OFFICE OF THE ST. GEORGE WEST COUNTY

PORT OF SPAIN CORONER

FINDINGS OF INQUEST

CITATION: Inquest into the death of Israel Sammy

TITLE OF COURT: The Port of Spain Coroner's Court

COR FILE NO(s): INQ 114 of 1998

DELIVERED ON: 29th September 2010

RULING OF: Nalini Singh
St. George West County
Port of Spain Coroner

REPRESENTATION:

#12311 Ag. Police Corporal Gonzales and now retired #10044 Police Corporal Lancelot Samuel appeared to assist the Coroner.

Mrs. Pamela Elder and Mr. Richard Mason appeared for Mr. Yasin Abu Bakr.

Mr. Larry Williams appeared for Mr. Brent Miller.

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PREFACE

On the 2nd February 2009 an inquest was formerly opened into the death of Israel Sammy. He died from shock and hemorrhage associated with gun shot wounds, on the 20th May 1998 en route to the Port of Spain General Hospital.

These are the findings of that inquest. They are divided into four parts.

Part 1 contains an introduction and sets out the extent of a coroner's jurisdiction in relation to such matters. This part also describes the inquest proceedings.

Part 2 deals with the law as it relates to the findings of this inquest.

Part 3 contains a summary of my findings as Coroner in relation to Israel Sammy's death.

Part 4 contains my concluding remarks in this inquest and a formal conclusion of same.

PART 1

INTRODUCTION

1. The Preliminary Investigation and the Inquest

I conducted a preliminary investigation into this matter as per **section 10 (2) of the Coroners Act Chap 6:04** (hereinafter referred to as "the Act"). I did this by perusing all the material relating to this matter which was forwarded to the Coroner's office. I then decided to conduct an inquest in relation to this death and same commenced on the 2nd February 2009.

During the course of this inquest evidence was taken from a number of witnesses and exhibits have been tendered into evidence as well. Only that which was tendered into evidence in this matter and *viva voche* evidence were relied upon in arriving at my decision in this inquest. It is against this background that the following facts have emerged.

The deceased Israel Sammy was 22 years old at the time of his death. He lived at #4 Dacca, Boissierre Village, Maraval with his mother Louisa Sammy, sisters Faith and Hasina Sammy, cousin Clive Charles also called Junior, and Clive's fiancé Annakie Villafana.

On Wednesday 20th May 1998, Israel Sammy was asleep at home with his aforementioned relatives when at about 2AM, they were awaken by the sound of someone pounding on the front door and a voice saying "police, police open the door!".

The door was eventually opened and 3-4 masked men entered the house with guns and ordered all the occupants to lie on the floor. The masked men tied up the occupants of the house and then they started talking to Israel Sammy. Faith Sammy testified that she remembered she heard a voice asking Israel Sammy:

> *"where de thing and he answered what thing? And the voice said the drugs. He keep asking him about three times after and Israel Sammy keep saying he don't know what he was talking bout. One of them turned and asked Clive Charles where the drugs and he said he don't know what they talking about and they kick him. Then they told Israel Sammy that they going with him and one of them asked you not tying his foot? And one of them answer saying no we leaving him to run. And after I heard two explosions. And five minutes after that I hear footsteps and one of the guys came in and shine the flashlight on us and walked back outside the door. I heard a voice asking all yuh done? I didn't hear anything after. One of them came in and wipe the door handle he walk back out and I heard footsteps going down the steps…".*

A short while after the masked men departed, the occupants of the house were able to untie themselves. They immediately went to the home of a nearby relative to seek assistance.

Daniel Watts, Nathaniel Charles, Clive Charles and Roger Williams then went in search of Israel Sammy. They proceeded to the vicinity of a ravine where they saw Israel

Sammy, who was still alive, lying in a crouched position. His hands were tied behind his back, and there was a white substance oozing from his nose. He was then removed from that location, placed in a police vehicle and taken to the Port of Spain General Hospital where he was pronounced dead at 3:48 on the morning of the 20th May 1998.

Israel Sammy's body was subsequently taken to the Forensic Science Center where he was formally identified by his mother Louisa Sammy and his grandmother Monica Watts. A post mortem examination was then performed by Dr. Chandulal. The cause of death was found to be shock and hemorrhage due to gun shot injuries. The body was later disposed of by cremation at the Long Circular Crematorium, Port of Spain.

On 31st July 2003 Mr. Brent Miller was in police custody -in connection with investigations into a shooting of one Ms. Angela Bowen at Movie Towne, when he indicated to the police that he wanted to give them some information which he had concerning the death of Israel Sammy. #12721 Ag. Police Inspector Veronique then recorded a cautioned statement from him. A photocopy of this cautioned statement has been admitted in these proceedings and marked "CE1". This statement detailed Mr. Brent Miller's and Mr. Yasin Abu Bakr's involvement in Israel Sammy's death.

Tragic incidents such as this are traumatic for the deceased person's family as well as the people whose interests are now affected by this inquest.

The deceased person's family members are entitled to a thorough and impartial examination of the circumstances of the death to determine among other things, whether there is evidence of the commission of a criminal offence -if it is to maintain its trust and confidence in our legal system. And so, if there is admissible evidence linking anyone to the shooting of Israel Sammy, the deceased person's family and indeed, the public are entitled to expect that those responsible will be held accountable and that changes will be made to reduce the likelihood of similar deaths occurring in the future.

It is also in the interests of those persons whose interests are affected by this inquest, that these maters are scrupulously and independently investigated and publicly reported on so that there can be no suggestion of a "cover up".

The Act recognizes and responds to this need for public scrutiny and accountability by requiring deaths in custody for instance, to be brought to the attention of the Coroner[1] and by mandating that an inquest be held into all such deaths[2].

[1] Section 4 (3) states that "The Keeper of any prison within which a prisoner dies shall forthwith give notice of the death to the Coroner and the District Medical Officer within whose respective districts the prison is situated".

[2] Section 11 states that "A Coroner, where there is in his district the body of any person who died in any prison or as to whose death an inquest is prescribed, shall hold an inquest as to the cause and circumstances of the death, whether the District Medical Officer does or does not make a report thereon".

JURISDICTION

1. The scope of the Coroner's inquest and findings

A Coroner has jurisdiction to inquire into the cause and the circumstances of a reportable death[3]. I understand this to mean that if it is possible, a Coroner is required to find:-

- whether a death in fact happened;
- the identity of the deceased;
- when, where and how the death occurred; and
- what caused the person to die.

Israel Sammy's death was reportable because it was unnatural in that it occurred in an unnatural manner[4].

As required by the relevant legislation, I have made findings in relation to the particulars of this death. I have not set out all of the information that came out during the course of this inquest. I have only alluded to those parts of the evidence as well as the relevant law relating to this evidence, which I believe are necessary to be included, to understand the findings I have made. These findings have been set out in Part Three.

[3] Section 10(1) states that "A Coroner having received the report of the District Medical Officer as to the cause of death of any person, shall carry out a preliminary investigation as to the cause and circumstances of the death".

[4] Section 2 defines an unnatural death as including "every case of death of any person (a) which occurs in a sudden, violent, or unnatural manner". Additionally, section 4(1) states that "Every person who becomes aware of an unnatural death shall forthwith give notice thereof to the District Medical Officer of the district in which the body is or to a constable, and the constable shall forthwith cause information to be given to the Medical Officer".

An inquest is not a trial between opposing parties but an inquiry into the death. In **R v. South London Coroner; ex parte Thompson (1982) 126 S.J. 625** it was described in this way

> *"It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends… The function of an inquest is to seek out and record as many of the facts concerning the death as the public interest requires".*

The focus of an inquest is on discovering what happened, but in the process of doing this, the Act authorizes a Coroner to issue a warrant for the apprehension of any person once the Coroner is of the opinion that sufficient grounds are disclosed for making a charge on indictment against that person[5]. I deal with this issue in some detail in Part Three.

2. The standard of proof

Before making findings, the Coroner must be satisfied to the required standard of proof. For a finding that there is sufficient evidence to link an individual to the commission of an unlawful killing, the standard is the same level set in a criminal court, that is to say "beyond reasonable doubt". This was made clear in **R v. Wolverhampton Coroner ex parte McCurbin (1990) 1 WLR 719** even though it was a case which was decided post 1977. This means that the inquest proceedings were not at all concerned with determining whether anyone ought to be charged with a criminal offence in relation to the death in question. The facts of this case are that there was a violent struggle with police

[5] Section 28 states that "If, during the course or at the close of any inquest, the Coroner is of opinion that sufficient grounds are disclosed for making a charge on indictment against any person, he may issue his warrant for the apprehension of the person and taking him before a Magistrate, and may bind over any witness who has been examined by or before him in a recognisance with or without surety to appear and give evidence before the Magistrate".

officers and an individual. During the struggle, the individual died whilst attempting to escape arrest. At a coroner's inquest to inquire into the cause of his death one of the police officers gave evidence that having forced the deceased to the ground, he had held him there with his arm around the deceased's head. There was other evidence that the officer's arm had gone around the deceased's neck and it was further suggested that the officer's arm might have inadvertently slipped down from the chin to the neck in the struggle. The medical evidence was that the deceased had died from asphyxia. In indicating possible verdicts of death by misadventure and unlawful killing, the coroner directed the jury in relation to the latter to apply the criminal standard of proof, namely, that they should be satisfied beyond all reasonable doubt. The jury returned a verdict of death by misadventure.

In proceedings for judicial review the applicant, the brother of the deceased, challenged the jury's verdict. One ground was that the coroner had misdirected the jury in requiring them to apply the criminal rather than the civil standard of proof. The Divisional Court dismissed the application. On appeal by the applicant it was held that the appeal would be dismissed. In arriving at this decision it was specifically held that although there was a technical distinction between the standard of proof in criminal proceedings and that in civil proceedings, the civil standard appropriate to a verdict of unlawful killing would, having regard to the gravity of the issue, be so high that it was effectively the same as the criminal standard, so that the result would be the same whichever were applied. It followed that a coroner's direction on the standard of proof appropriate to a verdict of

unlawful killing should therefore indicate that the jury was to be satisfied beyond all reasonable doubt or so that they were sure.

In perusing the case, I have found the dicta of Woolf LJ to be particularly useful on this point. I have accordingly set it out below:

> *"…the law with regard to coroners was codified by the Coroners Act 1887 (50 & 51 Vict. c. 71). Section 4(3) in dealing with the functions of a coroner's jury, stated:*
>
> > *'After viewing the body and hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder'.*
>
> *I draw attention to section 4(3) because it clearly sets out the task of the coroner's jury at that time. Section 5(1) went on to provide:*
>
> > *'Where a coroner's inquisition charges a person with the offence of murder or of manslaughter … the coroner shall issue his warrant for arresting or detaining such person …'*

The task of the jury, as set out in section 4 of the Act of 1887 has since been modified by section 56(1) of the Criminal Law Act 1977, which provides:

> *'At a coroner's inquest touching the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings shall not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition shall in no case charge a person with any of those offences'.*

So the historical position has got to be considered in the light of those provisions of the Act of 1977, which clearly modified what was previously the task of a coroner's jury.

Nonetheless, in my view, considerable assistance is provided still by section 4(3) of the Coroners Act 1887 in considering the question of the standard of proof which is applicable. That section made clear the importance of the decision of the coroner's jury and the gravity of the issues which they had to determine which could result in a person being at that time arrested and in due course tried for murder or manslaughter…

Having referred to the historical background, it is convenient to consider the usual distinction which exists between the approach to the burden of proof in civil proceedings and the approach in criminal proceedings. This

was considered by this court in Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247. In that case the court was concerned with a possible acute distinction between different degrees of liability which could occur depending upon the approach adopted by the judge in trying the case. The case was concerned with a possible finding of breach of warranty and a finding of guilt of fraud arising out of the same facts. The county court judge in the court below had indicated that, whereas he would, in relation to the same facts, find the defendant in breach of warranty, he would not be prepared to find that he had been guilty of fraudulent misrepresentation. With regard to this decision Denning L.J. on appeal said, at p. 258:

> *'In setting himself this problem the judge showed an uncommon nicety of approach. I must say that, if I was sitting as a judge alone, and I was satisfied that the statement was made, that would be enough for me, whether the claim was put in warranty or on fraud. I think it would bring the law into contempt if a judge were to say that on the issue of warranty he finds the statement was made, and that on the issue of fraud he finds it was not made. Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of*

probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law. Take this very case. If Mr. Neuberger did represent that the machine was Soag reconditioned he did very wrong because he knew it was untrue. His moral guilt is just as great whatever the form of the action, no matter whether in warranty or in fraud. He should be judged by the same standard in either case. I have already expressed my views on this subject in Bater v. Bater [1975] P. 35 and I need not repeat them here'...

Summarising the effect of what Denning L.J. was saying, it was that, technically, there can be a distinction between the civil and the criminal standard of proof. However, judges (and, I would add, all tribunals) should be cautious not to create problems for themselves by approaching the question of burden of proof in an artificial manner. From a practical point of view, where a serious allegation is being made, obviously, a high standard of proof is required, however technically you define that burden.

…a similar approach… was adopted by Lord Scarman in Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74, 112. That was a case which deals with very different facts from those which had been considered by Denning L.J. in the earlier case to which I have made reference. It was a case where the House of Lords was

considering the standard of proof which has to be adopted where the Home Office is suggesting that an immigrant has entered this country unlawfully. Lord Scarman started off by saying, at p. 112:

> *'The law is less certain as to the standard of proof. The choice is commonly thought to be between proof beyond reasonable doubt, as in criminal cases, and the civil standard of the balance of probabilities: and there is distinguished authority for the view that in habeas corpus proceedings the standard is beyond reasonable doubt, since liberty is at stake'.*

Lord Scarman then refers to a number of authorities, including Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247 to which I have just made reference. Then Lord Scarman adds:

> *'My Lords, I have come to the conclusion that the choice between the two standards is not one of any great moment. It is largely a matter of words. There is no need to import into this branch of the civil law the formula used for the guidance of juries in criminal cases. The civil standard as interpreted and applied by the civil courts will meet the ends of justice. The issue has been discussed in a number of cases. In Bater v. Bater [1951] P. 35, the trial judge had said that the petitioner, who alleged cruelty by her husband, must prove*

her case beyond reasonable doubt. This was held by the Court of Appeal not to be a misdirection. But Denning L.J. observed that, had the judge said the case required to be proved with the same strictness as a crime in a criminal court, that would have been a misdirection. He put it thus, at pp. 36–37: 'The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case'.

After a further citation from Denning L.J., Lord Scarman goes on to say, at p. 113:

'It is clear that all three members of the court (Bucknill, Somervell and Denning L.JJ.) found difficulty in distinguishing between the two standards. If a court has to be satisfied, how can it at the same time entertain a reasonable doubt (Bucknill L.J. at p. 36)?'

Lord Scarman summed up his views, at p. 114:

'Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices: but the degree of probability must be such that the court is satisfied. The strictness of the criminal formula is unnecessary to enable justice to be done: and its lack of flexibility in a jurisdiction where the technicalities of the law of evidence must not be allowed to become the master of the court could be a positive disadvantage inhibiting the efficacy of the developing safeguard of judicial review in the field of public law'.

The approach of Lord Scarman to the burden of proof was expressly adopted by the other members of their Lordships' House. I would summarise Lord Scarman's guidance in this way. Technically, there is a distinction between the standard of proof in civil proceedings and criminal proceedings. However, although there may be that technical distinction — and particularly in judicial review this makes it undesirable to use the criminal standard — from a practical point of view the result in the end will be the same, whichever approach is adopted.

It is now necessary to refer to a decision of the Divisional Court, presided over by Watkins L.J., in Reg. v. West London Coroner, Ex parte Gray [1988] Q.B. 467. The Divisional Court was faced with exactly the same problem as this court is faced with today, and the judgment of Watkins L.J. in that case was expressly followed by Glidewell L.J. in the court below in the present case. In relation to a possible verdict of unlawful killing, Watkins L.J. said, at pp. 477–478:

> *'I turn now to the standard of proof. We heard much argument about this. There is a lack of direct authority on the point. We were referred to cases on suicide going back into the last century, all of which emphasise the presumption against suicide, and the requirement of rebutting that presumption. Suicide was then a crime. It no longer is. But it is still a drastic action which often leaves in its wake serious social, economic and other consequences. Lord Widgery C.J. in Reg. v. City of London Coroner, Ex parte Barber [1975] 1 W.L.R. 1310, 1313, said: 'If that is a fair statement of the coroner's approach, and I sincerely hope it is because I have no desire to be unfair to him, it seems to me to fail to recognise what is perhaps one of the most important rules that coroners should bear in mind in cases of this class, namely, that suicide must never be presumed. If a person dies a violent death, the possibility of suicide may be there for all*

to see, but it must not be presumed merely because it seems on the face of it to be a likely explanation. Suicide must be proved by evidence, and if it is not proved by evidence, it is the duty of the coroner not to find suicide, but to find an open verdict. I approach this case, applying a stringent test, and asking myself whether on the evidence which was given in this case any reasonable coroner could have reached the conclusion that the proper answer was suicide'.

It will be noted that Lord Widgery C.J. alluded to the stringent test, but without reference to what may be called the conventional standards of proof. I cannot believe, however, that he was regarding proof of suicide as other than beyond a reasonable doubt. I so hold that that was and remains the standard. It is unthinkable, in my estimation, that anything less will do. So it is in respect of a criminal offence. I regard as equally unthinkable, if not more so, that a jury should find the commission, although not identifying the offender, of a criminal offence without being satisfied beyond a reasonable doubt. As for the other verdicts open to a jury, the balance of probabilities test is surely appropriate save in respect, of course, of the open verdict. This standard should be left to the jury without any of the refined qualifications placed upon

it by some judges who have spoken to some such effect as, the more serious the allegation the higher the degree of probability required. These refinements would only serve to confuse juries and, in the context of a jury's role are, I say with great respect to those who have given expression to them, I think, meaningless. Such matter as that led the coroner astray in this case, by providing the jury with no plain standard of proof to be guided by. He cannot be blamed for that, but it is another factor which must cause this verdict to be quashed'.

As appears from the passage from the speech of Lord Scarman in Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74, 112–114, which I have cited, in different proceedings there are different considerations which lead to what is the appropriate test which it is useful to apply, having regard to the role of the decision-making body who has the task of coming to the conclusion on the facts. As I have sought to indicate, whether in a case of a serious nature such as unlawful killing you adopt the standard of proof which is technically a civil standard but you elevate it because of the gravity of the issue, or whether you use the criminal standard of proof, the result will almost inevitably be the same.

I can see that there may be force in Mr. Macdonald's submission that perhaps in the case of a coroner's inquest, theoretically speaking, the appropriate standard might be said to be a very high standard indeed on the basis of the civil standard of proof. However, whether that be right or not, what I am absolutely satisfied about is that the practical guidance which is given by Watkins L.J. in Reg. v. West London Coroner, Ex parte Gray [1988] Q.B. 467 is correct, bearing in mind that it is given in relation to the coroner's role in respect of his duty to direct a coroner's jury as to how that jury is to perform its task.

I am quite satisfied that, in a case where it is open to a jury, as a result of a coroner's inquest, to come to a verdict of unlawful killing, the appropriate direction which the coroner should give to the jury is the simple one that they should be satisfied beyond all reasonable doubt or, as sometimes said, satisfied so that they are sure. That provides clear guidance to the coroner's jury which they will be able to follow, and it is not necessary for them to be involved with sliding scales which are more appropriate for a judge than a jury" (emphasis mine).

This case has been referred to with approval as recently as May 2009 in **Regina (O'Connor) v. Avon Coroner (Visser intervening) [2009] EWHC 854 (Admin), [2010] 2 W.L.R. 1299.** The facts of this case are that following an argument with his then wife at a hotel in Crete, a father pushed their children off a hotel balcony and then

threw himself after them. Their son died from injuries he sustained as a result of the fall. The father was tried for manslaughter in Greece, and acquitted on the basis of psychiatrists' reports according to which he had been suffering from temporary psychosis. At an inquest into the son's death, the coroner delivered a verdict of unlawful killing. The claimant, the father's sister acting as his litigation friend, sought judicial review of the verdict and an order substituting a narrative verdict describing the circumstances of the death. The coroner did not seek to uphold his verdict, acknowledging that he had erred in law in that he had treated as irrelevant the mental state of the father and his capacity to understand his acts. On the claim for judicial review, and on the question as to the approach which the coroner ought to have taken with regard to the issue of insanity and what other verdict, if any, ought to be substituted, the matter of the standard of proof in inquest proceedings was raised. Sir Anthony May P had this to say:

> *"6. A coroner's inquisition has, by section 11(5)(b) of the Coroners Act 1988 , to set out, so far as such particulars have been proved, how, when and where the deceased came by his death. By section 11(6) , where a person came by his death by murder, manslaughter or infanticide, the purpose of the inquest is not to include the finding of any person guilty of the murder, manslaughter or infanticide. A coroner's inquisition shall in no case charge a person with any of those offences. The historical antecedents of this section include that, before 1977, a coroner's inquisition finding homicide operated as an indictment of the person so charged, who would be committed for trial upon the inquisition in the*

criminal courts. This power was abolished by section 56(1) of the Criminal Law Act 1977 on the recommendation of a committee chaired by Mr. Norman Brodrick QC which reported in 1971, Report of the Committee on Death Certification and Coroners (The Brodrick Committee) (Cmnd 4810). A conclusion of unlawful killing then introduced was not intended to indicate even a prima facie case of criminal liability. It was "to enable the judgment-neutral fact of how the deceased came by his death to be recorded … it was hoped to turn the verdict into a purely factual record": see Jervis on Coroners, 12th ed (2002), para 13–31. Thus rule 42 of the Coroners Rules 1984 (SI 1984/552) provides that no verdict is to be framed in such a way as to appear to determine any question of criminal liability on the part of a named person or civil liability…

8. As Jervis on Coroners, para 13–32 explains, before 1977 a coroner's inquisition finding of murder or manslaughter operated to charge the person concerned, but not to convict them. After 1977, the verdict was designed to be factual rather than judgmental, but it is difficult to state that a person has been the victim of unlawful killing without first being satisfied that a crime amounting to unlawful killing has been committed. On the uncontentious facts of the present case, if Liam Hogan was killed unlawfully, it would be difficult, other than in a purely formal sense, to comply with rule 42 by suppressing the necessary

corollary that it was John Hogan who unlawfully killed him. As Sir Thomas Bingham MR said in R v. Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1 , 24 d-f , in cases of conflict, the statutory duty to ascertain how the deceased came by his death must prevail over the prohibition in rule 42 . But the scope for conflict may be small. Plainly the coroner may explore facts bearing on criminal and civil liabilities. But the verdict may not appear to determine any question of criminal liability on the part of a named person. There can be no objection to a verdict which incorporates a brief, neutral factual statement, but such verdict must be factual, expressing no judgment or opinions.

