[2014] UKPC 14

Privy Council Appeal No 0005 of 2012

JUDGMENT

Stoutt (Appellant) vThe Queen (Respondent)

From the Court of Appeal of the British Virgin Islands

before

Lady Hale

Lord Kerr

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT DELIVERED BY

Lord Hughes

ON

13 May 2014

Heard on 19 February 2014

Appellant	Respondent
Dr Joseph Archibald QC	Wayne L Rajbansie
Aidan Casey	Leslie Ann Faulkner
(Instructed by Collyer Bristow LLP)	(Instructed by Charles Russell LLP)

LORD HUGHES:

1.
The appellant was convicted of murder. His defence was that he had had nothing to do with the killing. A large part of the Crown case against him relied on statements made by the deceased which contributed to identification of the appellant. The challenge now made to his conviction is centred upon the directions given to the jury about the approach to that evidence.

2.
The deceased, Godwin Cato, was shot dead in the street outside a bar in East End, Tortola, sometime around 2300 on 25 January 2007. The Crown case against the appellant was that this was the culmination of a dispute between the two men which had its origins three months earlier in October

2006. On two successive days, 9th and 10th October 2006, Cato had made complaints to the police station that he had been threatened, on the second occasion with a gun. The Crown case was that the appellant was responsible, and that it was the same man who then shot Cato dead in January. All three incidents gave rise to evidence of what the deceased had said about them. Since, self-evidently, he could not be called, this was necessarily hearsay evidence. Hearsay evidence is admissible in the British Virgin Islands in the circumstances provided for by sections 67-74 of the Evidence Act 2006, No 15 of 2006, and this evidence was admitted without any objection.

3.
On 9 October 2006, Cato contacted the police and complained that he had been involved in a minor road traffic incident with another car in East End, and afterwards had been threatened by a man. The next day, 10 October, Cato made a further complaint to the police that whilst in East End the same man had driven up in a Suzuki jeep and had threatened him with a gun. These complaints were noted on the police computer by one or more officers who were not called at the trial, perhaps because they could not be identified, or perhaps because they had no recollection of making the entries. The two computer entries were the first two pieces of hearsay material deriving from the deceased, which were adduced by the Crown at the trial. On the second of those days, however, Cato also made a substantial written witness statement about the two incidents. That was the third piece of hearsay material.

4.
On the night of 25 January 2007 at 2256 Cato made a 999 call. He told the police operator that he was at a bar in East End, and that the same man he had complained about before had now accosted him with a gun again. While the line was still open, an argument between Cato and another man was recorded, following which three shots could be heard. The record of the call was the fourth piece of hearsay evidence. While Cato lay dying on the road, a police officer chanced to pass. He tried to comfort Cato, and was told by him that he had been shot by somebody about whom he had previously complained, and who lived in an adjacent house which he indicated with a head movement. This officer's evidence was the fifth piece of hearsay material relied upon.

5.
In very cogently presented submissions on behalf of the appellant, Mr Casey argues that although in due course the judge explained in general terms that this was evidence from a witness whom the jury had not seen, she did not explain the significance of this for the assessment of the evidence, nor did she make the jury understand the special need for caution in dealing with evidence which the defendant has had no opportunity to explore. At the heart of this argument lies the submission that what needed to be explored, but the deceased Cato could not be asked about, were significant discrepancies in what he had said on different occasions. So it is necessary to set out some of the detail of the several pieces of hearsay material.

6.
The first computer report of 9 October contained the following:

"Complaint (sic) came to the East End Police Station, BVI and reported that he was just involved in a traffic accident in the area of the Long Look Clinic and because he told the other driver that he was going to report same, he threatened him. He requested assistance…

Cato was interviewed and he stated that he was driving his motor jeep toward Road Town and a green motor car (possibly an old Toyota) license number unknown collided into the back of his vehicle and fled the scene. He was unable to give any useful information as to the identity of the other driver."

7.
The second computer report of 10 October contained this:

“Complainant came to the East End Police Station and reported that on the 09102006 he got into a traffic incident with an unknown male, but is familiar with his face in the area of Long Look, where police visited the scene. He went on to say that on the 10102006 while driving on Greenland Public Road in in (sic) vicinity of the cross walk, the same gentleman approached him driving a Grey Suzuki 2006 Jeep PV17445, pointed a gun at him and told him that if it wasn't for people in the area, he would kill him. He requested police assistance in the matter.”

8.
The witness statement taken on the same day, 10 October, was quite lengthy and took an hour to record. It contained the following:

“On Monday 9th October 2006, I was driving my black Suzuki Vitara PV 9958 along East End Public Road when I got involved in a minor traffic accident with a green Toyota motor car.…The driver of the green motor car and his passenger flee the scene of the traffic accident. Actually, the driver left the scene and the passenger stayed and was cursing me. The driver later returned without his motor car. I walked to East End Police Station and informed them of the traffic accident.…The police visited the scene and took measurements. While the police was at the scene two other young men who were not involved in the traffic accident started to tell me that ‘I am a punk, they will kill me and I can't drive by East End again’. I told them whenever they are ready I am waiting on them. I do not know the young men names, but I know them by seeing them. One of the young men is slim about 5 feet 6 inches in height about 150 pounds in his mid 20s with braided hair. The other young man was about 16 years old about 5 feet 4 inches in height about 140 pounds with a low hair cut.

On today's date the 10th day of October 2006, about 9:30 a.m. while I was driving in a westerly direction, I saw a brand new Grey Coloured Suzuki Grand Vitara PV 17447 driving in an easterly direction.….While in the vicinity of the road going to Greenland in the area of the Community Centre, the driver of PV 17447 pulled up alongside me. I stopped and he stopped also. He exited his jeep with a big handgun.…The young man pointed the gun at me and told me that if the houses were not around he would have killed me. He assured me that when he gets the chance he is going to kill me. While he was pointing the gun at me I exited my jeep with a baseball bat and a knife in my pocket. I was frightened for my life. The driver of motor jeep PV 17447 was not the person who was involved in the traffic accident but he is a relative to the young man who and I (sic) were involved in the traffic accident. The young man. who I was involved in the traffic accident with, I do not know his name but I know him by seeing him. I don't know his passenger either, but I believe they gave the East End Police their names. The driver of PV 17447 is the young man I described earlier who is in his mid 20s about 5 feet 6 inches with braided hair, bulged eyes and is very slim…”

9.
On that same day, 10 October, a different officer, PC Trumpet, spoke to the appellant. To the latter’s credit, he had come voluntarily to the police station, fairly clearly because the police had traced the jeep to his girlfriend, one Sharon Liburd. Its correct registration number was PV 17447, thus a single digit out from that recorded in the second computer report. According to PC Trumpet, he had asked the appellant if he “was driving” the jeep and received the answer yes. According to PC Trumpet, the appellant firmly denied threatening Cato with a gun and asserted that the boot had been on the other foot, because Cato had, he said, menaced him with a baseball bat. This last piece of evidence from PC Trumpet was disputed at the trial, and it is right to record that there was scope for cross examination

of the officer, fully deployed by counsel then appearing for the appellant, on the basis of the continuation of the second computer report. This, entered once again by some unknown hand, recorded simply that the appellant had denied threatening Cato; it made no mention of the counter-allegation relating to the baseball bat. However, the appellant himself did not give evidence at the trial, and PC Trumpet stood by his account. There is rightly no complaint about the way this was summed up. Moreover Sharon Liburd gave unchallenged evidence that as at 10 October only she and the appellant drove the jeep. Further, the deceased's previous disclosure that he had indeed brandished a baseball bat was, at least unless PC Trumpet had dishonestly manufactured the defendant's confession and avoidance, independent support for the accuracy of the constable's evidence of what the defendant said. It was for the jury to decide which evidence it accepted and clearly it was entitled to accept that of PC Trumpet. If accepted, it was a clear admission by the appellant that an argument had indeed taken place between him and Cato on 10 October, albeit he disputed who had done what.

10.
The tape-recorded 999 call, on which the shooting of Cato could be heard to take place, ran as follows:

999 Operator: Emergency line good evening

Voice 1: Yes hello good evening, my name is Godwin Cato

999 Op: eh, ha.

Voice 1: about from last year I made a complaint to the police department in East End of a gentleman who threatened me with a gun, now tonight this gentleman has threatened me with a gun, I'm at a bar here, in East End, the new bar Johnny's bar that open

999 Op: OK hold on for the police please, hold on.

Police Op: Good evening, Road Town police, how may I help you.

Voice 1: emergency please, couple months ago last year I made a complaint to the Police station in East End concerning a gentleman who pulled me over with a gun, tonight I'm at a bar here at Johnny's this gentleman has pulled me over again with a gun, I'm here asking for assistance please.

