult a legal representative. Doing so would violate the express terms of s 13(2), and where it occurs in a setting leading to a disputed confession (that is, where a suspect is interviewed and gives a statement without being informed of his right to an attorney), it would also violate the letter and spirit of s 18 which guarantees the protection of the law. The reason for the latter connection is because the right to counsel has always been associated with the right against self-incrimination and acknowledged as integral to fairness in criminal proceedings.

[67] These constitutional protections are reinforced by statutory provisions governing the admissibility of confessions. The Court of Appeal in this case interpreted s 70 of the Evidence Act narrowly as entrusting the trial judge solely with the function of determining the admissibility of confessions. However, the State in its submissions noted the similarity of the same provision to s 76(2) of PACE, which the majority in *Mushtaq* relied upon to foreclose any discretion in a jury to rely on a statement found to be obtained by improper means. For convenience, s 70 provides as follows:

Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admissions towards some other person, or by a threat of conduct of that kind, or by any promise made to the person who made the admission to any other person.

[68] According to the express terms of s 70, a court is prohibited from admitting into evidence any statement of an accused which was obtained by violence, oppression or some other unlawful conduct. Since a violation of a person's constitutional rights necessarily amounts to oppressive conduct, where a suspect is not told of his right to an attorney that would render any subsequent statement given by him inadmissible pursuant to s 70. *A fortiori*, if a judge is prohibited from admitting into

evidence a statement obtained in this manner, then it would be inconsistent to hold the jury to a lesser standard by allowing them to act on such evidence. To paraphrase Lord Rodger in *Mushtaq*, allowing a jury to act on a statement obtained in breach of these rights ‘flies in the face’ of an established constitutional framework designed to protect suspects and accused persons and aimed at promoting probity in criminal investigations.

[69] Ms Delaney raised a further point of considerable value, namely that of the differences in the standard of proof as between the UK and Barbados. In the former, as pointed out in *Mushtaq*, a judge may only admit a confession if satisfied *beyond a reasonable doubt* that it was freely and voluntarily obtained.⁵³ Given this high standard, Lord Rodger noted that it would be only in rare cases that a jury might find a confession, once admitted into evidence, to have been improperly obtained. In Barbados, however, the standard of proof that applies in a voir dire is that of proof on a balance of probabilities, while the jury must be satisfied of guilt beyond a reasonable doubt. The higher standard that applies to the jury thus leaves more room for the respective bodies to come to differing conclusions, or to put it more plainly, for the jury to disagree with a judge’s view of the evidence. In turn, this makes the *Mushtaq* direction far more meaningful in Barbados, enhancing the overall fairness of a trial by ensuring that any confession tendered in support of guilt is subject to rigorous scrutiny at different stages.

[70] It is worth noting that this analysis is not predicated merely on a literal interpretation of statute or a reflexive application of English standards. While the imperatives of constitutional supremacy and the logic of the statutory provisions do inevitably support the approach taken by the trial judge, in tandem with developments in English common law, there are also compelling reasons rooted in principle and justice for such an approach. As discussed earlier, the relationship between the police and an ordinary individual is highly asymmetrical. That power imbalance is heightened significantly in the context of a criminal investigation,

⁵³ *Mushtaq* (n 3) at [41].

where a suspect may be scared, unschooled in the law, outnumbered, and/or facing a host of other possible vulnerabilities (connected, for example, to their age, financial status, gender, mental capacity, level of education, emotional development and so on). In such a setting, and even without any illegality or improper motivation on the part of the investigating officers, a suspect may unwittingly incriminate him or herself (whether justifiably so or not). It is precisely to forestall such potential breaches, which may lead to unreliable confessions, that legal representation is so consequential and thus guaranteed by law.

- [71] Notably, examples drawn from across legal systems and legal cultures agree on this point, invariably justifying guarantees of access to a lawyer by reference to the latter's role in protecting a person's right against self-incrimination and promoting fair procedures in the criminal justice process. For at least half a century, Indian jurisprudence has acknowledged this connection in explicit terms. In *Satpathy v Dani*, the Supreme Court of India held that it is 'fundamental to the rule of law' that persons under arrest or facing interrogation by the police, even if not in custody, are entitled to the services of a lawyer. Elaborating, the court asserted that 'the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.'⁵⁴
- [72] Similarly robust assertions have emanated from the Irish Supreme Court. In *DPP v Gormley*, it was held that art 38.1 of the Irish Constitution's⁵⁵ guarantee to the right to trial 'in due course of law' extends to a suspect in custody having a right to access to a lawyer prior to the commencement of interrogation, rendering inadmissible statements obtained while awaiting the lawyer's arrival.⁵⁶ Interestingly, this right did not extend to the taking of genetic samples via minimally invasive techniques, the court reasoning that the subjective nature of information extracted from interviews meant that they could be influenced by the lack of legal advice, unlike physical samples. Writing for the court, Clarke J asserted that '... [t]he right to a

⁵⁴ *Satpathy v Dani* 1978 AIR 1025.