9. Although there is surprisingly little direct authority on the point, a coroner's verdict of unlawful killing necessarily predicates a finding equivalent to that required for a conviction of at least manslaughter in a criminal trial. Authorities, including R v. West London Coroner, Ex p Gray [1988] QB 467 , establish that an inquest's conclusion of unlawful killing cannot be reached unless the coroner or jury are so satisfied to the criminal standard of proof. As Watkins LJ said in Ex p Gray, at p 477 g , it was unthinkable that a coroner's jury should find the commission, although not identifying the offender, of a criminal offence, without being satisfied beyond reasonable doubt. The practical guidance given in Ex p Gray by Watkins LJ was approved as correct in the judgment of Woolf LJ in the Court of Appeal in R v. Wolverhampton Coroner, Ex p McCurbin

[1990] 1 WLR 719 , 727 h -728 b . This is all uncontentious in the present case, but from it, as will appear, derives in part the single point of disagreement as to the law in the present case" (emphasis mine).

Accordingly, the findings I have made in this inquest have been made after being satisfied of the necessary facts beyond reasonable doubt.

2. The rules of natural justice

It is beyond dispute that coroners have a duty to comply with the rules of natural justice: **Annetts v. McCann (1990) 170 CLR 596 at 598-603 per Mason CJ; Haydon v. Chivell [1999] HCA 39 at para. 9; Maksimovich v. Walsh (1985) 4 NSWLR 318** and **Musumeci v. Attorney General of NSW (2003) 57 NSWLR 193.**

It is trite law that coroners are obliged to act judicially: **Harmsworth v. State Coroner [1989] VR 989 at 994 per Nathan J; Electricity Commissioners; ex parte London Electricity Joint Committee Co Ltd [1924] 1 KB 171; Annetts v. McCann (1990) 170 CLR 596; Maksimovich v. Walsh (1985) 4 NSWLR 318 at 327 per Kirby P, 337 per Samuels JA; Moles v. The Queen (1994) 77 A Crim R 360 at 372 per Underwood J** and **Director of National Parks and Wildlife v. Barritt (1990) 72 NTR 1 at 10 per Kearney J.**

I understand the amalgam of these two principles to mean, among other things, that coroners are bound to provide a fair hearing to persons who may be adversely affected by

their findings or recommendations[6]. This duty of procedural fairness is something that must necessarily arise because the power of the coroner's court is one that may destroy, defeat or prejudice a person's rights, interests or legitimate expectations: **Ainsworth v. Criminal Justice Commission (1992) 175 CLR 564.**

More to the point, coroners are obligated to grant standing and allow individuals and entities to be alerted to and be heard in respect of potentially adverse decisions: **Annetts v. McCann (1990) 170 CLR 596, 589-600 per Mason CJ** and **Mahon v. Air New Zealand Ltd [1984] AC 808, 820 per The Court.**

In arriving at my findings in this case, I have endeavored to ensure the rules of natural justice and procedural fairness were applied as the particular circumstances warranted.

To this end I have:

- Invited submissions from counsel for Mr. Yasin Abu Bakr and Mr. Brent Miller respectively, on all legal issues as they arose,

- Given leave to counsel for Mr. Yasin Abu Bakr and Mr. Brent Miller respectively, to cross examine witnesses called by the Coroner at these proceedings,

[6] The *audi alteram partem* rule is a Latin phrase that means, literally, hear the other side. It is most often used to refer to the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against him.

- Provided Mr. Yasin Abu Bakr and Mr. Brent Miller with the opportunity to give evidence in these proceedings and to call witnesses on their behalf and,

- Forwarded to counsel for Mr. Yasin Abu Bakr and Mr. Brent Miller respectively, a copy of all documents forming the bundle of witness statements complied by the police which were submitted to this court for consideration during the preliminary investigation into this matter[7]. In respect of Mr. Brent Miller, the Court indicated to his attorney that there was no material discrepancy between the information contained in the witness statements and the evidence which was led by the Coroner from the witness statements at these proceedings. After considering the bundle of documents, counsel for Mr. Brent Miller indicated that he wished to have Ag. Insp. Veronique recalled for the purposes of cross examination and same was facilitated by the Coroner.

- Handed to counsel for Mr. Yasin Abu Bakr and Mr. Brent Miller respectively, an audio recording of all the evidence led during the course of this inquest. Mr. Brent Miller was absent for all of the evidence which was led at these proceedings[8]. Having handed counsel a CD with the audio recording of all the

[7] In so doing I have relied upon the authority of R v. Southwark Coroner, ex p. Hicks [1987] 1 W.L.R. 1624.

[8] After conducting a preliminary investigation and making a determination that Mr. Brent Miller was indeed a person whose interest stood to be affected by these proceedings, the Court issued summons for the appearance of Brent Miller at this inquest. In this regard the Court issued summons to Mr. Brent Miller on 5 out of the 18 times this matter was called before this Court as constituted. These efforts proved futile until the very day this matter was scheduled to be concluded –which was when Mr. Brent Miller appeared in court.

evidence led during the course of this inquest, I indicated to counsel that I was prepared to adjourn the matter so as to allow them time to consider the audio recording and ascertain for themselves whether there were material discrepancies between the evidence led and the material contained in the witness statements. I also indicated that following the adjournment I would be prepared to allow counsel to make further requests for witnesses to be recalled for the purposes of cross examination. Finally, I indicated to counsel that following the adjournment, I would be prepared to allow counsel to make further submissions if they wished. Counsel for both men raised no objection When the matter resumed, after the passage of time, counsel for both men were given leave to cross examine witnesses who were recalled by the Court for the express purpose of facilitating further cross examination by counsel. Further submissions were then advanced on behalf of Mr. Miller whose interest is affected in these proceedings and they have been duly considered.

It is against this backdrop that these findings are now handed down and I have satisfied myself that the rules of natural justice and procedural fairness were applied in this inquest as far as was reasonably practicable.

PART II

THE LAW

In Part I of my findings I outlined the evidence which came out during the course of this inquest. I turn now to questions of law which have emerged from this evidence. They are:

1. Is the out-of-court admission made by Mr. Brent Miller admissible in evidence against Mr. Yasin Abu Bakr?

2. Would the fact that Mr. Brent Miller's cautioned statement is a photocopy affect its admissibility?

I turn now to the resolution of each of these matters.

1. Is the out-of-court admission made by Mr. Brent Miller admissible in evidence against Mr. Yasin Abu Bakr?

A. THE GENERAL RULE

A confession is generally inadmissible against any other person implicated in the confession. So if in the course of A1's (accused number one hereinafter referred to as "A1") statement to the police, A1 makes allegations implicating a co-accused, A2 (accused number two hereinafter referred to as "A2"), in the commission of an offence, the traditional view is that this statement cannot be adduced by the State as evidence

against A2. This principle is clearly enunciated in a number of practitioner's texts. According to **Blackstone's Criminal Practice 2010 at para. F17.50:**

> *"A confession made by an accused person that is admitted in evidence is evidence against him… It is not, at common law, admissible against any other person implicated in it… unless it is made in the presence of that person and he acknowledges the incriminating parts so as to make them, in effect, his own".*

Similarly, it is stated in **Archbold Criminal Pleading Evidence and Practice 2010 at para. 15-388** that it

> *"is a fundamental rule that statements made by one defendant, either to the police or to others (other than statements, whether in the presence or absence of a co-defendant, made in the course and pursuance of a joint criminal enterprise to which the co-defendant was a party…), are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own…".*

It comes as no surprise therefore that specimen direction number 32 of the **Judicial Studies Board Criminal Bench Book of Specimen Directions**[9] makes it clear that jurors are to be directed that A1's statement, made in A2's absence implicating A2 cannot be evidence against A2, and if it becomes revealed to them during the course of a trial, they are to disregard it as evidence against A2.

[9] *Crown Court Bench Book Specimen Directions*, (London: The Criminal Committee Judicial Studies Board, October 2008).

B. EXCEPTIONS TO THE GENERAL RULE

As with most rules of law, this rule regarding the admissibility of confessions is subject to certain exceptions. According to Adrian Kean in **The Modern Law of Evidence[10] at pp. 385-86:**

> *"In two exceptional situations, a confession may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused by his words or conduct accepts the truth of the statement so as to make all or part of it a confession statement of his own. The second exception, which is perhaps best understood in terms of implied agency, applies in the case of conspiracy: statements (or acts) of one conspirator which the jury is satisfied were said (or done) in the execution or furtherance of the common design are admissible in evidence against another conspirator, even though he was not present at the time, to prove the nature and scope of the conspiracy, provided that there is some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it ... There is also a third exception, in fact an extension of the second: when, although a conspiracy is not charged, two or more people are engaged in a common enterprise, the acts and declarations of one in pursuance of the common purpose are admissible against another. This principle applies to the commission of a substantive offence or series of offences by two or more people acting in concert, but is limited to evidence which shows the involvement of each accused in the commission*

[10] Adrian Keane, *The Modern law of Evidence, 5th ed.* (London: Butterworths, 2000), 385-86.

of the offence or offences. It cannot be extended to cases where individual defendants are charged with a number of separate substantive offences and the terms of a common enterprise are not proved or are ill-defined".

Based on the evidence which emerged during the course of this Inquest, none of these exceptions are directly relevant to the matter engaging the attention of this Court.

It also appears that A1's statement implicating A2 may be admissible against A2 by virtue of **section 114(1)(d) of England's Criminal Justice Act 2003** if "the Court is satisfied that it is in the interests of justice for it to be admissible". A perusal of the cases illustrate that section 114(1)(d) has been invoked from time to time to justify the admission into evidence of one co-accused's out-of-court statement so that it could be adduced to support the case against another co-accused. So in **R v. M [2008] 1 Cr App Rep 155, [2007] EWCA Crim 219 at para. 20** Hughes LJ had this to say:

"If hearsay evidence is admitted in the interest of justice the jury is by law entitled to consider it, to determine its weight and to make up it mind whether it can or cannot rely upon it… There is no doubt that if and when hearsay evidence of this kind is ruled admissible it becomes evidence in the case generally."

Since this exception is premised upon a legislative framework that simply does not exist in this jurisdiction, it is inapplicable to the matter at hand.

C. THE CASE OF R V. HAYTER

There is however "a modest erosion"[11] to the general rule that A1's out of court statement can never be of any effect against A2 which is directly relevant to this Inquest. It manifests itself in the case of **R v. Hayter [2005] UKHL 6, [2005] 2 All ER 209, [2005] 2 Cr. App. R 3, [2005] Crim LR 720.** The facts of this case follow. Three defendants were charged with murder. All three were indicted as principals. The prosecution's case was that the first defendant had arranged for the contract killing of her husband through the second defendant, and that he in turn engaged and paid the third defendant, who actually shot the victim. The evidence against the first defendant came from a number of sources and was cogent. The evidence against the third defendant was based solely on a confession which he had allegedly made to his girlfriend. The evidence against the second defendant was circumstantial and on its own could not provide a case to answer.

Not surprisingly, at the end of the prosecution's case, the second defendant submitted that he had no case to answer. The judge held that if the jury were satisfied on the evidence admissible against the third defendant that he was the killer then that conclusion was relevant in considering the case against the second defendant. In his summing up, the judge invited the jury to consider in logical phases the cases against the third defendant, then against the first defendant, and finally against the second defendant. The judge directed the jury that only if they found both the third and first defendants guilty of murder, would it be open to them, taking into account those findings of guilt, together with other evidence against the second defendant, to convict the second defendant. The

[11] R v. Hayter [2005] UKHL 6, [2005] 2 All ER 209, [2005] 2 Cr. App. R 3, [2005] Crim LR 720 per Lord Brown of Eaton-Under-Heywood at para. 81.

jury, were also directed that the evidence of the confession made by the third defendant was only evidence in the case against him and not evidence in the separate cases against the first and second defendants. The jury convicted all three. The second defendant appealed, contending that the judge had erred in law for two reasons. Firstly, he erred in directing the jury that in the event they convicted the third defendant of murder they could use their finding that the third defendant was the killer as evidence in the case against the second defendant. It was also argued on behalf of the second defendant at his appeal that the judge erred in failing to withdraw the case from the jury at the close of the prosecution case when there was no evidence admissible against the second defendant sufficient to amount to a case to answer. The Court of Appeal dismissed the appeal and the second defendant appealed to the House of Lords.

It was held that in a joint trial of two or more defendants for a joint offence a jury was entitled to consider first the case in respect of defendant A1 (even if it was based solely on his own out-of-court admissions) and then use their findings of A1's guilt and the role A1 played as a fact to be used evidentially in respect of co-defendant A2. The House of Lords went on to say that A1's confession would not be evidence against A2 for all purposes but only if firstly, the jury were sufficiently sure of its truthfulness to decide that on that basis alone they could safely convict A1; and secondly, that the jury were expressly directed that when deciding the case against A2 they had to disregard entirely everything said out of court by A1 which might otherwise be thought to incriminate A2. Of course, the jury in deciding at the first stage to convict A1 would already have had regard to the evidence of A1's out of court admissions for that purpose when they then

came to use A1's conviction as itself a building block in the case against A2. But by that second stage A1's out of court admissions would have been in effect subsumed within their finding of guilt against A1. Finally the House of Lords opined that this was a sensible approach to take to the admissibility of evidence because juries were making findings of guilt against one accused in situations where that guilt was established by eye witness, fingerprint, or circumstantial, evidence, and they were permitted to consider it as logically and legally relevant in the case against a co-accused. In the face of this it was felt that there could be no sensible or rational reason why the same approach should not be applied in the case of an out of court statement by A1. It followed that a jury could properly decide on the evidence already adduced first that A1 was guilty, and then take the finding of A1's guilt coupled with such other evidence as went to incriminate A2, to find A2 guilty as well. Furthermore, where proof of A1's guilt was necessary for there to be a case to answer against A2, there was still a case to answer against A2 at the close of the prosecution case –and this was so even if the only evidence of A1's guilt was his own out of court admissions. In these circumstances the appeal was therefore dismissed.

In essence, the law in *R v. Hayter* is this. In a joint trial of A1 and A2, a jury must first find A1 guilty on admissible evidence against him before they could go on to use the fact of that guilt to consider whether the case against A2 has been proved. This means that the fact of A1's guilt is now part of the evidence which a jury are entitled to take into account when deciding whether the State have proved its case against A2.

The decision in *R v. Hayter* has been considered in a number of cases since its date of delivery on the 3rd February 2005. To date the rule has not been abrogated or conscribed in any way. I will make brief reference to these cases.

On the 2nd March 2005 the Supreme Court of Victoria referred to the case of *R v. Hayter* in **R v. Jeffery Kevin Mitchell (Ruling No 2), R v Gavin James Brown 2005 VSC 43**. In this case *R v. Hayter* was discussed in the context of the desirability of having a joint trial where two persons are engaged in a joint enterprise. Then on the 6th May 2005 the case of **R v. Haddock and Others [2005] NICC 14**[12] was decided in the Belfast Crown Court. In this case, there was an application to sever an indictment. The case of *R v. Hayter* was referred to by Hart J in the course of his ruling on an application to sever an indictment. The 9th March 2006 saw the case of **Conlon & Another v. Simms [2006] EWHC 401 (Ch), [2006] 2 All ER 1024** in which mention was made of *R v. Hayter*[13].

[12] In particular he directed his mind to the dicta of Lord Stein at **para. 6** of *R v. Hayter* to the effect that "(w)hile considerations of the avoidance of delay, costs and convenience, can be cited in favour of joint trials this is not the prime basis of the practice. Instead it is founded principally on the perception that a just outcome is more likely to be established in a joint trial than in separate trials". Hart J ruled that the interests of justice demanded that all the applicants be tried together and the application was accordingly refused.

[13] A disciplinary tribunal found that allegations of dishonesty against solicitor had been proved and proceeded to strike him from the Roll of Solicitors. The question to be determined was whether the findings of fact made in the disciplinary proceedings were admissible in proceedings for damages against the solicitor as evidence of facts so found. The Court found that because they could not be sure of precisely what evidence was led at the disciplinary tribunal hearings, the order of the tribunal would be treated only as evidence of the fact that the defendant had been struck off the roll on the grounds of dishonesty. The court dealing with proceedings for damages was entitled to reach its own view of the facts as found, provided that they were properly proved in accordance with procedural fairness. In arriving at this conclusion the court referred to the case of **Hollington v. Hewthorn [1943] KB 587,** which held that evidence that a person had been convicted of an earlier offence was inadmissible in civil or criminal proceedings so as to prove that that person had in fact committed the offence. This rule in *Hollington v. Hewthorn* was later abolished for civil proceedings by section 11 of the Civil Evidence Act 1968 and for criminal proceedings by sections 74-75 of the Police and Criminal Evidence Act 1984, statutory modifications which according to Lord Steyn in *R v. Hayter* marked an advance of rationality in law. It was in this context that *R v. Hayter* was referred to *Conlon & Another v. Simms.*

The 3rd April 2006 saw the Privy Council making its first reference to *R v. Hayter.* This was in the matter of **Simmons & Another v. R [2006] UKPC 19** where it was felt by their Lordships that there was more than a sufficient prima facie case against each appellants in the matter that even without the benefit of the House of Lords' decision in *R v Hayter* a submission of no case to answer could be defeated.

On the 28th September 2006 the case of **R v. Taylor [2007] 2 NZLR 250**[14] was decided in the Court of Appeal of New Zealand. The case of *R v. Hayter* came to be mentioned in this matter during a discussion on the desirability of having joint trials. Later, on the 22nd March 2007 the case of *R v. Hayter* was referred to in Hong Kong in the matter of **HKSAR v. Cheung Ka Ho [2007] HKCU 509**[15]. It came up because oral submissions in support of the grounds of appeal against conviction were made where counsel invited the court to regard those grounds as constituting a single ground: namely, that there was insufficient evidence on which it had been established to the requisite standard that the appellant was a party to the joint enterprise. At the conclusion of the oral submissions the

[14] This appeal arose when Taylor, his wife and one Royal had been charged jointly with various offences, on the basis that they had formed a common intention to carry out and assist each other in an unlawful purpose, namely, Taylor's escape from lawful custody while he was attending a family group conference outside prison. Taylor and his wife were awaiting trial. Royal had pleaded guilty to assisting Taylor to escape from lawful custody, to carrying an air-gun with criminal intent and to possession of an air-gun without lawful purpose. Royal remained to be tried on two other joint charges arising out of the attempted escape. Taylor applied for severance of the trials of himself and his wife on the ground that he wished to call his wife as a witness in his defence. Severance was not allowed and the point was raised on appeal. The Law Lords referred to the very paragraph of *R v. Hayter* which was referred to in *R v. Haddock and Others* and came to the conclusion that the interests of justice required that those alleged to have committed offences together were to be tried together and ought not to be able to 'game the system' in separate trials. Inadmissible material prejudicial to one accused was not, of itself, sufficient to warrant severance. The Courts routinely faced this problem in joint enterprise cases and dealt with it by giving appropriate directions. The appeal was dismissed.

[15] Counsel made no comment on the case raised by the Court and the appeal against conviction was later dismissed.

court drew the attention of counsel to the judgment of the House of Lords in *R. v. Hayter*. Counsel was invited to consider the relevance or otherwise of the judgment in light of the sequence in which the magistrate had dealt with his findings. Then on the 17th October 2007 the case of **R v. Abdroikov; R v. Green; R v. Williamson [2008] 1 All ER 315** was decided. The case of *R v. Hayter* was referred to here because Lord Carswell in commenting on the reluctance of courts to admit hearsay, concluded that one of the basic reasons which underlay the development and maintenance of the rule against hearsay was the longstanding distrust of the capacity of juries to evaluate it.

On the 25th January 2008, the matter of **R v. Y Prosecution Appeal (No 2 of 2008) [2008] EWCA Crim 10; [2008] 2 All ER 484** was decided. Reference was made to the case of *R v. Hayter* at para. 34 of the case[16].

Then there was the Privy Council matter of **Persad v. State of Trinidad and Tobago [2007] UKPC 51, [2008] 1 Cr App R 140[17].** The facts of this case are that a robbery

[16] Lord Justice Hughes had this to say about *R v. Hayter*:

> *"R v Hayter was decided under the common law, prior to the 2003 Act. The issue in R v Hayter was quite different from the issue in the present case. No one there sought to assert that the confession of A could be evidence against B. In R v Hayter, the Crown sought (i) to prove the guilt of A by way of his unequivocal confession that he was guilty, and (ii) once that was done to invite the jury to say that, on the facts, if A was guilty, then so must B be. The issue before the House was whether in so reasoning the Crown in effect wrongly bypassed the common law which prevented the confession of A from being direct evidence in the case of B. The decision of the House of Lords was that it did not. Their Lordships held that since s 74 of the 1984 Act permitted the Crown to prove the guilt of A by his conviction, and from that to invite the jury to say that it followed on the facts that B must also be guilty, it was by analogy entitled to invite the jury to reason similarly from guilt proved against A via his confession. Their Lordships were clear that that could only be done providing that the jury was directed that whilst the guilt of A, if established, might be evidence in the case of B, the confession of A, and anything said in it about B, was not. Thus the jury must be directed that in considering the case of B, it must disregard the confession of A; it was only if the jury was sure that A was guilty that it could use that fact as evidence against B".*

took place and in the course of it, one man raped and another man buggered one of the victims. The prosecution relied on the principle in *R v. Hayter* to establish, by a process of elimination, that B was responsible for the buggery, based on a combination of A's admission of rape, the victim's account that the rapist was not the man who buggered her, and C's admission to robbery as a look-out only. The argument failed.

