[2012] UKPC 37
Privy Council Appeal No 0051 of 2011

JUDGMENT

Carlos Hamilton and Jason Lewis (Appellants) *v* The Queen (Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Kerr
Lord Dyson
Lord Reed
Sir Anthony Hooper

JUDGMENT DELIVERED BY

SIR ANTHONY HOOPER

ON

25 October 2012

Heard on 17-18 July 2012

Appellant	*Respondent*
Edward Fitzgerald QC Richard Samuel	Tom Poole
(Instructed by Herbert Smith LLP)	(Instructed by Charles Russell LLP)

SIR ANTHONY HOOPER:

Introduction

1. On 2 April 2001 the appellants were found guilty in the Home Circuit Court, before Reckord J and a jury, of the murder of Saleem Hines, aged 21. On the same day they were sentenced to life imprisonment and ordered to serve 25 years before being eligible for parole.

2. On 24 March 2003 the Court of Appeal (Downer, Bingham and Panton JJA) refused the appellants' application for permission to appeal against their convictions and sentences. The Court made an order to the effect that the 25 year period was to start on 2 July 2001, thus adding three months to the original term.

3. Permission to appeal was sought long out of time, but the Board was persuaded that there was sufficient merit in the grounds of appeal to justify referring the appellants' case to a full hearing: *Hamilton and Lewis v The Queen* [2012] UKPC 31, [2012] 1 WLR 2875, para 20. The judgment that follows deals with the merits of the appeal. It should be noted that the grounds of appeal on which the Board gave permission were not grounds upon which reliance was placed by the unrepresented appellants when appealing to the Court of Appeal.

The facts

4. At about 6.30-7.15am on Wednesday 4 February 1998 Saleem Hines was chopped to death with a machete at or very near his home in the Cottage Hill District, Kingston, Jamaica, a home which, at the time of his death, he shared with his mother, Elaine Hines ("Elaine"), his father and his three brothers, one of whom was 13 year old, Manase Hines ("Manase"). Saleem had been away from the home for some time and had returned the previous Monday.

5. Saleem Hines suffered nine chop wounds from the machete and he was found to have suffered three defensive wounds.

6. The appellants, Carlos Hamilton ("Hamilton") and Jason Lewis ("Lewis"), lived together in a property very close by to the home of Saleem and his family.

7. On the evening of the killing Hamilton went to the local police station. He told the police officer: "A defend me a defend myself. Mi never mean fi kill him". After caution Hamilton said: "Mi nuh chop nobody, boss". He also said that only he and the deceased were present at the time. At the trial, through an unsworn statement, Hamilton again said that he had acted in self-defence and was alone at the time.

8. Lewis was arrested at about 10.00am on the morning of the attack and denied chopping anyone. Lewis gave evidence at the trial to the effect that he had left for work at about 6.15 am, walked down the hill to the main road to a bus stop. Whilst waiting there members of the Hines family and friends approached him and accused him and Hamilton of killing the deceased.

9. The prosecution's case linking the appellants to the killing depended upon the evidence of Manase Hines and Elaine Hines, evidence which the jury must have accepted in large part or in whole.

10. Manase knew both Hamilton and Lewis, seeing them every day.

11. Manase, aged 16 at the time of the trial, gave the following evidence in chief. On the morning of the killing he woke up at about 5.50am and started getting ready to go to school. As he was doing so, one of his brothers came to him and informed him of something which caused him to go outside. He went a short way to a bank or "banking" beside the road (later described as a track) which ran by the side of his house. From where he was standing he looked down into the road. He saw three men there chopping up his brother Saleem with machetes. Saleem was lying on the ground in the gutter with nothing in his hands. Of the three men present, Manase recognised two of them as Hamilton and Lewis. He was unable to identify the third man because he was wearing a hood over his head. All three were using a machete. When he arrived on the scene the third man was running away from Saleem's body with a machete in his hand. Manase said he was about 20 feet away from Hamilton and Lewis. He could see Hamilton's face and whole body un-obscured for 30 seconds. He could see Lewis' face and body un-obscured for 15 seconds. At the time it was "morning like". He later said that it was "kindah dark, but not really dark". Manase described going back to the house, speaking to his mother, his mother leaving the house to see what was happening and he fainting. He did not follow his mother back to the scene. Later that day he spoke to a police officer, Detective Sergeant McLeish ("McLeish"), at the police station and made a statement.

12. In cross-examination, counsel on behalf of Hamilton put it to Manase that he had not seen anybody chopping up Saleem, to which Manase said that he had. It was put to him that when he saw Saleem, he had already been chopped. Manase did not accept that. It was put to Manase in cross-examination that he had said to his mother

on returning to the house, "mommy mommy, dem chop up Saleem and kill Saleem" and he had agreed. It appears that this evidence was to be found in his police statement (a copy of which we do not have). A number of alleged inconsistencies were put to Manase. These were inconsistencies between what he had said in examination in chief compared to what he had said in his statement to the police on the day of the killing, what he had said in his deposition taken on 25 April 2009 and what he had said at an earlier trial before the Chief Justice, which for some reason had been stopped before it had come to an end. The appellants rely on a number of what are said to be key inconsistencies. In his deposition Manase had said that he did not see the third man with a machete. In his police statement and at the previous trial, he had said that, after speaking to his mother, he had gone back to the scene a second time with his mother and that the attackers had by then gone. In re-examination (following his later recall which occurred because of confusion as to what he had said at the earlier trial) he said that he had fainted and had not gone back out to the road with his mother. There was also confusion about what he had said to his mother and when.

13. Elaine gave evidence in chief to the following effect. She described seeing Manase run out of the yard, returning and he speaking to her. She then “run and bawl for murder”, went outside the yard to a banking and saw a chopped up and bloody Saleem lying down in the gutter. She said that he did not have a weapon. She saw Hamilton and Lewis, both of whom she knew well. She saw Hamilton raising what she described as a cutlass from Saleem’s body. Hamilton and Lewis left the scene and Hamilton threw something away, but she could not say what it was. She described a next door neighbour coming to the scene. She made a statement to the police some two days later. In cross-examination Elaine described running through her gate on to the road/track and seeing Saleem, Hamilton and Lewis “at the gutter at the banking”. It was put to her that in her deposition she had said that she had run “outside the gate behind Manase”. She said at first that she did not know whether she had run behind him or not. Later she said that she ran out behind Manase. It was put to her that she had not seen Hamilton and Lewis at the scene and she said that she had. She denied that there was a rubber handled machete in the house. It was put to her that Hamilton had complained to her about Saleem’s violence towards Hamilton and that Saleem bullied younger persons. Elaine did not accept that. Inconsistencies in the timing were put to her.

14. If the evidence of Manase and Elaine that both appellants were at the scene of the killing was accurate and reliable then it completely undermined both Hamilton’s unsworn account that he was acting alone in self defence and the evidence of Lewis that he was not at the scene. Given that Hamilton and Lewis were long time neighbours of Elaine and her family, this could not realistically be a case of mistaken identity.

15. McLeish was the investigating officer. On 4 February 1998 at about 7.30am he received an anonymous telephone report, as a result of which he proceeded to Cottage

Hill. When he arrived at about 8am he found a crowd of approximately 25 people including children gathered on the dirt track. He also found a pool of blood. He stated that he did not make a note of any potential witnesses and that no one was willing to come forward. McLeish stated that he overheard from the gathered crowd that there had been an argument between Hamilton and the deceased about a rubber handled machete. In cross-examination Detective McLeish initially denied he searched for a rubber handled machete during the course of his investigations. He further stated that he did not receive any information about such a machete on the footpath in Cottage Hill. However after being shown a statement taken from him on the day of the incident, McLeish confirmed that he had indeed received information about a machete left where the pool of blood had collected.

16. After speaking with some of the gathered people McLeish made his way to the University Hospital in Mona, where he saw the body of Saleem. McLeish said that he immediately returned to Gordon Town and spoke to Saleem's mother, father, brothers and sisters. McLeish stated that in the course of his investigations he received information as to the involvement of a third person. However in his deposition he stated that he had received no report as to the involvement of a third person.

