P.C. Criminal Law — Murder — Evidence — admissibility — probative value — "mixed" statement — whether misdirection by judge as to value of statement: Held: There was a misdirection but if jury properly directed they would inevitably have come to same conclusion: Appeal dismissed. Cases referred to p3(end)

Privy Council Appeal No. 36 of 1992

Cedric Whittaker *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

Evidence

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER 1993

Criminal Practice

Present at the hearing:-

LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
LORD LOWRY
LORD SLYNN OF HADLEY
LORD WOOLF

*[Delivered by **Lord Slynn of Hadley**]*

This is an appeal from the refusal of the Court of Appeal of Jamaica on 28th September 1990 to grant the appellant leave to appeal against his conviction of murder on 7th November 1989. The appellant was initially sentenced to death but pursuant to the Offences against the Person (Amendment) Act 1992 the murder has now been classified as non-capital.

The sole ground of appeal, which was not argued before the Court of Appeal, is that the trial judge misdirected the jury as to the admissibility and probative value of certain evidence.

At the trial evidence was given by Delroy Bulgin that on 12th March 1989 in the evening he was present with the appellant and Gerald Lewis at a "sweat table" where men were gambling by the light of a bottle torch. His evidence was that after an argument between the banker and Lewis, the appellant said "A rat you know. A gwine set puss fe you". Lewis replied "Through you have you police frien' them nuh, that is why you a gwaan soh". The appellant picked up the torch and went for Lewis. The two wrestled and fell. Bulgin separated them but the appellant went back to Lewis who said he had been "cut". The appellant then walked off with a knife. Lewis who had a deep wound was taken to hospital where he died.

A police officer (Corporal Kerr) gave evidence that the appellant came to him the same evening and gave a different version of what had happened from that given by Bulgin. The appellant told the officer that he had been called a police informer by Lewis who followed him and cut at him twice with a knife. They wrestled and fell to the ground. The appellant said that he realised whilst on the ground that Lewis had been injured and he ran to the police station. Before leaving the police station the appellant gave Corporal Kerr the shirt which he was wearing which had a cut three or four inches in length. The knife was not found.

The appellant gave evidence at the trial to the same effect - that having been called an informer by Lewis and having replied that "only a wrong doer suppose to be afraid of the police", Lewis followed him with a knife in his hand and cut at him twice. He went for Lewis. They wrestled. When he noticed blood he realised that Lewis had been injured and he went to the police station. He denied the allegation about the lamp and said that he never had the knife which remained with Lewis. When he left the scene he left the knife there. He was not cut but his shirt was cut.

The judge in his summing up having set out Corporal Kerr's evidence directed the jury as follows:-

> "Mr. Foreman and members of the jury, that related testimony of what was said I make bold to tell you that it is what is called self-serving testimony, self-serving evidence and it does not avail him anything. It was led I suppose - I don't know why the Prosecution led it - because it showed the consistency; it is no evidence as to the truth of the fact; ... but it was led ... Whittaker gave him a shirt which he was wearing and it had two cuts on it. Again Mr. Foreman and members of the jury, you didn't see any shirt, so any mention of that again is self-serving, self-serving."

When dealing with the appellant's evidence as to what he had told Corporal Kerr the judge said:-

> "And then he told you again that he made the report to Corporal Kerr and he repeated what Kerr tells you and you remember I told you that that is self-serving because it only shows the consistency; no evidence as to the factual situation."

The appellant contends, and the Crown accepts, that in relation to the statement made to Corporal Kerr this was a misdirection. This was not a wholly exculpatory statement but was one which contained both admissions and self-exculpatory statements. In *R. v. Sharp* (1988) 86 Cr.App.R. 274 the House of Lords approved the judgment of Lord Lane C.J. in *R. v. Duncan* (1981) 73 Cr.App.R. 359 at page 365 where the latter said:-

> "Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just

result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies ... Equally, where appropriate, as it usually will be, the judge may and should, point out that the incriminating parts are likely to be true (otherwise why say them?) whereas the excuses do not have the same weight."

In the present case the accused did give evidence and to that extent the case is different from *Sharp* and *Duncan* but the principle is the same. The jury should not have been told to ignore statements made to Corporal Kerr or the evidence about the shirt. The appellant admitted that he was present when Lewis was killed. That the jury could take into account. They were required also to consider whether the appellant's account to Corporal Kerr as to what had happened and his explanation of the state of the shirt was or was not true.

Their Lordships consider that there was here a misdirection in relation to the appellant's statement to Corporal Kerr and as to the state of the shirt. They also consider that to describe evidence as "self-serving" without an explanation of what that means is infelicitous. The term may be clear to experienced lawyers; it is not necessarily obvious to members of the jury.

Accepting, however, that there was such a misdirection the question remains as to whether there is any risk of a miscarriage of justice if the conviction is upheld. The test is clearly laid down in *Anderson v. The Queen* [1972] A.C. 100 at page 107 following *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, at pages 482-3, namely whether "if the jury had been properly directed they would inevitably have come to the same conclusion".

Their Lordships are satisfied that in this case the jury if properly directed would inevitably have come to the same conclusion.

In the first place, the appellant made a statement to Detective Inspector Gayle which if believed would also have exculpated him and the jury were not told to ignore that. Then he himself gave evidence on oath on which he was cross-examined. His version of the fight was put to the jury and they were not told that it was self-serving and could not avail the appellant. He also explained that he had handed the shirt to Corporal Kerr with the cut in it. Further the jury were told that the statement to Corporal Kerr was evidence that he had maintained a consistent version.

This was a case where there was a clear conflict between the evidence of Delroy Bulgin and the appellant. The jury had to decide which of the two they believed. The obviously accepted Bulgin's account.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed.