IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CRIMINAL DIVISION
CIRCUIT COURT HCC 171-07(3)

R v FRANK RICHARDS

MURDER

Miss Joan Barnett for the Crown
Mr. Linton Walters for the defendant

July 23, 27 and September 3, 2009

APPLICATION UNDER SECTION 31D (d) BY PROSECUTION UNDER THE EVIDENCE ACT - WHAT PROPONENT OF EVIDENCE MUST PROVE - BURDEN OF PROOF - STANDARD OF PROOF

SYKES J.

1. I have taken the somewhat usual step of producing a written judgment arising from a ruling made during the hearing of this case, after a voir dire, to exclude a post mortem examination report that the prosecution sought to admit under section 31D (d) of the Evidence Act. The ruling was made on July 27, 2009 after a voir dire held on July 23, 2009.

The background

2. Mr. Frank Richards was charged with the offence of murder in December 2007 arising from the stabbing death of Mr. Myers. A post mortem examination was done by Dr. Mynedi and it was the case for the prosecution that the doctor was no longer in the island and so the prosecution sought to have the report admitted under section 31D (d) of the Evidence Act.

The statute

3. Section 31D (d)reads:

(1) *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 -*

...

(d) is outside of Jamaica and it is not reasonably practicable to secure his attendance

4. This provision is not unique to Jamaica. It was taken from section 23 of the Criminal Justice Act 1988 (UK). From this standpoint, cases decided on the equivalent English provisions can provide useful guidance on the interpretation and application of the Jamaican equivalent. The English cases are at best, persuasive. A number of those cases will now be examined to see what ought to be the proper interpretation of the provision.

5. The case of ***R v Carmenza Jiminez-Paez*** (1994) 98 Cr. App. R. 239, reminds us that the provision has two requirements. First, the witness must be out of the island, and second, it must not be reasonably practicable to secure his attendance.

6. The statute applies to both the prosecution and the defence. However, it quite likely the prosecution who will seek to rely on this provision most of the time. The significant difference between the use of the provision by the prosecution and the defence is the standard of proof. The case of ***R v Mattey*** [1995] 2 Cr. App. R. 409 addresses the issue of the standard of proof. The Court there held that where the defence wishes to use the provision, the standard of proof is on a balance of probability. The case also held that when the prosecution is relying on the provision the standard is proof beyond reasonable doubt.

7. When interpreting the statute careful attention must be paid to the actual words of the statute. In section 31D (d), the wording is "reasonably practicable to secure his attendance" and not "reasonably practicable for the witness to attend." This crucial fact was pointed

out by Court of Appeal in ***R v Ernest French*** (1993) 97 Cr. App. R. 421, 425 - 426. It was necessary for the Court to make this point because the submission of counsel for the appellant was that the witness could have attended but chose not to do so. The importance of this point is that when an application is made under this provision, the Court is to focus on the effort made to have the witness attend and not whether it was practicable for the witness to attend.

8. The Court in ***French*** also stated that the relevant date is the date the application is made. The trial judge is not to look at the future but at the circumstances put before the court on the date of the application.

9. It is to be noted that in ***French***, the court accepted that the prosecution had made considerable effort to secure the attendance of the witness which failed. The important principle emerging is that evidence of effort made to secure the attendance of the witness will be an important consideration in determining an application made under this provision.

10. In the case of ***R v Luis Castillo*** [1996] 1 Cr. App. R 438, the Court of Appeal again emphasised that whether it was possible for the witness to attend is beside the point. The question is whether it is reasonably practicable to secure the attendance of the witness.

11. There is one aspect of ***Castillo*** with which I do not agree. I shall set out that passage. At page 442 Stuart-Smith L.J. stated:

> *The judge has to consider a number of factors. First, he has to consider the importance of the evidence that the witness can give and whether or not it was prejudicial, and how prejudicial it would be to the defence that the witness did not attend. In this particular case, the attendance of Mr Tyler was simply to prove what he had been told by Mr Maciel whose evidence we are concerned with in this matter.*

12. If his Lordship meant that in determining whether the statutory test was met the trial judge should look at the importance of the evidence as well as how prejudicial the evidence may be, I must say, respectfully, that I cannot accept this is a correct statement of principle. The importance and prejudicial nature of the evidence cannot, logically, answer the question of whether it is reasonably practicable to secure the attendance of the witness. The words of the statute do not suggest that the importance of evidence and how prejudicial the evidence may be, has anything to do with whether or not it is reasonably practicable to secure the attendance of the witness.