Police Op: Johnny's? Johnny's in where? Hello, Hello, hello

Police Op: (Continuous hello)

Voice 1: Daddy you flat my tire you nuh, I looking to get a ride you nuh daddy.

Voice 2: you get me fuck up you nuh

Voice 1: daddy you can't cut my hair you nuh,

Voice 2: Well daddy you can't cut my hair

Voice 1: I need to get a ride.

Voice 2: You think this is a game de man

Voice 2: You playing a game with me,

Voice 1: No ain't no game

Voice 2: I will show you what I feeling.

Voice 1: This is no game daddy.

…Short pause…

[Bang - first gun shot]

…3 seconds later…

[Bang - second gun shot]

… 3 seconds later…

[Bang - third gun shot]

[Busy tone]

Voice 1: Hello

[Call ended]

There was evidence that the deceased's vehicle was found near to his body and had a flat tyre. Three spent cartridges were found in the road. The deceased was found to have three gunshot wounds, a relatively superficial one on the back of the right forearm, a grazing wound on the front of the left arm with the bullet remaining in the arm by the elbow and the fatal wound where the bullet had passed from front to back and somewhat downwards. It had entered in the upper left abdomen and exited from the back, passing on the way through the stomach and right kidney and perforating the vena cava.

11.
Also found in the road not far from the deceased was a machete or cutlass. There was blood on it close to its tip. There were also spots of blood recovered from the road. The blood recovered from both places matched the DNA profile of the deceased and could not have been that of the appellant.

12.
Acting Inspector Howe's evidence was that he passed by chance and saw a group of bystanders looking at the deceased who was lying in the road. He went to the deceased and stooped over him. He asked his name and was told "African Cato". He asked what had happened and was told "Somebody in there shoot me, same person who pull the gun on me last year." The deceased indicated, said Mr Howe, what he meant by "in there" by gesturing with his head and by rolling his eyes in the direction of a green bungalow adjoining the road. Mr Howe tried to help the deceased and stayed with him until an ambulance came to take him away. In due course, the appellant admitted in interview with the police that he lived in the green bungalow.

13.
The appellant did not give evidence. He had, however, been interviewed under caution by the police five days after the killing, and the contents of the interview were proved and stood as a mixed out-of-court statement. He was seen on arrest to have a wound to the back of his right shoulder. The principal features of his account were:

i)

he denied that he had been in any altercation with Cato on 9 October, but admitted two of his cousins called Said and Stephan had been in a road traffic accident with Cato, that this had happened outside his home, and that he had been there sometime after the accident because he had seen Cato there with the police;

ii)
he denied that he had pulled a gun on Cato on 10 October; he added that he had not driven Sharon's jeep that day; he did not repeat the counter allegation previously made according to PC Trumpet that Cato had menaced him with a baseball bat; he appeared to be denying any contact with Cato that day;

iii)
he admitted that the green bungalow was his home;

iv)
he admitted that he was in the street outside that house on the night that the deceased was shot; although not immediately, he eventually asserted that Cato had arrived at the bar opposite his home complaining about a car accident and had chased him towards his house and attacked him from behind with a cutlass or similar, causing him the shoulder wound; subsequently he had heard shots; it had not been him who shot Cato;

v)
he admitted that he had left Tortola the next day and had gone to the US Virgin Island of St Thomas, without passing through customs either on leaving or on entry; he had done this because people were saying he had shot someone;

vi)
he said that he had not reported the attack upon him; he asserted, however, that he had gone to the hospital on the night of the injury but had not stayed for treatment because they had wanted information which he was not prepared to give.

14.
At his trial, the appellant called a man called Penn. Penn's evidence was that he had seen the shooting of Cato. He had left the bar opposite the appellant's home. He said that he had seen Cato outside and, a little further on, the appellant sitting in an alley. After passing him, Penn said that he had heard the appellant cry out and, turning, had seen him running, holding some part of his upper body as if injured. Cato was holding a machete. At that point, some person shot at Cato from a building alongside the road and then emerged into the road behind him, and shot him again. Finally, said Penn, Cato turned to face his attacker and was shot. The gunman was not the appellant, who was running away on the opposite side of the road. He never saw the gunman's face, but he was about six feet tall, of big build and was wearing a dark jacket, shorts and a hoodie.

