
CANADA / JUDGMENT

R. v. Skiffington

2004 BCCA 291

COURT

British Columbia Court of Appeal

DECIDED

26 May 2004

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2004 BCCA 291 R. v. Skiffington

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Skiffington,

2004 BCCA 291

Date: 20040526

Docket: CA29221

Between:

Regina

Respondent

And

William Wade Skiffington

Appellant

BAN ON PUBLICATION

OF INFORMATION TENDING TO IDENTIFY THE UNDERCOVER OFFICERS, THEIR
CONVERSATIONS WITH THE APPELLANT AND SPECIFICS OF THE UNDERCOVER SCENARIOS
USED IN THIS INVESTIGATION

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

J.R. Ray

R.J. Browning

Counsel for the Appellant

J.M.I. Duncan

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

April 20, 2004

Place and Date of Judgment:

Vancouver, British Columbia

May 26, 2004

Written Reasons by:

The Honourable Chief Justice Finch

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

- [1] William Wade Skiffington appeals his conviction on 21 October 2001 of the second degree murder of Wanda Martin on 6 September 1994, following a trial by judge and jury. The appellant seeks a new trial, alleging three errors in the trial judge's charge to the jury. First, he says the judge erred in his charge on how to use the evidence to find facts, a so-called "Miller error": see *R. v. Miller* (1991), 68 C.C.C. (3d) 517, 5 O.R. (3d) 678 (C.A.) [Miller cited to C.C.C.]. Second, the appellant says the judge erred in failing to instruct the jury properly on the exculpatory parts of the appellant's out-of-court statements. Third, the appellant says the trial judge erred in failing to warn the jury about the unreliability of the appellant's confession to undercover police officers, a so-called "Hodgson warning": see *R. v. Hodgson*, [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449 [Hodgson].
- [2] For the reasons that follow, I have concluded that the learned trial judge's instructions were adequate in all three respects and that there is no risk that a miscarriage of justice occurred. The appellant's appeal therefore should be dismissed.

II. THE CROWN'S CASE

- [3] The appellant and the victim, Wanda Martin, were common-law partners. In 1994 they had an 18 month old son, Ian. They moved to British Columbia from Newfoundland in the summer of 1994. The appellant found employment as a home carpet cleaner for a department store. He drove a white van, marked with his employer's logo, to go from customer to customer.
- [4] On 6 September 1994 the appellant drove Ms. Martin and Ian to the apartment of her friend, Gail Jordan, in Richmond. He dropped Ms. Martin and Ian off, and left to service his customer list for that day. In the afternoon, Ms. Jordan left her apartment for about 45 minutes. When she returned, she found Wanda Martin shot dead. The infant, Ian, was alone in the apartment, unharmed.
- [5] There was no forensic evidence of any kind to link the appellant to Ms. Jordan's apartment, or to Ms. Martin's death. The murder weapon was never found.
- [6] The police interviewed the appellant on multiple occasions shortly after the murder, including a conversation during a period of time the appellant spent in custody in the Richmond R.C.M.P. cells with an undercover officer. The appellant gave exculpatory statements during each of these initial interviews.
- [7] The Crown had evidence from Ms. Jordan, and others, which narrowed the time of Ms. Martin's death to a period between 2:00 p.m. and 2:45 p.m. The Crown also had evidence from the customers the appellant had serviced on 6 September 1994, and from which one might infer a short window of opportunity for the appellant to have committed the crime between customer calls while Ms. Martin and Ian were alone in Ms. Jordan's apartment.
- [8] However, it is clear that at the conclusion of the initial police investigation in Richmond there was insufficient evidence to support a charge against the appellant, and none was laid. Much of the evidence developed to this point was contradictory and inconsistent, and might well have given rise to a reasonable doubt that the appellant perpetrated the crime.
- [9] The appellant returned to Newfoundland with his son Ian sometime after the initial police investigation concluded. However, he remained a suspect in the eyes of the police.
- [10] In the fall of 1999, the police commenced a sophisticated undercover operation in Newfoundland, and elsewhere, with a view to obtaining a confession from the appellant. The police plan involved a number of undercover officers playing roles as members of a criminal organization which offered the appellant well paid employment on the condition that the crime boss, B.A., another undercover police officer, could be satisfied of the appellant's honesty and trustworthiness. In this context, the appellant was persuaded to confess to B.A. that he murdered Ms. Martin. The appellant's confession to B.A. was tape recorded, and the jury heard the tape recording and had a transcript of the conversation.

- [11] The tape recorded conversation was the foundation of the Crown's case against the appellant, and it is clear that without the appellant's confession the charge could not be made out.
- [12] The appellant did not testify, and the defence called no evidence. Defence counsel in his submission to the jury focused on the unreliability of the appellant's confession, as having been induced by promises of wealth, and by fear of consequences of not telling B.A. what he believed to be the truth, namely that the appellant had killed his wife.
- [13] The appellant's third ground of appeal is that the judge failed to warn the jury of the confession's unreliability, given, as it was, to a person in an apparent position of power and authority over the appellant, and in response to inducements and intimidation.

III. DISCUSSION

A. The charge on finding facts from the evidence

(the Miller error)

- [14] The appellant takes issue with this passage early in the trial judge's charge to the jury:
- [6] What is the difference between evidence and fact? Evidence is the total body of things which you heard or which were filed as exhibits and will be available to you in your deliberations. The facts are the things which you chose (sic) to believe from that evidence. And from the facts which you find or accept you may draw inferences with respect to other facts. And you may rely upon these inferences in determining whether the accused is guilty or not guilty.
- [15] The appellant says this instruction was erroneous because it directs the jury to engage in a two step process: first, to sort the evidence into that which the jury accepts, and that which it rejects; and second, to base the verdict only upon that evidence which has been accepted.
- [16] The appellant says this instruction effectively directs the jury to ignore evidence which is neither accepted nor rejected, and limits their consideration of the evidence to only that evidence which the jury accepts as true. This is said to eliminate the possibility that different members of the jury might believe or disbelieve different parts of the evidence in reaching the same conclusion, and to deprive the jury of the opportunity to base its decision on evidence which is neither accepted nor rejected, but which may nevertheless still give rise to a reasonable doubt as to the appellant's guilt.
- [17] The Crown says this part of the charge was not erroneous, and is distinguishable from the offending charge in *Miller*, supra, and other similar cases: *R. v. R.H.B.* (2001), 159 C.C.C. (3d) 215, 2001 BCCA 533; *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 393; *R. v. Chan* (1989), 52 C.C.C. (3d) 184, 100 A.R. 133 (C.A.); and *R. v. Plewes* (2000), 144 C.C.C. (3d) 426, 2000 BCCA 278 [Plewes].
- [18] The erroneous passage of the charge in *Miller*, supra was this:

Now to this point, ladies and gentlemen, in describing your function I have referred to "evidence" and I have referred to "finding of fact", and they are two different things. Let me try to explain the difference to you.

If you imagine the evidence you have heard as a big pile, what you have to do now is you have to look at the pile and go through the pile and determine what parts of that pile you accept as true and reliable, and you must then remove from the larger pile that part of it which you accept as true and reliable. That second pile becomes the facts or the source from which you make your judgment as to what the facts of the case are. So, evidence is what you have heard, the exhibits that have been received, and the admissions. Facts are the conclusions you draw from the evidence you accept. So, the first process you go through is to take this big pile of evidence, and out of it to sort the evidence that you accept, and then from that smaller pile to make your findings of fact. There are no facts in this case until you decide that something is a fact. To this point in the trial we have only evidence, not facts.

If you reject evidence, that means it is simply excluded from your consideration, and you proceed to make findings of fact based on the evidence you accept.

[19] With respect to this instruction, the Ontario of Court of Appeal said at 543:

In the present case, the impugned direction did not instruct the jury to apply proof beyond a reasonable doubt in two stages. In our opinion, however, it was a misdirection to instruct the jury to examine the evidence in a first stage, to eliminate all evidence except that which the jurors accepted as true and reliable (a lower standard than proof beyond a reasonable doubt), and then to consider only the residual in arriving at their verdict. This involved the injection of artificial rules for the jury and constituted "an intrusion into the province of the jury". We believe it is wrong and prejudicial to confine the jury, in their initial findings of fact, to evidence accepted as true and reliable; evidence which is neither rejected nor accepted should survive to the final stage of the jury's determination on the crucial application of reasonable doubt.

[20] The court held that the misdirection could not be cured by reading the charge as whole, and it allowed the appeal and ordered a new trial.

[21] In *Plewes*, supra, the trial judge instructed the jury as follows:

You may be troubled by the difference between what is evidence and what is fact. Evidence is the body of testimony, including the exhibits that are filed. Facts are the things that you choose to believe from the evidence. The things that you choose not to accept must not be taken into account when arriving at your verdict. From the facts that you find you may draw inferences with respect to other facts, and you may rely upon those inferences in determining whether the accused is guilty or not guilty.

[Emphasis added on appeal]

- [22] This too was held to constitute reversible error. Esson J.A., at ¶22, pointed to the underlined sentence as erroneous, but described the paragraph as "otherwise unexceptional". The charge at issue in the present case closely resembles that "otherwise unexceptional" paragraph.
- [23] In my view, the trial judge did not fall into the error made in cases such as Miller and Plewes. In those cases the judge expressly instructed the jury to eliminate from their consideration all evidence except that which they accepted as true. The impugned charge in this case does not bear any such exclusory instruction. The inference which the appellant submits the jury might have drawn from the judge's charge is so subtle as to be practically non-existent.
- [24] Moreover, this jury was told repeatedly to consider all the evidence before reaching a verdict, and to give the appellant the benefit of any reasonable doubt arising on the whole of the evidence.
- [25] I am therefore of the view that this instruction could not have misled the jury in the way the appellant suggests, and I would not give effect to this ground of appeal.

B. The instruction on the exculpatory part of the appellant's out-of-court statements

- [26] Before finally making his confession to B.A., the appellant made a number of exculpatory statements to the police (including an undercover officer in the Richmond cells) in the early stages of their investigation. He also made many further exculpatory statements in 1999 and 2000 to various members of the undercover team, including B.A.
- [27] The appellant does not take issue with the trial judge's instruction concerning the use of the appellant's inculpatory out-of-court statements. That instruction was that the Crown must prove beyond a reasonable doubt that the appellant made the statement, and that the statement was true.
- [28] The appellant says, however, that the trial judge failed to give the jury any instruction concerning the use they could make of his exculpatory out-of-court statements. The appellant says the trial judge's charge was misleading because he did not distinguish between inculpatory and exculpatory statements. The appellant relies on *R. v. Harrison*, (2001), 156 C.C.C. (3d) 117, 2001 BCCA 272 ¶43-44, leave to appeal refused [2001] S.C.C.A. No. 321, and says the trial judge should have told the jury that an exculpatory out-of-court statement is evidence in favour of the appellant, and may give rise to a reasonable doubt, whether the jury believes that statement to be true or not.

- [29] The appellant says that where the focus of the evidence is out-of-court statements to an undercover operator, the judge must direct the jury both as to the inculpatory and exculpatory statements. The appellant says further the judge must instruct the jury on the differing principles which apply to inculpatory and exculpatory statements. The appellant says the proper and complete instruction was not given in this case and that that constitutes reversible error.
- [30] The respondent says that the jury was adequately instructed on the appellant's out-of-court statements, and the uses to which the jury could put them. The Crown points out that before the evidence was concluded, the trial judge raised with counsel the question of how to deal with the appellant's statements. Defence counsel focused on the confession, agreed there was no issue about whether the appellant had made inculpatory statements, and said the only real issue in the case was whether the appellant's confession was true. There was a similar discussion before defence counsel completed his submissions, and a further discussion post-charge when defence counsel took no issue with the trial judge's treatment of the out-of-court statements.
- [31] The trial judge's charge included this:
- [81] Then, there are the words of Mr. Skiffington, the out-of-court statements of Mr. Skiffington, to the various undercover agents. That is where I am about to turn to. You recall that Constable G., I forget the ranks of these constables, but G., K., D. and Sergeant H. all made notes of what was said to them - I'm not sure about Sergeant H. - that were made by them of events or occurrences during the meetings with Mr. Skiffington.
- [82] I want to give you a special instruction relating to you what they say Mr. Skiffington said to them. I want to give you a special instruction on statements made by an accused out of court. First, you must decide whether the accused made the statements that these witnesses say he did, and that were introduced by them into evidence in this case. You cannot consider the statements unless you are satisfied beyond a reasonable doubt on the totality of the evidence that the accused did make the statements as reported to you. If you have a reasonable doubt that the accused made these statements, as reported to you by D., G., K., then you must ignore everything in the statements. If you have a reasonable doubt that any part of the statements were made by the accused, then you must reject that part. On the other hand, if you are satisfied beyond a reasonable doubt on the whole of the evidence, that the accused did make these statements or part of the statements, then you must go on and decide whether they are true.
- [83] To determine whether or not the alleged statements are true, you must consider all of the evidence. Consider whether there is any evidence that appears to confirm or support the statements made by the accused. Is there any evidence that appears to contradict the statements made by the accused. Consider the condition of the accused at the time he is said to have made these statements. If the accused was suffering from any mental disability or was under the influence of alcohol or drugs at the time he made the statements, you would