The Privy Council had two reasons for declining to apply the legal principle in *R v. Hayter* to the facts of the case before them. Firstly, it was felt that *R v. Hayter* concerned the joint trial of defendants "for a joint offence". There the offence was murder so Hayter's conviction was upheld on the basis that the jury, having concluded that the first defendant (the victim's wife) was guilty of murder for having arranged for the contract killing of her husband, and (by virtue of his out of court confession to his girlfriend) that the third defendant was the killer, were entitled to use those conclusions as part of the evidence (building blocks) in the case against the second defendant (Hayter, the middleman who had engaged the killer and passed the money to him). In *Persad v. State of Trinidad and Tobago*, by contrast, the Privy Council noted that the three defendants - so far as the counts of rape and buggery were concerned - although ostensibly being tried for a joint offence, were not and could not ultimately be jointly liable on those counts. Indeed the judge, having indicated to the jury the basis on which they could convict the appellant of buggery, directed that his two co-accused must be acquitted of that offence. In *R v. Hayter*, there was simply no question of the co-defendant's admission which led to his conviction on one count, of itself, exonerating that defendant from possible

[17] This case has since been referred to in **HM Advocate v. Duffy [2009] HCJAC 5, 2009 S.C.L. 350**

conviction on another count whereas with *Persad v. State of Trinidad and Tobago* the reality was that the confession could not be used as a building block in the case against the co-accused.

The second reason advanced by the law Lords for not applying *R v. Hayter* emerged from a reference to the third defendant's cautioned statement. This, whilst obviously incriminating the third defendant in respect of the robbery counts, was purely exculpatory with regard to the sexual offending. To this extent it plainly tended to implicate the appellant and, as such, "ought strictly and for all purposes to be excluded from the jury's consideration of the case against the appellant. The explanation advanced was that it was not an admission against self interest and was therefore less likely to be true.

In these circumstances the Privy Council did not apply the principle in *R v. Hayter* to the peculiar fact situation which presented itself in *Persad v. State of Trinidad and Tobago.*

At any rate, the dicta of Lord Brown at para. 15, can not be ignored as it is an endorsement of the law as laid down in *R v. Hayter*. According to Lord Brown:

> *"In the ordinary way, of course, out of court admissions are inadmissible against a co-accused for all purposes. They are, indeed, only admissible against the maker himself by way of an exception to the hearsay rule. That, until the decision of the House of Lords in Hayter, had been regarded as 'the universal rule' (R v Spinks [1982] 1 All ER 587, 589, 74 Cr App Rep 263). Hayter, however, now stands as authority for 'a modest*

adjustment' (Lord Steyn at para 25), a 'modification' (Lord Brown at para 80), of that rule".

Of particular interest is the approach taken by the Privy Council in discarding the argument advanced before it that the law in *R v. Hayter* was inapplicable to Trinidad and Tobago. The court had this to say at paras. 23-4:

> *"Mr Dingemans QC advanced as alternative grounds of appeal against conviction the submission that the Hayter modification to the absolute prohibition against the use of out of court admissions as evidence against co-accused should not apply in Trinidad and Tobago, first because, so he suggests, the decision in Hayter was founded materially upon the enactment of s 74 of the Police and Criminal Evidence Act 1984 ('PACE') which has no counterpart in Trinidad and Tobago; alternatively, because Hayter is persuasive authority only in Trinidad and Tobago and the reasoning of the minority is to be preferred.*
>
> *Their Lordships are wholly un-persuaded by either limb of this submission. Section 74 of PACE can be seen rather to have informed and reinforced the reasoning of the majority in Hayter than to have constituted its essential underpinning. And the Board takes the view that the considerations which led the House to adopt the decision in Hayter for the law of England and Wales, apply equally in Trinidad and Tobago"*.

Finally, there was the matter of **R v. Roger Leslie [2009] EWCA Crim 2728** which was decided on the 2nd December 2009. The facts of this case was that the appellant Roger Leslie and two co-accused were found guilty of the murder of Special Constable Nisha Patel-Nasri at her home on 11 May 2006. A third co-accused was acquitted by the jury. The Recorder of London sentenced the appellant to life imprisonment and set the minimum term of imprisonment at 18 years, less 482 days spent in custody on remand. The appellant appealed his conviction advancing one ground of appeal. In essence it was that the appellant was forced to lie in evidence at the trial and that he now wished to put before the court his "truthful" evidence, which will demonstrate that his conviction is unsafe. In the course of the appeal proceedings, Lord Justice Aikens enquired (at paragraph 59) whether the jury could have used their conclusions that either Nasri and/or Jones (co-defendants) were guilty of the murder of Nisha as facts to be used evidentially against the appellant in deciding whether or not he too was guilty of being party to a joint enterprise for her murder. Lord Justice Aikens opined that the "answer to that question is clear; they could". He then referred to statements to this effect by Lords Steyn and Brown of Eaton-under-Heywood in *R v. Hayter [2005] 2 Cr App R 3* at paragraphs 20 and 88 respectively, with which Lord Bingham of Cornhill agreed.

From a perusal of these authorities it is safe to conclude that the very alphabet of criminal evidence appears therefore to have undergone some measure of modification. Accordingly, the out-of-court admission made by A1 is admissible in evidence against A2 in certain instances. *R v. Hayter* is good law which can be applied by the courts of Trinidad and Tobago.

D. AN APPLICATION OF R V. HAYTER TO THE FACTS

The question which now arises is whether this is such an instance where A1's out-of-court admission would be admissible against A2. In other words, can the rule in *R v. Hayter* be applied in these proceedings to render the out-of-court admission of Mr. Brent Miller admissible against Mr. Yasin Abu Bakr. An answer to this question must necessarily involve a consideration of the evidence in this inquest. Accordingly, I do so now.

As mentioned previously, the evidence which emerged during the course of this inquest is that on the 31st July 2003, Mr. Brent Miller gave a statement under caution to No. 12721 Ag. Cpl. Veronique (now Ag. Insp. Veronique). This was reduced into writing in the usual cautioned statement form. A photocopy of this document was admitted into evidence at this inquest and marked "CE1". The material parts of this document are as follows:

> *"Well me and Fly really used to deal personal with the Imam. We also use to watch ah druglord back which is Rawle Cassie. This druglord use to be paying the Imam powertax. Whe go on is de druglord didn't pay for two weeks so de Imam call him and ask him what is going on with his money. He told him to meet him in Maraval by Ronaldo street by de bar. De Imam came and meet all of us there. Rawle tell him de reason why he ain't pay no money is because Israel open ah big block in de back. So de Imam ask him what yuh go do. Rawle tell him he go send Glen to talk to him on de mosque with me and Fly. We carry Glen de next day on de*

mosque. We went in de Imam office, the Imam ask him what it is going on in Boisserre by Rawle and them. He tell the Imam Israel getting drugs from two Spanish and that is what closing down de block in de front by Rawle.

De Imam turn and tell him that he have to deal with it and he ask him how to deal with it. The Imam turn and tell him well you go have to kill him and he say well alright. After ah lil while we just was talking normal. Three of us that is me, Fly and Glen come out de office. The Imam call back me and Fly. When the Imam call back me and fly he tell us let Glen kick down de man because he is not part of us. We leave de mosque and went back by Rawle, drop Glen, de Imam call Rawle and tell Rawle he go deal with it. About two nights after Randell and Sylvon come and pick meh up to go over by Rawle when we was over by Rawle, Chris and Fly come after. Glen bring de guns and them and give us. He bring out four nines and a thirty-eight. He keep de thirty-eight and he give the rest of us de nines. He told us de man have drugs and we go take it that is how we manage to go over by Israel with Glen. We leave from by Rawle yard and went through de bushes and went over by Israel. We went down de ravine and went by Israel house. We surround de house and we knock and say Police open up. Ah woman open de door. We went in the house and went in ah bedroom where we meet people sleeping which was two other girls and two fellas. We wake up everybody and put them in the de drawing

room to lie down. Then Glen take out Israel we carry him outside de door which is by me Sylvon and Glen. Glen ask him where he have de drugs Israel say ah have nothing. Glen then say lets go up de river. We carry him up de river until we almost reach to the end. Glen keep asking him give we de drugs give we de drugs. Israel keep saying ah ain't have nothing boss. Glen tell him yuh have nothing ah go let them fellas kill all yuh family. Then Israel say oh god oh god wait nah de drugs in ah house in west mooring. Glen tell him nah give me what yuh have and he say ah ain't have nothing. Then Glen take ah knife and was cutting Israel finger. Israel keep saying he have nothing. Glen turn and tell him well that is it with you yes. Me and Sylvon take some steps forward then Glen shoot him once. At de time when Israel get shoot he was sitting down on de ground in de river it was ah dry river and he hands was tied behind he back. We did tie up he hands since from down by de house. Israel was groaning then after a few seconds ah see Glen shoot him again. Then three of us leave…When ah get up in de morning ah call de Imam and ah tell him everything is everything and he say well alright…

Question : When you tell de Imam everything is everything, what do you mean?

Answer : Well everything the Imam tell we to do we handle it.

Question : Who is the Imam?

Answer : The Imam is the leader of the Jamaat Al Muslimeen. His name is Yasin Abu Bakr. I know him two years

before de scene. I does deal with him personally.

Question : Do you remember the date of the incident?

Answer : Boss ah ain't good with dates, but ah remember it was sometime in de middle of 1998 and de incident was in Boisierre Village, Maravel opposite Ellerslie Plaza up on de hill".

If a properly directed jury is satisfied beyond reasonable doubt that Mr. Brent Miller made this confession to Ag. Insp. Veronique and they are satisfied beyond reasonable doubt that it is true (after of course taking into consideration all the circumstances in which they find it was or may have been made and after considering whether there were any circumstances which might cast doubt upon its reliability), it is open to a jury to convict Mr. Brent Miller of murder contrary to common law on this confession evidence alone.

This finding will of course be premised on the principle of joint enterprise. In criminal law, the doctrine of common purpose, common design or joint enterprise refers to the situation where two or more people embark on a project with a common purpose which results in the commission of a crime. In this situation the participants are jointly liable for all that results from the acts and omissions occurring within the scope of their agreement. For example, the High Court of Australia in **McAuliffe v. The Queen 69 ALJR 621, at 624** states that "...each of the parties to an arrangement or understanding is guilty of any crime falling within the scope of the common purpose which is committed in carrying out that purpose" and concluded at page 627 that "…it is sufficient to found a conviction for

murder for a secondary party to have realized that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm". In English law, the doctrine derives from **R v. Swindall and Osborne (1846) 2 Car. & K. 230** where two cart drivers engaged in a race. One of them ran down and killed a pedestrian. It was not known which one had driven the fatal cart, but since both were equally encouraging the other in the race, it was irrelevant which of them had actually struck the man, and they were held jointly liable. Thus, the parties must share a common purpose and make it clear to each other by their actions that they are acting on their common intention so that each member of the group assumes responsibility for the actions of other members in that group. When this happens, all that flows from the execution of the plan will make them all liable.

According to the contents of the cautioned statement of Mr. Brent Miller, it would appear that Mr. Brent Miller, Rawle Cassie (address unknown[18]), Terrance Guerra aka "Fly" ("he get kill about three years after"[19]), Sylvon Martin ("he leave de country about two years ago"[20]), Glen Geeban ("he dead"[21]) Christopher Fredericks aka Chris Bulls ("from Gonzales up in de quarry"[22]), Randell (address unknown[23]) and Mr. Yasin Abu Bakr shared a common purpose to murder Israel Sammy and made it clear to each other by their actions that they were acting on their common intention. It follows that each member of the group must now be ascribed with responsibility for the actions of other

[18] At the time of the recording of the statement under caution, Brent Miller was unable to provide an address for Rawle Cassie.
[19] Direct quotation from the cautioned statement of Brent Miller.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

members in that group[24]. Additionally, since the plan was executed, all that flows from the execution of the plan makes all of them criminally liable.