13. The issues raised by the learned Lord Justice can only properly arise after the court has decided that the statutory requirements have been established. If the statutory test has been passed, that is not the end of the matter because there is the question now of whether the trial court should exercise its discretion under section 31L to exclude the statement. It is at this second stage that questions of prejudice and importance can be properly addressed. The approach suggested by Stuart-Smith L.J. is likely to lead to analytical errors.

14. Stuart-Smith L.J. also said at page 442 - 443:

> *Secondly, we have to consider the expense and inconvenience of securing the witness's attendance, which the judge took into account. It may well be that if a witness is part of the prosecution team, so to speak, that should not be a major consideration, but it is a matter of considerable expense to bring a witness all the way from Venezuela simply to give evidence on a matter which it seems to this Court could not seriously be challenged in cross-examination.*
>
> *Thirdly, the judge has to consider the reasons put forward as to why it is not convenient or reasonably practicable for the officer to come. This is a question of fact, and this Court does not*

lightly interfere with findings of fact by the trial judge. This is not a case where any credibility arises but, nevertheless, the judge had to make a decision as to what was reasonably practicable, ...

15. I have another qualification to make. I do not think that reference to the ability of the opposing party to seriously challenge the proposed evidence is a factor to be considered at all. This would place the court in the uncomfortable position of trying to second guess what counsel's instructions are, where the defendant is represented, or what the defendant may wish to ask, if he is unrepresented. While I can sympathise with general thrust of what the Lord Justice was getting at but nonetheless I do not think that this idea should be warmly embraced, and if it is, it must not be held to tightly.

16. In the case of ***R v de Arango*** (1993) 96 Cr. App. R. 399, the Court of Appeal had to interpret identical words in section 68 of the Police and Criminal Evidence Act 1984. This case stated that the statutory test is purely objective and there is no element of discretion. This is how McCowan L.J. put the matter at page 404:

The question for us is whether the interpreter and the Customs and Excise went far enough and took sufficient steps. Mr. Issard-Davies submitted that it was really a question of the judge's discretion. With respect, we do not think that is the right way of putting it. The judge had to decide, on the material before him, whether it was not reasonably practicable to secure the attendance of various witnesses. Was the judge justified on that material in so concluding? That is the real question. It was a very important question. It is not a peripheral question in the case because, as we have indicated, it was apparent to all concerned that without this evidence there was no case against Restrepo.

The test, we accept from Mr. Wiggs, must be an

objective one. In viewing it objectively, we conclude that on the material before him, it was not open to the judge to conclude that it was not reasonably practicable to secure the attendance of the witness. We add, in passing, that it is obviously of importance, if this section is to be fairly applied, that Customs and Excise, or any other investigating body, should get its tackle in order before it seeks to rely upon it. In this case, we do not think they did so. Accordingly, in our judgment, the conviction of Restrepo cannot stand. It is therefore quashed and his appeal is allowed.

17. This passage emphasises that the test is not only objective but there must be evidence placed before the court for it to consider. Further, the passage makes it clear that those who wish to rely on these provisions need to have the evidence necessary to sustain the application.

18. The ***de Arango*** case is important for another reason. It contains passages from the submissions of counsel which indicate the kind of effort that needs to be made before it can be said that it is not reasonably practicable to secure the attendance of a witness. The prosecution as part of its case needed to have evidence from computer clerks at a travel company which was located outside of the United Kingdom. At page 403 - 404 there is the following:

Mr. Wiggs, in his most powerful argument for which we are grateful, submitted that the Customs and Excise simply did not take all the steps they ought to have taken. He says, first, that the interpreter ought to have asked why it was that Marta and Dora were saying that they were not prepared to come or could not come. It might be, said Mr. Wiggs, that it was nothing more than a financial problem. They may have assumed that they were being asked to come at their own expense or at the expense of Caravelle. Caravelle

may not have been willing to pay for it. He submits that the Customs and Excise ought to have offered conduct money. They plainly did no such thing. That is not in dispute.

Another suggestion made is that they ought to have written a letter rather than merely telephoned. Again, it is submitted with force that contact should have been made with higher management of Caravelle Tours in Bogota. These, after all, were merely booking clerks.

There were other suggestions. For instance, the assistance might have been sought of the British Embassy, a customs officer might have been sent to Bogota or at least some contact should have been made between our Customs and Excise and Customs and Excise in Bogota. At a later stage--and it is unnecessary to go into this in detail--the local police went to Caravelle Tours' offices and obtained a certain document. If they were able to do that about a year later (and hence too long after to be really useful) why could it not have been done at an earlier stage? All these points seem to us to carry a good deal of force.