of course take that into account to determine the weight you'll give to them.

- [84] You will recall that I told you earlier that you do not have to accept or reject everything the witness says. The same thing applies to the statements made by the accused. You may believe all of them, part of them, or none of them. But keep in mind that the accused is entitled to the benefit of any reasonable doubt you may have, including a reasonable doubt about the truth of these statements or any part of them.
- [85] Although I told you that as a matter of law, the requirement for proof beyond a reasonable doubt does not apply to each individual issue or each individual item of evidence placed before you, I tell you now, that in the circumstances of this particular case, unless at the end of the day, having considered all of the evidence, you are convinced beyond a reasonable doubt that the accused made the statements and that he was telling the truth in the statement, or in part of the statement, you can not convict the accused. You must find him not guilty. So if you're not satisfied beyond a reasonable doubt that he was telling the truth in the confession to Sergeant H., then you must find him not guilty.
- [86] But you should examine all of the other evidence, and I want to emphasize, that it is up to you to decide how much weight or importance to give to it, to the statement, any part of it. It is for you to decide, you and you alone, that the statements that he made were true and if that they are true. So examine all of the evidence in the case and then look for evidence that supports or confirms the statements, or parts of the statements, or undermines, weakens, or destroys any of the statements. What you should look for is evidence that agrees with the important parts of his statements to the undercover officers that have been introduced into this trial. Evidence which makes you more confident that his alleged statement or portion of statements are true, is what you're looking for. And in order to do this properly, you must listen and view the tapes that have been marked. And do so carefully.
- [32] Given defence counsel's position at trial on the central importance of the appellant's confession, I do not consider that the trial judge's failure to comment specifically on the appellant's exculpatory statements was non-direction amounting to mis-direction. As noted above, the jury was told repeatedly that they were to base their verdict on the whole of the evidence, and that the appellant must have the benefit of any reasonable doubt arising on the whole of the evidence.
- [33] I would not give effect to this ground of appeal.

C. The trial judge's failure to warn the jury about the unreliability of the appellant's confession (the Hodgson warning)

- [34] The appellant's confession was obtained in his discussion with B.A. on 8 February 2000 at the culmination of the R.C.M.P. undercover operation in which several police officers played roles of criminal gang members, and B.A. was the boss of the organization. The sophisticated and elaborate scenarios set up by the police portrayed B.A. as a person of great power and authority, the opportunity of membership in the gang for the appellant as one

holding the promise of great financial gain, and the appellant's membership in the gang as being dependent upon his absolute truthfulness with B.A. By the time of the confession, various gang members, and B.A. himself, repeatedly had told the appellant that they believed he had killed his wife, and that unless he was frank with B.A. about that, he would be unacceptable as a member because he could not be trusted, and neither he nor others could be protected from further police investigation.

[35] The appellant says these circumstances made the confession inherently unreliable, and that it was incumbent upon the trial judge to warn the jury of that unreliability, even though the crime boss was not a "person in authority" in the conventional sense.

[36] The pressure on the appellant, by inducement and intimidation, to tell B.A. the story he wanted to hear is well captured in this passage from the closing address of defence counsel to the jury:

I mean he's got two choices. There's a fork in the road and here's the two choices. Think about this. He can say, "I killed her," or he can say, "I didn't kill her." That's the only two choices he has. He tried a third choice, he tried to say, "Well, I hired a hit man," but no way, that one didn't work. So he's got two choices. He can say, "I did it", he can say, "I didn't do it."

