Privy Council Appeal No. 30 of 1979

Neville Nembhard - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - *Respondent*

FROM:

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 6TH JULY 1981 DELIVERED THE 6TH OCTOBER 1981

Present at the Hearing:

LORD DIPLOCK

LORD ELWYN-JONES

LORD EDMUND-DAVIES

LORD ROSKILL

SIR OWEN WOODHOUSE

[*Delivered by* SIR OWEN WOODHOUSE]

This appeal is concerned with evidence admitted by Smith C.J. as a dying declaration at the trial of the appellant in the Supreme Court of Jamaica on a charge of murder. He was found guilty by the jury and applied unsuccessfully for leave to appeal against conviction to the Court of Appeal. On 6 February 1979 he was granted special leave to appeal to Her Majesty in Council and the appeal was heard by their Lordships on 6 July 1981. At the conclusion of argument they announced that they would humbly advise Her Majesty that the appeal should be dismissed. They now give their reasons.

The deceased who was a police officer returned to his home in Kingston at about 8.30 one evening and there, at the gate, he was shot down by two bullets fired at close range. His assailant immediately disappeared and there were no eye-witnesses. But his wife had heard the shots fired and immediately ran out to him from their house a few feet away. He was lying inside the gate, bleeding profusely but still alive. In evidence she said that as he lay there she took his head in her hands and he then said to her that he was going to die and named his assailant. He was soon taken to the hospital where, she said, he further referred to the shooting both to her and to another police officer. He had suffered a mortal wound in the upper abdomen and he had also been struck in the neck. He died about four hours after the shooting.

At the point in her evidence when the wife was about to describe what the deceased had said about the identity of the assailant objection was taken that the deceased's statement to her was not admissible and the Chief Justice thereupon dealt with the issue. He did so in the presence of the jury after being told by counsel for the accused that it did not matter whether they remained or not. The witness was then cross-examined upon alleged inconsistencies in accounts she had given of what her husband had said; and as an experienced nurse she was also asked for her own opinion as to his condition after the shooting. His pulse was weak, she said, but he spoke in a strong voice.

It was submitted to the Chief Justice that the deceased's statement should not qualify as a dying declaration because there was insufficient evidence to satisfy the test that he was then in a hopeless expectation of death; and in any event that the wife's version of what the deceased had said could not safely be relied upon. In the result the Chief Justice ruled that evidence could be given of what the deceased had said at the gate and, although he delayed a decision upon the subsequent conversation at the hospital, he finally held that this other evidence should not go before the jury. Before that later decision the wife gave an account of what the deceased had said to her when she first ran to him. She repeated that he had told her—

> " I am going to die "

and then had said—

> " 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."

She explained that Neville Nembhard had lived for ten years with his grandmother in a house across the street from her own house and was well known to her and her husband, as Nembhard subsequently said when he gave evidence himself.

Two independent grounds in support of the appeal were argued before their Lordships. The one is that in deciding to admit the critical evidence of the dying declaration the Chief Justice had misdirected himself: that he had failed to assess for himself the criticisms that had been made of the wife as a witness and also that he had been in error when he held that there was sufficient evidence to show that the deceased had a hopeless settled expectation of death when the statement was made. The other ground is that the jury should have been warned, and they were not, that it is dangerous to rely upon the words of a dying declaration in the absence of corroboration. It was this second matter which led to leave being granted to the appellant to appeal to their Lordships' Board—in particular, a practice concerning corroboration in such a context that was said to have developed in the Court of Appeal for Eastern Africa. For that reason their Lordships will consider this issue at once.

It is not difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he was face to face with his own impending death. There is the further consideration that it is important in the interests of justice that a person implicated in a killing

should be obliged to meet in court the dying accusation of the victim—always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment by the jury. In that regard it will always be necessary for the jury to scrutinise with care the necessarily hearsay evidence of what the deceased was alleged to have said both because they have the problem of deciding whether the deponent who has provided the evidence can be relied upon and also because they will have been denied the opportunity of forming a direct impression against the test of cross-examination of the deceased's own reliability.

Against those considerations the question in this part of the case is simply whether the need for care in assessing the significance of a dying declaration requires that a jury should be specifically directed that it would be dangerous to convict on that evidence in the absence of corroboration. Before providing the answer the practical implications and effect of the directions actually given by the Chief Justice in the present case deserve to be put beside the complaint that he should have said still more.

In this part of the summing-up the Chief Justice began by putting in contrast the evidence given on oath by a witness who has appeared in person in the courtroom and the hearsay evidence of a dying declaration. And he took pains to describe the basis upon which a dying declaration was regarded as admissible and the tests which must be satisfied in that regard. He went on to direct the jury that before they could act on the dying declaration they themselves must be satisfied as to the reliability of the wife, both in terms of veracity and accuracy, and that if so satisfied then they must still assess the probative value of the dying declaration itself. *Inter alia* he said:—

> "Do you believe Mrs. Campbell? Do you believe her that she went out there? Do you believe her that her husband told her the things which she said she was told? That you have to decide first of all . . . . .
>
> If you believe her that the deceased did tell her then, you have to examine the circumstances and say whether in the light of what he is supposed to have said, you are convinced by this, taking all the circumstances into account, so that you can feel sure that in fact it was this accused who shot the deceased."

and later:—

> "Now if you believe her that the deceased did tell her this, you will have to test the statement and say whether you can rely implicitly on it. If you believe the statement was made, Mr. Campbell is saying how he got his injuries and who caused them, if you believe he made the statement and he has described accurately what he said took place, were the circumstances such that he could identify positively the person who attacked him in order to convince you that a mistake has not been made in the identification of the person who shot him? In other words, you have to examine it in the same way as you would examine the evidence if he had come here and said the same thing."

