JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 241/2001

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

R. V. NYRON SMITH

Miss Deborah Martin for the appellant

Miss Kathy Pyke and Miss Tanya Lobban for the Crown

February 10 & April 11, 2003

PANTON, J.A.

1. Errol Topping was murdered on February 25, 2000, at a customer appreciation party hosted by a Mr. Smith on Eighth Avenue, which runs between Newport Boulevard and First Street in the parish of Kingston. The appellant was convicted for Mr. Topping's murder in the Home Circuit Court and sentenced on October 26, 2001, to life imprisonment with a specification that he should serve fourteen years before becoming eligible for parole. His application for leave to appeal was refused by a single judge of this Court. He renewed his application before us, relying on a single ground, namely:

> "That the learned trial judge erred in admitting into evidence the deposition of the witness Dennis Singh as the requirements of section 31(D) ss(e) of the Evidence (Amendment) Act under which the Crown purported to act, had not been complied with: there was no evidence, properly adduced, that the witness Singh was being kept away from the proceedings and furthermore that no reasonable steps could be taken to protect him. Instead there was the hearsay material from the witness Robin Longmore".

At the end of the hearing of the application on February 10, 2003, we granted the application for leave to appeal, treated the application as the hearing of the appeal, dismissed it and affirmed the conviction and sentence, with the order that the sentence is to be computed from January 26, 2002.

2. Mr. Dennis Singh was the only eyewitness to the killing who gave evidence at the trial although the deceased was stabbed to death in circumstances which indicate that the incident occurred in the presence of several persons. Indeed, in the group of persons present at this party were at least six members of the constabulary including constable Randolf Hall who watched for a good while as the deceased danced in the street but unfortunately did not see when the deceased was stabbed. His evidence at the trial was that he had taken his eyes off the deceased for a period of three to five minutes; and it was during this period that the deceased was stabbed.

3. Mr. Singh gave evidence at the preliminary examination held into this charge of murder against the appellant. The examination was conducted by His Honour Mr. Ralston Williams, Resident Magistrate for the parish of Saint Andrew. At that preliminary examination, Mr. Singh testified that he saw the appellant stab the deceased who had been "dancing all over the place" at the customer appreciation function. He stated that the appellant, having done this foul deed, went and spoke with a lady who was standing beside the bar, then he went to a group of persons underneath the street light and a member of that group took the knife from the appellant.

4. Mr. Singh's evidence formed the basis of the committal for trial. He turned up for the trial on April 13, 2001, at the Home Circuit Court before Dukharan, J. The appellant pleaded not guilty, a jury was empanelled and Mr. Singh was called after counsel for the Crown had opened the case. This is what Mr. Singh said to the judge and jury after he was sworn and asked to state his name to commence his testimony:

> "My name is Dennis Singh. I just have something to say. The thing is this, I don't want to go further with this. My life is being threatened. I went to the police. I reported it and nothing was done. I got a call from someone saying they are going to kill my wife, my mother and father and my kids and whosoever is close to me. My parents live in Olympic Gardens. I have a trucking business in Newport West where I operate trucking business all over the island". (page 17 lines 8 to 17)

The learned judge inquired of him if the threats were in connection with the case. He answered in the affirmative. He went on to say that he was in fear for his life. After a brief discussion between counsel for the Crown and the judge, the latter discharged the jury and fixed a new trial date.

5. It is against this background that the matter came before Mrs. Justice McCalla and a jury on the 8th October, 2001, when the trial commenced. In the absence of the jury, the learned judge dealt with an application by the prosecution for the evidence of Mr. Singh taken at the preliminary examination to be read to the jury. The application was under the provisions of section 31D(e) of the Evidence (Amendment) Act which reads:

> "Subject to section 31G, a statement made by a person in a document 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. is unfit by reason of his bodily...;
>
> c. is outside Jamaica and it is not reasonably...;
>
> d. cannot be found after all reasonable steps...; or
>
> e. is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person".

6. The application was grounded on the evidence of the official court reporter who produced the evidence that Mr. Singh had given at the aborted trial to the effect that he had received threats on his life as well as those of his family. There was also evidence from Mr. Robin Longmore who works with the witness protection unit of the Ministry of National Security. His evidence was that his job was to interview witnesses who are recommended by the police or the Director of Public Prosecutions to be placed under protection. The interview is to ascertain the concerns of the witness; whether he wishes to relocate, and whether he is willing to attend court and testify. To be on the programme, the witness must be willing to attend court to give evidence.

