

36/81

O N A P P E A L
 FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N

NEVILLE NEMBHARD Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal by Special Leave from the Judgment
 10 of the Court of Appeal of Jamaica of the 9th day of November
 1977 refusing the Appellant's application for leave to appeal
 against his conviction for murder before Mr. Justice Smith
 (C.J.) and a Jury in the Home Circuit Court for the Parish
 of Kingston in the Supreme Court for Jamaica on the 15th day
 of April 1977 upon which he was sentenced to be detained at
 Her Majesty's pleasure on the 19th day of April 1977.

2. The principal questions to be determined in this Appeal
 are :

20 (1) Whether the trial Judge misdirected himself on
 the tests to be satisfied when deciding whether to admit
 evidence of a dying declaration in that he directed him-
 self that he must assume :

(a) the person giving evidence of the words of
 the deceased said to indicate that the deceased
 was conscious of being in a dying state at the time
 of the dying declaration was telling the truth; and

(b) that such words were said by the deceased;

(2) Whether a dying declaration admitted by the trial

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Judge pursuant to the correct tests and/or self-directions is sufficient evidence on its own without any supporting or corroborating evidence to found a conviction for murder of the person identified therein as causing the injuries leading to the death and if this is the case whether special directions by the trial Judge are necessary in his summing-up relating to (a) the danger of convicting a person solely on the evidence of such dying declaration and (b) the necessity for the Jury to be satisfied that the deceased at the time of such dying declaration was conscious of the required dying state and was telling the truth.

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(3) Whether evidence is admissible of words spoken at the time of the dying declaration by the person giving the evidence of the dying declaration such words supporting the identification relied upon as established by the dying declaration as referred to in (2) herein above.

P. 1,
ll. 20-24

3. The Appellant was charged with the murder of Linval Campbell on either the 13th or 14th day of January 1974 in the parish of Kingston.

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Pp. 5-6

4. The deceased was a Detective Acting Corporal in the Jamaican Police who lived with his wife Maria Campbell at 13 Goffe Way, Kingston 14. He normally carried a firearm and on the day of his death left his address with his wife to go to work at about 5.30 a.m. At about 8 p.m. that day his wife returned home and at about 8.30 p.m. while inside the home the wife heard two gun shots.

P. 138,
ll. 12-14

5. The entire prosecution case as presented before the Jury at the Appellant's trial before the Home Circuit Court relied upon as establishing the Appellant's guilt were statements made by the deceased to his wife following the said two shots identifying the Appellant as the person who caused the gunshot wounds resulting from the two shots as proved by the wife at his trial. The Judge in his summing up referring to the wife's evidence of those statements alleged to be dying declarations said "so far as the prosecution's case is concerned that is really the only evidence in the case".

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P. 8,
ll. 8-31

6. The evidence at the trial relating to the admitted dying declarations arose after Maria Campbell ran out having heard the two shots and found and attended to her husband, the deceased, by the garden gate at about 8.30 p.m. In chief she stated that she noticed his two wounds one bleeding profusely to the left side of his body the other to