17. Mcleish was asked a number of questions by counsel for Hamilton seeking to stablish that Hamilton had said various things whilst at the police station after being cautioned, in addition to what we have set out in para 7 above. The judge, Reckord J, then ruled that what Hamilton had said to the officer was inadmissible as "self-serving" and "also hearsay". This ruling is the subject of one of the grounds of appeal and we return to it later.

18. We conveniently take the defence cases from the "Case for the Appellants", omitting the "references":

> "59. Mr Hamilton made an unsworn statement from the dock. He stated that at 6am on 4 February 1998 he was in his yard moulding a banana tree root with his cutlass. Saleem then appeared at his gate and started to walk towards him with a rubber handled machete. Saleem said to him 'I ketch yuh rass now, this time you alone.' Mr Hamilton believed that Saleem was coming to kill him. Mr Hamilton therefore attacked him first and started to chop him. Saleem fell from the banking and dropped onto the foot-track into a gutter with his rubber handled cutlass. When this happened Saleem and Mr Hamilton were by themselves. He did not see either Manase or Elaine.

60. Afterwards, Mr Hamilton ran to his mother's house and spoke with her. Later on in the evening he went to Gordon Town police station and spoke to Detective Mcleish. Mr Hamilton stated that Detective McLeish showed him a rubber handled machete and told him that he had taken it from Saleem. Mr Hamilton told Detective McLeish that he was defending himself and that Mr Lewis was not present.

61. Mr Hamilton told Detective McLeish that Saleem had been physically abusing him since he was 13 years old. He reported it to the police at that time. When Mr Hamilton was 14 years old Saleem attacked him again. Mr Hamilton complained about this to Elaine. On the evening of 3 February 1998 Mr Hamilton was at the yard of someone known as Fire Dread. When he was there Saleem threw a big stone at the back of his head which knocked him unconscious. Other people had to throw water over him to revive him.

62. Mr Wayne Knight ("Mr Knight") was called to give evidence on behalf of Mr Hamilton. He had lived in Cottage Hill since 1989 and had been friends with both Saleem and Mr Hamilton. He knew a man known as Fire Dread who had a shop on Cottage Hill Road. On the evening of 3 February 1998 he was watching the World Cup football match on the veranda of Fire Dread's shop with about 10 other people including Mr Hamilton.

63. At about 7pm Saleem arrived. He was carrying a large stone in his hand which was about eight inches in diameter. He threw the stone at Mr Hamilton from behind at very close range and it hit Mr Hamilton on the head. Mr Hamilton dropped to the ground and some of the others present helped to hold him up and threw water on his face to revive him. Saleem then began to act aggressively towards Mr Hamilton and said 'mi will kill you'. Saleem then fled the scene. Nobody gave chase because they were all scared of Saleem.

64. Mr Lewis gave sworn evidence in his defence. He said that he was an apprentice steel worker which is why he got the nickname 'Steelie'. In February 1998 he was living in Cottage Hill at Mr Hamilton's yard. He had lived there since the age of 17. He knew that Saleem had not been around and had not seen him since December 1997 [the evidence from Elaine was that Saleem had moved back a few days before the killing].

65. Mr Lewis said that on 4 February 1998 he left for work at around 6.15am. When he left Mr Hamilton was in bed. He walked down to the main road and arrived at the bus stop at about 6.45am. Whilst he was waiting for the bus he was approached by Patricia Donville, her boyfriend, Elaine Hines and her three brothers, Vaughn, Donnie and 'Ding Dong'.

66. Patricia's boyfriend and Vaughn threatened him with a cutlass and Mr Lewis was told that 'me and Carlos killed him bredda'. Mr Lewis replied that he did not know anything about it. He then went to the police station where he was told to wait for Detective McLeish. When Detective McLeish arrived he asked Mr Lewis whether he and Mr Hamilton had killed Saleem. Mr Lewis replied that he didn't know anything about it. He did not have anything to do with the death of Saleem. Manase and Elaine were either mistaken or lying.

67. Mr Lewis was not at Fire Dread's place watching the football the night before the incident in question. He saw Mr Hamilton when he returned home that night but they did not discuss the incident with Saleem."

19. We turn to the various grounds of appeal.

Provocation

20. It is submitted on behalf of Hamilton that the judge's direction on provocation was defective. The judge rightly left provocation to the jury. However he identified the potentially provocative conduct to be the incident at Fire Dread's shop the night before Saleem's death. Consistent with that approach he then directed the jury to ask themselves whether Hamilton had "sufficient cooling off time" between 7.30pm on the Tuesday evening, and 6.30am on the Wednesday morning. Reference was made to whether "the period was sufficiently long… for a reasonable person to cool down". Whilst that was a sufficient direction as to what had happened the night before, the judge failed, as Mr Fitzgerald QC rightly submitted, to indicate to the jury that the account given by Hamilton of Saleem's attack with a rubber-handled machete, on the morning of his death, was capable of supporting a conclusion that Hamilton lost his self-control.

21. Given the misdirection, we must ask ourselves whether the verdict of murder would necessarily have been the same had the jury been directed as they should have

been (see eg *Stafford v The State (Note)* [1999] 1 WLR 2026, at 2029-2030). We shall return to this issue later after considering the other grounds of appeal.

Inconsistencies in the accounts given by Manase and Elaine and the absence of vital evidence

22. We have identified the key inconsistencies relied upon when summarising the evidence of Manase and Elaine. The judge gave a general direction about inconsistencies and identified the inconsistencies as he summarised the evidence. In our view there was no need for him to go any further. Whatever were the inconsistencies between the various accounts given by the two witnesses over some three years, central to their evidence was the presence of Hamilton and Lewis in the gutter area where Saleem was being attacked. That evidence was completely inconsistent with the accounts given by the appellants.

23. It is submitted that the failure to call the neighbour who, so Elaine said, joined her at the scene and the failure on the part of McLeish to look for the machete at the scene and to carry out an investigation into it, also makes the convictions unsafe. As to the neighbour we have no idea of how much she saw when she arrived. As to the machete, if it had been found at the scene then that would have been consistent with the evidence of Elaine that she had seen Hamilton throw something away and consistent with Hamilton's account that Saleem was armed.

24. We reject this ground of appeal.

Joint enterprise - Lewis

25. It is submitted on behalf of Lewis that the jury may have had doubts about the evidence of Manase implicating Lewis in the attack, and that Elaine's evidence alone does not establish a proper basis for a verdict of murder by joint enterprise. It is submitted that Lewis' presence alone was insufficient evidence for a verdict of murder by joint enterprise to go before the jury. In essence, it is submitted, that Elaine's evidence was no more than Lewis was standing by while Hamilton attacked Saleem.

26. It seems very unlikely that, having accepted the evidence of Elaine, the jury had doubts about the evidence of Manase as to the participation of Lewis. In any event there was ample evidence for the jury to find Lewis guilty of murder even if the jury were not sure of the evidence of Manase. The jury would be entitled to be sure that the presence of Lewis in the road at that time of the morning whilst Hamilton attacked Saleem so ferociously was not a mere coincidence. If it was not a mere coincidence,

the jury could also be sure that Lewis was at the scene to encourage or assist Hamilton in some way or another.

27. Criticism is also made on behalf of Lewis of the directions to the jury. The judge having told the jury that if both were engaged in the attack then they are both guilty went on to say:

> "And he would be guilty even if he didn't inflict one injury at all, if he was standing up there giving comfort and assistance there, aiding and abetting him: "Yes, man, go on, give him another one," that sort of thing, even though he didn't inflict one injury, that is the accused man, Mr Lewis; because both Mrs Hines and Manase put Lewis there.
>
> Because both Mrs Hines and Manase puts Lewis there. So, if you so find that they were there, it matters not how many chops he gave him, if he gave any at all. It matters not.
>
> … The Prosecution is saying that the two of them 'mek up' or 'set up' and agreed and attacked the man without any lawful reason for doing so."