7. The learned judge, after hearing the submissions of counsel, ruled that the evidence given had satisfied her that the necessary conditions pursuant to section 31(D) had been met. Thereupon, she admitted in evidence the deposition of Mr. Singh as recorded by His Honour Mr. Williams.

8. Miss Deborah Martin submitted that the evidence of Mr. Longmore as recorded at pages 24 to 26 of the transcript outlining the details of the conversation between Mr. Singh and himself constitute hearsay and ought not to have been received in evidence or relied on by the learned judge. The

admissible evidence, according to Miss Martin, on which the judge had to base her decision consisted of :

(a) A threat on Mr. Singh's life;

(b) Mr. Singh's resulting fear for his life;

(c) Mr. Singh's unfitness for the witness protection programme; and

(d) Mr. Singh's unwillingness to be involved in the witness protection programme.

The evidence referred to at pages 24 to 26 is to the effect that Mr. Singh had told Mr. Longmore that his parents were septuagenarians who had been living in their community for over fifty years; that he is a haulage contractor who earns between $300,000 and $500,000 monthly; that he employs fourteen persons in his business; and that his parents, siblings, the members of his extended family, and certain charities depend on him for support. The witness protection programme was unable to sustain him and his dependents. Accordingly, he was not willing to make himself available for any further court appearances.

9. Miss Martin further submitted that section 31(D)(e) was intended to deal with persons who cannot be protected, not persons who elect not to testify and who reject reasonable steps taken to protect them. It was not enough, she said, for one to say one has been threatened. The prosecution must

demonstrate that the threat has been investigated and shown to be real, and that the witness cannot be protected from the threat. The question of the disruption of the livelihood of the witness is not something to be taken into account, she said.

10. Miss Pyke responded that the evidence had been properly admitted as the threats had been proven in the form of the evidence given by Mr. Singh before Dukharan, J. and that no reasonable steps could be taken to protect the witness as it was impractical to provide bodyguards for so many persons. Mr. Singh did not qualify for the programme, and this is highlighted, she said, by the fact that it would have been impossible to relocate him given the nature of his business commitments in the country. She cited three cases on the matter of the admissibility of the evidence presented at the voir dire before Mrs. Justice McCalla. The cases adverted to by Miss Pyke were ***R. v. Acton Justices and others*** (1991) 92 Cr. App. R. 98; ***Neill v. North Antrim Magistrates*** (1992) 1 W.L.R. 1220 and ***R. v. Ashford Magistrates' Court ex parte Hilden*** (1993) 96 Cr.App.R. 92. In the circumstances of this case, it is necessary to take a closer look at ***Neill v. North Antrim Magistrates*** only.

11. In ***Neill v. North Antrim Magistrates*** [H.L.(N.I.)] 1992]W.L.R.1220, at a preliminary inquiry in Northern Ireland into charges of assault and robbery against four defendants, the prosecution tendered, and the magistrate

admitted, into evidence two statements made by two youths who did not attend to give oral evidence. In admitting the statements, the magistrate heard evidence from a police officer that the mother of the two young witnesses had told him that they were afraid to come to court because of threats made to them. In allowing the appeal from a Divisional Court in which it had been sought to quash the committal, the House of Lords held:

> "that the evidence of the police officer as to what he had been told by the mother of the two youths about their apprehensions had been hearsay and could not be admitted under the exception to the hearsay rule that enabled the court to receive first-degree hearsay as to state of mind; and that, accordingly, the statements of the youths should not have been admitted in evidence".

12. This case from Northern Ireland was determined against the background of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988, art. 3 which reads:

> "(1)...a statement made by a person in a document shall be admissible...if...(ii) the requirements of paragraph (3) are satisfied. ...
>
> (3) The requirements mentioned in paragraph (1)(ii) are ...
>
> (b) that the person who made it does not give evidence through fear..."

Lord Mustill, with whom all the other Law Lords were in agreement, referred to ***R. v. O'Loughlin*** (1988) 3 All E.R.431, a case presided over by

Kenneth Jones, J. at the Central Criminal Court. He described the report of this case as:

> "... deceptive at first glance, since although the ruling was not reported until 1988, it was in fact given in 1986 before the significant change in the law effected by section 23 of the Criminal Justice Act 1988 - a change which appears to have been made to counteract the effect of the ruling: see Cross on Evidence, 7th ed. (1990), p.630".