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P. 8,
ll. 35-43

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the left side of his neck. His physical condition appeared to her to be "very strong". Maria Campbell and the deceased spoke together by the garden gate with the deceased saying, inter alia "he was going to die". "He was going to die and I am going to lose my husband". Whilst speaking together by the garden gate the deceased named a person who lived opposite their house in Goffe Way at number 10 who the deceased and his wife had known for years. The deceased also stated that that named person caused his	P. 9, ll. 1-21 P. 10, ll. 14, 15 P. 9, 1. 3 P. 13, ll. 39 & 40 P. 10, 1. 20 - P. 11, 1. 9 P. 14, 1. 38 - P. 15, 1. 1
10 injury.	
Following this conversation the deceased was taken to hospital and died some time next morning. At the hospital Maria Campbell stated the deceased's condition appeared to be "looking good", and that at the hospital she heard the deceased talking to a detective. She heard him say "that he was going to die" but that "he didn't tell me about his condition, sir, he was just talking". Also he repeated the name mentioned by the garden gate, and spoke about "how he got his injury" and "how and who gave it to him".	P. 11, ll. 10-15 P. 12, 1. 31 P. 13, 1. 5 P. 12, ll. 41-44 P. 13, 1. 33 P. 14, ll. 9 & 10
20 The defence then objected to Maria Campbell being asked to identify the name and the person referred to in the conversation by the garden gate.	P. 17, 1. 20
7. The defence objection related to whether there was satisfactory evidence of an expectation of death by the deceased and involved cross-examination of Maria Campbell on this issue. The jury were present during the whole of the determination by the Judge of the admissibility of the dying declaration and at the conclusion of that determination the Judge ruled "that there has been sufficient evidence	P. 17, 1. 20 P. 33, 1. 20 P. 17, 1. 20 - P. 33, 1. 20
30 brought to ground the admissibility of this statement that the witness said was made to her by the deceased at the gate". Maria Campbell gave no evidence of any other words at the hospital said to amount to a dying declaration.	P. 33, ll. 16-20
8. During the course of Maria Campbell's <u>cross-examination</u> the contents of the deposition made at Sutton Street Magistrates' Court was put to her and at stages she apparently contradicted her evidence in relation to (i) the deceased telling her he was going to die by the garden gate and (ii) the deceased stating at the hospital he was going to die. In relation to (i) (<u>by the garden gate</u>) Maria Campbell	P. 19, 1. 12 - P. 25, 1. 40
40 stated :	
(a) That at the Magistrates' Court she did not say "He (the deceased) did not tell me how he felt" and did not say "the only expression he made as to how he	P. 20, 1. 45 - P. 21, 1. 2 P. 21, ll. 18-24

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felt was that he was vexed because he did not do anyone anything".

P. 23, ll. 4-9
P. 23, l. 3

(b) That at the Magistrates' Court she stated she did say "He did not tell me how he felt"(having initially made no answer to that proposition).

P. 25, ll. 2-6
and ll. 28-32

(c) That at the Magistrates' Court she was not asked "what he (the deceased) said at the gate".

P. 25, ll. 18-24

(d) That when she stated at the Magistrates' Court "he did not tell me how he felt" she was referring to what occurred at the hospital not by the garden gate.

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In relation to (ii) (at the hospital) Maria Campbell stated :

P. 20, ll. 25-33
P. 20, ll. 34-36
P. 23, ll. 25-32

(e) That at the hospital she heard her husband say to Detective Walker that "... he wanted to go home" and "... he was vexed, he had not done anyone anything" but she denied saying at the Magistrates' Court "He didn't say anything more as to his feelings".

P. 24, ll. 25-33
P. 26, l. 13

(f) That she did not recall saying at the Magistrates' Court "the only expression he made to how he felt was when he was vexed because he did not do anything" and that she did recall that but "he wasn't talking to me at the time".

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P. 32, l. 21 -
P. 33, l. 20

9. The Judge ruled admissible the statements of the deceased by the garden gate as they constituted a dying declaration. In the course of his short Judgment making that ruling he stated inter alia "... if I admit the evidence I have to admit it on the assumption of what is said is true ... assuming that the deceased did say what the witness has said his widow has said, when he was at the gate "I am going to die", one has to take into account what she said at the preliminary enquiry, and she admits having said : "He did not tell me how he felt". But she has explained that when she said these words she was speaking in the context of the hospital. Assuming that it is true as she said that he said to her at the gate ... that he is going to die ... and the fact that at the hospital she said that she heard him say so ... Assuming it to be true that he told the Detective that he was going to die - it seems to me that that would be sufficient evidence ... from which it can be said that he was under an accepted hopeless expectation of death ... I rule that there has been sufficient evidence brought to ground the admissibility of this statement that the witness said was made to her by the

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deceased at the gate".

10. Following the Judge's ruling Maria Campbell gave evidence that the deceased said to her by the garden gate: "You are going to lose your husband. It is Neville Nembhard. Miss Nembhard's grandson that shot me and take my gun. Your husband did not do him anything: Just as I came through the gate and turned to lock the gate I saw him over me and your husband could not help himself".

P. 34, ll. 6-13

10 11. The remaining witnesses for the prosecution at the trial were :

(1) Nioka Fraser, who came across the deceased and Maria Campbell by the garden gate, who reported what she had seen to the Police and who attended the hospital ascertaining the deceased's death at about after 12.00.

P. 45, 1.17 -
P. 49, 1.5

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(2) Detective Inspector Tulloch, who arrested the Appellant on the 14th day of January 1974 the Appellant saying "I know nothing about it, I was not there". The Appellant also told the Inspector where he was at the time and the Inspector investigated that to see if it were true.

P. 50, ll. 30-31

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(3) Dr. Eric de Pass, who gave evidence of the two bullet entry wounds, one on the left upper abdomen with an exit wound on the right side of the abdomen, the other on the right side of the root of the neck with an exit wound on the left side of the root of the neck. In relation to the first wound the bullet passed from left to right across the abdomen. That injury caused the death, the neck injury not affecting any vital organs. The powder burns at entry indicated that the gun was a maximum of 2 feet away from the body when discharged.

P. 53, 1.13 -
P. 56, 1.26

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(4) Lascelles Samuels, who gave evidence that he heard two shots fired that he went to and saw a small crowd at the deceased's gate and that there he saw Maria Campbell holding the deceased and "asking for Neville", the Appellant. He then went up 6th Street looking for the Appellant and saw him in Dolly's Yard. He then told the Appellant "that Mr. Campbell got shot and his wife is asking for him" and then the Appellant "He appear as if him was frightened or surprise".

P. 58, 1.39 -
P. 71, 1.31

P. 60, 1.30

P. 64, ll. 26 & 27

P. 64, ll. 36 & 37

12. The Appellant gave evidence that up to the time Lascelles Samuels came into Dolly's Yard he had been there

P. 73 1.7 -
P. 102, 1.44

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P.103, l.28 - since the afternoon. The Appellant called two witnesses
P.120, l.8 also present in Dolly's Yard to support his alibi. Olga
P.120, l.14 - Bennett and Ivy White.

P.127, l.29

P.128, l.6 - 13. The Judge in the summing-up referred to the pre-
P.162, l.2 requisite to the admission of the evidence of Mrs. Campbell
P.136, l.55 - of a settled state of hopeless expectation of death by the
P.137, l.18 deceased and stated (having previously stated that such
P.136, ll.5-11 state of mind "is induced by the most powerful considerations
to speak the truth ... a situation so solemn and so awful is
considered by law as creating an obligation equal to that
which is imposed by a positive oath administered in Court") 10
that he had decided as a matter of law that that pre-requisite
P.137, ll.36-49 was satisfied. Later on he stated "You are entitled to test
the situation on the same basis upon which I admitted it, that
is to say, if for any reason you think that the evidence given
by Mrs. Campbell doesn't convince you that the deceased
Mr. Campbell was in this state where he was at the point
of death when every hope of the world is gone - in other
words, if when he made the statement he was just saying so 20
and the question did not matter to him, and he thought he
was going to live, then the considerations which would make
his statement acceptable would be gone". And later, "you
P.157, ll.30-34 have to take into account his state of mind when he made
the statement; was he in a state of mind where you would
feel that you could safely rely on what he was saying, as
being the truth". The Judge also directed the Jury that
P.141, ll.33-38 they had not "the advantage of the witness coming here and
having what he said tested by cross-examination. The
statement is there. It is not tested, as it suffers or is at
a disadvantage insofar as you are concerned as against 30
evidence given from the witness box ...".

P.162, l.35 14. On the 15th day of April 1977 the Appellant was
convicted of murder and on the 19th day of April 1977 he
was sentenced to be detained during the Governor General's
pleasure.

P.167, l.23 On the 9th day of November 1977 the Court of Appeal
of Jamaica refused the Appellant's application for leave to
appeal against conviction.

