

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HC RAP 2007/008

BETWEEN:

SELWYN FOYE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

Appearances:

Mrs. Kay Bacchus-Browne for the Appellant

Mr. Colin Williams, Director of Public Prosecutions with Mr. Carl Williams,

Mr. Duane Daniel and Ms. Sejilla Mc Dowall for the Respondent

2010: January 26;
May 31.

Criminal Appeal – Murder – admissibility of hearsay evidence – res gestae – dying declaration – whether prejudicial effect outweighed probative value

Percy Browne was shot at about 9:00 p.m. on 2nd October 2004, shortly after leaving a shop. The area where he was shot was dark and no one witnessed the shooting. Upon being shot, Mr. Browne ran towards the shop but collapsed and was taken to a health clinic by patrons of the shop. At the clinic, a police constable questioned him as to what had happened and he replied that “Kashie” shot him. When asked whether he saw Kashie, he replied affirmatively. A male attendant at the clinic also heard Mr. Browne bawling, “Kashie shoot me, Kashie shoot me. I going dead.” Later that evening, Mr. Browne was transferred to the hospital. Upon arrival at the hospital, his son, who accompanied him, asked who had done that to him and he replied, “Kashie.” Mr. Browne subsequently succumbed to his injuries. Selwyn Foye also known as Kashie (“the appellant”) was charged with murdering Mr. Browne.

The prosecution's case rested exclusively on the statements of Mr. Browne that Kashie shot him. Counsel for the appellant objected to the admissibility of these statements on

the grounds that they were strictly hearsay and not capable of falling within the principles of res gestae or dying declaration; and, that their prejudicial effect outweighed their probative value. The learned judge held a voir dire and ruled that the statements were admissible. The appellant was subsequently convicted of murder and sentenced to life imprisonment. The appellant appealed on the grounds that: (i) the learned judge erred in admitting the dying declaration; and (ii) the verdict was unreasonable and could not be supported by the evidence.

Held: allowing the appeal, quashing the conviction and setting aside the sentence of life imprisonment:

1. A dying declaration at common law may be admitted where it is shown that the maker of the statement died; that a trial for his murder followed; that the statement related to the cause of his death; and that when making the statement he was shown to have had a settled hopeless expectation of death. These conditions were met in the instant case. However, a trial judge has a discretion to exclude the evidence of dying declaration if in his opinion it is so unreliable, meaningless or ambiguous that it would be unfair to invite the jury to consider it.

R v Lawson [1998] EWCA Crim. 1495, applied.

2. When the prosecution's case depends on a dying declaration in circumstances in which the identification evidence cannot be relied on, the dying declaration should not be admitted in the absence of other evidence supportive of the correctness of the identification.
3. In the instant case, the identification evidence was unreliable as the shooting occurred at night in an unlit area so that Mr. Browne could not have seen who shot him. Further, there was no forensic evidence linking the appellant with the shooting, no motive for the crime and no other evidence supporting the correctness of the identification or otherwise connecting or implicating the appellant with the crime. In all the circumstances, the admission of Mr. Browne's statement had an adverse effect on the fairness of the proceedings and gave rise to the risk of a miscarriage of justice so that it ought to have been excluded. The learned judge accordingly erred in admitting Mr. Browne's dying declaration.

Furbert and Another v The Queen (Bermuda) [2000] 1 WLR 1716 (Privy Council), distinguished.

REASONS FOR DECISION

- [1] BAPTISTE, J.A.: This judgment concerns the reasons for allowing an appeal against a murder conviction where the prosecution's case depended exclusively on a dying declaration.

- [2] On the night of 2nd October 2004, Percy Browne (“Mr. Browne”) was shot soon after leaving a shop in Carriere, Saint Vincent. He succumbed to his injuries later that night. On 6th December 2006, Selwyn Foye also known as Kashie (“the appellant”) was convicted of murdering Mr. Browne. The prosecution’s case rested exclusively on the dying declaration of Mr. Browne that Kashie had shot him.
- [3] The circumstances leading to the dying declaration are as follows: Mr. Browne left the shop at about 9:00 p.m. The direction in which he proceeded was dark. His home was not far from the shop. A couple of minutes after his leaving the shop gunshots were heard. No one witnessed what happened. Mr. Browne ran back towards the shop holding his stomach and bawling “murder, oh God! Help me, help me”. He fell before he reached the shop. Patrons from the shop transported him to the Levi Latham Health Clinic (“the clinic”). During the journey no one asked him what had happened neither did he proffer any information as to the cause of his injury or the author of his misfortune.
- [4] Police Constable Salem George arrived on duty at the clinic and inquired of Mr. Browne what had happened. Mr. Browne replied that Kashie shot him. He asked Mr. Browne whether he saw Kashie, Mr. Browne replied affirmatively. Mc.Vale Kydd, a male attendant at the clinic, said that Mr. Browne was lying and bawling “Kashie shoot me, Kashie shoot me. I going dead.” Mr. Browne’s son, Leonard Dabreo, arrived at the clinic and saw his father lying on a bed with a wound. He did not ask his father how he came by his wound. He stated that he was confused.
- [5] From the clinic Mr. Browne was transported by ambulance to the Milton Cato Memorial Hospital. His son, Dabreo, accompanied him. He never asked his father anything during the journey. It was only after the ambulance driver spoke to him that he went into a room where his father was and asked his father who did that to him and his father replied, “Kashie.”