Now, if he says, "I did it," what's going to happen? The analogy I'm going to draw here, you may recall the game show Let's Make a Deal, and you had curtain number one and curtain number two. Well, behind curtain number one, when you say, "I did it," we've got some wonderful gifts here. You can get a new home, you can get a new car, you can get \$50,000 in cash. You'll have enough money to retire to your villa in France, and as an extra special bonus, behind curtain number one, you'll never be, ever be convicted of this offence. And as an extra extra special bonus behind curtain number one, W. won't blow your brains out. Curtain number one's a pretty good prize package.

Or you can persist in saying you didn't do it, and then you get curtain number two. Well, what's behind curtain number two? Not very much, there's no home, no car, no \$50,000, a life of poverty, and there's W. standing there with the gun, ready to blow your brains out. Because that's what you get behind curtain number two because behind curtain number two is where the liars go. B.A. thinks you're a liar, you get curtain number two, you get W. blowing your brains out. Because behind curtain number two, B.A. thinks you're a liar, W. also thinks you're a liar, and plus you've embarrassed W. because W. vouched for you to B.A. and now it turns out you're not solid so he'll be more than happy to blow your brains out, but, of course, K. will be willing to do it too because he vouched for you to B.A. so he's been made to look a fool in front of B.A. because he said you were solid, when you weren't. And that's the fork in the road for this target. That's the decision that's facing Mr. Skiffington in this completely fictitious world that the police have created because all of this is a big lie. They've created - the police have created all of this and in this completely fictitious world, at this moment in time, that was the decision facing this target. Curtain number one, new home, new car, \$50,000, as much money as you ever wanted, never have to worry about this trial, where he could be convicted in the next couple of days, or curtain

number two, W. blowing your brains out. Now, tell me, Mr. Skiffington, which curtain would you like? What's your choice? It's Let's Make a Deal. Would you like the prize package behind curtain number one, or the prize package behind curtain number two? And what's the down side? What is the down side to Mr. Skiffington saying, "I killed her"? None, absolutely none because B.A. has given his word it will stay in this room. The police aren't going to ever find out about it, and even if they do find out about it, "Don't worry, I'll fix the trial." So there's absolutely no down side, and there's a tremendous up side. And he took curtain number one. He said the magic words.

- [37] Counsel for the appellant does not submit that the appellant's confession should not have been admitted into evidence. Counsel contends, however, that given the pressure of the inducements under which the appellant made his inculpatory statements, they were inherently unreliable, and that it was incumbent upon the trial judge to caution the jury in clear and strong terms about the dangers of placing any significant weight on the statement.
- [38] The appellant says that an instruction along the lines of that suggested in *Hodgson*, supra, should have been given. In that case Mr. Justice Cory discussed the "person in authority" requirement as one element of the legal test for excluding confessions induced by promises. At ¶29-30 he said:
- [29] The confessions rule, including the burden on the Crown to prove voluntariness beyond a reasonable doubt, is carefully calibrated to ensure that the coercive power of the state is held in check and to preserve the principle against self-incrimination. The elimination of the person in authority requirement would represent a fundamental change to the confessions rule, and a significant change to the common law which could bring about complex and unforeseeable consequences for the administration of justice. This change involves the recognition of a new concept. It does not, as in other cases, simply involve the interpretation of an amendment to a statute, such as the Criminal Code. The unfairness of admitting statements coerced by private individuals should be recognized. However, it is the sort of change which should be studied by Parliament and remedied by enactment. See [citations omitted]. Because of the very real possibility of a resulting miscarriage of justice and the fundamental unfairness of admitting statements coerced by the violence of private individuals, I would hope that the study will not be long postponed.
- [30] In the meantime I would suggest that in circumstances where a statement of the accused is obtained by a person who is not a person in authority by means of degrading treatment such as violence or threats of violence, a clear direction should be given to the jury as to the dangers of relying upon it. The direction might include words such as these: "A statement obtained as a result of inhuman or degrading treatment or the use of violence or threats of violence may not be the manifestation of the exercise of a free will to confess. Rather, it may result solely from the oppressive treatment or fear of such treatment. If it does, the statement may very well be either unreliable or untrue. Therefore if you conclude that the statement was obtained by such oppression very little if any weight should be attached to it." However, if a private individual resorts to violence or threatens violence after the statement has been made, this conduct will not as a general rule be a factor affecting the voluntariness

of the statement and the suggested direction will not be needed.

