

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

**ANTIGUA AND BARBUDA
CASE NO. ANUHCR2016/0007**

BETWEEN:

THE QUEEN

vs

PHYILIS TAYLOR

Appearances:

Mr. Adlai Smith for the Crown

Mr. John Fuller for the Defendant

2016: October 18,
November 22

Criminal Procedure – Admissibility of Evidence – Hearsay – Statement made to police by a victim now deceased – Common Law Exceptions to Hearsay not applicable – Statement Admissible under section 37 of the Evidence Act 2009 – Retention of common law discretion to exclude such statement where its prejudicial effect outweighs its probative value.

A statement made by a victim to an assault who later dies allegedly as a result of that assault, is admissible into evidence as the truth of its contents where it is relevant to matters leading to the death of the victim against a person charged with the murder of that victim. This is virtue of section 37 of the Evidence (Special Provisions) Act 2009 which complements the rules of admissibility of a statement made by a person now deceased. The court retains a common law power to exclude such evidence where it is shown to be more prejudicial than probative. Once such a statement is admitted, the Accused has a right to lead evidence to discredit the maker of the statement and demonstrate the unreliability of that statement. The trial judge has an obligation to direct the jury that in deciding what value and weight to give to such statement they should give to the statement to point out that the maker of the statement did not make the statement under oath or affirmation nor was he subjected to cross examination to test the veracity of the statement.

DECISION

- [1] **RAMDHANI J. (Ag.)** This was an oral decision given during the course of the trial. There was a promise that it would be reduced into writing. This fulfils that promise.
- [2] During the course of this trial into a charge of murder, a question arose as to whether a statement made by the deceased victim which related to injuries believed to have led to his death, some six weeks later, was admissible into evidence. The court ruled it was admissible giving detailed reasons on the 18th October, and promised to reduce those reasons into writing. This fulfils that promise.
- [3] In this matter, the Accused was charged with the murder of the deceased victim, one David Ramsey who was 75 years old at the time of his death. It was alleged that on the 1st December 2013, the Accused attacked and struck Mr. Ramsey with a concrete block outside both of their respective homes in Langsford, St. John's. Mr. Ramsey, injured by the blow, fell to the ground and was shortly thereafter assisted into his home. The next day, the injured Mr. Ramsey reported the matter to the police and gave a statement relating to the matter and was sent to seek medical attention.
- [4] He was recovering at home, and from all accounts was doing well, but on the 11th January 2014, after spending most of the day with his son, Mr. Ramsey complained of not feeling well and shortly thereafter he collapsed and died. It was the prosecution case at the trial, that the blow the received on the 1st December 2013 was a contributing cause of his death.
- [5] There was one eyewitness, Ms. Denise Dover, a relative of Mr. Ramsey living with him. She stated in her evidence that on the 1st December 2013 at about 7 p.m. she was in her kitchen and she had heard voices outside her home. One of those voices which she recognized was that of the Accused which she said was very loud. She heard the Accused saying that, 'me ah you problem, me go be your problem forever.'

[6] She looked out and saw Mr. Ramsey walking to their gate and saw the Accused come up to him and struck him on the left side of his head with a concrete block. She heard the Accused saying just before she struck him that, "Ah go kill this old man today." She saw Mr. Ramsey fall to the ground and the Accused then ran away to her yard.

[7] She and her mother went out to assist Mr. Ramsey and she picked up the block. She noticed that Mr. Ramsey had fresh bruises on his chest and that his hand appeared swollen. The next day, Mr. Ramsey went to the Langsford's Police Station and made a report. In his statement he spoke of ongoing conflict between the Accused and himself and went on to describe an incident which took place at about 7.10 p.m. on Sunday the 1st November 2013 when he complained about a visitor to the Accused blocking his driveway with her vehicle. After that visitor had apologized and left he said that:

"...[the Accused then] came out of her yard and came towards me and also pushed herself up against me very closely and replied, 'I am your problem and I am going to be your problem forever'. I then pushed her off and she grabbed my T-Shirt and scratched me on my left shirt while doing so and I slapped her in her face. She then went away. Suddenly she shouted in a loud angry manner 'I am going to kill this fucking old man!' And struck me on the left side of my head with a piece of block and I fell to the ground on my right hand. I fell unconscious. When I gained consciousness I was assisted by two of my relatives to where I live. On Monday 2nd December 2013 about 06.35 a.m. I contacted sergeant Francis of the police headquarters by telephone and told him what happened and he came to my home along with two officers from Langsford's Police Station and I was advised to get a police medical form which I did and took same to Dr. Raymond Daoud's Office located on St. John's Street where I received medical treatment.'