⁵⁵ Constitution of Ireland 1937.

⁵⁶ *DPP v Gormley* [2014] 2 IR 591.

trial in due course of law encompasses a right to have early access to a lawyer after arrest and the right not to be interrogated without having had an opportunity to obtain such advice. The conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process.⁵⁷

[73] Regional human rights systems have long articulated similar standards, most recently endorsed in stirring terms by this Court in *Ramsamoj*. In that case, the right to counsel was positioned as an integral part of the Caribbean Community's foundational values such as respect for human dignity and access to justice.⁵⁸ As well, it is worth recalling the rationale of the ECtHR in this regard, namely, that access to counsel promotes equality of arms, provides a counterweight to the vulnerability of suspects, safeguards against coercion and ill-treatment, and overall can help to forestall miscarriages of justice.⁵⁹

[74] Having regard to this multiplicity of sources, therefore, the approach of the trial judge which was to direct the jury to disregard the confession if they felt it was obtained in violation of his right to an attorney, is an approach that can hardly be faulted. Not only is it faithful to the constitutional framework in Barbados for the protection of suspects but it is also consistent with modern approaches to this issue both in other jurisdictions and under international human rights law.

[75] Ultimately, of no small moment is the position taken by the State in this appeal. Unlike the defence which viewed the judge's direction as an improper delegation of her function, the State correctly interpreted it as intended to assist the jury on how to assess the *weight* to be given the confession and not about its admissibility. And in that vein, Ms Delaney impartially advocated that the higher standard of a jury being obliged to disregard a confession obtained in improper circumstances, even if they felt it was true, was consistent with the Evidence Act, precedent, and

⁵⁷ *ibid* at [96].

⁵⁸ *Ramsamoj* (n 21) at [161].

⁵⁹ *Beuze* (n 16); see discussion at [29] above.

the overall interests of justice. I can think of no reason why this Court should resist such an ethical stance or hold the State of Barbados to a lower standard in the conduct of criminal investigation and prosecution than that which it is prepared to adopt.

[76] To summarise, therefore, the learned trial judge did not abdicate her responsibility to rule on the claimed constitutional breach, nor did she improperly delegate to the jury her function of determining the admissibility of evidence. The trial judge's use of mandatory language in her directions was in fact justified by both the scheme of constitutional protections and the logic of the applicable statutes. Accordingly, she did not misdirect the jury and this ground of appeal fails.

[77] This being our conclusion on the submission that the trial judge improperly delegated her function, there is no need to consider Mr Gordon's further submission that the Court of Appeal erred by finding no miscarriage of justice occurred to the appellant because the trial judge's direction to the jury was more favourable to him than what the law provides. Since we have concluded that the trial judge did not in fact misdirect the jury, there was no danger of the jury relying on evidence tainted or vitiated by inaccurate directions, and the argument based on *Dominican*⁶⁰ necessarily falls away.

The Directions on Assessing Credibility

[78] The appellant submitted that the trial judge erred by failing to direct the jury on the special need for caution before acting on unrecorded police testimony (what has been called in these proceedings an '*Edwards*' direction), in light of the circumstances surrounding the taking of the confession statement and the difficulties faced by an accused person in proving oppression or involuntariness. The State contested any need for such a direction in this case since it is only required where the prosecution's case rests solely on a disputed confession statement, which

⁶⁰ See [49] above.

was not the situation here given the cogent circumstantial evidence led by the Prosecution. That said, Ms Delaney submitted that the trial judge did in fact direct the jury along these lines, even though there was no requirement to do so on the state of the evidence.

[79] The reference to an *Edwards* direction is of course a reference to the case of that name decided by this Court,⁶¹ where the requirements of s 137 of the Barbados Evidence Act were fully explained. In *Edwards*, the two appellants were convicted of murder *solely* on oral confessions. Those statements were made almost a year after the incident in question, and though recorded in the police notebooks, they were unsigned and unacknowledged by the appellants at the time and disputed at trial. Allowing their appeals, this Court held that under the criminal justice system of Barbados, it is not permissible for a person to be convicted of an offence solely on the basis of an unsigned and otherwise unacknowledged and uncorroborated confession, which that person denies making. There must either be independent verification that the admission was actually and voluntarily made (for example by way of electronic recording of the admission during the police interview), or other evidence that independently corroborates or otherwise points to the guilt of the accused.

[80] The matter of how a jury must be directed in these circumstances was separately addressed by Saunders J, who provided a detailed explanation of the rationale underpinning s 137. This statutory provision imposes a duty on trial judges to warn the jury of the potential unreliability of certain types of evidence, why that potential exists, and the resulting need for caution before acting on such evidence. Among the categories of evidence requiring such a warning is oral evidence of questioning of a defendant which – though recorded in writing – has not been signed or otherwise acknowledged in writing by the defendant.⁶²

⁶¹ *Edwards* (n 2).

⁶² Evidence Act (n 34) s 137(1)(f).

- [81] As Saunders J explained, the reason for the requirement to warn the jury about the special need for caution in relation to such types of evidence is to level the ‘playing field’. An accused person is inevitably at a disadvantage in relation to the police during an investigation. The police are in charge at the station, operate in their own environment and have colleagues to back them up; by contrast, a suspect is often alone, isolated without support, and likely overwhelmed in the moment. When the case reaches the court, the police are practised witnesses and the accused person faces an uphill task in proving that they might not be fully truthful. It is to equalise these disparities that the judge should direct the jury on how to approach the evidence and assess credibility.⁶³
- [82] This required direction, therefore, arises specifically in the context where the evidence in question is *oral* evidence that was recorded in writing but not signed or otherwise acknowledged by a defendant who is alleged to have thus answered in the course of an interview.
- [83] In this case, the prosecution case was that the appellant made both oral and written statements while being interviewed by the police. The latter amounted to a full confession of guilt, so there was really no need for the prosecution to rely on any of the oral answers, which were mostly about context in any event. Nonetheless, and no doubt mindful of s 137, the trial judge fully complied with the obligation therein and directed the jury according to its express terms: warning the jury that evidence of unsigned and unacknowledged oral statements may be unreliable, and highlighting the reasons for such potential unreliability and the corresponding need for caution when deciding whether to act on such evidence.
- [84] Since the appellant has alleged that the trial judge did not discharge her obligation, it would be prudent to reproduce verbatim extracts of what she said in this regard:

You will recall, as I said, that ... the accused man did not initial the orals. They gave evidence that the accused man said his lawyer told him not to

⁶³ *Edwards* (n 2) at [53]–[54].

sign anything. Now, if oral admissions recorded in the police notebook are not initialled by the accused, *I must caution you that you must carefully consider the reliability of such oral admissions, as there is a danger that they may have been concocted by the police witnesses.* If a policeman gives an accused man the opportunity to initial his notebook when he makes a statement, that is useful, because it gives the accused man an opportunity to see that the police officer recorded everything correctly, and did not omit or misrepresent anything he said. None of the orals were initialled by the accused and the accused man on top of that denied having said anything of the sort to the police.

So they were not initialled or otherwise acknowledged in writing by the accused man, they were not given on oath. However, the fact that the accused man did not initial the notebooks, does not mean that you can disregard the statements. *You must regard them with caution...*

... the accused man has denied that he made these statements, and has suggested that this evidence is deliberately false, concocted by the police. It is not unknown for a guilty person to make full admissions to the police and then have second thoughts and then dishonestly deny having made them. *However, and it is unfortunate but and it is also not unknown for police officers to manufacture evidence against a person whom they believe to have committed an offence.*

In relation to the first issue, that is whether the orals were made, *you must approach the evidence of the police with caution.* This is because the circumstances in which it was alleged that the orals were made may make the evidence unreliable.

...

There are a number of reasons why the evidence may be unreliable. Generally, it is easier for police officers to fabricate their evidence than it is for the accused man to have evidence available to challenge what they have said.

First of all, there was no one present at the interview except the police and the accused. This is in itself not improper. The police officers were perfectly entitled to

interview the accused man alone. What it means is that there is no independent person present who might have been able to support the accused challenge to the police officer.

...

