

Privy Council Appeal No. 74 of 2000

**(1) Andre Bennett and
(2) Augustus John**

Appellants

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF GRENADA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 17th July 2001

Present at the hearing:-

Lord Slynn of Hadley
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Hutton

[Majority Judgment delivered by Lord Hutton]

1. On the afternoon of 25th July 1996 an elderly woman named Myrtle Linda Williams was found by her son lying dead on a bed in a bedroom of her house in St George's, Grenada. The bedroom was on the upper floor of the house and the kitchen was also on the upper floor. Her throat had been cut, a cloth was tied round her mouth, and she had numerous other stab wounds to her body.

2. The two appellants, together with a third man, Wayne Murray, were charged with the murder of Mrs Williams and were tried in March 1998 before St Paul J and a jury. At the conclusion of the trial the two appellants were convicted and sentenced to death. The third co-accused, Wayne Murray, was acquitted after a successful submission of no case to answer at the conclusion of the Crown case. The appellants appealed against their convictions to the Court of Appeal and the appeals were dismissed on 27th July 1998. They now appeal with special leave to the Board.

The Crown case

3. At the trial the principal witness for the Crown was an accomplice, Kyron McFarline. He was a young man aged about 18 at the time of the trial. His evidence was that he knew the appellant Bennett well, and through him knew the appellant John and the other co-accused Murray. He described in considerable detail how with the two appellants and Murray he went to the home of the deceased. The appellants and Murray went into the house and he went in after them. In the kitchen he saw Bennett holding a long black-handled knife with teeth to the throat of a lady while she signed a cheque for him. John was standing close to her. The lady handed over the cheque to Bennett, who put it in his pocket. John then put a piece of cloth round the lady's mouth, and as he did so Bennett stabbed her on the left shoulder bone. He (McFarline) ran to a gas station nearby and the two appellants, together with Murray, then came running down to the gas station. Later that day Bennett came to his (McFarline's) home and told him that he had given the lady 21 stabs. He also told him that if he talked he would be a dead man, and he had a gun in his hand. At that time Bennett was living with "Portia".

4. The Crown also called Portia Clarke who was Bennett's girlfriend, and the mother of his young child. When she was first called to give evidence on 11th March 1998 she said that at 12 noon on 25th July 1996 she was at home with Bennett and that he then went over to see a neighbour at 2.00 pm, returning home at 6.00 pm. When he left he did not take anything with him and he did not do anything when he returned.

5. The prosecution applied to be allowed to treat her as a hostile witness on the ground that the evidence which she had given was inconsistent with her evidence at the committal proceedings. On the following day of the trial the judge ruled that she should be given the opportunity to refresh her memory from her deposition, but as she was not in court a bench warrant was issued for her. When she was recalled to the witness box on 16th March 1998 she confirmed that she had now read her deposition. She said that on 25th July, at about 12 midday, Bennett left the house and went into town taking with him a black-handled knife with teeth at the top. When he returned at about 2.00 or 3.00 pm, she saw him in the kitchen washing blood off a knife in the sink and she noticed that his pants had something like blood on them. When she asked him what had happened to them, he replied that he had got a cut on his hand but after an argument he asked her for some kerosene and burnt the clothes he had been wearing. He showed her a cheque

and asked her where he could get it changed, and she said "I tell him go and see, he might go in jail". She saw the name "Andre" and "\$5000" written on the cheque. In cross-examination by counsel for Bennett, Portia Clarke agreed that she had been detained by the police for 5 days in connection with the murder when she was about 4 months' pregnant. She said that "Someone did frighten me to give evidence in this case".

6. Dr Rukmini Jayaram, a government pathologist, gave evidence that on 26th July 1996 she performed an autopsy on the body of Mrs Williams. The cause of death was a penetrating wound to the left side of the neck which severed the left internal jugular vein which led to a massive haemorrhage. In addition there were many other lacerated wounds to the body.

7. The Crown also sought to adduce in evidence written confession statements alleged to have been made by each appellant. Each appellant objected to the admissibility of his alleged statement on the ground that it was not voluntary, having been obtained by force and threats on the part of Inspector Mason and Inspector Maitland, and two *voire dres* were held. Inspector Mason and Inspector Maitland gave evidence that each appellant had made a written confession when interviewed by them – on 14th September 1996 in the case of Bennett and on 16th September 1996 in the case of John. Both inspectors said that they had used no force or threats and that each statement was made voluntarily.

8. Bennett said in evidence that in the police station Inspector Mason slapped him in the belly and on the back, gave him shocks to his head and body "with a black ting with two sprang on the end", and beat him on his body with a piece of iron, lashing him first on the belly. He then put out five bullets on the table, put one in a gun, and put the gun to his head.

9. In support of his allegations Bennett called Bervon Norcisse, a prison officer, and Dr Trevor Friday. Norcisse said that he saw Bennett around 1635 hours on 16th September 1996 at Richmond Hill Prison. He asked him if there was anything wrong with him and he said that he had some bruises on his skin. When he asked him how he got the bruises he said he sustained them from "the police officers". He looked at him and saw the bruises and made a note as regards his observations.

10. Dr Trevor Friday said that he was a district medical officer. He went to Richmond Hill Prison on 18 September 1996 where he examined Bennett who complained that he had some bruises on his

right arm and abdomen. He saw that he had a few abrasions on his right arm on the outer aspect and that he also had some abrasions and bruising on the upper abdomen. There was nothing else. A blunt trauma could have caused those injuries. On cross-examination he said that the abrasions were not fresh.

11. John said in evidence that in the South St George police station he was forced to sign the statement. Inspector Mason held his hand and said "Sign quick, sign quick". He had an apparatus in his hand which he kept resting on him hard. Inspector Maitland, Sergeant Dunbar and another police officer whom he called "Mr Joe" were also in the room. Inspector Maitland had a piece of wood hitting him with it. Sergeant Dunbar had a table foot and Sergeant Joe had a gun to his head.

12. In support of his allegations John called Finbar Charles, a prison officer, and Dr Trevor Friday. Charles said that he saw John on 18th September 1996 at the prison gate lodge. He observed some bruises on the lower part of his left hand. He asked him how he came by the bruises and John replied that he got them as a result of lashes from a police officer and told him it was Mr Mason. Dr Trevor Friday said that he visited the prison on 18th September 1996. While in the prison he saw John and had a conversation with him. He examined him and saw some abrasions on his left shoulder. There were no other findings. The abrasions were fresh and were about a day or two old.

13. At the conclusion of the voir dire in relation to Bennett's statement the judge ruled that the evidence did not lead him to believe that the statement was not made voluntarily. The judge stated that he would hand down a ruling in writing later, but that this does not appear to have been done.

14. At the conclusion of the voir dire in relation to John the judge gave the following ruling:

“Except as regards the period of time the accused was detained before the statement was allegedly given the evidence does not suggest that the statement was obtained involuntarily or not made voluntarily.

I do not believe the evidence of Augustus John. I accept the evidence of the prosecution. The statement was to my mind made voluntarily and not by improper or unfair means.”

15. After the rulings on the voir dices the alleged written statements were put in evidence before the jury.

Bennett's defence case

16. Bennett made an unsworn statement from the dock. He said that on 25th July 1996 he was in his home at Boca. About nine in the morning he went to a neighbour's, and from there he went to Grenville where he spent most of the day and then he went to Mount Horne. He remained there "by my girlfriend uncle". He did not return home until the next day.

17. After 25th July 1996 Stephen Williams, the woman's son, called him to work part-time with him. During the months of July and August he asked him to work part-time on a number of occasions. He asked him if he knew that his mother had died and he told him "No". He did not know that his mother had died. He then described how in September he was picked up by the police and was taken by them to South St George police station. The police questioned him about the woman's death and he told them that he knew nothing about what they were talking about. He then described, as he had done in the voir dire, the manner in which the police had threatened and physically ill-treated him and forced him to make a statement which was untrue. Bennett then called the prison officer, Bervon Norcisse, and Dr Trevor Friday, who gave evidence similar to the evidence which they had given on the voir dire.

John's defence case

18. John made an unsworn statement from the dock. He said that on 25th July 1996 he went to his brother's house soon after nine o'clock in the morning. Whilst there he was working on carnival costumes with Miss Carriman and spent the whole day with her until he started walking up the road some minutes past six in the afternoon. He had never been to St George's that day.

19. He described being picked up by police officers on 14th September 1996. They took him to Grenville police station and then to Grand Anse. They questioned him and he told them where he was, but they refused to go and find out. He then described, as he had done in the voir dire, how he had been ill-treated by police officers and forced to sign a statement.

20. He called the prison officer, Finbar Charles, and Dr Trevor Friday, who gave similar evidence to that which they had given on the voir dire with some minor variations. John also called Helen Carriman who gave evidence supporting his alibi that he had been

at his brother's house from about 9.30 am to 5.30 pm on 25th July 1996.

The summing up

21. In his summing up the judge told the jury that Kyron McFarline was the star witness in the case. The judge also told the jury that McFarline could have been charged with the other accused persons as an accomplice in that he participated in the crime. He was there so he could have been charged as an accomplice. He then continued at pages 101-103 of the record:

“Kyron McFarline may therefore be considered to be an accomplice in the crime of murder. If you good members of the jury conclude that Kyron McFarline was at any stage of the proceedings an accomplice in the crime charged against the two accused there would be danger in convicting the accused on the evidence of McFarline, standing alone and uncorroborated, standing alone and uncorroborated because he may be trying to save his own skin by giving evidence. But is that the case here? You may however convict the accused if you are satisfied that McFarline was speaking the truth. You may convict if you are satisfied that McFarline was speaking the truth. Never mind he was called old thief and old prisoner. If you are convinced he was speaking the truth you may convict the accused persons.

I said and I am going to repeat. If you conclude that McFarline was at any stage of the proceedings an accomplice in the crime charged against the two accused there would be danger in convicting the accused on the evidence of McFarline, standing alone and uncorroborated. Now is there evidence capable of amounting to corroboration of McFarline's evidence? It is for you to decide whether the evidence you will hear later is capable of amounting to corroboration of McFarline's evidence. I will point you to some parts of the evidence and you will decide whether or not that evidence is capable of corroborating McFarline's evidence.

McFarline told you, ‘Bennett put the dog on the porch. That dog was in the yard. A chain was attached to the dog’. Meaning the dog was tied, I suppose. What did Stephen Williams tell you? He told you before he left the home that morning three dogs were chained. McFarline said he found a dog chained and that dog Bennett clicked his finger the

dog started to wiggle its tail and he Bennett put the dog on the porch. McFarline told you the knife Bennett had was a long knife and he pointed how long the knife was. It was a black handle knife with some teeth at the top. What did Portia say to you? Portia who describes herself as the mother of Bennett's child said, 'I had seen that knife before that day. The knife had teeth at the top'. Was McFarline lying when he said he saw the knife? A matter entirely for you. McFarline went on to tell you, 'The lady signed the cheque and gave it to Bennett and he put it in he pocket'. What did Portia Clarke tell you? She said, 'When he came home we had a falling out. He then left the room kitchen and went inside the room and he was cursing. He came back out of that room. He asked me to give him some kerosene with matches. I gave it to him. He burned the clothes. He had a cheque in his hand. He asked me where he could get that cheque change. I tell him to go and see he might go in jail. He burn the cheque. I saw Andre name on the cheque. I also saw \$5000.00 mark on the cheque'. Was McFarline lying? A matter entirely for you.

I go on. Bennett stab the lady on she collar bone. What did Dr Jayaram tell you? I will go to her evidence later but what did she tell you where she found the major wound? Was McFarline lying? A matter for you.

Bennett told me he gave the lady 21 stabs. You have heard the doctor's evidence. Did you count those stabs? Did you count them? She said multiple. McFarline told you Bennett told him he gave the lady 21 stabs. Was McFarline lying? It is a matter for you.

McFarline told you Augustus John bar the lady mouth with a piece of cloth. What did Cpl Hacket tell you? Hacket told you when he went to the house he saw the lady mouth bar with a piece of cloth. Trevor Modeste told you the same thing. Stephen Williams told you the same thing. Was McFarline lying because he is an old thief? A matter for you. These are some of the points which I ask you to ponder on whether they are capable of corroborating McFarline's evidence."

The appeal to the Court of Appeal

22. Counsel for Bennett advanced two grounds of appeal in argument before the Court of Appeal. The first ground was that

because McFarline said in evidence that he saw Bennett inflict only one wound on the deceased in the kitchen, and because the deceased was found lying in the bedroom with multiple stab wounds, it had not been established beyond a reasonable doubt that Bennett had inflicted the fatal wound which caused her death. The Court of Appeal rejected this ground of appeal for two reasons. First, because Bennett was guilty on the basis of joint enterprise. Secondly, because there was no evidence whatsoever that any persons other than the appellants could have inflicted the injuries on the deceased, and it was open to the jury to find on the evidence that the stabbing of the deceased on the shoulder bone as described by McFarline was the fatal stab wound in the neck as found by Dr Jayaram. The second ground advanced in argument was that the judge's directions on the standard and burden of proof were inadequate, but this ground was also rejected by the Court of Appeal. Accordingly Bennett's appeal was dismissed.

23. The principal ground of appeal advanced by counsel on behalf of John to the Court of Appeal was that the trial judge should have ruled that John's written statement was inadmissible in evidence as being involuntary. The Court of Appeal accepted this submission and in delivering his judgment, in which the other members of the Court concurred, Singh JA stated:

“Mr Clouden for the appellant argued against the judge's ruling to admit into evidence a caution statement given by the appellant to the police, on the ground that it breached certain of the judge's rules, and that the appellant was beaten to give the statement. This issue will be dealt with some brevity because of its obvious merit from the transcript before us. The learned DPP conceded that the judge's rules were breached, the statement having been taken from this appellant one hour and fifteen minutes beyond the requisite 48 hours detention. More seriously however, having perused the evidence given at the voir dire held by the judge on the issue of the admissibility of this statement, we are perturbed that the judge could have ruled the statement as being admissible. This appellant's evidence as to the violence used on him by the police to extract the statement was not only overwhelming but it was amply supported by evidence of a doctor and prison officer. The learned judge should have rejected the statement and I so rule.”

24. Singh JA also held that as the statement had been held inadmissible John's second ground of appeal relating to the failure

of the judge to give a Lucas direction was no longer relevant, as the alleged lies were contained in the statement. Singh JA also rejected the third ground of appeal that the evidence did not support a joint enterprise and that the trial judge had failed to put the appellant's case properly to the jury.

25. However, notwithstanding that it had held that John's statement was inadmissible in evidence, the Court of Appeal applied the proviso and also dismissed his appeal, Singh JA stating:

“In my judgment, the wrong admission by the judge of the caution statement of this appellant, which by itself, may have amounted to a confession only to manslaughter, did no injustice to the appellant's case. It could have caused no miscarriage, especially when regard is had to the power of the evidence of the accomplice as strengthened by the corroborative evidence.”

McFarline's retraction

26. On 12th July 2000, almost two years after the Court of Appeal had dismissed the appeals of both appellants, Kyron McFarline, who was on remand in prison on a charge of murder, swore an affidavit retracting all the evidence which he had given at the trial and deposed that he had been forced to give false evidence against the appellants by threats and violence on the part of Inspector Mason. He alleged that he had been picked up by the police for being in possession of cocaine some time after the killing of Myrtle Williams. He said that Inspector Mason questioned him for two days about that murder and he kept telling him that he knew nothing about it because he was not in Grenada at the time. But Inspector Mason beat him and threatened to have him sent to the gallows if he did not admit that he was at the scene of the killing and saw Bennett stab the woman with John and Murray looking on. He said that he was so frightened that he agreed to sign a statement that Inspector Mason had written out about the killing and at the trial he gave evidence against Bennett, John and Murray. After the trial Inspector Mason met him and told him that if he gave any statement to any lawyer he would put him away for life and he then took him to the CID and gave him \$500 in cash to keep quiet. He was now in custody for another murder he knew nothing about and Inspector Mason had beaten him and forced him to sign a confession for that killing. He felt guilty about the men who were convicted on his statement so he decided to tell the truth and spoke to a priest and another prisoner and gave him a statement. He was not in Grenada when Myrtle Williams was killed. He had gone to St Marten/Dominica for four weeks and came back to Grenada

after the lady was killed. He made the statement of his own free will and with no pressure from anyone to do so.

27. Inspector Mason swore an affidavit on 11th May 2001 in which he totally rejected the allegations which McFarline made in his affidavit and gave a number of reasons why the details set out in McFarline's affidavit were untrue. He stated that on more than one occasion McFarline was kept in protective custody by the police at his own request because he expressed fear for his life as a result of threats issued against him in connection with drugs. Therefore the Crown submitted that McFarline has retracted his evidence because of threats made against him in prison and that his retraction and the allegations made in his affidavit are false.

The grounds of appeal to the Board

28. The Board proposes to consider first the appellants' grounds of appeal without regard to McFarline's affidavit, and turns to the appeal of John. The principal submission of Mr Grieve QC on his behalf was that, having held that his statement was inadmissible, the Court of Appeal erred in applying the proviso and upholding his conviction, because if the statement had been excluded from evidence at the trial it was not inevitable that a reasonable jury, properly convicted, would have convicted.

29. On behalf of the Crown Mr Cassel QC submitted that the Court of Appeal had erred in holding that John's statement was inadmissible and that the Board should uphold the judge's ruling that it was voluntary and admissible. Mr Cassel's argument, briefly summarised, was that the question whether or not John was forced by police officers to make the statement by physical violence and threats was a question of fact for the trial judge, taking into account his impression of the witnesses in giving evidence in chief and in cross-examination. Mr Cassel criticised the statement of the Court of Appeal that John's evidence on the voir dire was "amply supported" by the evidence of Dr Friday and a prison officer. He submitted that the doctor and the prison officer saw the injuries on John two days after the written statement was alleged to have been made, and the injuries could have been caused by another prisoner. He further submitted that the injuries seen by the doctor and the prison officer were inconsistent with the extent of the beating alleged by John. It was not put to the police officers that they had caused the bruises seen in the prison, and this point was of importance because there was some evidence that there had been a fight or argument between John and Bennett a few days earlier.

30. Their Lordships are unable to accept these submissions. It is well established that it is not the function of the Judicial Committee to act as a second court of criminal appeal. Unless there are exceptional circumstances the Board does not embark upon a reassessment of matters such as the weight which should be given to particular pieces of evidence or the inferences which may properly be drawn from them. These are matters for the decision of the Court of Appeal. But their Lordships add that, even if it were their function to consider such issues, they see no reason to differ from the opinion formed by the Court of Appeal as to the inadmissibility of John's statement.

31. Having ruled that John's statement was inadmissible their Lordships are of opinion that the Court of Appeal erred in upholding his conviction and that this was not a case in which it was proper to apply the proviso. McFarlane was an accomplice and the judge rightly directed the jury that it would be dangerous to convict on his evidence standing alone in the absence of corroboration. But the judge then fell into error in the passage of his summing up set out earlier in this judgment in which he pointed out to the jury evidence which he suggested was capable of corroborating McFarlane's evidence against John. The Court of Appeal fell into the same error because in his judgment, when considering John's appeal, Singh JA referred to "the power of the evidence of the accomplice as strengthened by the corroborative evidence". It is clear law that evidence is not corroborative unless it connects or tends to connect the accused with the crime. To be evidence in corroboration the evidence must confirm in some material particular not only that the crime has been committed, but also that the accused committed it: *R v Baskerville* [1916] 2 KB 658, 667. But none of the parts of the evidence to which the judge referred at pages 102 and 103 of the record and no other piece of evidence connected or tended to connect John with the commission of the murder. The judge referred to the evidence of Corporal Hackett that when he went to the home "he saw the lady mouth bar with a piece of cloth", but that is not evidence which shows or tends to show that it was John who gagged the mouth of the deceased. Therefore, once John's statement had been held to be inadmissible, the only evidence against him was the uncorroborated evidence of the accomplice McFarlane. Accordingly the proviso could not be applied and his appeal should be allowed and his conviction quashed, and his case is not one where it would be right to order a retrial.

32. Their Lordships now turn to consider the appeal of Bennett. The principal submission advanced by Mr Owen QC on his behalf

was that, just as the judge should have ruled that the statement of John was inadmissible on the ground that the Crown had not established beyond reasonable doubt that it was obtained without violence on the part of the police, so also he should have ruled on the same ground that the confession statement of Bennett was inadmissible.

33. Bennett's written grounds of appeal to the Court of Appeal stated in paragraph 6:

“The learned trial judge misdirected himself when he admitted in evidence the statements of the appellants.”

It is a matter of regret that it appears that this ground was not advanced in argument to the Court of Appeal by Bennett's counsel. The Court of Appeal was satisfied from the transcript before it of the “obvious merit” of John's argument that his statement should have been excluded on the ground that the judge's rules had been breached and that John was beaten to give the statement. Their Lordships recognise that in assessing the truthfulness of Bennett's account of the behaviour of the police towards him, the Crown can attack his credibility with some force on the ground that he said in evidence that he had been told by the police what others had been saying about him at a time when other evidence shows that the police could not have been in possession of that information. Nevertheless if Bennett's counsel had argued before the Court of Appeal that his statement should not have been admitted in evidence their Lordships consider it probable that the court would have accepted that argument. If a judge is left with a reasonable doubt as to whether certain police officers had ill-treated a person in custody in order to obtain a statement from him, there is no hard and fast rule that a judge must form a similar doubt as to the treatment of another suspect by the same officers. But in the present case, where the same officers, Inspector Mason and Inspector Maitland, during a period of a few days, questioned Bennett and John in respect of the same murder, the basic similarity (notwithstanding some differences in the details and the separate attack which can be made on Bennett's credibility) between the allegations of ill-treatment made by John and the allegations of ill-treatment made by Bennett, with marks on both appellants consistent with ill-treatment being seen by Dr Friday and by two respective prison officers, is such that their Lordships consider, on balance, that the judge should have ruled that Bennett's statement, as well as John's statement, was inadmissible.

34. In Bennett's case, unlike in the case of John, there is evidence which is capable of constituting corroboration of the evidence of McFarlane because it tends to connect Bennett with the crime. This is the evidence of Portia Clarke that on 25th July 1996 around midday Bennett left home with a knife with teeth at the top, and that when he returned home between 2.00 to 3.00 pm she saw him washing the knife with something like blood on it and that he had a cheque with the name Andre and with \$5000 written on it.

35. However their Lordships consider that it would not be proper to apply the proviso in the case of Bennett. Having regard to the variation between the evidence of Portia Clarke in her deposition and her evidence at the trial, her reluctance at the trial to give evidence against Bennett, and her statement that she had been frightened to give evidence, their Lordships consider that the jury might not have accepted the truth of her evidence and would not inevitably have convicted if Bennett's statement had been excluded from evidence. Therefore their Lordships consider that Bennett's appeal should be allowed and his conviction quashed. The question then arises whether his case should be remitted to the Court of Appeal to consider whether a new trial should be ordered.

36. In *Reid v The Queen* [1980] AC 343 Lord Diplock in delivering the judgment of the Board in an appeal from Jamaica set out the principles which should guide an appellate court in considering whether or not a new trial should be ordered. He stated at page 349G:

“Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.”

At page 350B:

“... there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo

for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica.”

And at page 351A:

“Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another. The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today. As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate judges residing in the island.”

37. The appellate court which decides whether there should be a retrial is concerned with the question whether such a trial would serve the interests of justice in Grenada. One of the factors referred to by Lord Diplock in *Reid v The Queen* is the current state of public opinion in the jurisdiction where the crime was committed. It seems to their Lordships that by whomsoever committed this was a particularly brutal murder of an elderly woman for money and the prevalence of this sort of crime is one of the matters to be taken into account in deciding whether there should be a retrial. As Lord Diplock stated the task of balancing the various factors is more fittingly exercised by appellate judges residing in Grenada who are

much more familiar with the crime rates and the state of public opinion in that island than the members of the Board. Where the various factors have to be balanced it has been the practice of the Board to entrust that task to the appellate court of the local jurisdiction and their Lordships consider that there is no reason to depart from that practice in the present case.

38. A factor which would militate strongly against ordering a new trial is if evidence which tended to support Bennett's defence at the first trial would not be available at a retrial. At a new trial there would be no evidence from John that he had been beaten to obtain a statement by the same police officers who Bennett alleged had beaten him for the same purpose. But their Lordships consider that in the particular circumstances of this case counsel for Bennett could put to the police officers in cross-examination that the Court of Appeal had ruled that they had used violence to extract a statement from Bennett's co-accused, John: see *R v Edwards* [1991] 1 WLR 207, 217. Moreover, whilst the issue of the admissibility of Bennett's statement would be a matter for the judge to rule on at a new trial, and the evidence called on that issue by the prosecution might differ to some extent from the evidence called at the first trial, the judge would have the benefit of the views of the Court of Appeal as to the admissibility of John's statement and the views of the Board as to the admissibility of Bennett's statement in the first trial. Therefore their Lordships think that the risk of Bennett suffering prejudice from the absence of John's evidence as to police ill-treatment is not a grave one, but it is a factor which the Court of Appeal should take into account.

39. As their Lordships have stated, having ruled that Bennett's statement should have been excluded from evidence, they have not applied the proviso in his case. However their Lordships consider that if McFarline and Portia Clarke at a retrial gave the same evidence as they did at the trial but Bennett's statement was not in evidence, a reasonable jury properly directed could convict him. Therefore, on that basis, their Lordships consider that it is appropriate to remit Bennett's case to the Court of Appeal to consider the issue of a retrial.

40. However, McFarline has retracted the evidence which he gave at the trial. It is not feasible for their Lordships to consider whether that retraction is well founded or is without foundation and has been made because of threats against him. This is a matter which will have to be investigated by the Court of Appeal and will be an important factor in their consideration whether the interests of justice would be served by ordering a retrial of Bennett.

41. In conclusion their Lordships desire to emphasise the following matters:

(1) In remitting to the Court of Appeal the decision whether there should be a retrial the Board is not ordering that a retrial should take place. The issue whether a retrial should be permitted is being remitted for decision by the Court of Appeal in accordance with the well-established practice of the Board.

(2) It is not feasible for the Board and it is not its function where the facts are not clear and require further investigation (in this case whether, *inter alia*, McFarline's retraction is true or is false and has been induced by threats in prison) to grapple with the issue whether there should be a retrial.

(3) Their Lordships are not at this stage in a position to decide that the evidence of McFarline and Portia Clarke should be left out of account. If both McFarline and Portia Clarke were to repeat at a retrial the evidence which they gave at the first trial and if the jury did not believe that they were giving false evidence because of improper pressure from the police, their evidence would constitute a case of some weight against Bennett. Their Lordships appreciate that Bennett may be able to make a case that McFarline and Portia Clarke were giving false evidence because of improper police pressure, but that is an issue which it is not possible for the Board to resolve.

(4) Their Lordships consider that at this stage it cannot be concluded that the case is irreparably and irredeemably infected by the conduct of the police. If a confession is excluded from evidence because the police have used violence against the accused to obtain a confession, it does not follow that evidence from other witnesses which is sufficient to permit a reasonable jury to convict must also be regarded as infected. To draw such a conclusion would require a careful and detailed examination of the facts of the particular case in respect of that issue which has not taken place before the Board.

42. Accordingly, for the reasons given, their Lordships will humbly advise Her Majesty that the appeal of John should be allowed and his conviction quashed, and that the appeal of Bennett should also be allowed and his conviction quashed, and that his case should be remitted to the Court of Appeal to consider whether a retrial should be ordered.

Dissenting judgment delivered by Lord Steyn

43. The convictions of the two appellants must be quashed. I am in substantial agreement with the fair and balanced reasons of the Privy Council given by Lord Hutton. I also agree that it would be wrong in the case of John to order a retrial and that the matter should therefore not be remitted to the Court of Appeal in Grenada for it to consider whether there should be a retrial. But I do not agree that the case of Bennett ought to be remitted to the Court of Appeal for it to consider whether there should be a retrial. I must explain the reasons which compel me to dissent on this point. Issues of general importance arise.

44. Counsel for the prosecution, in the alternative to his principal submissions argued that the cases of both appellants should be remitted to the Court of Appeal to decide whether there would be a new trial. He said that such an order has become the “usual” or “normal” order when a conviction of murder has been quashed. I am unable to vouch for the accuracy of this statement but if it be correct I respectfully suggest it may require reconsideration. In my view all such cases always demand an intense focus on the particular circumstances surrounding each case.

45. It is necessary at the outset to clarify what is meant by an order for a retrial. In reality it is not a mandatory order but in truth leave granted, in the exercise of the discretion of the court, to present the charge to a judge and jury at a new trial. The prosecution is in the driving seat. If the prosecution considers that a new trial is not practicable or in the public interest, it may abandon the prosecution.

46. The concept of a retrial, where the circumstances require it, is a valuable one. After all, there is a high public interest in ensuring that grave crimes should not go unpunished. It would undermine public confidence in the criminal justice system if such a power is not invoked where it is appropriate. On the other hand, the power to order a retrial is one which must be exercised with care in the interests of justice. It requires the court examining such an issue to consider, on the one hand, the interests of the public and of the victim’s family in an appropriate punishment of what was perhaps a horrific crime and, on the other hand, fairness to the accused whose conviction was quashed due to a failure of the criminal justice system after he had perhaps served a number of years in prison.

47. A factor which must weigh in favour of a retrial would be a powerful prosecution case which appears to make the accused's conviction on a retrial very likely. On the other hand, a retrial may be undesirable after a lengthy delay between the date when the accused was first arrested and the likely date of a new trial. Since this is not a relevant factor in the present case I do not propose to consider such cases.

48. It is, however, always important to consider whether in the particular circumstances a retrial can take place without unfairness to the accused. An order for a retrial may only be made if the interests of justice so require: section 41(2) of Act No 17 (Grenada). The purpose of this statutory provision is to enable a court to order a retrial to ensure that justice is done. On the other hand, this power is not to be exercised where it would place the defendant in a worse position than he was at his original trial: *R v Hemmings* [2000] 1 WLR 661, 671G-672G; *Taylor On Appeals*, 2000, para 10-006, at p. 425. An obvious example of unfairness could be a case where an important witness, for the prosecution or defence, has died or is no longer available to testify: *Fulcher* (1995) 2 Cr App R 251. It is also established that the prosecution should not be given another chance to cure evidential deficiencies in its case against the defendant: *Reid v The Queen* [1980] AC 343, at 348F, per Lord Diplock; *Nicholls v The Queen*, (Privy Council Appeal No. 14 of 2000; 13th December 2000). While not covered by direct authority, an analogous negative factor may be to give the prosecution a second chance to seek to introduce a confession ruled inadmissible at the first trial or on appeal from the first conviction.

49. In this context the majority refer to the *dicta* of Lord Diplock in *Reid v The Queen* [1980] AC 343 about the state of public opinion in Jamaica. Certainly I accept that public opinion in Grenada would favour a retrial in a serious case where it is just and appropriate to order one. On the other hand, I would not for a moment entertain the idea that public opinion in Grenada would demand a retrial even if it cannot take place without injustice to an accused. If I am wrong on this point, I would say that the baying of a lynch mob is no more acceptable in Grenada than elsewhere. The Constitution of Grenada is the silent sentinel guarding against such pressures. And the Privy Council is the ultimate guarantor of the enforcement of the Constitution of Grenada and the integrity of its criminal justice system.

50. The circumstances in which it is right for the Privy Council to remit the question whether there should be a retrial to the Court of Appeal must now be examined. Such an order relieves the Privy

Council of the burden of grappling with this question. It is also a mark of deference to the Court of Appeal. On the other hand, the reality is that at the end of a substantial hearing the Privy Council will have an in depth knowledge of the case. If the matter is remitted to the Court of Appeal and is heard by the original panel, or by a differently constituted panel, the Court of Appeal cannot realistically be expected to be conversant with the details of the case. Take, for example, the present case. The Eastern Caribbean Court of Appeal dismissed the appeals on 27th July 1998, i.e. almost three years ago. Even if the same panel of the Court of Appeal is available to hear the retrial issue the members of the court will have very little memory of the case. They will have to study the summing up, the transcripts of evidence, the judgments in the Court of Appeal and in the Privy Council, and consider the rival arguments. On such an important matter the accused is, of course, entitled to a fair and effective hearing and in Grenada and all the Caribbean countries this right is guaranteed by constitutional guarantees. Usually, counsel who appeared before the Privy Council will not be able to appear before the Court of Appeal. The accused is, however, entitled to be represented by properly briefed counsel. And the Court of Appeal will have to set aside sufficient time for a substantial hearing. In some cases a remission may place a considerable burden on the Court of Appeal. In contrast the Privy Council will be fully apprised of the shape of the case and, so far as practicability of a retrial is concerned, the "order" for a retrial is in law merely authorisation for a retrial which may not take place if a change of circumstances has made it impossible or impracticable. If it be the view of the Privy Council that the accused should be retried, there will sometimes be good sense in the Privy Council making that order. In my view the case of Bennett falls in this category and the Privy Council should now grapple with the issue whether in principle and on the facts of his case there should be a retrial.

51. While it is alleged that Bennett is guilty of a horrific crime, I am satisfied that in the circumstances of the case it would be unfair to have a retrial in his case. The Court of Appeal observed about the caution statement of Augustus John:

"... having perused the evidence given at the Voir Dire held by the judge on the issue of the admissibility of this statement, we are perturbed that the judge could have ruled the statement as being admissible. This appellant's evidence as to the violence used on him by the police to extract the statement was not only overwhelming but it was amply supported by evidence of a doctor and a prison officer. The

learned judge should have rejected the statement and I so rule."

Given that there was *no* explanation whatsoever tendered in evidence by the prosecution to explain the significant contemporaneous injuries of John, it was overwhelmingly probable that the police officers had assaulted John to extract the statement. It follows that the police officers must have lied in their evidence. In the circumstances of the two linked cases the same applies to Bennett. Again, there was *no* explanation of his significant recent injuries testified to by a doctor and prison officer. It was overwhelmingly probable that police officers assaulted Bennett to extract his statement. The same police officers were involved in the two cases. The police officers must have lied in Bennett's case. If this is the case, there must be a shadow hanging over the whole prosecution case.

52. I am perturbed by the idea of giving the prosecution another opportunity to try to adduce the statement of Bennett. If at a retrial the trial judge were to admit the statement, Bennett would in my view have strong grounds for an appeal to the Court of Appeal and, if necessary, again to the Privy Council. And I am afraid I cannot agree that without the caution statement the comparatively weak accomplice evidence of Kyron McFarlane and the evidence of the witness Portia Clarke, who had to be declared hostile, amounts to a strong case. In any event, given the conduct of the police officers as well as their false accounts, a grave suspicion must attach to the whole police investigation and prosecution case.

53. Moreover, if the Court of Appeal were to direct the case of Bennett to be retried, the consequence will be that the police conduct towards John, his injuries, the evidence of the doctor and police officer relating to him, as well as the police lies concerning the treatment of John, will not be before the judge and jury. If the judge admits the statement of Bennett which on half the picture he may well do, the jury will not have the whole picture before them. In these circumstances Bennett would be placed in a markedly worse position than he had been in at his first trial.

54. The majority observe that:

"... in the particular circumstances of this case counsel for Bennett could put to the police officers in cross-examination that the Court of Appeal had ruled that they had used violence to extract a statement from Bennett's co-accused, John: see *R v Edwards* [1991] 1 WLR 207, 217."

This point trenchantly underlines the inevitable disadvantage of Bennett in a new trial. If the police deny that they used violence against Bennett's co-accused, John, as seems likely, there will be no evidence from John, the prison officer and the doctor about John's injuries sustained at the hands of the police. Counsel for the prosecution would be entitled to place before the judge and the jury the standard argument: "You must decide the case on the evidence before you". The dilemma of Bennett not being able to put the whole picture before the judge and jury will be insurmountable at a new trial.

55. The majority also observe that:

"... the judge would have the benefit of the views of the Court of Appeal as to the admissibility of John's statement and the views of the Board as to the admissibility of Bennett's statement in the first trial."

I have to observe that the implication underlying this observation is heterodox, contrary to principle and pregnant with potential adverse consequences for retrials. It places the judge in an intolerable position. He must make his rulings and direct the jury on the evidence led in the new trial, whether as part of the *voir dire* or before the jury, and he cannot be expected to weigh in the balance observations in the Court of Appeal and Privy Council on the state of the evidence at the first trial.

56. Lastly, the majority contemplate that the prosecution may not tender Bennett's statement in evidence or that, if they do, the judge will probably rule that it is inadmissible. Unfortunately, in that eventuality there will also be grave prejudice to Bennett. In those circumstances the jury will be wholly unaware of the conduct of the police. The truth is that the case is irreparably and irredeemably infected by the conduct of the police. That is a result which the agents of the state are responsible for. And it is immeasurably more important that the Privy Council should not permit an unjust retrial than that a wicked criminal should be allowed to escape justice. Miscarriages of justice are a perpetual risk in any country. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 I pointed out with the agreement of others that in the last decade in England many miscarriages of justice have been exposed. By this term I was referring to cases where convictions were first upheld on appeal but, subsequently, after the defendants had served years in prison, the convictions were reopened and the conviction found to be

unsafe: see 119F and 127D-128G. There is no reason to suppose that in Grenada the risk of miscarriages of justice is lower. An insistence on the principle that there may only be a retrial if it can be scrupulously fair reduces the risk of wrong convictions.

57. In my view it would be wrong in principle to order a retrial in the case of Bennett.