[8] It appeared that the prosecution had not intended to lead evidence of the contents of this statement though it was a part of the committal bundle, and the issue only arose during cross examination of Ms. Dover when Mr. Fuller had put to her that the deceased had slapped the Accused on the 1st December 2013, and when this was denied, had sought to have the witness shown this statement to 'jog her memory of the events that evening on the 1st December 2013. Mr. Fuller himself appeared to have accepted initially accepted that the statement which did not fall to be considered a dying declaration was not admissible.

[9] This Court had serious reservations of showing a statement contained document to the witness in the presence of the jury, which both sides appeared to be agreeing was not admissible. Jurors are likely to be affected when statements contained in documents bandied about in court or passage read out from them in their presence.¹ It is equally inappropriate if such statements contained in documents are passed to a witness in the presence of the jury subtle or not so subtle suggestions are made in the relation to them for the jury's benefit. This may be inimical to a fair trial as often such tactics are likely to lead to speculation. Further, this was not a question of refreshing the witness memory as this statement had not been made by this witness but a person now deceased; a witness is not permitted to refresh his or her memory from a statement made by another person. Considerations therefore, of how much use could be made of this statement, evolved into a question of whether it was in fact admissible. The matter was adjourned overnight at the request of the prosecution to facilitate further research on the point.

[10] The following day both sides, having done the necessary research, was prepared to agree that section 37 of the **Evidence (Special Provisions) Act 2009** was applicable and that the statement was indeed admissible. This Court agreed with this view for the following reasons.

Analysis and Findings

[11] Under the common law, this statement made by this deceased person would not have been admissible. The limited exceptions to the hearsay rule would have permitted the admission of a statement made by a deceased victim only in certain limited scenarios.

[12] First, such a statement made by a person who later dies would be admissible as a dying declaration where the person making the statement expressed a settled and hopeless expectation of death. Some courts appear to require at the very least that the person must make a statement that he is dying or at least believe that he is dying.

¹ See generally R v Francis [2010] LRC 571. Decision of the Caribbean Court of Justice.

[13] Second, a statement made by a deceased person would also be admissible where it was made in the presence of the person charged with the offence and it was admitted to show the reaction of that person.

[14] There were arguments raised in this matter that portions of the statement were admissible as being against the interest of the maker. In making this argument, Mr. Fuller pointed out that the deceased had said that he had slapped the Accused at the time. He submitted that this was against the deceased's interest and to the benefit of the Accused. It is doubtful whether this rule is applicable to criminal proceedings, and even if it were so admissible, this would have allowed a portion of this statement alone to be led into evidence whilst the rest of the statement remained inadmissible. To my mind that would lead to considerable unfairness and would in fact distort what the deceased had said of the events of the 1st December 2013. Fairness would have meant that even if this portion was at all admissible under this rule this court would have been minded to exclude it to ensure fairness; fairness runs both ways.

[15] In any event the Court agrees that the answer to the question is to be found in section 37 of the Evidence (Special Provisions) Act 2009. The relevant portion of section 37 reads:

“...a statement made by a person in a document including a witness statement tendered in committal proceedings shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person-

(a) Is dead

(b) ...

(c)

(d) ...

(e)”

[16] This section is very clear. All that is required to be satisfied is proof that the maker of the statement is dead. Further, if this was even necessary, it had to be shown that the statement of the witness had been a part of the committal bundle. In this case, this

statement was contained in the committal bundle as a statement taken by police officer Dhaine O'Keiffe on the 2nd December, 2013 who himself provided a statement included in the bundle and was a witness for the prosecution. The statement therefore is admissible into evidence.

- [17] If there was a need to find some authority for this conclusion, this is found in **R v McGillivray** (1992) 157 JP 943, in which an almost identical provision contained in section 23 of the UK Criminal Justice Act 1998 was being considered. There, the Court of Appeal accepted that the provision allowed for the admission of the statement, and it was more a question related to the fact that the maker had failed to sign the statement. In that case, 'petrol and a lighted match were thrown at the victim who sustained very severe burns and died in hospital seven days later. Before he died, the deceased made a statement to two police officers, one of whom made a note of what he said. A nurse was also present. The deceased was recorded as having said that he heard a noise at the front door of his flat. He noticed that the door was wet from the letterbox down and he smelt petrol. When he opened the door he saw the appellant outside with a capless plastic bottle. The appellant squeezed the bottle and covered the appellant with the liquid. The appellant then threw a lighted match and the deceased caught fire. The appellant was charged with his murder and at his trial he admitted squirting petrol at the door and lighting the match but he denied even seeing the deceased. He then fell down the stairs and his memory of events was hazy because he had been drinking. The prosecution sought leave to introduce the deceased's statement in evidence.' The court held that 'where a person had been injured and died before the trial but after having made a statement to a police officer, recorded contemporaneously by him, and the deceased indicated by speech or otherwise that the record was accurate, he being unable to sign the record owing to some physical disability, that was in law a statement made by a person in a document and was accordingly admissible in law' under the gateway provisions of the section.

- [18] Section 37 is wide enough to allow admission of the statement under consideration. It is a provision which to my mind complements the rules of admissibility rendering all statements

made by a witness in a document admissible once one of the gateways are proven to the court.

- [19] No doubt admissions of such statements made by unavailable witnesses can lead to some imbalance in the proceedings. The legislature itself has recognized and sought to mitigate the effect such a provision may have on the fairness of the proceedings. By section 38 of the same Act, it is provided that where such a statement is admitted into evidence:

“(a) any evidence which if that person had been so called would have been admissible as relevant to his credibility as a witness, shall be admissible in proceedings for that purposes.

(b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the party cross examining him.

(c) evidence tending to prove that, whether before or after he made the statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith, shall be admissible for the purpose of showing that the person had contradicted himself.”

- [20] In some cases, it is possible that even these safeguards might not truly mitigate unfairness. If this were the only evidence against this Accused, or if the credibility or reliability of its maker was not corroborated or confirmed in any way by any other evidence² a court should be alert to ensure that its admission might not lead to unfairness.³ Here the court should be prepared, in an appropriate case, to exclude the evidence in the exercise of its common law discretion to exclude admissible evidence to ensure fairness; this discretion has not at all been affected by the new provisions of the Evidence Act.

- [21] In this case, there was independent evidence that the deceased man had scratches on his chest. This is evidence which can be taken into account in considering the credibility or

² 'The fact that a witness's evidence is supported to some extent by other evidence is something which can always be taken into account in considering her credibility or reliability in general, and can therefore be taken into account in relation to other parts of her evidence. *Robert John Potter v Her Majesty's Advocate* - 2002 S.C.C.R. 980

³ *HM Advocate v Johnston* - 2004 Scot (D) 22/6 pointing to position taken by the European Human Right cases that evidence of the statement was potentially 'decisive' in the sense used in European human rights cases on when hearsay might not be used to ground a conviction.

reliability of the deceased's statement as the eyewitness clearly would have only seen a part of the confrontation. Further, the statement itself was not decisive of the guilt of the accused. If anything, it suggested that the accused may well have been provoked in striking the deceased as she did. There would therefore be no unfairness in its admission in this case.

[22] The statement is accordingly admissible into evidence.

.....
Darshan Ramdhani
High Court Judge (Ag.)

Postscript: The prosecution conceded that the medical evidence led failed to prove causation. Thereafter, at a request by counsel for the accused the indictment was read over to the Accused who pleaded not guilty to murder but guilty only to common assault. The court considering section 36 of the Offences against the Person Act, and the prosecution agreeing that such an unusual course was permissible, thereupon directed the jury to return a verdict of not guilty to murder but guilty of common assault.