28. It is submitted that the trial judge's direction to words of comfort and assistance stray uncomfortably far from the evidence because no one gave any evidence that Lewis gave any words of encouragement to Hamilton.

29. In our view the judge properly directed the jury about the need for "comfort and assistance" and, as we have said, there was ample evidence that Lewis, if he did not strike a blow, did give comfort and assistance.

30. We reject this ground of appeal.

Failure to direct the jury as to the need for caution in respect of the evidence of Manase, a child

31. This ground is not to be found in the appellants' case and was added at the outset of the hearing.

32. Manase was 16 when he gave evidence. It is submitted that the judge should have warned the jury of the dangers of acting on his uncorroborated evidence. It is submitted that whereas in England and Wales the common law rule requiring a corroboration warning was abolished (Criminal Justice Act 1988, section 34), it has not been abolished by statute in Jamaica. We should add that it has been abolished in most other common law countries: see *"The Evidence of Children: the Law and the Psychology"*, *Spencer and Flin*, 1990, p 173.

33. Was Manase a child when, aged 16, he gave evidence? In one of the leading cases *R. v Campbell* [1956] 2 QB 432 Lord Goddard CJ seems to have taken the view that a child is someone aged under 14, that also being the definition of "child" in the Children and Young Persons Act 1933, section 107.[1] Lord Goddard CJ said (at p 436):

> "In a case where the complaining party is a grown woman the jury would be advised to look for corroboration and if the evidence is that of a child, that is, of one under the age of 14, but who in the opinion of the court can be sworn, we can find no reason for saying that such evidence could not be accepted by the jury as corroboration."

34. We were also referred to *Rohan Chin v The Queen* (Court of Appeal Jamaica No 84 of 2004), in which the Court pointed out that although section 2 of the Juveniles Act defines a "child" as under the age of 14, the trial judge may deem it desirable to give the warning although the witness is over 14 and thus no longer a child. In that case the witness appears to have been 16 and, upon counsel's attention being drawn to that fact, counsel did not further pursue the ground relating to the lack of a warning.

35. In *R v Morgan (Michael)* [1978] 1 WLR 735, the Court thought that it was not possible to state as a general proposition what the age above which it is unnecessary for a judge to give a warning and the judge is much better placed than an appellate court to consider the matter.

36. On the questionable assumption that the common law still requires a warning of the dangers of acting on his uncorroborated evidence, we take the view that the judge was certainly not required to give a warning of the kind sought, given the age of Manase. Even if we are wrong about that, there was ample corroboration of the presence of Hamilton and Lewis at the scene of the killing and, as we have said, the jury were entitled to convict even if they were unsure about the evidence of Manase to the effect that Lewis had and was using a machete.

[1] Section 38(1) of the Children and Young Persons Act 1933, before its repeal in 1988, required the unsworn evidence of a child of tender years to be corroborated.

37. We reject this ground of appeal.

Failure to adduce good character evidence

38. Unfortunately counsel did not introduce evidence of the admitted good character of Hamilton and, subject to a stale conviction for an irrelevant offence, the good character of Lewis. We were told that it was not the practice of counsel then to adduce such evidence although it is now.

39. The jury ought to have been informed about the characters of the appellants and had they been so, the judge would no doubt have given a good (or almost good) character direction for Lewis and (as Mr Poole points out) a modified good character direction for Hamilton in the light of the fact that he did not give evidence.

40. We return later to the consequences of counsel's failure to adduce this evidence.

Failure on the part of the judge in the case of Lewis to give a false alibi direction

41. It is submitted on behalf of Lewis that the judge should have given the jury a "false alibi direction", to the effect that if the jury were sure (as they were) that Lewis had put forward a false alibi, it may be that he had an innocent reason for having lied and that the lie would therefore not be evidence of guilt. The suggested innocent reason, it is said, related to a fear of being placed at the scene of the killing whilst he looked on.

42. There was, as Mr Poole submits, no need to give such a direction on the facts of this case. If the jury were sure that Lewis lied about his alibi, then, given his arrest at the bus stop, the jury would inevitably be sure that Lewis was, as Manase and Elaine said, at the scene. For reason which we have already given, if he was at the scene a conviction was, on the facts of this case, inevitable.

Failure to admit into evidence the oral and written statements made by Hamilton during interviews by the police

43. As we have already said, McLeish gave evidence that after Hamilton had been arrested and cautioned, Hamilton said that he had acted in self defence and had not intended to kill Saleem (see para 5 above). We have also noted that after McLeish had been asked a number of questions by counsel for Hamilton seeking to establish that he

had said various further things whilst at the police station, Reckord J ruled that what Hamilton had said to the officer was inadmissible as "self-serving" and "also hearsay".

44. During the course of the hearing before the Board it became clear that Hamilton had made a three and a half page statement under caution on 9 February 1998, five days after his arrest. The delay, it is not suggested, was not the responsibility of Hamilton. The statement was taken by an Inspector in the presence of another police officer, probably McLeish, and signed by Hamilton.

45. In the statement Hamilton described his personal circumstances. He described knowing Saleem from his youth and how, when Hamilton was aged 13 Saleem had hit him with a stone in such a manner that Hamilton had to receive medical attention. The incident was reported to the police. Saleem, who was bigger than Hamilton and, so it appears, about a year older than Hamilton bullied Hamilton (our words not his) on more than one occasion and made him "fraid bad". Hamilton described in some detail an incident in mid-January when Saleem "jucked" at him with a pointed cutlass and Hamilton retaliated by throwing two big stones at him. This incident was reported to the police. Hamilton then described again in some detail the incident the night before the killing about which he told the jury in his unsworn statement and about which the witness Wayne Knight gave evidence. Hamilton then described the events of the morning much as he did in his unsworn statement.

46. The prosecution decided not to introduce the statement into evidence. If the prosecution had done so then, given that it included both inculpatory and exculpatory passages (a so-called "mixed statement"), the whole statement would have been admissible for the truth of its contents: see the decision of the House of Lords in *R v Sharp (Colin)* [1988] 1 WLR 7.

47. It also became clear during the hearing before us that the Chief Justice during the earlier trial had ruled that the defence could not itself introduce the written statement under caution. Counsel did not seek a fresh ruling and, even if she had, Reckord J made it clear that the evidence was inadmissible as self-serving (see p 225).

48. In the light of that ruling, counsel sought to elicit what Hamilton had said to McLeish on 4 February but without success.

49. We do not have a copy of the Chief Justice's ruling. However we take the view that we should ask ourselves whether the exclusion of the statement under caution and what Hamilton said on 4 February (which out of fairness to Hamilton we shall assume are similar) is such that the conviction should be quashed, pursuant to section 14 of the Judicature (Appellate Jurisdiction) Act 1962, on the ground of "a wrong decision of

any question of law" or on the ground that the exclusion of the evidence caused a miscarriage of justice.

50. As counsel agreed during oral argument, the excluded evidence was not inadmissible because of the rule against hearsay. If it were to be admitted at the request of the defence, then the statement would not have been evidence of the truth of its contents. The relevant common law rule of evidence is, as Reckord J identified, the rule which, subject to exceptions, prevents the admission of self-serving statements. The rule is also known as the rule against narrative or the rule against self-corroboration. To the long-established common law rule against the admissibility of self-serving statements there are exceptions, the most well-known of which is the rule which permits evidence to be called of a recent complaint in a sexual case. The evidence of recent complaint at common law is not admitted for the truth of its contents but to show consistency between the evidence given now and the earlier complaint. Another well-known exception to the rule provides for the admissibility of self-serving statements to rebut an allegation of recent fabrication.

51. Mr Fitzgerald relied upon the case of *R v Pearce* (1979) 69 Cr App R 365 Lord Widgery CJ, giving the reserved judgment of the Court prepared by Lloyd J, said (at 368):

> "The case raises an unusual question. It has been the practice to admit in evidence all unwritten and most written statements made by an accused person to the police whether they contain admissions or whether they contain denials of guilt. ... In this case however the judge has excluded two voluntary statements and part of an interview on the grounds that they are self-serving statements and as such are not admissible. If the judge is right it would mean that the practice of the courts over the last fifty years or more has been erroneous."