He then referred to the fact that the relevant legislation considered in the ***O'Loughlin*** case was section 13(3) of the Criminal Justice Act 1925 which provided for the reading of the deposition of a witness at a trial if the witness was "proved at the trial by the oath of a credible witness...to be kept out of the way by means of the procurement of the accused or on his behalf." Two witnesses refused to give evidence due to fear for themselves and their families. Evidence was given by police officers of conversations with the witnesses who had spoken of their fear and of threats made to them. The judge declined to admit the depositions on the basis that the officers' evidence of what the witnesses had told them about threats was hearsay and inadmissible; and that even if admissible the evidence did not show that the threats were uttered by the accused or on his behalf. In discussing the importance of ***O'Loughlin***, Lord Mustill pointed out that on the principal point in the case it has been overtaken by section 23 of the Act of 1988

which permits the use of documents in criminal proceedings upon proof that the maker does not give evidence through fear or because he is kept out of the way. He stressed the following:

> "What the case does **not** decide is that the evidence of the officers about the witnesses' complaints was inadmissible. It would have been surprising to find any such decision for it would entail that the judge had quite overlooked the long-established law that a person's declaration of his contemporaneous state of mind is admissible to prove the existence of that state of mind: see ***Reg. v. Blastland*** (1986) A.C.41, 54, per Lord Bridge of Harwich, and Cross on Evidence, pp.666 et seq., and the cases there cited. In fact, however, Kenneth Jones, J. said no such thing. On the contrary, he distinguished between the officers' evidence of what the witnesses had said about their fear, and what they had said about the reason for their fear. As to the former, he observed, at p.434: 'that of course is evidence which can be given'. I agree, and pause only to remark that the evidence must be, not that the witnesses **were afraid** (for that is an inference to be drawn by the court), **but that they said they were afraid** and (if it be the case) that their demeanour was consistent with what they had said".

13. It is appropriate at this time to look at what is really hearsay, bearing in mind the challenge to portions of Mr. Longmore's evidence. A safe starting point is the definition set out in Halsbury's Laws of England, 4th edition, Reissue, Vol. 11 (2) at paragraph 1099:

> "At common law, it is a fundamental rule of evidence that hearsay is inadmissible. The hearsay rule provides that an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. Evidence of a statement made to a witness by a person who is not himself called may or may not be hearsay. It is hearsay and inadmissible where the object of the evidence is to establish the truth of what is contained in the statement, but it is not hearsay and is admissible where it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made".

In Phipson on Evidence (15th edition), at paragraph 25-02, the above formulation also appears, and at paragraph 25-04, the following distinction is noted:

> "Out-of-court statements may constitute either original evidence (where the statement is in issue, or relevant, independent of its truth or falsity) or hearsay (where it is used as an assertion to prove the truth of the matter stated). The key to the above distinction is the purpose for which the evidence is tendered".

The learned authors cite as examples of various forms of original evidence "inquiries and answers tendered to the judge to show reasonable search for a lost document (***R. v. Braintree*** (1858) 1E&E 51) or an absent witness (***Wyatt v. Bateman*** (1836) 7 C&P 586)".

Paragraph 25-05 continues:

> "The statement itself may constitute a fact in issue or a fact relevant to the issue. Into whichever category it falls the purpose of adducing it will often be as evidence of a person's state of mind. Such a person may be living or dead, a party to the proceedings or otherwise, the hearer or speaker".

14. In addition to the above definitions, it is necessary to look at how the courts in England have dealt with a few other cases in which applications similar to that in ***Neill v. North Antrim Magistrates*** were made. In ***R. v. Fairfax*** (1995) Crim. L.R. 949, the appellant, prior to the trial date, had assaulted one prosecution witness and threatened the other. As a result, the witnesses said that they were too frightened to give evidence. On the voir dire, this was confirmed by two police officers who gave evidence. The statements of the witnesses were ruled admissible. On appeal, it was held, in dismissing the appeal, that the evidence of the police officers and the witnesses' statements were not hearsay, and so were admissible to prove that the witnesses were in a state of fear. In ***R. v. Greer*** (1998) Crim. L. R. 572, at a trial for grievous bodily harm and assault occasioning actual bodily harm, leave was granted by the Recorder for the reading of the statements of two persons who were unable to give oral evidence due to fear. An appeal against conviction was dismissed. In a commentary at page 574, the reviewer notes:

> "The fear of the maker can be established by the court receiving the maker's own statements of his fear or hearing evidence from someone (usually a police officer) who has heard from the maker first-hand: see recently ***Wood and Fitzsimmons*** (1998) Crim. L.R.213."

In an earlier case, ***Reg. v. Blastland*** (1986) 1 A.C.41, the judge refused to allow the appellant on a trial for murder of a young boy to call witnesses to give evidence that someone else had said, before the discovery of the body of the deceased, that a young boy had been murdered. In dismissing the appeal, the Court of Appeal held that the principle that statements made to a witness by a third party were not excluded by the hearsay rule when they were put in evidence solely to prove the state of mind of the maker of the statement or of the person to whom it was made applied only where the state of mind evidenced by the statement was directly in issue at the trial or of direct and immediate relevance to an issue in the trial.

> Per curiam: "The admissibility of a statement tendered in evidence as proof of the maker's knowledge or other state of mind must always depend on the degree of relevance of the state of mind sought to be proved to the issue in relation to which the evidence is tendered".

14. Section 31D(e) of the Evidence (Amendment) Act requires proof of two ingredients to the satisfaction of the Court:

(1) that the maker of the statement (Mr. Singh) has been kept away from the proceedings by threats of bodily harm; and
(2) that no reasonable steps can be taken to protect him.

In respect of the first ingredient, there is no doubt that more than sufficient evidence was produced to the learned judge in proof of threats having been made to Mr. Singh which caused him to keep away from the proceedings. This evidence came in the form of what Mr. Singh had told Dukharan, J. when the matter had earlier come up for trial. So far as proof of the second ingredient was concerned, evidence was required from those charged with the responsibility of protecting Mr. Singh in his capacity as a witness; such evidence to indicate that from a reasonable standpoint the security forces were unable to offer protection at the level that would have been required. To this end, Mr. Longmore's assessment was crucial. His assessment does not fall in the category of hearsay. It is his assessment, distinct from what Mr. Singh may have told him, on which the learned judge relied in arriving at the decision to have the deposition read to the jury.

15. The complaint as to the admissibility of hearsay evidence relates to pages 24 to 26 of the transcript, as stated earlier. The contents have already been summarised at paragraph 8 of this judgment. That evidence was in effect the substance of the interview conducted by Mr. Longmore of Mr.

Singh. Based on the interview, Mr. Longmore made an assessment of the security situation so far as Mr. Singh was concerned. He communicated that assessment to the Court on page 28 of the transcript thus:

> "...the programme would not be able to compensate him for the discontinuation of such business. As a condition of Mr. Singh's protection, and that of his family and relatives, relocation of everyone would have to be done. It is therefore impossible that the witness protection programme could cater for a total of thirty-four persons at any one time. ...My recommendation was that Mr. Singh would not be a fitting person to be a client of the witness protection programme at this time".

16. From the above, it is clear that the learned judge was correct in admitting not only the evidence in relation to the fear that Mr. Singh was experiencing, but also the evidence as regards the inability of the police to protect and sustain him. Mr. Longmore made inquiries of Mr. Singh. The result of those inquiries was communicated to the court. There has been no suggestion as to the existence of any other means by which any Court, in a similar situation, may be satisfied as to the taking of reasonable steps to protect a witness. Mr. Singh was in fear for the safety of himself and his family. In considering the taking of reasonable steps to protect him, the authorities charged with that responsibility had to consider his total circumstances, and the possibility of relocating him and his family. The information

communicated by him to Mr. Longmore was only indicative of the things operating on his mind - the safety of his family including his aged defenceless parents, as well as the comfortable earnings that he enjoys from his livelihood. It was imperative for Mr. Longmore to have the full picture in order to determine what action was reasonably possible so far as protection was concerned. That was the only way a proper assessment could have been made. It was therefore incumbent on the prosecution to present to the Court not only the assessment, but also the basis for it, so that the Court could make its own independent judgment on the matter, bearing in mind the decisions in ***Blastland*** and the other cases referred to above. In the circumstances the evidence that was led was not hearsay, and was therefore admissible.