15. The Appellant respectfully submits that the onus is 40
on the prosecution to prove beyond reasonable doubt that
the deceased was conscious of being in a dying state at the
time of any dying declaration sought to be admitted by the
prosecution and that the words said to constitute the dying
declaration were said by the deceased at the time of such
consciousness and that the trial Judge was wrong in law

when ruling the dying declaration admissible (as at paragraph 9 herein) in assuming any words said to indicate a consciousness of a dying state or the dying declaration reported to be heard by a person purporting to witness a dying declaration were said the onus being on the prosecution throughout to prove beyond reasonable doubt that such words were said - and that the test set out in paragraph 1293 of the Fortieth Edition of Archbold's Criminal Pleading Evidence and Practice that "dying declarations are receivable in evidence if it appears to the satisfaction of the Judge that the deceased was conscious of his being in a dying state at the time he made them" does not clearly set out the onus and burden upon the prosecution in this matter and may have influenced the trial Judge when ruling the dying declaration admissible (as at paragraph 9 herein).

16. The Appellant respectfully submits that when in a trial of murder the only evidence indicating guilt is a dying declaration a conviction cannot stand unless there is evidence supporting or corroborating the dying declaration and that the case of R. v. Fitzpatrick 1910 46 ILTR 173 (C.C.R.) indicating a dying declaration is sufficient on its own ought not to be followed and the practice developed in the East African Courts of Appeal be followed namely that there must be satisfactory corroboration of a dying declaration to secure a conviction for murder (Terikabi v. Uganda 1975 E.A. (C.A.) Rep. 60, Okathi Okale and Others v. Republic 1965 E.A. Rep. (C.A.) 555, Pius Jasunga s/o Akumu v. Reginam 1954 E.A. Rep. (C.A.) 331) alternatively that a Jury be directed that it is dangerous to convict of murder solely on the evidence of a dying declaration with no supporting or corroborating evidence especially in cases as in the present case where the witness giving evidence of the words implicating a consciousness of a dying state has a motive to serve by saying those words were said (reception of her evidence) and had contradicted herself in evidence (as at paragraph 8 (a) to (d) herein).

It is also submitted that if either of the above contentions require a change or development in the Common Law such change or development is required in relation to dying declarations as was the similar change or development that recently took place in the common law (R. v. Turnbull and Others 1976 63 Cr. App. Rep. 132) in relation to identification evidence being relied upon as the sole evidence founding a conviction. The reason for the change or development being that a conviction for murder based on an entirely untested and unsupported statement by a person not called as a witness is manifestly unsafe. It is

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further submitted that the present common law position whereby it is a serious error for a Judge in summing up not to point out to the Jury that a dying declaration is not liable to cross-examination (Archbold Fortieth Edition paragraph 1298) (followed here by the trial Judge as at paragraph 13 herein) does not sufficiently answer the submissions herein contained.

17. It is respectfully submitted that the inclusion in the evidence of the report by Lascelles Samuels of what he heard Maria Campbell say at the time she alleged she heard the dying declaration namely she asked for the Appellant (as at paragraph 11 (4) herein) was inadmissible and should not have been admitted in evidence at the trial. 10

Pp. 168 & 169 18. On the 6th day of February 1979 an Order in Council was made pursuant to the advice of Their Lordships of the Judicial Committee granting the Appellant Special Leave to Appeal to Her Majesty in Council.

19. The Appellant respectfully submits that this Appeal should be allowed and his conviction and sentence quashed for the following amongst other 20

R E A S O N S

1. BECAUSE the Trial Judge did not direct himself properly on the tests to be applied including the onus and burden on the prosecution in relation to the admission in evidence of the dying declaration.
2. BECAUSE a conviction for murder founded solely on a dying declaration is unsafe.
3. BECAUSE a conviction for murder based on a dying declaration is unsafe if the Jury are not directed sufficiently of the dangers of convictions based solely on dying declarations. 30
4. BECAUSE evidence of what a recipient of a dying declaration said at the time of such dying declaration is not admissible.

PETER MARTIN

No. 30 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF
JAMAICA

B E T W E E N

NEVILLE NEMBHARD Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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