Charles v. The Queen (Saint Vincent and the Grenadines) [2007] UKPC 47 (16 July 2007)

Privy Council Appeal No 77 of 2005

Ken Charles *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF
SAINT VINCENT AND THE GRENADINES

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 16th July 2007

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Present at the hearing:-

Lord Bingham of Cornhill
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

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*[Delivered by **Lord Carswell**]*

1. On the evening of 12 April 2002 two people were attacked on the Mt Wynne old road and shot by two assailants. One of the victims, Ronald Lewis, was killed and the other, Shelley Ann Gregg, was wounded by the gunfire. On 24 July 2003 the appellant Ken Charles and one Leonard O'Garro (also known as "Toco") were convicted after a trial before Bruce-Lyle J and a jury of the murder of Ronald Lewis and of wounding Shelley Ann Gregg with intent to do her grievous bodily harm.

Each defendant was sentenced to death on the murder charge and to 25 years' imprisonment on the wounding charge. Both appealed to the Court of Appeal of St Vincent and the Grenadines and in a written judgment given on 6 December 2004 the Court (Saunders CJ (Ag), Alleyne and Gordon JJA) allowed O'Garro's appeal, quashed his conviction and sentence and ordered a retrial. It dismissed Charles' appeal against conviction, but allowed his appeal against sentence, remitting the matter to the trial judge for consideration in compliance with the sentencing guidelines laid down in *Mitcham v Director of Public Prosecutions* (unreported) 3 November 2003; Saint Christopher and Nevis Criminal Appeal Nos 10, 11 and 12 of 2002.

2. In the afternoon of 12 April 2002 Mr Lewis and Miss Gregg drove out in Lewis' car to a car park on the Mt Wynne old road. About 6 pm they were standing by the car when they were approached by two men carrying guns and wearing overalls. The men told them not to move, then without further ado shot them both. Miss Gregg sustained wounds to her middle right finger, upper left arm and stomach. She lost consciousness and fell underneath the car. The men put her into the back seat of the car and loaded Lewis' body into the trunk. They drove to Mt Wynne beach, where they buried the body. At that place one of the men, whom Miss Gregg subsequently identified as O'Garro, indecently assaulted her. The two men drove to various places in the island over the next few hours, with Miss Gregg in the back beside the man whom she identified as Charles. Finally they parked the car on the beach side of Argyle. The man from the back seat took Miss Gregg by the hand and headed towards the sea, with the apparent intention of killing her. She broke free and ran towards an approaching vehicle, which stopped. The occupants took her to a police station, where she reported the crime about 1.30 am. She was taken to hospital, where she spent five days.

3. Later that morning police officers found the body of Ronald Lewis buried on the Mt Wynne beach. The car used by the assailants was also found, but it yielded no fingerprints when examined by a police fingerprint officer.

4. On the same day police officers came to see Miss Gregg in hospital. They showed her two albums containing a number of photographs, from which she picked out that of a man whom she purported to identify as the shorter of her assailants (she described Charles as the shorter one when giving evidence at trial). The man whose picture she picked out was not, however, either of the defendants. Miss Gregg said in evidence that she was sleepy at the time and Detective Corporal Maloney stated that she was disoriented and complaining of pain, though Miss Gregg denied in her evidence that she was disoriented.

On 4 June 2002 Miss Gregg was shown some fifty loose photographs (which did not include that which she had picked out on 13 April). She then picked out photographs of both defendants. On 8 June she attended an identification parade, at which both defendants were present in the line-up along with twelve other men. Miss Gregg identified both defendants as her assailants.

5. The appellant Ken Charles was arrested on 5 June 2002. Following his arrest he made two oral statements, which were subsequently ruled inadmissible. In the evening of 6 June 2002 he commenced to make a long written statement, which was completed some four and a half hours later at 1.15 am on 7 June. The appellant challenged the admissibility of this statement and the judge held a voir dire. The appellant alleged that he had been beaten by the police, in consequence of which he agreed to make the statement and had conducted the police on a tour on the afternoon of 6 June to various places on the island which had been identified by Shelley Ann Gregg. The judge rejected the appellant's allegations in robust terms and admitted the written statement and the evidence relating to his pointing out locations.