- [39] Hodgson is authority on the admissibility of statements made to persons in authority, or apparent authority. However, the passages quoted above are persuasive obiter dicta on the advisability of warning about the reliability or otherwise of an admitted statement made to someone other than a "conventional" person in authority.
- [40] The need for such a warning was considered by this court in *R. v. Carter* (2001), 157 C.C.C. (3d) 165, 2001 BCCA 407 ¶54-60 [Carter], and in *R. v. Forknall* (2003), 172 C.C.C. (3d) 61, 2003 BCCA 43 ¶33-39, leave to appeal refused [2003] S.C.C.A. No. 466. This court held that in the particular circumstances of those two cases, a warning from the judge was not necessary.
- [41] In *Carter*, supra ¶59-60, Ryan J.A. assessed the need for a Hodgson warning according to its purpose. She said:
- [59] The purpose of the Hodgson warning is to bring home to a jury that a confession obtained under oppressive or fearful circumstances may not be reliable and must be scrutinized with care. Self-preservation is a natural human instinct that may lead a person to confess to something he or she did not do simply to bring an end to the misery of the situation.
- [60] In this case, the defence forcefully asserted to the jury that the statement made by Brian Carter to the undercover police officer was both unreliable and untrue. Not only did the appellant testify that he was frightened by the undercover officer and told him what he thought he wanted to hear, but a psychiatrist testified that Carter was anxious and susceptible to pressure. The trial judge made several references to the theory of the defence that the statement was seriously flawed because it was obtained in an atmosphere of intimidation and fear. The effect of all of this was to bring home to the members of the jury that their task was to examine the statement and the circumstances of its making before they could rely upon it to convict. I am of the view that no further warning was necessary. I would dismiss this ground of appeal.
- [42] I am similarly of the view in this case that it was not necessary for the trial judge to provide a Hodgson warning to the jury about the reliability of the appellant's confession to the undercover police officers. Although the appellant did not testify or call evidence as did the appellant in *Carter*, supra, the whole thrust of the defence in this case was that the confession was inherently unreliable. Defence counsel emphasized the reasons the appellant had to lie to B.A., his repeated denials of responsibility both in 1994 and subsequently, his financial difficulties, the attraction of easy money, the importance of his being trusted by B.A., and the need to admit the murder to him in order to gain his trust.
- [43] The transcript of defence counsel's closing submissions shows that about 80% of it was devoted to discrediting the appellant's confession. That part of counsel's address concluded in this way:

So you've got a person who has a history of lying. Then you've got lies in the confession, and inaccuracies and inconsistencies, and then you've got all the reason in the world to lie in the confession. Well, when you give a liar all the reasons in the world to lie, what do you think you get? They knew he was a liar, they'd been having problems with him all the way along, lying, and then they dangled in front of him all these incredible inducements. What do you expect? I mean, really, what do you expect when you give a guy with a history of lying every reason in the world to lie? He would have been a complete fool not to have lied. He should risk his life that W's going to blow his brains out? He should give up \$50,000, the house, the home, all that stuff, just give it all up? He would have been a fool not to do what he did.

So that's it for the confession. I spent a lot of time on that because it's really, when it comes right down to it, the entire Crown case. That's all they've got, is the confession.

[44] The learned trial judge extensively reviewed defence counsel's submissions on the unreliability of the confession (see ¶140-160 of the charge). Defence counsel made no submission on the need for an independent warning from the trial judge either before or after the charge to the jury.

[45] I am satisfied that the jury must have had clearly in mind the central role of the appellant's confession in the Crown's case, the many reasons why the confession might not be a truthful statement, and hence the danger of basing a conviction upon it. In my view, any further instruction from the judge would have been superfluous.

[46] I would not give effect to this ground of appeal.

IV. DISPOSITION

[47] I would dismiss the appeal.

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Mr. Justice Donald"

I Agree:

"The Honourable Madam Justice Saunders"

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