Now it must also be appreciated that this would be a finding against Mr. Brent Miller which would be based solely upon a cautioned statement purported to be given by him but, it is not unheard of to premise an entire prosecution upon the evidence of a confession of the accused. **R v. Greenwood [2005] 1 Cr. App R 7**, for instance is a murder case in which the only evidence against the Appellant was a confession statement[25]. The New Zealand case of **R v. Pauga [1992] 3 NZLR 341** affords another example of a conviction obtained solely on the strength of confessional evidence. In an attempt to prevent an indictment from being presented it was argued that a conviction could not be sustained on the basis of the confession alone in an attempt to have the trial judge. The application was declined and in the course of giving reasons for so doing, Smellie J had this to say:

> *"Although it has not so far been expressly decided in New Zealand I am nonetheless prepared to rule on this application that there is no rule of law to the effect that a conviction cannot be properly sustained on the basis of the accused's confession alone.*
>
> *In Re v. Lord [1970] NZLR 527, Turner J delivering the judgment of the Court of Appeal considered inculpatory statements made by two accused*

[24] After being informed of his right against self incrimination, Brent Miller opted not to testify in these proceedings. In the circumstances any details which would have allowed this Court to issue summons for these men were not forthcoming and same could not be done.

[25] It is to be noted that this verdict was quashed on appeal on the ground that the trial judge had wrongly prevented G from adducing evidence suggesting that a former boyfriend with a motive could equally have committed the murder.

of possible cattle stealing but in circumstances where there was real doubt as to whether any beasts had been stolen and real doubt as to whether a particular beast that was slaughtered was from a neighboring farm. In that case the Court of Appeal set aside a conviction based on statements made by the alleged cattle thieves, but his Honour went on to say at p 529:

> *'But where the fact of the commission of any crime is supported only by something the accused himself has said, that something must be convincingly proved, and it itself must be cogent and satisfactory evidence, before it can be accepted by itself as a foundation of a conviction'.*

I was also referred by Ms Grey to a decision of Fisher J in R v Whitu (Rotorua, T 1/91, 26 February 1991). The facts in this case were quite different to those in the charge I am considering but his Honour quoted the passage referred to above and more from p 529 of Lord and then said:

> *'It is not the case that in all circumstances a confession standing alone will be insufficient to support a conviction. The large principle is simply that a case should not be left to a jury where there is no satisfactory evidence upon which an accused could reasonably be convicted. It may well be that in a case where the Crown relies solely upon a confession without any independent evidence that a crime has been committed, one would consider the reliability of that*

confession anxiously before deciding that the case should go to the jury. But beyond that caution, I do not think that Lord and Doyle really takes the accused any further'.

Valuable guidance is also to be found in McKay v R (1935) 54 CLR 1, a decision of the High Court of Australia. In that case a man and his infant male victim had both made statements to the police and both subsequently retracted them at the trial. It is apparent from the judgments in the case that at the trial the presiding Judge directed the jury that they could convict on the confession alone, provided of course that they were satisfied that guilt had been proved beyond reasonable doubt. That direction was challenged and in the judgment of Latham CJ at p 6 of the report he said:

'It is contended that there must be independent evidence (in addition to any confession) that the acts were in fact done, or, at least, other evidence tending to show that the confession is probably true'.

On p 7 he continues, however:

'. . . I have been unable to discover any authority that it is a rule of law that a prisoner cannot be convicted upon evidence consisting solely of his confession. It is for the jury to determine whether the confession, when admitted in evidence, is in fact a confession of the particular offence

charged, and whether it is a confession that the accused person was the person who did the acts or was guilty of the omissions which constitute the offence charged. If a confession is subsequently repudiated, it is for the jury to decide what degree of credit should be given to the original confession and the subsequent repudiation respectively. In my opinion the direction given to the jury by the learned Chairman was correct'.

The decision of Dixon J commencing on p 8 is to the same effect. In the middle of p 8 his Honour said:

'The jury were directed that if they found it satisfactorily proved that the confession had been made, that it was voluntary and was direct and positive, definite and explicit, they might convict without any corroboration whatever'.

And at the end of his judgment on p 10 he said:

'The direction which the jury received was not contrary to law'.

Also of interest is the recent High Court decision of McKinney v R (1991) 65 ALJR 241. There the headnote, recording the decision of the majority, reads:

'. . . that where, in criminal proceedings, the prosecution relies on police evidence of disputed confessional statements

allegedly made while the accused person was under interrogation in police custody . . . and where the making of the statements is unsupported by video or audio tapes, or written verification by the accused, or by the evidence of a non-police witness, the jury should be instructed carefully to consider the dangers involved in convicting on that evidence alone'.

Ms Grey also provided me with a useful example from Great Britain. It is the case of Porter v Court, recorded in [1963] Crim LR 39. It was a case of a journalist who admitted on television and to the police that he had shot deer in a prohibited area without a licence. When he was charged, however, he gave evidence at the trial that all that he said was merely a joke and there was no truth in it. He was convicted and on his appeal the Divisional Court, presided over by Lord Parker CJ held at p 40 dismissing the appeal, that even had P not given any evidence the justices could still have convicted. P's own admissions were evidence against him, and could not be compared to the retracted deposition of a prosecution witness. And the learned editors of the review add by way of commentary at p 40:

'Confessions . . . are exceptions to the hearsay rule and, as against the persons making them, are evidence of the facts asserted therein. Provided then, that a court is satisfied

beyond reasonable doubt that an accused's confession is true

and his evidence on oath false, it should convict'."

It was on the basis of all these authorities that it was held that there was no rule that a conviction cannot be entered on a confession alone.

The implications of such a finding is that if a properly directed jury opts to convict Mr. Brent Miller of murder contrary to common law (even if the case against him was based solely on his own out-of-court admission) then on the authority of *R v. Hayter*[26] this finding of Mr. Brent Miller's guilt (and incorporated in this would be the role Mr. Brent Miller played in the joint enterprise to kill Israel Sammy) is something a jury would then be entitled to use evidentially in respect of Mr. Yasin Abu Bakr. Furthermore, *R v. Hayter* is authority for the point that where proof of Mr. Brent Miller's guilt is necessary for there to be a case to answer against Mr. Yasin Abu Bakr (which it clearly is here), there will still be a case to answer against Mr. Yasin Abu Bakr at the close of the prosecution case –and this is so even if the only evidence of Mr. Brent Miller's guilt is his own out-of-court admissions. It is worth recalling at this point that in *R v. Hayter* this was exactly the scenario which presented itself in respect of the appellant who was in essence convicted on the cautioned statement of a co-accused which was admitted into evidence against him and without this cautioned statement of the co-accused there would never have been a case for the appellant to answer for murder at all. A conviction it is to be noted, which was later affirmed by the House of Lords and then endorsed by the Privy Council in two matters to date.

[26] In the opinion of this court the facts as present in *Persad v. State of Trinidad and Tobago* are not present in this case so as to prevent the applicability of *R v. Hayter.*

E. THE SUBMISSION REGARDING THE NON APPLICABILITY OF R V. HAYTER TO THE FACTS OF THE INSTANT MATTER

The court heard submissions from Mrs. Pamela Elder regarding the non-applicability of *R v. Hayter* to the instant matter. Counsel has argued that the rule can not be applied to the evidence in this inquest and so it must necessarily follow that there is therefore no evidence against Mr. Yasin Abu Bakr which could sustain or justify a charge on indictment against her client. I proceed now to outline her submissions in this regard.

Mrs. Elder contends that the only evidence which establishes an offence against Mr. Yasin Abu Bakr is a confessionary statement purported to have been given by Mr. Brent Miller. This cautionary statement, it is submitted, can not be used against Mr. Yasin Abu Bakr to justify a charge on indictment. According to her line of reasoning, the material in the confessionary statement must be considered in light of *R v. Hayter* which has created a limited modification to the principle that out of court statements of one accused can not be used against a co-accused.

Counsel asserts that *R v. Hayter* has not eradicated the fundamental principle that an out of court statement of an accused can not be used against a co-accused and it certainly has not, she says, allowed liberal use of one accused's statement against a co-accused. Reference is then made to the dicta of Lord Brown at paras. 84-5 of *R v. Hayter* which it is submitted supports her general contention. Paras. 84-5 are reproduced below:

"[84] Let me make it absolutely plain that in everything I have said thus far I have been assuming that A's confession is directed solely towards incriminating himself and that, whilst of course it tends to establish A's guilt, it says nothing directly implicating B. In other words it is incriminatory against B only in so far as the fact of A's guilt of itself helps to establish B's guilt (perhaps because, as in R v Rhodes, A and B had been in each other's company at the time of the offence or because, as in R v Spinks, it was necessary to prove that A had committed an arrestable offence, or for whatever other reason). I have assumed, in Professor Birch's words, that 'proof of A's guilt [is] a fundamental building-block in the prosecution case against B', and that A's confession goes no further than this.

[85] I understand that others of your Lordships are troubled by this assumption; it is, indeed, suggested that there is no relevant difference whatever between those parts of A's admissions which refer to his own actings and those parts which refer to the involvement in the offence of B himself. This I cannot accept: rather there seems to me a critical distinction between the two. I readily acknowledge that those parts of A's confession which directly implicate B ought strictly and for all purposes to be excluded from the jury's consideration of the case against B. But the reason for this is because those parts of A's confession which directly implicate B are not admissions against A's interest at all and so are

materially less likely to be true. The objection to their admissibility against B is less, therefore, that they are hearsay than that there is a real risk that A will have had his own motives, and not merely a wish to clear his conscience, for casting blame on B".

Mrs. Elder interprets this to mean that once there is an out of court statement of an accused person, one may use only those parts of that statement which are not incriminatory, against a co-accused. The reason for this it is submitted, is the parts incriminating a co-accused would not be declarations against the self interest of the maker of the statement and can therefore be declarations made for a variety of reasons apart from a wish to clear one's conscience.

In essence then, counsel submits that *R v. Hayter* states that firstly, one may use a confessionary statement of A to establish A's guilt. Then, having determined A's guilt by using A's confession, a determination of B's guilt can be made by relying *only* on those parts of A's confessionary statement which do not incriminate B. Counsel further argues that the case of *Persad v. The State of Trinidad and Tobago* makes this very point because the statement in that case was an admission to robbery but a denial of a rape and if it was true then the co-accused committed the rape. This case it is submitted, says that if it was incriminatory or tended to incriminate the co-accused it could not be used.

In concluding, counsel says that when these two cases are applied to the evidence in this inquest, the portions of Mr. Brent Miller's confessionary statement which incriminate Mr. Yasin Abu Bakr can not be used against him.

I have considered these submissions carefully and I agree with it in part. Firstly, there is nothing in *R v. Hayter* which renders one accused's confession admissible against another co-accused for all purposes. Secondly, there is no dispute that before the rule in *R v. Hayter* can be applied a jury would need to be told that before convicting a co-accused:

(i) they must be sufficiently sure of the truthfulness of A1's confession to convict A1 solely on the strength of it; and

(ii) when determining the case against A2, they must entirely disregard everything said out of court by R which might otherwise be thought to incriminate A2.

Indeed Lord Brown makes it clear that those portions of A1's confession implicating A2 ought to be excluded when the jury comes to consider the case against A2 for the reason that they are not declarations against A1's interests and are thus less likely to be true: A1, after all, may well have an interest in seeking to implicate A2.

