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4 IN THE GRAND COURT OF THE CAYMAN ISLANDS

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6 HOLDEN IN GEORGE TOWN, GRAND CAYMAN

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8 (CRIMINAL)

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10 IND. NO. 37 OF 2003



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16 REGINA

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18 - and -

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23 DANITZA ZAMARA WOOD

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26 Accused

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33 Transcript of the ruling delivered by the
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35 HONOURABLE MR. JUSTICE HENDERSON, on the 1st day of July in
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37 the year 2004, at George Town, Grand Cayman.

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43 CHARGES: ASSAULT OCCASIONING ACTUAL BODILY HARM
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45 ASSAULT OCCASIONING ACTUAL BODILY HARM

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49 APPEARANCES:

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53 Ms. J. Ziemnak For the CROWN

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55 Mr. J. Furniss For the ACCUSED

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4 Thursday, July 1, 2004
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8 R U L I N G O N A P P L I C A T I O N
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12 HENDERSON J. :
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14 The Crown called as a witness a security
15 guard, Mr. Hank Barnes, who gave direct evidence
16 without making any mention of a certain
17 exculpatory statement he received from the
18 defendant. In cross-examination, counsel to the
19 defendant adduced from Mr. Barnes, without
20 objection by the Crown, the exculpatory statement
21 to which I have referred. That statement was not
22 part of the *res gestae* because the alleged
23 offences - two acts of assault - had already
24 terminated by the time the statement was made.
25 Neither was this wholly exculpatory statement
26 adduced, with leave of the court, for the purpose
27 of rebutting an inference or suggestion of recent
28 concoction.
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32 The question is whether the evidence was
33 admissible at all and what should be said to the
34 jury about it.
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37 The defendant did not give evidence in her
38 defence. It is anticipated that her defence will
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be based upon what she said to the security guard.

In my view, this particular statement by the defendant is one referred to in the law of evidence as a previous consistent statement. The current state of the law is well summarized in Cross on Evidence, Seventh Edition, 1990, 281, under the heading "Previous Consistent Statements." The learned author says this:

"The general rule at common law is that a witness may not be asked in-chief whether he has formerly made a statement consistent with his present testimony. He cannot narrate such statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory), and other witnesses may not be called to prove it. The rule against hearsay as defined in this book prohibits the reception of the statement as evidence of the facts stated, but there is an independent common law ban on proof of the previous oral or written statements of the witness as evidence of his consistency."

The learned author then makes reference to

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R. v. Roberts [1942] 1 All ER 187, a decision of the Court of Appeal to which I will come in a minute.

Later, on the same page, the reason for the rule is given in these terms:

"In this case, the reason given for the ban (sometimes loosely described as 'the rule against narrative' or 'the rule against self-corroboration') was the ease with which evidence of this nature can be manufactured. But, generally speaking, this can only be apposite when the witness is a party and, in any event, the ease with which evidence can be fabricated is a matter which should affect its weight rather than its admissibility. A more convincing reason was given by Sir W D Evans in his notes to Pothier when he said that in an ordinary case, the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true, until there is some particular reason for impeaching them as false. The necessity of saving time by avoiding superfluous testimony and sparing the court a protracted

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5 inquiry into a multitude of collateral issues
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7 which might be raised about such matters as
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9 the precise terms of the previous statement
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11 is undoubtedly a sound basis for the general
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13 rule."
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17 To repeat, then, the general rule is that a
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19 witness cannot in his evidence refer to a prior
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21 consistent statement made by himself out of court
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23 at a time when he was not under oath, and other
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25 witnesses may not be called to prove that the
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27 witness in question made such a statement.
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29 One might ask whether there is any different
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31 rule applicable to a previous consistent statement
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33 of a defendant adduced in cross-examination of a
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35 Crown witness.
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39 Cross on Evidence at page 510 answers that
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41 question in this way:
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45 "The rule against hearsay applies just as
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47 much to evidence elicited in
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49 cross-examination as to evidence in-chief. A
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51 deceased workman's statements to his widow on
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53 returning home after an accident have been
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55 held inadmissible at common law as evidence
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of its cause on a number of occasions. If a widow narrates in cross-examination what her deceased husband told her about the cause of his injuries or illness, her assertion is no more admissible as evidence of that fact than it would have been if made in-chief."

The position is perhaps brought into focus more clearly for present purposes when one refers to the case of *Roberts*, cited by Cross in the first extract I read.

Roberts was on trial for murder. He was charged with shooting a girl with a rifle; his defence was that of accident. At a certain point, Mr. Roberts's father was called and was asked to give evidence about statements made by Roberts to the father. These were wholly exculpatory statements and they were not being lead or relied upon by the Crown. They were not part of the *res gestae* because they were not contemporaneous with the shooting. Neither, it would appear, were they being introduced to rebut any assertion by the Crown of recent concoction.

The Court of Appeal, which was unanimous on

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the point, said this (at page 191):

"The second of the grounds of appeal is put in this way - that the learned judge was wrong in law in refusing to admit the evidence of the appellant's father as to the statement made to him by the appellant after his arrest. That relates to a statement alleged to have been made by the accused to his father after his arrest and while he was in custody. The father naturally was allowed to see his son.

In our view, the judge was perfectly right in refusing to admit that evidence because it was in law inadmissible. It might have been, and perhaps by some judges would have been, allowed to be given on the ground that it was the evidence which the defence desired to have given, was harmless, and there was no strenuous opposition on the part of the prosecution. Such evidence might have been allowed to be given, but the judge was perfectly entitled to take the view which he did, that in law the evidence was inadmissible. The law upon the matter is

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well settled.

The rule relating to this is sometimes put in this way - that a party is not permitted to make evidence for himself. That law applies to civil cases as well as the criminal cases. For instance, if A and B enter into an oral contract and sometime afterwards there is a difference of opinion as to what were the actual terms agreed upon and there is litigation about it, one of those persons would not be permitted to call his partner to say, "my partner a day or two after told me what his view of the contract was and that he had agreed to do so".

So in a criminal case, an accused person is not permitted to call evidence to show that after he was charged with a criminal offence he told a number of persons what his defence was going to be, and the reason for the rule appears to us to be that such testimony has no evidential value. It is because it does not assist in the elucidation of the matters in dispute that the evidence is said to be inadmissible on the ground that it is irrelevant. It would not help the jury

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in this case in the least to be told that the appellant said to a number of persons who he saw while he was waiting his trial, or on bail if he was on bail, that his defence was this, that or the other. The evidence asked to be admitted was that the father had been told by his son that it was an accident. I think the evidence was properly refused.

Of course, if the statement had been made to the father just at the time of the shooting, that would have been a totally different matter because it has always been regarded as admissible and a person should be allowed to give in evidence any statement accompanying an act so that it may explain the act.

It was put by counsel for the appellant that the statement might be admissible on the ground that the accused had been asked in cross-examination, and it had been suggested to him in cross-examination, that this story of accident was one which he had recently concocted. If any such question had been put, undeniably the evidence would have been admissible as showing it was not recently

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2 concocted because the accused had said so on
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4 the very day the incident occurred. The
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6 answer is that no such question had been put
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8 and no suggestion made to the accused."
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12 In my view, that passage, which has not been
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14 judicially disapproved of, is the law in the
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16 Cayman Islands today.
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18 Self-serving statements by a defendant are,
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20 in general, not admissible at the behest of that
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22 defendant. There are two narrow exceptions:
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24 a self-serving statement which is part of the
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26 *res gestae* is admissible; and a self-serving
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28 statement may become admissible where the court is
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30 satisfied that it is necessary to rebut an
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32 allegation of recent concoction.
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34 Neither of the two exceptions are material
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36 here, so I am driven to the conclusion that the
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38 evidence was not admissible and should not have
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40 been admitted in the way that it was.
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42 The Crown took no objection to it. The
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44 defence may well have governed its tactics in this
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46 case on the basis that the evidence would be
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48 available for the jury to rely upon.
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50 As *Roberts* makes clear, a trial judge has
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52 some discretion to admit evidence of this sort,
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even where a technical approach would demonstrate that the evidence is not admissible.

Taking these latter considerations into account, I have decided that I will not instruct the jury to ignore the evidence. I am simply going to remind them that the evidence was not given upon an occasion when the defendant was under oath, and it has not been tested by cross-examination. I will leave the evidence with them for their consideration, with that comment.

Henderson, J.
MR. JUSTICE HENDERSON