- [6] At the trial, learned counsel for the appellant objected to the admissibility of the statements made by Mr. Browne as to who had shot him. Counsel contended that they were strictly hearsay and were not capable of falling within the principles of dying declaration or *res gestae*. Further, their prejudicial effect outweighed their probative value. In other words, the admission of the evidence would be unfair. The learned trial judge held a *voir dire* into the admissibility of the statements and ruled that they were admissible.
- [7] The appellant filed several grounds of appeal against conviction including: (1) the verdict is unreasonable and cannot be supported having regard to the evidence; (2) the learned judge erred in not excluding the dying declaration.
- [8] The conditions for admitting Mr. Browne's statement as a dying declaration at common law are that it had to be shown that he had died; that a trial for his murder followed; that the statement related to the cause of his death; and that when making the statement he was shown to have had a settled hopeless expectation of death. The conditions were fulfilled in the present case. However, the trial judge has a discretion to exclude the evidence if in his opinion it is so unreliable, meaningless or ambiguous that it would be unfair to invite the jury to consider it.¹ This court would only interfere if it concludes that the judge exercised his judgment on a wrong principle or reached a conclusion which was outside the sphere of legitimate decisions available to him.
- [9] In *Furbert and Another v The Queen (Bermuda)*² the judge erred in admitting a dying declaration into evidence. Its admission did not lead to a miscarriage of justice as there was strong supporting evidence against the appellant in respect of whom the evidence was admitted. In that case, after being shot in a house and running into the back garden, Caines went a short distance up a lane to the home of his mother and brother. He was soaked with blood and vomiting and told them

¹R v Lawson (1998) EWCA Crim. 1495

²[2000] 1 WLR 1716 (Privy Council)

that he was going to die. Overruling objections from counsel for Franks, the judge permitted counsel for Furbert to elicit evidence from them that Caines had told them that Franks had shot him. The judge ruled that the statement that Franks shot him was admissible in evidence as a dying declaration or in the alternative as part of the *res gestae*.

[10] The Privy Council stated that it was clear that because of the curtains on the window and door of the house Caines could not have seen who it was that shot him. In summing up the judge reminded the jury of this and told them that Caines must have assumed that Franks had shot him because Franks had attacked him in the yard after he had gone outside immediately after the shooting. The judge reminded the jury that because of those factors they should not rely upon the statement by the deceased unless there was other evidence which went to support the correctness of the identification. The judge told the jury that if they found, as a fact, that there was gun shot residue on Franks' right hand, that may support Caines' dying declaration, but they must bear in mind the limitation of that evidence as elicited in cross-examination.

[11] The Privy Council observed that because it was clear on the evidence that Caines could not have seen or known who shot him his statement was of no relevance and it should have been excluded. Their Lordships however considered that the admission of the statement in evidence did not give rise to a risk of miscarriage of justice. They stated that although the judge should have excluded the statement, he clearly warned the jury that it was of little weight because Caines could not have seen who shot him. Further, there was very strong evidence against Franks that he was a party with Furbert to a plan that the gun would be fired. This was an act of such a nature which was likely to endanger human life within the meaning of the relevant section of the law and therefore he was guilty of murder whether he, or Furbert, fired the gun.

[12] It seems to me that when the prosecution's case depends on a dying declaration in circumstances in which the identification evidence cannot be relied on, the dying declaration should not be admitted in evidence in the absence of other evidence supportive of the correctness of the identification. The appellant's case is indicative of such a situation.

[13] In fairness, the dying declaration of Mr. Browne should not have been admitted in evidence. The area in which the shooting occurred was dark. There was no light in the area. It is clear on the evidence that Mr. Browne could not therefore have seen who shot him. Apart from the dying declaration there was no other evidence connecting or implicating the appellant with the crime. This is unlike the situation in *Furbert* where there was very strong evidence against the co-accused, Franks. There was no evidence supporting the correctness of the identification. There was no forensic evidence linking the appellant with the shooting. There was no motive for the crime. The admission of Mr. Browne's statement in evidence clearly gave rise to the risk of a miscarriage of justice and it was unfair to invite the jury to consider it. In those circumstances the evidence had an adverse effect on the fairness of the proceedings and should have been excluded. Therefore, I am of the view that the judge erred in admitting Mr. Browne's dying declaration. For all the above reasons I would allow the appeal, quash the conviction and set aside the sentence of life imprisonment.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal