

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 113/2003

**BEFORE: THE HON. MR. JUSTICE PANTON, JA
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, JA (Ag.)**

R v ONIEL SMITH

Leroy Equiano for the applicant
Suzette Rogers, for the Crown.

November 22, 26, December 1 and December 20, 2004

SMITH, J.A.:

Oniel Smith, the applicant, and Garth Brown were charged on an indictment for the murder of Shawn McDonald on the 16th March, 2001 in the parish of St. Andrew.

On the 30th April, 2003 the applicant was convicted before Harrison J and jury and sentenced to life imprisonment with a mandatory minimum of 30 years imprisonment.

On the 4th April, 2004 his application for leave to appeal against conviction and sentence was refused by a judge in Chambers. He has now renewed his application for leave to appeal before this Court.

The prosecution's case was that on the 16th March, 2001 at about 11:00 p.m. the applicant, also known as "Phantom" and Garth Brown otherwise called "Wingie", entered the dwelling house of Mr. and Mrs.

Shawn McDonald at 16 Clarion Avenue, Maverley, St. Andrew. They shot and killed Mr. McDonald and shot and injured his wife Mrs. Vilma McDonald. The only eyewitness to the shooting was Mrs. McDonald. While she was in hospital she gave a written statement to the police. Subsequently Detective Cpl. Bailey, who recorded her statement, obtained warrants for the arrest of "Phantom" and "Wingie". On his arrest the applicant told Detective Bailey that he was not the only one who goes by the name "Phantom". Because of this statement an identification parade was held. On this parade Mrs. McDonald identified the applicant as the person who shot and killed her husband. When the applicant and his co-accused were charged they denied the allegations.

Mrs. McDonald and Detective Bailey were among the several witnesses who gave evidence at the preliminary enquiry. The only evidence against the applicant was that contained in the deposition of Mrs. McDonald. At the trial which commenced on the 24th April, 2003, neither Mrs. McDonald nor Detective Bailey was available to give **viva voce** evidence. The Pathologist was also absent. The Crown applied to have the depositions of these witnesses and the Pathologist's post-mortem report received in evidence pursuant to section 34 of the Justices of the Peace Jurisdiction Act (JPJA) and/or section 31D of the Evidence Amendment Act, 1995.

During a **voir dire** the prosecution led evidence intended to satisfy the learned trial judge that the witnesses in question were absent from the island and that it was not reasonably practicable to secure their attendance. Further, the evidence led by the prosecution addressed the inability of the police to find Mrs. McDonald. The defence had no objection to the reception of the post mortem report pursuant to section 31D(c) of the Evidence Act. The learned trial judge in a very well reasoned ruling exercised his discretion in favour of the reception of the depositions of Mrs. McDonald by virtue of section 31D of the Evidence Act and of Detective Bailey pursuant to section 34 of the JPJA.

At the end of the prosecution case, no-case submissions were made. The learned trial judge rejected the submissions made on behalf of the applicant but upheld those made on behalf of his co-accused, Garth Brown, who was accordingly formally acquitted.

The applicant gave evidence in which he denied any involvement in the crime. He testified that he knew the deceased and Mrs. McDonald. He claimed that Mrs. McDonald's evidence was born out of vindictive feelings against him.

Grounds of Appeal

Mr. Leroy Equiano, counsel for the applicant, sought and obtained permission to argue the following supplemental grounds:

1. The learned trial judge erred in law when he allowed in evidence the depositions of the witnesses Mrs. Vilma Allen-McDonald and Detective Sergeant Rickey Bailey.
2. The learned judge erred in law when he ruled that the accused be called upon to answer the charge.

Ground 1

The reception of depositions into evidence

Section 34 of the Justices of the Peace Jurisdiction Act (JPJA) provides that if upon the trial of a person charged with any indictable offence –

“...it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same:

Provided, that no deposition of a person absent from the Island or insane shall be read in

evidence under the powers of this section, save with the consent of the court before which the trial takes place."

Section 31D of the Evidence (Amendment) Act 1995 reads:

"31D. 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) unfit by reason of his bodily or mental condition to attend as a witness;
- (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
- (d) cannot be found after all reasonable steps have been taken to find him; or
- (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect that person."

(Section 31G concerns computer evidence and is not relevant here).

The 1995 amendment to the Evidence Act has made wide provisions for the admissibility in criminal cases of documentary hearsay evidence. It has permitted a liberal use of presumptively reliable statements made by a person in a document. As Gibson LJ said in **R v**

Cole [1990] 90 Cr. App. R. 478 at 1486:

"The overall purpose of the provisions was to widen the power of the Court to admit documentary hearsay evidence while ensuring that the accused receives a fair trial".

Although section 31D is aimed primarily at out of court statements – see **Rudolph Fuller v R** SCCA No. 55/2001 delivered December 19, 2003, it no doubt embraces depositions and the transcript of a person's evidence in previous proceedings, see **Lockley and Corah** [1995] 2 Cr. App. R 554.

In so far as section 34 of the JPJA is concerned, it is incumbent on the prosecution to establish:

- (i) that the deponents are absent from the island;
- (ii) that it would be fair and just for the Court, in the circumstances, to allow the reception of the depositions in evidence.

By virtue of section 31D(d) if the prosecution is unable to satisfy the requirement at (i) but can satisfy the Court that the deponent cannot be found after all reasonable steps have been taken to find her, the Court has a discretion to admit the deposition.

The evidence

The fact that the depositions of both Mrs. McDonald and Detective Bailey were taken in accordance with the law is not disputed. What is in dispute is the sufficiency of the evidence adduced to satisfy the provisions of section 34 of the JPJA and section 31D of the Evidence Act.

The first important issue is whether or not there was sufficient evidence to establish beyond reasonable doubt the fact that the

witnesses were absent from the island. What is the evidence in this regard? Mr. Harold Allen, the father of Mrs. McDonald, told the court that his daughter had run away. She fled from the home where she had resided for over 20 years. He said that at one stage she was living somewhere in St. Catherine, but he did not know exactly where. She would visit him now and again. He did not know if at the time of the trial she was in Jamaica but she had telephoned him to say that she was not interested in the case, that she was living in England and did not intend to return to Jamaica. He had no address or telephone number for her. He had not received any letter from her and since the telephone call he had not seen or heard from her. When asked if he wanted the police to locate his daughter he replied : "I could not say yes, I don't want her to be found. She says she is not interested."

During cross-examination he denied telling the police that "on several occasions I called her on the number she gave me and told her that the police had come to the house looking for her." A portion of his written statement was admitted in evidence as a previous inconsistent statement.

Constable Roderick Brown, who assumed the responsibility of an investigating officer after the departure of Detective Bailey, told the Court that in vain he tried to locate Mrs. Vilma McDonald. He visited her last known address at 16 Clarion Avenue on several occasions. On one such

visit he spoke with Mrs. Joyce McDermont a sister of Mrs. McDonald. He tried but failed to get any assistance from her as to Mrs. McDonald's whereabouts. He spoke with Mr. Allen the father of the witness, but such efforts were to no avail. He tried in vain to get a telephone number or address from the witness' relative. Because of the information he received he had no reason to believe that Mrs. McDonald was in hospital or in prison or that it was necessary to place any advertisement in the newspapers. That was the gist of the evidence in relation to the whereabouts of Mrs. McDonald.

In relation to Detective Bailey only one witness was called. He is Special Sergeant Ian Thompson. He told the Court that Detective Bailey was his "good friend". Detective Bailey, he said, resigned from the Force and was a resident of Canada. In December 2002 he telephoned Detective Bailey in Canada who told him that he was going to school and would not then be able to return to Jamaica.

Mr. Equiano submitted that the evidence as to the location of Mrs. McDonald is grossly inadequate. We think there is merit in his submission. Indeed the learned trial judge did not think otherwise. He did not found his decision on section 34 of the JPJA or on section 31D(c) of the Evidence Act. Under these provisions the prosecution must establish that Mrs. McDonald was absent from the island. There is certainly no admissible and credible evidence as to her location. The only evidence on this point

is that of Mr. Allen who said that his daughter during a telephone conversation told him that she was in England. It is beyond debate that there is no proof of her being absent from the island. The learned trial judge however, based his decision on section 31 D(d) to which we will return shortly.

As regards the location of Detective Bailey, Mr. Equiano did not and indeed could not argue that there was no adequate evidence. The learned trial judge found that there was evidence to substantiate the fact that he was absent from the island and that he had permanently left this country to reside in Canada. We can find no reason to interfere with the exercise of his discretion to admit the depositions of Detective Bailey.

We must return to the admission of Mrs. McDonald's deposition. We have observed that because of the absence of any admissible and credible evidence as to the location of Mrs. McDonald, her deposition may not be admitted under section 34 of the JPJA or section 31D(c) of the Evidence Act. The question now is – Can it be received by virtue of section 31D (d)? Under this subsection the prosecution must prove to the satisfaction of the Court: (i) that the witness cannot be found; and

(ii) that all reasonable steps have been taken to find her.

There can be no doubt that Mr. Allen was reluctant to divulge anything as to the whereabouts of his daughter. This reluctance was probably born out of fear for her safety and a commitment to respect her wish not to

testify at the trial. On several occasions he stated that his daughter was not interested in the case. As the learned trial judge observed she had put herself in a position where she could not be found. The critical question though is whether or not "all reasonable steps have been taken to find her." In considering this issue the fact that the witness does not want to be contacted by the police, is in our opinion relevant. This was the view taken correctly we think, by the learned trial judge. Support for this view may be gleaned from the following statement of Wright J which was referred to with approval by Swinton Thomas LJ on appeal. See **R v Pereira** [1999] EWCA Crim. 591 delivered 4th March, 1999:

"... I am quite satisfied all reasonable steps have been taken to find the person who made the statement, that he cannot be found because for one reason or another he has decided not to remain at the Pennsylvania Avenue address where he could be contacted but to leave that address and go off somewhere else in the USA or elsewhere for reasons for which one can only speculate without leaving any contact number or address behind."

Accordingly, the evidence of Constable Roderick Brown as to the steps taken by him to find Mrs. McDonald must be viewed in the light of the witness' unwillingness to make herself available and the support she had from her relatives to this end.

The situation is this, Mrs. McDonald gave evidence at the preliminary enquiry. In her evidence she said one of the persons who came into her house accused her of being a "duffy informer gal".

Thereafter she ran away. She was seen on a few occasions by her father. Then her father received a telephone call from her. She told him she was in England and that she was not interested in the case. According to him, he has not seen or heard from her since. He told the Court he did not want her to be found. The learned trial judge was of the view that the witness and her father were making it "impossible" for the police to locate her. From the information the police received they had no reason to believe that she was dead, or in hospital or in prison. The police made several visits to her home. They endeavoured to get the assistance of the witness' father and other relatives. They had no access to information of her whereabouts. What other reasonable steps could they have taken to find her? As to whether all reasonable steps have been taken must be assessed on the particular circumstances of each case. We do not agree with Mr. Equiano that in the circumstances of this case it was reasonable to expect that the police should have checked the hospitals and prison and should have placed advertisements in the newspapers.

In our view it was open to the learned trial judge to conclude that Mrs. McDonald could not be found after all reasonable steps had been taken to find her.

In deciding to admit her deposition the learned trial judge correctly took into consideration the advancement of the interests of justice and other circumstances including the contents and importance of the

deposition and the fact that the jury would not be able to assess the demeanour of the witness.

In our judgment the learned trial judge properly exercised his discretion in admitting the deposition of Mrs. McDonald.

The written statement of McDonald to the police

Mr. Equiano in both his written and oral submissions argued that it was unfair for the learned trial judge to have admitted the deposition of the witness because of the applicant's ability to place the written statement of the witness before the jury. It is his contention that there is one important discrepancy between the deposition and the written statement.

The prosecution had the statement "marked for identity" and invited the defence to apply to have it admitted. The learned trial judge seemed to have agreed with Crown counsel that the written statement should be put before the jury. However, there seems to have been some doubt as to the admissibility of the witness' statement in the absence of the police who wrote it. The learned trial judge sought the opinion of the defence – he addressed Mr. Equiano:

"His Lordship: Counsel also brought to the Court's attention the fact that you had put before the Court that there were certain inconsistencies where her statement is concerned and what is contained in the depositions so that all of these matters can be brought to the attention of the jury at the appropriate time. So she was

canvassing with the defence as to the admissibility of the statement of Mrs. McDonald which you had brought out that is evidence contained in the statement, or issues, rather contained in the statement that a jury ought to be made aware of as well.

Mr. Equiano: I am obliged, my Lord. Let me just have a word with my colleague.

Mr. Bryan: My Lord I have had brief words with my learned friend and we conclude that everything ought to go ahead. No editing.

The Court: Meaning what?

Mr. Bryan: The entire depositions, my Lord. Nothing must be edited. Let everything go in.

The Court: The statement of Mrs. McDonald?

Mr. Bryan: Yes my Lord.

The Court: Okay."

(The learned trial judge had earlier indicated his intention to have the depositions of Mrs. McDonald and Detective Bailey edited to excise prejudicial matters. It is difficult to understand why Mr. Bryan did not want to have the depositions edited).

The above exchange seems to suggest that the consensus was that the written statement of Mrs. McDonald should be read into evidence. However, no application was made to the court to have the statement admitted. It would certainly not be in the interest of Mr. Equiano's client to have the statement in. Mr. Bryan apparently took the view that it

would not advance his client's cause. We have had the opportunity to peruse the statement. There is one obvious discrepancy with the deposition. In the statement Mrs. McDonald said that she saw both men and that Wingy fired one shot at her which caught her on her left hand whereas in her deposition evidence she said it was Phantom who shot her. In her deposition evidence she identified Phantom but said that she saw someone who looked like "Wingy" but she was not "one hundred percent sure" it was "Wingy".

It is important to note that at the preliminary enquiry Mrs. McDonald was cross-examined as to the previous written statement made by her. It was then open to defence counsel to call her attention to the inconsistency now complained of. If she did not admit it then the statement or that part of the statement could have been admitted in evidence pursuant to section 16 of the Evidence Act. We must assume that defence counsel was of the view that such a course would not be in the interest of his client.

Further, at the trial, counsel for the prosecution went beyond the call of duty to lay the foundation for the reception of Mrs. McDonald's written statement "If it is the desire of defence that it be put before the jury". Presumably, counsel for the defence thought the statement with the detailed description of the applicant would do more harm than good to the defence and so he did not take that path. The submission of Mr.

Equiano that it was not possible for the defence to adduce the statement, in our judgment, is devoid of merit.

In any event, we are clearly of the view that the admission of the statement would not have affected the verdict of the jury. Its omission did not, we hold, result in an unfair trial.

Accordingly this ground fails.

No case submission

As previously stated the only evidence implicating the applicant was that contained in the deposition of Mrs. McDonald. Her deposition reads:

"AND THIS DEPONENT ON HER OATH SAITH AS FOLLOWS:

Mrs. Vilma Allen-McDonald: I run a shop. I usually live in the parish of Kingston. I usually live in Kingston 20. I recall the 16th of March 2001 at 11:00 p.m. I was inside my house lying down. I hear some footsteps walking, coming through the other door. It is two ten by twelve rooms. I heard the footsteps in the room adjoining my room. I was not alone in the room. My husband was asleep. I was not asleep.

I see 'Phantom, 'Phantom' is in court. 'Phantom' is on the left hand side. I only know him as 'Phantom', he is Oneil Smith. 'Phantom' came in and shub down the whatnot and mash up everything on the whatnot and the whatnot mash up.

I jump up and sit up in the bed. Same time 'Phantom' come in, come in with the gun and start to fire pure shot. 'Phantom' come into my room. I lay down and close my eyes. I hear my

husband say, "Just cool nuh man." I open back my eye. When I open it back I see 'Phantom' stand up on top of the bed. Same time 'Phantom' shoot me in mi left hand. Same time I said, 'Murder'. I tried to take up back my hand. I could not take it up back. I get two more shots in the left hand. One of the shot bruck up the bone in my elbow. After I get the last shot I put my hand on my forehead.

'Phantom' jumped off the bed and walk and back through the same door dem come through. I heard someone say, 'Mi kill di two of dem'. It sound like 'Phantom' voice. Then they go away. Is not 'Phantom' alone come, 'Wingie' was here.

'Wingie' is Garth Brown. Mi si someone that look like 'Wingie' but mi nuh one hundred percent sure.

I lay wait until dem gone. I lay down like mi dead for about three minutes. I wait till mi hear dem cut through the door dem come through I jump up and open mi personal room door. I then go out and run go down my mother house. My mother house is at the front of the yard and my house is at the back. I knock the door and try to open it. My son hold on to it and tried to keep it close. I then called out. Same time mi run go out to the road to go tell everybody. One youth inna a station wagon car took me to the hospital. My daughter went along as well. I saw when my husband breath his last breath.

I know 'Phantom' before, from he was a baby. Him build all cart for me. I would see 'Phantom' everyday. Me and him live in the same neighbourhood. Mi si him up to the morning before mi husband get shot.

The morning before the killing, I saw the accused, 'Wingie', give 'Phantom' a gun. I see them bright bright day. I hailed 'Phantom' and

him give mi a piece a cut eye. 'Wingie' say, 'duttu informer gal'. I have spoken to 'Phantom', me and him use to talk good good good. I was going to hail 'Phantom' about 1:00 p.m. and the incident took place about 11:00 p.m. I know 'Phantom' from him is a baby.

The room him come in is pure light in it. Is 75 watt bulb in it. It is two rooms, but it is whatnot part them. The bulb was in the room the two men enter from. The room where they enter from the door was open. There is a door entrance between the two doors, but no door. It is the whatnot that parts the two rooms. It is the whatnot 'Phantom' shub down the door. Someone else came in with him. The person was in the same clothes that 'Wingie' was in earlier.

I could see 'Phantom's' face. He was in the room for a long time. Him alone and God was shooting. It took 'Phantom' about three minutes to push down the whatnot. I could see 'Phantom's' face for the three minutes he was pushing down the whatnot. When he was pushing down the whatnot he was about seven feet from me. I jump up sit down and look at 'Phantom' good. I did this for about a second or two. He was about seven feet from me. Then he started to fire pure shot. I lay down and close my eye. I was right beside my husband. I open back my eyes and I see 'Phantom' standing on top of the bed. I could see his face, hands, gun in his hands, everything. I could see his face as long as he fired about nine shots. I was so frightened. I could see his face for around a minute, mi nuh know. He was right at my foot. My foot could touch him.

I did not see them after that. I hear dem a walk go out. There was nothing obstructing me from seeing 'Phantom'. Another person came in the room. I am not one hundred percent sure who came in the room. The person look like 'Wingie'. Is the same clothes 'Wingie' had on the

day. Is just the person who fired the shot mi really a penny. I saw the person when he helped 'Phantom' push down the whatnot. The person did not come in my room. The way mi get so panic I saw this person a short time, a second or two. The only reason I am saying is 'Wingie' is because mi si him wid phantom earlier the day and because of the clothes. I only saw the clothes.

I saw 'Phantom' with gun. It was a short gun. It was shine 'Phantom' was holding on to the part that you press the trigger. This is the handle. He was firing the shots and they came out of the mouth of the gun. I have seen guns before. I see police with guns. At one time it look like the next man had a gun to. 'Wingie' had on a cream looking jeans shorts and cream looking ganzie earlier in the day. I gave statement to the police. Police came to Kingston Public Hospital.'

WITNESS: Then cross-examination by Mr. Bryan continued through the deposition.

The incident took place the 16th of March, 2001 at 11:00 pm. I know 'Phantom' before. I made the statement to the police when admitted to the hospital. The police asked me if I wanted to add or alter the statement. I gave the statement the day after the incident. The incident would have been fresher in my mind when I give the statement.

When I saw the gun handed from one to the other 'Wingie' said, 'dutty informer gal'. I did not report that to the police. I know the two accused well. I did not report it to the police that I saw gun pass. I remembered it.

I got three shots and about nine to ten shots were fired. I don't know how may shots my husband got. All the shots were inside my room. I shouted for murder. I did not call out Phantom's name. I closed my eyes. I was frightened. It

would not make sense to call to him. I eventually ran outside. I ran up to my mother. My son was 14 years old. When I went to my mother and said, 'dem shoot me up' mi get shot dem shoot mi husband'. I did not say 'Phantom' shot mi up. At the time I was shot up I knew where 'Phantom' live. I told the police he lived on Moberly Avenue. I did not give the number.

It is not because I saw the gun being handed over why I say it is the two accused persons. I was telling the truth in the statement. A whole heap of shots were fired. I went to bed about 9:30 p.m. I lay down, but never asleep. I was watching T.V. The T.V. was on. I told police light was in my room. I don't remember if I told the police the T.V. was on. I did not tell the police I was asleep. I told the police I had retired. The room me and my husband were, I told the police light was on. Light was in the next room. The T.V. was on.

I am very upset. The accused men had done something to me. I do not know Mr. Oniel Smith has relatives in the country. Him come an go. When him ready him go to country. It is because of his bad ways I am calling his name. Me and 'Phantom' was not enemy is me an 'Wingie' was enemy. I was not annoyed when I saw 'Phantom' and 'Wingie' earlier in the day. I did not called 'Phantom' name because he is (not) part of the group that break my shop. 'Phantom' was not part of the group'.

WITNESS: Then there was no cross-examination by Mr. Cunningham. No re-examination.

TO COURT: " I did not call 'Phantom' name when I went over my mother's house as I did not want anyone to know I know I know it was who because it is a crew of them. I wanted to pinch the police quietly and tell them is who. Him woulda run away and gone'.

WITNESS: It was dated the 4th of September and this deponent on her oath saith as follows:

'I remember the 17th of May, 2001, about 3:55 I was at Hunts Bay Police Station. I attend an identification parade. I went to identify a man who killed my husband and shot me three times. I pointed out 'Phantom'. He was under number seven. I went to Duhaney Park Police Station and gave a statement about five p.m'."

The medical evidence was to the effect that the deceased died from gunshot wounds. It is sufficient to state that we do not agree with Mr. Equiano that the learned trial judge erred when he ruled that a prima facie case was made out against the applicant. This ground also fails.

Conclusion

We have treated the hearing of the application for leave to appeal as the hearing of the appeal. For the reasons above we dismiss the appeal. The conviction and sentence are affirmed.

We order that the sentence commence as of the 30th July 2003.