52. The Court said (369):

> "A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police. ... The longer the time that has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements."

53. Thus in this case what Hamilton said to the police orally and in his statement under caution would be admissible on the authority of *Pearce* to show his attitude when he gave himself up to the police on the evening of the killing.

54. The Court also said (370):

> "Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible."

55. That, in our view, is not this case.

56. Mr Fitzgerald also referred us to *R v McCarthy (Gerald)* (1980) 71 Cr App R 142 in which Lawton LJ said (at 145):

> "One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place and he says at once, 'That cannot be right, because I was elsewhere,' and gives details of where he was, that is something which the jury can take into account."

57. The Court in *McCarthy* ruled that the judge ought to have admitted into evidence what the appellant had said to the police following his arrest. However on the facts of the case the appeal against conviction was dismissed. The Court took into account the strength of the evidence and the fact that the appellant did not give evidence and that no witnesses were called on his behalf.

58. We were also referred to the 1997 edition of Archbold, Criminal Pleading, Evidence and Practice, paras 15-382 and following.

59. We have looked at an article by Professor Gooderson in the Cambridge Law Journal, 1968, p 64, entitled "Previous Consistent Statements". The first example that he could find to illustrate the practice of admitting statements made by the accused when arrested is in 1858. He points out that Wigmore argued in his treatise on the law of evidence that such evidence should be receivable, albeit that, at that time, the bulk

of US case law went the other way (69). Professor Gooderson also discusses the admissibility of statements by an accused person when incriminating articles are received from his possession, a sub-set of the exception which we are considering.

60. We have looked at the Law Commission's 1997 "Report on Evidence in Criminal Proceedings: Hearsay and Related Topics" (Law Com 245), which preceded the substantial changes made to the common law of England and Wales by the Criminal Justice Act 2003. In Part X there is discussion of the common law rule to the effect that, subject to exceptions, a prior consistent statement cannot be used to enhance the credibility of the evidence of a witness by demonstrating consistency. The Law Commission Report did not deal with the exception now under consideration.

61. In our view the Court in *Pearce* correctly identified an exception to the common law rule making self-serving statements inadmissible. The modern practice of case management puts an emphasis on the defendant disclosing as early as possible the nature of his or her defence. The defendant when cautioned at common law is asked for his account and is told that anything he says may be given in evidence (in Hamilton's case he was told before making his written statement that it would be introduced into evidence). Entitling defendants to put into evidence what they say at the time of arrest, if the prosecution choose not to do so, should encourage defendants to give their account of the events at the earliest opportunity. This is particularly important where, as in this case, there is such a substantial delay between arrest and trial. It could perhaps be said that if the defendant wants his account to be considered by the jury he should give evidence. But this ignores the fact that, even if Hamilton had given evidence, his statements to the police on arrest would have been inadmissible on the ruling of the Chief Justice and Reckord J, unless, which is unlikely, the prosecution had alleged recent fabrication.

62. In our view the statements made by Hamilton at the time of his arrest should have been admitted in evidence.

The proviso: But for the identified errors, would the jury have inevitably come to the same conclusion?

63. We have identified three errors, the jury mis-direction on the issue of provocation, the failure on the part of counsel to adduce the evidence of the characters of the appellants and the failure to admit what Hamilton said to the police. We should add that we have looked at the summing up, which, was, contrary to the submissions of Mr Fitzgerald, fair.

64. The jury were sure that both Hamilton and Lewis were involved in the attack, contrary to the account given by both of them. In so far as the provocation

misdirection is concerned, although it is not impossible to imagine a situation where a verdict of manslaughter based on provocation would be possible even though two or more were involved in the killing, on the facts of this case and given the findings of the jury, we take the view that the jury would have inevitably rejected provocation.