That said, it must be noted that Lord Brown went on to acknowledge at para. 86 of *R v. Hayter* that the jury, in deciding at the first stage to convict A1 on the basis of his own out of court admissions, would already have had regard to the evidence involving A2 when they come to use A1's conviction as itself a building-block in the case against A2- and by that second stage of the jury's deliberations A1's out of court admissions against A2 would have been in effect subsumed within their finding of guilt against A1. Clearly then the jury would not be disregarding the incriminating evidence against A2 entirely

although they certainly would not be using it directly and on its own in determining the case against A2.

Now applied to the facts of the instant matter, a jury in deciding at the first stage to convict Mr. Brent Miller on the basis of his own out of court admissions, would inevitably have to have regard to the evidence involving Mr. Yasin Abu Bakr before they could be sufficiently sure of the truthfulness of Brent Miller's confession to convict him solely on the strength of it. It follows that when the jury comes to use Mr. Brent Miller's conviction as itself a building-block in the case against Mr. Yasin Abu Bakr, by that stage of the jury's deliberations, Mr. Brent Miller's out of court admissions against Mr. Yasin Abu Bakr would not be considered by them on its own but there is no denying that it would in effect be subsumed within their finding of guilt against Mr. Brent Miller. But if Mrs. Elder's submission is taken to its logical conclusion however, it would mean that the jury must completely ignore all the incriminating evidence against her client at all stages of their deliberations so that at the end of the day there really is no evidence that could sustain or justify a charge on indictment against Mr. Yasin Abu Bakr. This is clearly not the principle propounded by *R v. Hayter*. In fact if this had been the principle of law which was established in *R v. Hayter* then the appeal would have been allowed in that matter as without the parts of the confession of the killer which incriminated the middle man, the middleman's no case submission would have had to succeed as there simply was no other evidence to sustain the state's case of murder against him; a fact which was readily conceded by the prosecution.

In these circumstances the arguments put forward by counsel are over-ruled and I find that there are sufficient grounds for concluding that the out-of-court admission made by Mr. Brent Miller is admissible in evidence against Mr. Yasin Abu Bakr.

2. Would the fact that Mr. Brent Miller's cautioned statement is a photocopy affect its admissibility?

It will be recalled that Ag. Inspector Veronique testified in this inquest that on the 31st July 2003, he recorded a cautioned statement from Mr. Brent Miller. This, he said, was reduced into writing by him in the usual cautioned statement form. A photocopy of this document was admitted into evidence at this inquest and marked "CE1". The original was never produced because the evidence which emerged from a number of witnesses in these proceedings is that it could not be found despite diligent efforts to locate same.

The issue which therefore arises at this stage is this. Having concluded that the out-of-court admission by Mr. Brent Miller is admissible evidence against Mr. Brent Miller and Mr. Yasin Abu Bakr, would the fact that the document before the court is a photocopy and not the original, now affect its admissibility and consequently the previous findings made by this court.

I turn now to examine this issue.

It is helpful to start by reminding myself of what constitutes a document. I adopt the definition of Darling J in **R v. Daye [1908] 2 K.B. 333** where a document is judicially

described as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed".

I come now to examine the law as it relates to the proof of the contents of documents. According to **Archbold Criminal Pleading Evidence and Practice 2010 at para. 9-100** all statements contained in a document are regarded as hearsay and inadmissible unless an exception to the hearsay rule applies. Once, however, it has been decided that a statement in a document is admissible in evidence it may be proved.

In the instant matter, the document in question is a confession statement given by Mr. Brent Miller. This Court has concluded that it is admissible in evidence against Mr. Brent Miller and Mr. Yasin Abu Bakr so I turn now to the issue of proof of the actual contents of this cautioned statement.

The law regarding the proof of the actual contents of a document is this. As said in **Blackstone's Criminal Practice 2010 at para. F8.2,** at common law, the general rule, often regarded as the only remaining instance of the best evidence rule, is that a party seeking to rely upon the contents of a document must adduce primary evidence of those contents. A perusal of the cases however reveals that there are a number of exceptions to this general rule requiring proof of the contents of documents by primary evidence. As stated in **Phipson on Evidence at para 41-33[27],** one common law exception which allows for secondary evidence of documents to be given in evidence is where the original

[27] Hodge M. Malek, ed., *Phipson on Evidence, 16th ed.* (London: Sweet & Maxwell, 2005), 1207.

document has been lost. The text goes on to say that if this is the limb relied upon, there must be:

1. direct proof of the existence and execution of the original document and,
2. proof of its loss i.e. actual proof that the original document cannot be found after diligent searches have been made for same,

before secondary evidence of the contents of a document can be tendered into evidence.

What then is the secondary evidence which can be relied upon as proof of the contents of a document? According to **Nodin v. Murray (1812) 3 Camp. 228,** a copy made by a copying machine is regarded as secondary evidence of the original. Furthermore, it is acknowledged in **Phipson on Evidence at para 41-13** that the chief admissible form of secondary evidence of the contents of documents is copies.

On the evidence which emerged during the course of this inquest, the original cautioned statement of Mr. Brent Miller appears to be lost and there has been the necessary proof of this. Firstly, there has been evidence which came out at this inquest dealing with how this document came to be created by Ag. Inspector Veronique. He testified that he wrote down what Mr. Brent Miller was saying to him at the material time in prescribed cautioned sheets and this document was then verified by Mr. Brent Miller as true and correct. There is therefore proof of the existence and execution of the original cautioned statement of Mr. Brent Miller. Secondly, there is evidence before the Coroner that searches were conducted for the original cautioned statement in question by exhausting all sources and means which were reasonably accessible in an attempt to locate the

original document and these searches have yielded no results. Furthermore, all the witnesses who were named as having custody of the said document were called by the Coroner and none of them were able to produce the original before this court. There is therefore proof that the original cautioned statement of Mr. Brent Miller is lost.

The document which was eventually tendered into evidence by the Court in this inquest and marked "CE1" is a copy of that cautioned statement which was obtained from personnel at the Office of the Director of Public Prosecutions. It is not clear exactly what degree of secondary evidence this copy actually is and certainly the law makes no distinctions in this regard: per Lord Abinger in **Doe d Gilbert v. Ross (1840) 7 M&W 102.** What is important is that where secondary evidence of a document is going to be given by means of a copy, **Archbold Criminal Pleading Evidence and Practice 2010 at para. 9-101** makes it clear that a witness is to be called who can verify in essence that the copy produced is a true copy and that it is in the same terms as the original. This evidence was forthcoming from Ag. Inspector Veronique, retired Senior Superintendent of Police Mr. Ruthven Paul and Senior Superintendant of Police Mr. David Nedd.

With these considerations in mind it stands to reason that secondary evidence of the contents of the cautioned statement may now be adduced in the form of a copy of that document because the original document has been lost and the copy which has been produced to this Court, has been verified as a true representation of the original document which was created in 2003.

These common law principles governing the admissibility of secondary evidence of the contents of documents are mirrored in our statute. **Section 14(c) of the Administration of Justice (Miscellaneous Provisions) Act No. 28 of 1996** which amends the Evidence Act Chap. 7:02 states that:

> "*14C. Where a statement contained in a document is admissible in criminal proceedings, it may be proved—*
>
> *(a) by the production of that document; or*
>
> *(b) by the production of a copy of that document, or of the material part of it, whether or not that document is still in existence, and authenticated in such manner as the Court may approve; and it is immaterial for the purposes of this section the extent to which the original or a copy thereof may have been reproduced".*

As per the prerequisites embodied in our legislation, it has been established during the course of this inquest that the statements in the document are admissible and it has also been established that these statements can only now be proved by the production of a copy of that document. This Court also has evidence of Ag. Inspector Veronique, retired Senior Superintendent of Police Mr. Ruthven Paul and Senior Superintendant of Police Mr. David Nedd that the copy of the document is a true reflection of the original document created based on what Ag. Inspector Veronique was told by Mr. Brent Miller. Ag. Inspector Veronique in particular testified that the contents of the copy accord with his recollection of what was said to him by Mr. Brent Miller during the interview, moreover the copy is a copy of a document which is in his handwriting. This evidence authenticates the copy marked "CE1" in a manner which meets with the approval of this

court and in the circumstances I find that it is immaterial that "CE1" is a copy of the original cautioned statement recorded from Mr. Brent Miller. The fact that "CE1" is a copy does not affect its admissibility. It follows from this that the previous conclusions regarding the law which have been made by this Court, remain unaffected.

With these points of law settled, I move now to my findings in this matter.

PART 3

FINDINGS

Findings pursuant to the Coroners Act Chap. 6:04

Section 10(1)

I am required to find, so far as has been proved, the cause and circumstances of the death of Israel Sammy. As stated previously I understand this to encompass who the deceased person was and when, where and how he came by his death.

As a result of considering all of the evidence which came out during the course of this inquest, I am able to make the following findings:

IDENTITY OF THE DECEASED

The deceased person was Israel Sammy

PLACE OF DEATH

He died in a marked police vehicle en route to the Port of Spain General Hospital

DATE OF DEATH

He died on 20th May 1998

CAUSE OF DEATH

The cause of death was shock and hemorrhage associated with gun shot injury.

Section 28

In so far as it is relevant to this inquest, the Act provides in section 28 that:

> *"if during the course or at the close of any inquest the Coroner is of the opinion sufficient grounds are disclosed for making a charge on indictment against any person, he may issue his warrant for the apprehension of the person…".*

The test for the charging question set out in section 28 of the Act requires a coroner to consider whether "sufficient grounds are disclosed for making a charge on indictment". The idea of sufficiency of evidence appears to be similar to that found in section 23(2) of the **Indictable Offences (Preliminary Enquiry) Act Chap. 12:01** which states in material part that:

> *"Where the Magistrate is of the opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused on trial for any indictable offence, the Magistrate shall commit the accused for trial…".*

In neither of the aforementioned acts is any guidance given as to what level or weight of evidence is required before it is "sufficient" to charge (in the case of the Coroners Act) or commit (in the case of the Indictable Offences (Preliminary Enquiry) Act). I have therefore sought guidance on this question of sufficiency from our case law. In this light I have come across one recent authority. It is the ruling handed down by His Lordship Mr. Justice Mon Désir in **The State v. Brian Gayapersad No. 69 of 2008** dated 2nd March 2010. In this case, counsel for the accused, Mr. Jagdeo Singh raised the questions

of whether the Court had jurisdiction to quash an indictment where it considers that there was insufficient evidence to warrant a committal; and if so, whether the evidence in the particular case would have met the requisite threshold for the test of sufficiency. In the course of dealing with the threshold of sufficiency his Lordship had this to say at paragraphs 41 and 44:

> *"Having considered the elements of the offence of larceny, what then is the threshold of sufficiency that the State's evidence must cross in order to satisfy this Court that the instant indictment must be allowed to stand? To my mind, the question must therefore, be what evidence is there, if any, as foreshadowed on the depositions that goes towards proof of each of the constituent elements of the offence? It is not, what is the quality of such evidence insofar as the issues of veracity or truthfulness of witnesses are concerned, since in my view, this Court has no business at this stage, considering the quality of the evidence in the true sense of the word, since such issues of the reliability or unreliability of witnesses and the quality or weight of their evidence, are more effectively resolved after the witnesses have actually testified before the tribunal of fact, and have been subjected to cross-examination. It is only then that the tribunal of fact will be left with an overall and fuller impression of the totality of that evidence. Now, the judge on an application such as this, in order to effectively determine the "sufficiency" of the evidence before him, to support the indictment, must of necessity, weight the evidence as foreshadowed on the depositions, but when he does so, it is done in only a rough scale to determine its*

usefulness at the trial and what conclusions the whole or parts of it would support- viz a viz the indictment before him. But such weighing of the evidence is not for the purpose of determining whether such evidence actually "proves" the charge but rather, for the purpose of determining whether it has any weight at all which "could prove" the charge. Sufficiency of evidence in this context must therefore, be taken to mean something in the nature of whether or not there actually exist any evidence, which, if accepted by the tribunal of fact, would go towards proof of the constituent elements of the offence. Likewise, insufficiency of evidence, as referred to by counsel for the applicant, can in this context, only mean either that, when the available evidence is taken as a whole, there is no evidence of some essential ingredient of the offence which the indictment charges; or that committal of the accused was based wholly on inadmissible evidence... The standard and the test applicable here are, in my view, precisely the same as that which the learned Magistrate was required to apply at the preliminary enquiry, and the same as that which this Court would apply on a submission of no case to answer at the close of the case for the State" (emphasis mine).