6. In the statement the appellant admitted venturing forth with O'Garro, both armed with shotguns and dressed in overalls. They approached a man and a woman at the Mt Wynne beach and O'Garro fired two shots at them. They took the girl and the man's body in the car to the beach, where they buried the body. They hid the overalls and drove off with the girl to a number of places round the island. At one point in the drive they stopped for Charles to buy some items at a shop. At another point Charles left the car and went to a house to try to obtain clothing. They ended up at Argyle, where they intended to kill the girl. She broke free and made her escape. They then drove the car to Spring, where they abandoned it.

7. In the afternoon of 6 June the appellant had gone with a party of police officers, together with a justice of the peace Gloria Stapleton, to various places on the island. He pointed out the place where Lewis' car had been parked and where he was buried on the beach. He showed them the place where he said that they had emptied the contents of Miss Gregg's bag. The police carried out a search there and found a brassiere and other items, subsequently identified by Miss Gregg as her property. He showed them the shop where he said they had bought cigarettes and a drink, the house where he went to collect clothes and the place at Argyle where Miss Gregg escaped from them. Ms Stapleton said in evidence that when they were at Argyle the appellant admitted that he and O'Garro had planned to rape and kill her there.

8. O'Garro also made a detailed written statement, commencing at 2 pm on 7 June 2002. He challenged the admissibility of the statement, claiming that he had been beaten by the police, but following a voir dire the judge admitted it in evidence. In the statement he fully admitted complicity in the shooting, but tended, as is not unknown in such cases, to throw more of the blame on his accomplice. He did admit at the end of the statement that both of them fired shots at the man and the woman at Mt Wynne.

9. Both defendants gave evidence before the jury. Each denied having anything to do with the incident at Mt Wynne and repeated the allegations about police maltreatment. The appellant also averred that one of the reasons why he had made his statement was because Superintendent Christopher had promised to let him go if he made a statement and he trusted Mr Christopher to help him. When he pointed out places around the island to the police he was simply assenting to what the police put to him.

10. Mr Guthrie QC, who appeared for the appellant before the Board, relied on a number of matters in his attack upon the safety of the conviction, but in the light of their conclusions their Lordships do not need to deal with them all at length. The first was in relation to the evidence of identification and the use of photographs. It is obvious that when the identifying witness Miss Gregg was shown photographs and picked out suspects from them, her identification at the subsequent parade was of materially less value, since there was the risk that she would pick out the persons at the parade whose faces she had in mind from her earlier identification in the photographs: cf May & Powles, *Criminal Evidence*, 5th ed (2004), para. 14-35. The judge failed to warn the jury of this risk in his summing-up, except rather inferentially (Record, page 168). Instead he invited them to consider whether it was improper for the police to show photographs to Miss Gregg as a prospective identifying witness.

11. When the case came before the Court of Appeal Alleyne JA, with whose judgment the other members of the court agreed, stated at several points that the showing of photographs was irregular and improper. In so holding he based himself on the decision of the Court of Appeal (Criminal Division) in *R v Lamb* (1980) 71 Cr App R 198. The complaint in that case was that the witness had picked out the appellant from a photograph which was then shown to the jury. The photograph plainly showed that he was in police custody when it was taken and was accordingly liable to signal to them that he had a criminal record. Although the photographs were not shown to the jury in the present case, Miss Gregg stated in her evidence that the police told her that the photographs which she was viewing were photographs of criminals. This

piece of evidence was, however, brought out in reply to a question in cross-examination by Charles' counsel and did not form part of her evidence in chief led by the prosecution. Mr Guthrie also placed some reliance upon the fact that both defendants took part in the same identification parade, which would in England be a breach of Code of Practice D, Annex B, para 9, made under the Police and Criminal Evidence Act 1984 ("PACE"). This Code has not been enacted in St Vincent and the Grenadines, but it would be a desirable practice to follow it where feasible.

12. Their Lordships consider that some care has to be taken when identification from photographs is carried out, although it is not in itself an improper practice. The rules applicable in England and Wales under Code of Practice D, although not binding, form a reliable basis for good practice. Two basic rules are set out in May & Powles, *op cit*, para 14-35:

> "(1) The police may show a witness photographs in order to identify a suspect.
>
> (2) Once a man has been arrested, and there is therefore an opportunity that he can be identified in person, photographs should not be shown to witnesses before an identification parade."

As the learned authors point out, when the police are looking for a culprit, the showing of photographs to witnesses may be essential: indeed, it may be the only way in which the culprit can be identified. Once he has been picked out and is available to take part in an identification parade, photographs should not be shown to witnesses. They should instead be asked to attend an identification parade, as should also the witness or witnesses who picked the suspect out from photographs. In relation to the latter, the procedure set out in the headnote to *Lamb* should be followed, *viz*, the defendant's advisers should be informed of the showing of the photographs and the decision left to them whether to refer to that at trial. If they do so decide, the photographs should not be shown to the jury, and they should be warned of the consequence that the reliability of the identification is likely to be decreased.

13. Mr Guthrie also pointed out that the judge did not give a *Turnbull* warning (*R v Turnbull* [1977] QB 224) of the dangers inherent in identification evidence until well after he had discussed the identification evidence at some length, but he placed less weight on this point. Their Lordships do not regard the procedure adopted in the present case as wholly satisfactory, but bear in mind that Miss Gregg had ample opportunity to see the appellant close up over an extended period and that

a jury would not find it difficult to accept that her identification was likely to be reliable.

14. The next argument put forward on behalf of the appellant was that the jury did not have the benefit of a direction on the lines laid down by the House of Lords in *R v Mushtaq* [2005] UKHL 25, [2005] 1 WLR 1513 (which had not of course been decided at the time of the trial). That decision applies where a defendant accepts that he made a statement attributed to him, but alleges that he made it as the result of maltreatment or oppression (it does not apply where the complaint is that the statement was a fabrication and did not represent what the defendant told the interviewing officers: see *Wizzard v The Queen* [2007] UKPC 21). In *Mushtaq* the appellant had made a confession statement, but claimed that he had not made it voluntarily. The trial judge rejected this contention and admitted the statement in evidence. In his summing-up he directed the jury that it was for them to assess whether the confession was true, , bearing in mind the allegations of oppressive and improper behaviour on the part of the police which, if proved, would negate its voluntary nature. He instructed them that if they were not sure, for whatever reason, that the confession was true, they must disregard it. He then added, in accordance with the prevailing practice:

> "If, on the other hand, you are sure that it is true, you may rely upon it, even if it was, or may have been, made as a result of oppression or other improper circumstances."

The reasoning of the members of the Appellate Committee was not identical on all points, but a majority held that in the light of section 76(2) of PACE a confession which was not made voluntarily could not be admitted in evidence, and a differently constituted majority held that the direction was inconsistent with the requirements of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. St Vincent and the Grenadines has a statutory provision equivalent to PACE and their Lordships accordingly consider that in appropriate cases a direction should be given along the *Mushtaq* lines, that the jury should not rely on a confession which they think has or may have been obtained by maltreatment or oppression, even if they conclude that its contents were true. The judge did, however, direct the jury substantially along these lines, when he told them (Record, pp 179-80) that they must first decide if the statement was given freely and voluntarily and only if they decided that issue in favour of the Crown should they deal with the issue of whether they considered that its contents were true. Their Lordships are of opinion that this could be regarded as a sufficient compliance with the requirements now enshrined in *Mushtaq*.

15. The centrepiece of the argument on behalf of the appellant was the contention that the judge wrongly permitted the jury to take into account against the appellant Charles the content of O'Garro's statement which implicated the appellant. The Court of Appeal dealt with this issue *in extenso* when considering the converse case, that they were allowed to have regard to Charles' statement when deciding the sufficiency of the case against O'Garro. Alleyne JA set out in his judgment substantial extracts from the summing-up which tended to show that the jury were invited and permitted to consider the content of the statement of each defendant in considering the case against the other. Their Lordships do not find it necessary to repeat these extracts, but their flavour may be obtained from a few sentences:

- "If ... you decide from what Ken Charles says that it was O'Garro who did the whole thing ... (Record, p 144)."

- "... the prosecution is saying this is the basis of our case. The evidence of Shelly Ann Gregg who was on the scene and the evidence from the prosecution, from the caution statements of the two accused which forms part of the prosecution's case (Record, pp 154-5 .)"

- "... if you look at the caution statements they complement ... the evidence of Shelly Ann Gregg ... You will also find that the caution statements complement one another, except in so far as Ken Charles says it was O'Garro who did everything (Record, p 175)."

It was only just after he made the last of these remarks that the judge gave the jury the necessary direction that the content of the caution statement of one accused is not evidence against the other. Alleyne JA described this as being incidental and by way of afterthought and concluded (para 61) that the correct directions, being given at the eleventh hour, were too little too late. In his opinion the jury must have been thoroughly confused as to how to treat the evidence and their minds must have been greatly prejudiced by inadmissible evidence on the basis of the earlier directions.

16. Their Lordships are impelled to agree with the strictures of the Court of Appeal. By the time the judge belatedly gave the jury a proper direction about the inadmissibility against one defendant of another's out

of court statements, they must have formed some views about the purport of the evidence, and it would have been asking a great deal of them to disregard the incorrect directions given over some little time during the summing-up and put the inadmissible statements out of their minds. Their Lordships cannot avoid the conclusion that if the judge had commenced with general propositions about the evidence admissible against each defendant he might not have fallen into this error. The summing-up was more than a little diffuse and their Lordships commend to trial judges the systematic enumeration at an early stage of such relevant general points, where appropriate with the assistance of previous consultation with counsel in the absence of the jury. In England and Wales the standard models of directions prepared by the Judicial Studies Board and published in its Bench Books are of great assistance to judges, and any similar venture in other common law jurisdictions is likely to be useful.

17. The Court of Appeal accordingly allowed O'Garro's appeal and set aside his conviction and sentence, ordering a retrial before a different judge. It did not refer in his case to the possibility of applying the proviso, on the basis of the overall strength of the case against him. Remarkably, when the court had earlier considered the case against Charles it made no reference to the misdirection concerning the use which the jury could make of the content of the statement of his co-accused, which it regarded as a fatal misdirection in O'Garro's case. Having dealt seriatim with the grounds of appeal advanced on Charles' behalf and rejected them all, it simply dismissed the appeal and affirmed his conviction. It is true that the point was not taken in the notice of appeal lodged on behalf of the appellant, nor did it form any part of his skeleton argument before the Court of Appeal. But it did not form any part of the grounds of appeal of O'Garro, and from paragraph 47 of Alleyne JA's judgment it appears that his counsel confined himself to submitting that Charles' statement should have been edited. The point appears to have been taken by the court itself, and for some reason it relied on it to allow O'Garro's appeal but not that brought by Charles. Their Lordships are unable to discern any sustainable reason for that distinction. It is the duty of an appellate court to advert to any such matter which may appear to it to be significant and possibly determinative of an appeal in favour of the accused. The court quite correctly performed this function in respect of O'Garro, but inexplicably did not do so in respect of Charles.

18. Their Lordships are of opinion that there was the same serious irregularity in Charles' case as in O'Garro's. They do not see any sufficient ground of distinction on the facts between the two. The issue in the case of each defendant was not so much the extent of his participation in the criminal acts – there was a clear case against both of joint

enterprise on the Crown evidence – but of whether either was a participant at all or was, as each claimed, altogether uninvolved. Mr Dingemans QC for the Crown argued that the case against Charles was so strong that even if the judge had been in error in his directions concerning the use of O'Garro's statement, there was no miscarriage of justice and the appeal should be dismissed by resort to the proviso to section 40 of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act. Mr Guthrie argued, on the other hand, that there were difficulties in the identification evidence and the appellant's complaints about ill-treatment, capable of creating doubts in the jury's minds which they may have resolved by taking into account O'Garro's statement inculpating Charles. In view of the conclusion which they have reached, their Lordships do not propose to enter into discussion of the strength of the case against Charles. They consider that it would be quite wrong that Charles' conviction should stand when O'Garro's conviction has been quashed on account of the judge's directions. They are unable to see a difference between their cases which would be sufficient to justify a difference in result and to perpetuate such an inequality would in their view be undesirable.

19. The Board will humbly recommend to Her Majesty that the appellant's conviction and sentence should be set aside and it should be ordered that the case be remitted to the High Court and that the appellant be retried jointly with O'Garro.