You should also take into account that police officers are generally experienced in giving evidence in court and are practised witnesses. *All of these matters mean that the evidence of the police as to disputed orals may*

*be unreliable. For this reason, it is necessary for you to approach their evidence with caution in deciding whether to accept it and what weight or significance you should give it.*⁶⁴

[85] As these extracts from the official record of the summing up demonstrate, the trial judge fully complied with s 137, directing the jury on the potential unreliability of unsigned and unacknowledged oral admissions, the reasons why they might be unreliable, and the need for caution before acting on such evidence. Crucially, she acknowledged multiple times the possibility of fabrication of evidence by the police, so the jury was apprised of such uncomfortable realities. Moreover, the oral statements, such as they were, were not probative of guilt and what was in fact incriminating was the confession which was written by the appellant himself. And contrary to counsel's submission, there is no statutory or other obligation on a trial judge to direct the jury that a written statement constituting the only direct evidence of guilt must be approached with caution. There is thus no merit whatever in this ground of appeal.

Fairness of the Summing Up

[86] In light of our conclusions on each of the grounds raised on behalf of the appellant, the final one can be disposed of shortly. Mr Gordon submitted that the cumulative effect of all the errors made by the trial judge renders the summing up unfair and, by extension, the conviction unsafe.

[87] Our examination of the record of proceedings at trial, including the judge's summing up, as against the relevant legal principles, has led to the conclusion that the learned judge did not err in any of the ways alleged by the appellant. To reiterate, the trial judge did not abdicate her obligation to consider and rule on the constitutional objection that the appellant was denied his right to an attorney (albeit doing so impliedly), nor, having done so, did she improperly invite the jury to revisit her ruling. The specific direction impugned by Mr Gordon was necessitated by the reopening of the issue of voluntariness by him before the jury, so those directions

⁶⁴ Record, 1306–1309 (emphasis added).

were needed to assist the jury in how to approach the evidence bearing upon the alleged infliction of violence and general oppression of the appellant. By directing the jury that they should disregard the statement if they felt it was obtained in breach of his right to counsel, the trial judge applied the higher standard espoused in *Mushtaq* and one which, we feel, is demanded by the combination of the statutory provisions and the constitutional protections in Barbados in favour of suspects and accused. And as just discussed, the trial judge did not fail to direct the jury on how to approach the oral evidence as to the questioning of the appellant while in police custody, but in fact directed them at length and in unequivocal terms as to the potential weaknesses and flaws of such evidence and the consequential need for caution before acting on it.

- [88] In all these circumstances, then, not only was the summing up fairly balanced, on some points it adopted a stance more favourably weighted towards the appellant. Accordingly, there is no merit in this final ground of appeal.

Conclusion

- [89] In concluding we wish to acknowledge, in agreement with the Court of Appeal, that the circumstantial evidence in this case was indeed formidable. Mr Gordon's submission that a special direction was needed because the confession constituted the only direct evidence of guilt is evidently unmindful of the potential strength and value of circumstantial evidence, long acknowledged by the common law. Writing almost a century ago, Hewart LCJ said '...circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.'⁶⁵

- [90] Hewart's reference to mathematical precision fits the evidence in this case perfectly. As recounted above, although no witness saw the appellant shoot the deceased, the combination of what the three eyewitnesses saw leaves no room for doubting this

⁶⁵ *R v Taylor* (1930) 21 Cr App R 20 at 21.

conclusion. The passenger who saw the shooting, but not the shooter, confirmed that the conductress Prim accosted the gunman and called him ‘Baggio’, as did the driver. Prim, who did not see the shooting, testified that she saw the appellant when she turned around immediately after hearing the explosion, at which time he was holding a gun. At all times, the witnesses spoke of only one man with a gun on the bus. The person whom the passenger saw shoot the deceased was the same person whom Prim called by name and walked up to as the drama was unfolding. Prim recognised the man with the gun and later identified the appellant as that man in a lineup at the police station. As against the appellant’s defence that he was indeed on the bus but did not shoot the deceased, it is not difficult to understand why the jury convicted him of murder.

Disposition

- [91] The Court grants the application for special leave to appeal. However, all the grounds of appeal having failed, we dismiss the appeal and affirm the appellant’s conviction and sentence.
- [92] In closing, we acknowledge and thank counsel on both sides for the quality of their submissions and the assistance provided to the Court.

/s/ W Anderson

Mr Justice Anderson (President)

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ P Jamadar

Mr Justice Jamadar

/s/ C Ononaiwu

Mme Justice Ononaiwu

/s/ A Bulkan

Mr Justice Bulkan