I understand this case to be saying that the sufficiency test is not concerned with deciding whether any person is guilty of an offence. Rather, it is only whether a properly instructed jury *could,* on all of the evidence presented at the inquest reasonably convict for such an offence -not *would* they. This test according to the Learned Judge is akin to

the test performed by a committing magistrate. This is instructive because the case of **R (Cash) v. HM Coroner for the County of Northamptonshire and Chief Constable of Northamptonshire Police (interested party) [2007] EWHC 1354 (Admin) QBD** suggests that the test to be adopted by coroners in so far as it concerns a determination of sufficiency of evidence, is similar to the test adopted by a committing magistrate i.e. the Galbraith test. This is what Keith J had to say on the issue:

> *"A coroner is obliged to leave to the jury those verdicts - and only those verdicts - which are properly open to them to reach on the evidence. In determining whether a particular verdict is open to the jury to reach on the evidence, the test is similar to that laid down in R v Galbraith [1981] 1 WLR 1039 , which identified the test for determining whether a defendant in a criminal case has a case to answer. Early on in his judgment, Lord Lane CJ identified at p1040F-G two schools of thought on the topic:*
>
> > *'There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict'.*
>
> *The answer the court gave was at p1042B-E:*
>
> > *'(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for*

example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can be safely be left to the discretion of the judge'.

23. How is the Galbraith test to be applied to inquests, specifically to whether a verdict of unlawful killing should be left to the jury? In R v HM Coroner for Exeter and East Devon ex p Palmer [2000] Inquest Law Reports 78, Lord Woolf MR said:

'In a difficult case, the coroner is carrying out an evaluation exercise. He is looking at the evidence before him as a whole and saying to himself, without deciding matters which are the province of the jury, 'Is this a case where it would be safe for the jury to come to the conclusion that there had been an unlawful killing?' If he reaches the conclusion that, because the evidence is so inherently weak, vague or inconsistent with other evidence, it would not be safe for a jury to come to the verdict, then he has to withdraw the issue from the jury. In most cases there will only be a single proper decision which can be reached on any objective assessment of the evidence. Therefore one can either say that there is no scope for Wednesbury reasonableness or there is scope, but the only possible proper decision which a reasonable coroner would come to is either to leave the question to the jury or not, as the case may be. However, as was pointed out by the Lord Chief Justice in Galbraith, in these cases there will always be borderline situations where it is necessary for the coroner to exercise a discretion. It is only in such a situation that he has a discretion. It follows, therefore, that [the role which] the test of reasonableness enunciated in Wednesbury has to play in relation to decisions as to whether to leave a particular issue to the jury or not … is extremely limited.'

24. It is possible to argue that Lord Woolf was saying that the Galbraith test was not the appropriate test for a coroner to apply when considering whether a verdict of unlawful killing should be left to the jury. After all, according to Galbraith, the question is not so much whether it would be unsafe for the jury to convict, but rather whether there was evidence on which the jury could convict. But Lord Woolf made it clear in R v Inner South London Coroner ex p Douglas-Williams [1999] 1 All ER 344 that the Galbraith test was to apply. At p349a he said that:

> *'a coroner should adopt the Galbraith approach in deciding whether to leave a [particular] verdict' to the jury." (emphasis mine).*

I consider this amalgam of cases to be saying that a coroner who is faced with deciding whether there is sufficient evidence of a crime must make that decision along the principles set forth in *R v Galbraith* and look to see whether there is evidence which *could* cause a jury to convict as distinct from whether there is evidence which *would* cause them to convict.

Following from this I come now to deal with two matters:

A. Credibility and my findings

B. The Prosecutorial discretion and my findings

A. CREDIBILITY AND MY FINDINGS

The Court heard submissions from Mr. Williams that no finding ought to be made that there is sufficient evidence to charge his client with an indictable offence. He develops his argument this way.

He starts off by reminding the Court of time line in this matter. It is to the effect that in 1998 Israel Sammy met his untimely demise and for the next five years no one was held accountable for his passing. Then in 2003, Mr. Brent Miller was held and charged with a murder and as a consequence of him being held, he gave the police a statement on the 7th July 2003 relative to the Movie Towne murder and for that information he was told by the police that he would be granted immunity once the facts panned out. It was "under the shroud of immunity" that Mr. Brent Miller gave the cautioned statement which is the subject matter of this inquest. Furthermore, it is submitted that at the material time that Mr. Brent Miller gave said cautioned statement to the police; Mr. Brent Miller was in police protective custody. This it is submitted, are facts which "reek of reasonable doubt" as to whether there is sufficient evidence to charge Mr. Brent Miller and by extension Mr. Yasin Abu Bakr of any indictable offence.

Counsel for Mr. Brent Miller has also asked this Court to have regard to the finding of Mr. Justice Ibrahim who in a trial at the assizes, found that the one and same Mr. Brent Miller was a manifestly unreliable witness and the matter was accordingly dismissed.

Another point which was canvassed was the fact that the information coming from the cautioned statement in this inquest is that Glen took a knife and started to cut Israel Sammy's finger but Dr. Chandulal having examined the extremities of the deceased man did not indicate as much in the post mortem report which was prepared under his hand. Indeed it states that damages to the extremities were nil. This it is submitted, is a material point upon which the cautioned statement differs from information coming from other sources.

Then Counsel urged the Court to look at the fact that what happened in the house is not meted out by the material contained in the cautioned statement. Central to this point is the person who opened the door to the house. The evidence coming from the occupants of the house was that Israel Sammy opened the door to the house. The cautioned statement however lists a lady as opening the door to the house. Other divergences with the cautioned statement and the evidence from the occupants in the house relate to issues such as who were in the living room as opposed to the kitchen, the location of the various occupants of the house on the morning in question and finally which if any of the occupants were asleep when the masked men entered the house.

Upon consideration of these submissions I find that they are matters which do not render the evidence in this matter so inherently weak, vague or inconsistent with other evidence, that it would not be safe for a jury to come to a verdict. On the contrary they are matters which depend upon the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of a jury.

B. THE PROSECUTORIAL DISCRETION AND MY FINDINGS

The question of whether the prosecutorial discretion may be exercised in favor of presenting an indictment and bringing the matter before a jury are entirely outside the ambit of a Coroner's function at Inquest proceedings. This means that the two tests which are applied by prosecutors in deciding whether to initiate a prosecution i.e. the evidentiary test as well as the public interest test are irrelevant matters for a Coroner. I say this because it came out during the course of this Inquest that the then Director of Public Prosecutions (DPP), now Mr. Justice Geoffrey Henderson, was approached for instructions in this matter and he advised the police that they should not institute criminal proceedings. Indeed Counsel for Mr. Brent Miller suggests that it was a judicial mind that considered the evidence and said that there was not enough evidence to charge so that to go further at this stage would be an abuse of process in light of the reasonable expectation Mr. Brent Miller had from such a conclusion by the then DPP.

Applying the law to this situation, I conclude that any considerations relating to the exercise of the prosecutorial discretion are entirely irrelevant in so far as my obligation under section 28 of the Act is concerned.

I find support for this position in the case of **R (Stanley) v. HM Coroner for Inner North London ; and PC Fagan and Insp. Sharman (as interested parties) 2003 1 Inquest LR 38.** In this case evidence was led about the decision of the CPS not to prosecute police officers who were responsible for the killing of a person. In dealing with this issue, the Administrative Court had this to say:

"…any view of the CPS about a possible prosecution before an inquest is held must be regarded as a provisional view and it should have been described as such at the inquest. Indeed, a verdict of unlawful killing at the inquest would mean that a prosecution would then be brought. Lord Bingham CJ explained the effect of a jury's verdict of unlawful killing, implicating a person who is clearly identified, who is living and whose whereabouts are known, is that 'the ordinary expectation would naturally be that a prosecution would follow' - R v Director of Public Prosecutions ex p Manning and Melbourne [2001] QB 230 , para 33.

32. A similar approach was advocated more recently in R (Rupert and Sheila Sylvester) v Director of Public Prosecutions (21 May 2001) by the Divisional Court, when Lord Woolf CJ specifically adjourned a hearing of a judicial review application of a decision by the Director of Public Prosecutions not to prosecute a police officer for causing a death until after the conclusion of the inquest into the deceased's death. He explained that there were a number of reasons for this decision of which one of relevance to the present application was that: 'Secondly, it would enable the matter to be reconsidered by the Director of Public Prosecutions after the conclusion of the inquest when he will have had an opportunity to take into account what occurred during the inquest'."

Informing my mind of these principles, I turn now to the matter of my obligation under section 28 of the Act.

Section 4 of the Offences Against The Persons Act Chap. 11:08 states that every person convicted of murder shall suffer death.

From a perusal of the evidence which came out during the course of this Inquest there was an out-of-court admission which was made by Mr. Brent Miller in which he confessed to participating in a joint enterprise to murder Israel Sammy. This evidence is admissible against Mr. Brent Miller as it is a declaration against his self interest. In other words, it is a confession hence it is admissible evidence as an exception to the hearsay rule. This out-of-court admission also implicates Mr. Yasin Abu Bakr in the killing of Israel Sammy and I have previously found that it is evidence which is capable of being admissible against Mr. Yasin Abu Bakr as well. This said it stands to reason that I am satisfied beyond reasonable doubt that there is sufficient evidence before this Coroner linking both Mr. Brent Miller and Mr. Yasin Abu Bakr to the commission of the indictable offence of murder.

Accordingly, I make the finding pursuant to section 28 of the Act that sufficient grounds are disclosed for making a charge on indictment against Mr. Brent Miller and Mr. Yasin Abu Bakr for the common law offence of murder and I hereby issue warrants for the apprehension of said Mr. Brent Miller and Mr. Yasin Abu Bakr for the common law offence of murder.

PART 4

CONCLUDING REMARKS

Finally, I wish to place on record my thanks to my court staff, Corporal Gonzales, Corporal Levine and now retired Corporal Samuel for their assistance in this inquest. I also take this opportunity to thank Mrs. Elder, Mr. Williams and Mr. Mason for their invaluable contributions to this inquest.

All manner of persons who have had anything to do at this court before the Coroner for this County touching the death of Israel Sammy, having discharged your duty may depart hence.

I now declare this inquest closed.

…….

Her Worship Ms. Nalini Singh
St. George West County Coroner.