15.
It follows that the principal question for the jury, accurately summed up by the judge, was whether Penn might be telling the truth. The judge placed Penn's account in the forefront of the summing up, and returned to it at the end. There is and can be no suggestion that this central feature of the appellant's case was not put properly before the jury. It was for the jury to assess Penn. Quite apart from assessing his manner of giving his evidence, there was specific material on which it could reject his evidence. He had refused to give any account to the police near the time and had said nothing until the trial. His account was inconsistent with the evidence of the 999 call that there had been a verbal exchange between Cato and his killer immediately before the shots were fired. His evidence

was arguably inconsistent with the evidence of the likely trajectories of the first two gunshot wounds. He described five or six shots. The account of the deceased not running away when shot but turning to face the gunman was one which the jury might well not accept. He had a conviction for dishonesty. His explanation for refusing to speak to the police, that he had been intimidated and threatened with arrest, was arguably internally inconsistent and was contradicted by the officers. He gave inconsistent and unsatisfactory evidence about whether he had made a telephone call to his godmother whilst with the police.

The grounds of appeal.

16.
Although the summing up was full and detailed, the Board is satisfied that in two respects it fell into error in its treatment of the hearsay evidence from the deceased.

17.
First, although the judge reminded the jury that normally evidence is given by live witnesses who can be seen in the witness box, she did not explain to them that the absence of the opportunity to test the accuracy of what the deceased said represented a significant disadvantage to the accused, and needed to be taken into account when assessing what he had said. Hearsay evidence is indeed admissible, providing the necessary statutory conditions are met, and this evidence was admitted without objection. But it always suffers from the disadvantage that the jury cannot see the source of it and cannot see his accuracy tested. Of course, how far this disadvantage may affect the reliability of the evidence varies considerably from case to case, but it is important that the jury be confronted with the need to think about it. The judge dealt with the point in relation to the evidence of Inspector Howe. She reminded the jury that Mr Howe's account of what the deceased said had not been challenged in cross examination. But there are two possible risks with hearsay. One is indeed that the report of what the absent witness said is false or mistaken, and no-one suggested that that risk applied to Mr Howe. But the other risk is that although the absent witness has been accurately reported, he was false or mistaken in what he said. In the present case, the appellant's case was necessarily that Cato was wrong in saying that the gunman came from the green bungalow and that if he was right about the gunman being the man he had had trouble with in October, he was also wrong about who that was. The summing up ought to have made that clear, and it did not. Similarly, counsel for the appellant made much of the differences between the computerised police reports from October and the detailed witness statement of the deceased. It needed to be explained to the jury that because the deceased was dead it had been impossible to ask him about these differences. This may be obvious to lawyers, but its implications are not always apparent to jurors. The explanation or warning required is not of great complexity. In a case where the jury has seen other witnesses challenged and tested in their evidence it is usually simple to remind them of the process, to observe that a witness does not always leave the witness box with his evidence as secure as when he started and to invite them to remember that the hearsay evidence cannot be subjected to the same kind of examination.

18.
Secondly, the brother of the deceased gave evidence, principally to identify the voice of the deceased on the 999 tape. Counsel for the defence wished to adduce from him that the deceased had, in the period between October and his death, spoken on more than one occasion of "guys" in the East End of Tortola who were harassing him, and had said that if they continued to do so, he may have to defend himself. The brother had made a witness statement some time previously giving this account of what the deceased had told him. When first asked to confirm it in the witness box, he did not remember it. However, when shown his earlier witness statement he readily and handsomely adopted it as the

truth. This was potentially of some assistance to the appellant because it enabled counsel to argue that there might have been more than a single person with a dispute with Cato.

19.
When the judge came to sum up, she correctly reminded the jury of the evidence which the brother had given, and she thus put before them the history of complaint about “guys” in the plural. The difficulty is that she then went on to deal compendiously with this witness together with others who had been cross-examined on previous statements, and to give general directions. She told the jury, correctly, that where discrepancies had been elicited between a previous statement and the evidence given from the witness box, or between one piece of evidence and another, it was a matter for the jury to assess whether the difference was significant or not. She went on to tell them that the previous out of court statement was not itself evidence, whilst what came from the witness box was. She added that the only purpose of cross examination on a previous out of court statement was to test the credibility of the witness. These general statements of principle were of course correct under the common law applicable to the trial (contrast the present statutory position in England and Wales under sections 119 and 120 of the Criminal Justice Act 2003). But what the judge did not do was to remind the jury that in the case of the brother of the deceased his adoption of his earlier statement meant that his evidence, given from the witness box, was in accordance with it and that this was evidence in the case for their consideration. Without such an explanation there was a risk that the jury might think that his previous statement was to be disregarded, just like those of others who had not adopted their contents. The combination of directions was, whilst technically correct, potentially and unintentionally misleading.

20.
In the Court of Appeal, this latter deficiency was correctly identified, but dismissed on the grounds that the evidence from the brother was in any event itself hearsay. In the case of one judgment, it was characterised as inadmissible hearsay. This overlooks the fact, first, that the brother’s evidence was adduced without any sign of objection from the prosecution and treated thereafter as properly admitted. More importantly, whilst this evidence was certainly hearsay, it was not in fact inadmissible. Hearsay is regulated in the British Virgin Islands by sections 67-74 of the Evidence Act 2006 and section 71 makes it admissible in criminal proceedings in defined situations. There might be scope for argument as to whether this piece of hearsay evidence was admissible under section 71(2)(b), as made at or shortly after the time when the asserted fact occurred and in circumstances which made it unlikely that the representation was a fabrication. But whatever the position might be under that subsection, this evidence was admissible under section 71(5), which provides:

“The hearsay rule does not prevent the admission or use of evidence of a previous representation adduced by a defendant, being evidence that is given by a witness who saw, heard or otherwise perceived the making of the representation.”

21.
Mr Casey asserts a further twofold error in the summing up. This was an identification case, in which the identification from the deceased was given by way of hearsay evidence. Says Mr Casey, both in relation to hearsay generally and in relation to evidence of identification, it is incumbent on the judge to help the jury by drawing attention to possible specific weaknesses in the evidence. Whilst the judge gave the jury a textbook identification direction as required by R v Turnbull[1977] QB 224, including a reminder that even recognition of an acquaintance can be mistaken, and including a re-statement of the need for caution right at the end of the summing up as the last thing said before the jury retired, she did not identify the potential specific weaknesses. Those were, says Mr Casey:

i)
the differences between the reports attributed to the deceased in the computer entries of 9 and 10 October, on the one hand, and his witness statement of 10 October on the other; the chief of these was that the two computer reports both suggest that it had been the driver of the other car who threatened the deceased, whereas his statement said that the aggressor was a different person who came on the scene afterwards; similarly, the computer report of 9 October said that the deceased could give no useful description of the driver, whereas that of 10 October said that the assailant's face was familiar to him and the witness statement gave a detailed description; thirdly, the computer reports did not suggest two men being present on 9 October, which the witness statement did; nor, fourthly did the computer reports contain any hint that the deceased knew that the assailant was in some way a relative of the driver of the car;

ii)
the description given in the witness statement, which the prosecution asserted fitted the appellant, did not do so because the appellant, whom the jury saw, was plainly significantly taller than 5'6", and counsel adduced from a police witness an estimate of his height in the region of 5'11";

iii)
the deceased at no time purported to name the gunman;

iv)
the identification was weakened by the fact that Sharon Liburd said that she did not know who had been driving her jeep on 10 October.

22.
The estimate of height plainly had potential to assist the appellant, but there can be no complaint that this was not fully summed up. On the contrary, counsel for the defence understandably made much of it, and the judge explicitly reminded the jury of it, saying in terms that "this accused is in no way five feet six inches". What the jury made of the remainder of the description, given that it had the appellant in sight for the duration of the trial, was a matter for it. No one seems to have suggested that in details other than the estimate of height it was demonstrably inconsistent with the appellant.

23.
As to the remainder, whilst it is the duty of the judge to identify for the jury potential weaknesses in identification and/or hearsay evidence, the extent of the duty depends entirely on the state of the evidence in an individual case. If the judge does identify points which the defence rely on as weaknesses, she should also normally remind the jury of all the evidence affecting such points. She is not required in effect to make a second speech for the defendant. In the present case, if the judge had identified the points now relied upon by Mr Casey, fairness would have required her also to help the jury assess their potential significance. If she had adopted that course in this case, the effect would undoubtedly have been to expose the extremely limited value of them and the strength of the identification. Thus:

i)
neither of the two computer entries had been verified by the deceased; both were double hearsay of his report and carried the plain risk of incomplete or inaccurate summarising; by contrast his witness statement was an infinitely fuller account, signed and verified by him; the implication in the computer entry of 9 October that the assailant was the driver, and the omission of reference to a second person, were particularly likely to be a misunderstanding through truncation of what the deceased was saying, duly corrected in the full witness statement;

ii)
for the same reason there was probably no inconsistency at all between the report of being unable to describe the driver and the description given the next day of the assailant; the witness statement makes it clear that they were not being said to be the same person;

iii)
it is extremely common for an initial report to be amplified later; much depends on what if any questions the recipient of the report asks; the recipients of the initial reports were not identified; the witness statement was clearly carefully taken; the additional information that the assailant was believed to be related to the driver is exactly the kind of material which questions asked in the process of taking a witness statement are likely to elicit;

iv)
it was true that the deceased had never named his assailant, but if reminding the jury of this the judge would have had to remind them also that there was no reason why he should know the name;

v)
it was true that Sharon Liburd had said that she did not know who was driving the jeep on 10 October; this asserted agnosticism had no impact on the assessment of the identification by the deceased; moreover in any event, if reminding the jury of this, the judge would have been obliged to remind them also (a) that she had said that the only male who drove it was the appellant, and (b) that the appellant had, if PC Trumpet was right, told him that he had indeed been the driver that day.

24.
Mr Casey also invited the Board to hold that the judge had failed to make sufficient mention of certain other matters of evidence. Generally it is a matter for the judge which parts of evidence or argument call for specific reference in her summing up, provided that the summary is overall fair. None of the matters raised by Mr Casey were such as to mandate specific reference. The principal ones were:

i)
the gap in time between the incidents of October 2006 and the killing on 25 January 2007; this was clear to the jury, as was the fact that it had to consider was whether the deceased's assertion that it was the same man might be wrong;

ii)
a suggestion that there was a risk of damaging communication between witnesses; it is impossible to see where this possibility arose;

iii)
the contention that the identification of the deceased's voice by his brother called for a specific direction as to the difficulties of voice identification; this is irrelevant since there was no doubt that one of the voices on the 999 call was that of the deceased; nobody suggested that the other voice had been identified as that of the appellant;

iv)
a difference of expert evidence as to the age of the wound to the appellant's shoulder; this was fully and fairly ventilated before the jury.

25.
It follows that even if it is possible to construct a criticism of the summing up for not descending into detail of suggested weaknesses in the identification/hearsay evidence, it is not possible that any

omission which can be made out can have damaged the case of the appellant or can have led to an unsafe conviction. The reality is that the treatment of the evidence was fair to the accused.

26.
Lastly, Mr Casey contends that the judge ought to have left provocation to the jury for consideration in the event that it rejected the evidence of Mr Penn that the appellant did not kill the deceased. The asserted provocative behaviour is the deceased wounding the appellant with a machete. It is certainly the law that if there is evidence from which the jury might infer that the defendant killed when provoked to lose his self control, that issue must be left to the jury whether or not it is his primary case. But there must be evidence from which the jury could infer this. Here the appellant did not give evidence. Contrary to the submission of the Crown, there was nevertheless evidence from which the jury might have inferred provocative behaviour by the deceased, in wounding the appellant with a machete. The appellant had so asserted in his police interview, and this was evidence in the case, albeit not backed up by evidence on oath. Penn's evidence that the deceased was holding himself as if injured was some limited support. The jury could have inferred wounding by the deceased only if it rejected the expert evidence that the wound could not be old enough to have been sustained on the night in question, and only if it rejected the hospital evidence that the defendant was lying when he said he had been to the hospital in an injured state. So provocative behaviour might have been inferred even in the absence of the appellant's own evidence and even though the blood on the machete was definitely not his and appeared to be that of the deceased. There was, however, simply no evidence at all of loss of self control and the 999 tape was not consistent with it. Consistently with this, nobody at the trial suggested that provocation ought to be left to the jury.

An unsafe conviction?

27.
It follows that the two material irregularities in the trial process which have been made good are the two aspects of the treatment of the hearsay status of the evidence deriving from the deceased, which the Board has identified at paras 17 and 19 above.

28.
Under section 37 of the West Indies Associated States Supreme Court Act (Virgin Islands) (cap 80) the question is then whether notwithstanding those irregularities the Board is satisfied that no miscarriage of justice has actually occurred. That involves determining the impact of the irregularities upon the outcome of the trial.

29.
Whilst hearsay evidence potentially suffers from the twin weaknesses that (i) what the witness says may be misreported and (ii) what he says may be in error (deliberately or otherwise), it may nevertheless sometimes be strong evidence. The principal hearsay material emanating from the deceased in the present case was, compared with many instances of hearsay, very strong, both because of the circumstances in which it came into existence, and because of independent support for it.

30.
As to the risk of misreporting, there was clearly some risk that the deceased had been misreported in the two computer entries relating to his complaints of 9 and 10 October, but any such error was set at naught by his witness statement, verified by him personally, on the second of those two dates; in relation to that statement, misreporting did not arise. Nor could misreporting possibly arise in relation to the other vital piece of evidence, the 999 call; the transcript spoke for itself and was not in

dispute. As to the additional piece of hearsay evidence, Inspector Howe's report of the deceased indicating that his killer had come from the bungalow, there was no reason for the inspector to have falsified this account and it was not challenged, although the judge cautiously reminded the jury that it must be sure he had not concocted his evidence; he might have misunderstood a gesture of the head made by a dying man, but this possibility was similarly clearly and distinctly placed before the jury.

31.
As to accuracy of the content of the deceased's statements, they were powerfully and independently supported in their important detail.

i)
The appellant's admission to PC Trumpet was evidence entirely independent of the deceased that there had been an altercation between them on 10th October. The deceased did not purport to identify the appellant by name as the person who threatened him on 9 and 10 October, but the appellant's admission made it clear that it was him on the 10; further he gave the additional detail of the deceased's use of a baseball bat; if it was him on the 10, this was very powerful evidence that it was also him on the 9.

ii)
Likewise, Sharon Liburd's evidence powerfully supported the deceased's recollection of the number of the jeep and was material entirely independent of the deceased that it was the appellant who must have been concerned in the altercation of 10 October.

iii)
The appellant's admission to the police in interview that his relatives had been in a car accident with the deceased was independent support for the deceased's statement that his October assailant was related to the car driver.

iv)
Likewise, the appellant's admissions to the police in interview that he lived in the green bungalow and that the car accident had happened outside it supported the deceased's assertion to Inspector Howe that he knew the home of his assailant and could point it out.

v)
The impromptu and contemporaneous circumstances of the deceased's assertions in the 999 call and to Inspector Howe made deliberate invention very unlikely; not only was there no time for it, but the deceased was mortally wounded for part of the call.

vi)
Whilst there might yet, in principle, have been an error by the deceased in telling the 999 operators that his assailant was the same man as he had had trouble with in October, this risk was effectively removed by the appellant's admission in interview that he had not only been present when the deceased was shot but had been in a further altercation with him.

vii)
There was further support for the deceased's identification of the appellant in the fact that the latter made himself scarce the next day, taking precautions not to be recorded in his movements.

viii)

If the jury accepted it, there was expert medical evidence that the appellant's wound could not be as old as to have been sustained on the night of the killing. Moreover several hospital staff gave apparently compelling evidence that the appellant had not, as he told the police he had, presented himself with a wound that night.

32.
The evidence of the brother of the deceased, by contrast, did not greatly advance the appellant's case in the face of these factors. Certainly, it suggested that the deceased had spoken of having trouble with people in the plural, but both on his account, and on what the appellant had said to the police, there had indeed been more than one person involved in altercation with him, and they were related to one another. It is not easy to see how the deceased's reference to more than one person significantly weakened the Crown case against the appellant. In the end, given the latter's admission that he was present immediately before the killing and in physical dispute with the deceased, his case depended upon the jury not rejecting the evidence of Mr Penn. Once it did reject it, there was little plausible possibility that the deceased had seen and confronted his murderer but had nevertheless identified someone else as responsible, and, moreover, someone else who was admittedly present. The judge was accordingly quite right to leave the case to the jury as depending very largely on whether Mr Penn might be telling the truth; to concentrate the mind of the jury on the central feature of the case is an essential part of summing up in a trial of this kind.

33.
In these circumstances, the Board concludes that the irregularities of treatment of the hearsay evidence could not, on the facts of this case, have led the jury to convict when they would not have done so if accurately directed. There is no miscarriage of justice in this case. It follows that the Board will humbly advise Her Majesty that the appeal against conviction should be dismissed.