At that point the Chief Justice expressly drew the attention of the jury to the fact that the dying declaration had not been tested by cross-examination. He said:—

> "Another thing which you bear in mind when you consider evidence of this sort is that you have not had the advantage of the witness coming here and having what he said tested by cross-

> examination. The statement is there, it is not tested, so it suffers or it is at a disadvantage in so far as you are concerned as against evidence given from the witness box where the witness states a fact and counsel can test him or her on it as to whether it is true or not."

There follows a lengthy and entirely accurate warning concerning the various problems that can and do arise in the area of identification evidence and the circumstances that were relevant in assessing the deceased's identification of Nembhard as his assailant. Then he summarised what he had been saying in the following way:—

> "If you feel sure the statement was made to her you have to examine the circumstances which must have existed at the time when Mr. Campbell was shot; you 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? You have to take into account the caution that I have given about mistaken identity and whether the circumstances were such, having regard to distance, light and so forth, that you can feel that a mistake was not made in the identity of the accused. And if you are not sure whether a mistake was made or not, or if you do not think that you can safely rely at all on what the deceased is alleged to have said, then you must acquit the accused."

Their Lordships have thought it appropriate to repeat the foregoing passages from the very fair and helpful summing-up by the Chief Justice in this case because they demonstrate so clearly, if demonstration were necessary, that adequate and proper directions to a jury do not require nor depend upon the strait-jacket of previous enunciation by the higher courts of some precisely worded formula. Certainly a jury must be given adequate assistance in respect of those questions of fact and law that seem to require it. But in general this is a responsibility that can be sufficiently discharged by the application of fairness and the good common-sense of the judge.

Some attempt was made by counsel to argue by analogy that the comparatively recent example of the decision in *R. v. Turnbull* (1976) 63 Cr. App.R.132 justified the definition of a new rule of law as to the need for corroboration in the area of dying declarations. But their Lordships accept neither the analogy nor its application in the present case. *Turnbull* does not purport to change the law. It provides a most valuable analysis of the various circumstances which common-sense suggests or experience has shown may affect the reliability of a witness's evidence of identification and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. *Turnbull* sets out what the judgment itself described as "guidelines for trial judges" who are obliged to direct juries in such cases. But those guidelines are not intended as an elaborate specification to be adopted religiously on every occasion. A summing-up, if it is to be helpful to the jury should be tailored to fit the facts of the particular case and not merely taken ready-made "off the peg". In any event in the present context their Lordships regard it as unnecessary and believe it would be a mistake to lay down some new rule, whether of practice or of law, that then might have to be followed almost verbatim before a judge could feel sure that he had discharged his general duty to leave with the jury a clear consciousness of their need for care in assessing the significance of a dying declaration. Furthermore their Lordships are

satisfied that the eminently fair and sensible summing-up in the present case was more than adequate for the purpose of giving every necessary assistance and direction to the jury.

A final observation should be made concerning the cases already mentioned that have been decided in the Court of Appeal for Eastern Africa. It appears that a rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example *Pius Jasunga s/o Akumu v. Reginam* (1954) 21 E.A.C.A.331 and *Terikabi v. Uganda* [1975] E.A. 60. But it is important to notice that in the countries concerned the admissibility of a dying declaration does not depend upon the common law test: upon the deceased having at the time a settled hopeless expectation of impending death. Instead there is the very different statutory provision contained in section 32(1) of the Indian Evidence Act 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts—

> " When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant *whether the person who made them was or was not, at the time when they were made, under expectation of death,* and whatever may be the nature of the proceeding in which the cause of his death comes into question " (emphasis added).

In *Akumu* it was pointed out (for the reason associated with the italicised words in the subsection) that the weight to be attached to a dying declaration admitted by reference to section 32 of the Indian Evidence Act would necessarily be less than that attached to a dying declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and who had given up all hope of survival. Accordingly it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied. Be that as it may it is clear that the line of authority to which reference was made when the petition for special leave was under consideration has no relevance for present purposes.

The argument that the Chief Justice wrongly admitted the relevant evidence as a dying declaration can be dealt with shortly. As mentioned counsel contended both that there was insufficient evidence to justify a finding that at the critical time the deceased was under a hopeless settled expectation of death and also that the Chief Justice had failed to assess the probative quality of the wife's evidence concerning the matter. They are issues that turn upon the record of what the Chief Justice said when ruling in favour of the evidence.

As to all this, their Lordships appreciate that there are references in the ruling to an assumption to be made concerning what the witness gave in evidence which, when examined in isolation from the surrounding record, may seem to carry a degree of ambiguity. It may appear at first sight that the Chief Justice was prepared to adopt the wife's evidence without assessing it. But their Lordships are of opinion that the approach

was designed to test the wider significance of her evidence as it bore upon the true attitude of mind of the deceased himself. It is beyond argument that in the very context of the assumption there is further reference to and evaluation of the alleged inconsistencies already mentioned which counsel had relied upon to support his submission that the evidence was unreliable. The ruling was given orally and although the part of it under review is elliptical their Lordships are clearly of opinion that the Chief Justice did not misdirect himself: that he well understood the need to assess the quality of the deponent's evidence just as he then proceeded quite properly to test the statement said to have been made by the deceased himself against the latter's state of mind at the relevant time.

For these reasons this ground of appeal too must fail.

313542—2 Dd 8256127 70 10/81

In the Privy Council

NEVILLE NEMBHARD

v.

THE QUEEN

DELIVERED BY
SIR OWEN WOODHOUSE

Printed by HER MAJESTY'S STATIONERY OFFICE
1981