65. The jury were faced with a choice between an attack by Hamilton alone on Saleem, Hamilton fearing an attack by Saleem, or, alternatively, some form of revenge attack by at least Hamilton and Lewis on Saleem. The evidence of Manase and Elaine which, in the main essentials, had been consistent from the outset provided very strong evidence for the latter. Both put the attack on Saleem as taking place in the gutter of the road or track which ran outside their property and the adjoining property where Hamilton and Lewis lived. If Hamilton was right, the attack took place on Hamilton's property followed by Saleem falling down the bank into the gutter after which Hamilton ran home. On his account he would not have been seen in the gutter by Manase and Elaine. That presumably explains why it was put by Hamilton's counsel to both Manase and Elaine that they had not seen anyone chopping Saleem. The case for the appellants had to be that seeing the chopped body of Saleem, the witnesses had decided there and then to fabricate a case against Hamilton and Lewis.

66. The fact that Lewis was accused of the murder by Saleem's family at the bus stop so shortly after the attack shows that statements of his involvement in the killing were not an afterthought. If this was, as Hamilton maintained, an attack by him on Saleem in anticipation of an attack by Saleem on him, why would Manase and Elaine falsely accuse Lewis? Why did Manase from the outset refer to the attackers in the plural? If this was, as Hamilton maintained, an attack by him alone on Saleem in anticipation of an attack by Saleem on him, why was it so ferocious, why was it that, whereas Saleem suffered defensive wounds, there was no evidence that Hamilton did and why was there no evidence to support the claim that Saleem was armed? The evidence, taken as a whole, pointed inevitably to this being a joint attack on Saleem and to the fact that the appellant Hamilton was neither provoked nor was he acting in self-defence. If the jury had known about the good characters of the appellants, we do not believe that it would have made any difference to the verdicts, such was the strength of the evidence.

Sentence

67. The Court of Appeal's order that the appellants' 25 year period of imprisonment was to start on 2 July 2001 had the effect of adding three months to the original term. It was made on the ground that there was no merit in any of the appellants' grounds of appeal. The statutory basis for it was section 31(3) of the Judicature (Appellate Jurisdiction) Act 1962 which provides that a prisoner who is specially treated as an appellant while in custody awaiting his appeal is not entitled to credit for the time so spent, but that this is subject to contrary direction by the Court of

Appeal. In this case the Court of Appeal gave the appellants credit for all but three months of the time they spent in custody between the date of their conviction on 2 April 2001 and the determination of their appeals on 24 March 2003. The appellants say that they should have been given credit for the whole of this period. This is because there was sufficient merit in their grounds of appeal for them to be given permission to appeal, and because their appeals were dismissed only on the application of the proviso.

68. In *Tiwari v State of Trinidad and Tobago* [2002] UKPC 29, para 42 Lord Hutton said that time spent in prison awaiting determination of an appeal should, as in England, count as part of the term of imprisonment unless the appeal is devoid of any merit. In *Ali v Trinidad and Tobago* [2005] UKPC 41, [2006] 1 WLR 269, para 16 Lord Carswell said that an appellate court should consider in each case in the light of the relevant facts whether to exercise its discretion to backdate the sentence and, if so, for what length of time. In para 17 he said that the making of orders backdating sentences to the date of conviction should not be restricted to exceptional circumstances and that any decision about loss of time should be proportionate. Their Lordships did not want to be prescriptive about the appropriate length of loss of time orders, which was a matter for each appellate court in each individual case. They should however be made with regard to the abuse which they are designed to curb, which was frivolous appeals, and they would not be expected to exceed a few weeks in the vast majority of cases.

69. The appellants cannot be criticised on the ground that their appeals were frivolous or devoid of any merit. The Board took the view that permission should be given, and it saw enough merit in the appeals for them to give rise to a question under the proviso. The proper course in this case would have been for them to be given credit for the whole of the time spent in custody awaiting the determination of their appeals. The date as from which their sentences of 25 years imprisonment were to start should have been 2 April 2001 when they were taken into custody, and not 2 July 2001 as ordered by the Court of Appeal.

Conclusion

70. For these reasons the Board will humbly advise Her Majesty that the appeals against conviction should be dismissed, but that the appeals against sentence should be allowed to the extent that the period of the appellants' sentences of 25 years imprisonment is to start on 2 April 2001.