19. It is clear, therefore, that serious effort must be made, especially on the part of the prosecution, to secure the attendance of witnesses. This is not an unreasonable position given that criminal trials in Jamaica place a high premium on viva voce testimony given in court from the witness box. The tribunal of fact, when the witness is absent, is deprived of the considerable advantage of seeing and hearing the witness.

20. McCowan L.J. rejected the proposition that applications under these kinds of provisions turn on demeanour, and insisted at page 404:

Mr. Issard-Davies, for the respondent, says that

the judge saw the witness. He is referring, of course, to the interpreter. That is often a good point, but with respect to him, it has no validity in this case. We are in just as good a position as the judge was, since no one challenged the veracity of the interpreter. If it had been suggested that she was not telling the truth, the judge would have been in a better position than us to judge whether she was or not. However, there was no challenge as to her truthfulness. Therefore, the fact that he saw the witness is neither here nor there.

21. This is not to say that credibility issues cannot arise under these applications but this should not disguise the fact that the exercise is largely objective.

22. The final case to which I shall refer is that of ***R v Mei Hua Yu*** [2006] E.W.C.A. 349. This case supports the point that was made earlier that the enquiry under the statute is a two stage one. Scott-Baker L.J. said at paragraph 30:

It has to be observed that the judge has, at this stage, to form a judgment as to whether the "not reasonably practicable test" has been met. Only if it has, does he go on to the next stage, which is to exercise his discretion not to admit evidence that would otherwise be admissible under section 23.

23. His Lordship appeared to have accepted the proposition from the 2004 Archbold that "reasonably practicable" involves a consideration of the normal steps one takes to secure the attendance of witnesses. I agree with this position. The proponent of the evidence is not required to take extraordinary steps.

Summary of legal requirements

24. The position under section 31D (d) is as follows:

(1) both the prosecution and the defence can rely on section 31D;

(2) the standard of proof on the prosecution is proof beyond reasonable doubt while the standard of proof on the defence is on a balance of probability;

(3) any party relying on section 31D (d) must establish both limbs namely, that (a) the witness is off the island and (b) it is not reasonably practicable to secure the attendance of the witness at the time when the application is made;

(4) the test is not whether it is possible or reasonably practicable for the witness to attend but whether it is reasonably practicable to ***secure*** the attendance of the witness;

(5) the party relying on section 31D (d) does not have to prove extraordinary efforts to secure the attendance of the witness;

(6) the normal steps taken to secure the attendance of witnesses is to be taken into consideration;

(7) if the proponent of the evidence meets the statutory criteria, the opponent has a second opportunity to exclude the evidence by appealing to the judge to exercise his statutory discretion under section 31L.

The evidence

25. The evidence put forward by the prosecution comes from three witnesses. These were District Constable Glenford Stewart, Mr. Howard Hood and Dr. Ere Sheshiah.

26. The District Constable's evidence is that he is a police man attached to the Office of the Director of Public Prosecutions. He has the responsibility of notifying witnesses of their court dates. Dr. Mynedi was one of the witnesses he had to notify.

27. In respect of this particular case, DC Stewart swore that he spoke to Dr. Mynedi by telephone in April 2009 as well as Monday, July 20, 2009. In order to prove that the District Constable was familiar enough with the voice of the doctor, the prosecution led evidence to show that he spoke with the doctor at least twice per week each week between 2006 and August 2008.

28. He testified that he spoke to Dr. Mynedi by telephone while the doctor was in India on July 23, 2009, the day the voir dire commenced. The evidential basis for this conclusion was that he went to the secretary of the Director dialed a number which had a county code for India. He also said that during the conversation with Dr. Mynedi, the doctor told him that he was in India and that he would not be able to come to Jamaica until the end of 2009.

29. The District Constable also stated that the doctor complained that he had not been given adequate notice of the trial date. It was also said that the doctor stated that he was working in India and his family was there.

30. The burden of the cross examination was directed at showing that mere dialing of a number could not prove that the doctor was outside of Jamaica. Mr. Walters also undertook the difficult task of demonstrating that the witness did not really know Dr. Mynedi's voice.

31. The next witness called on the voir dire was Mr. Howard Hood, a paralegal employed in the Office of the Director of Public Prosecutions. He swore that he spoke to Dr. Mynedi while the doctor was in India and the doctor told him that he (the doctor) was not interested in coming back to Jamaica since his contract ended and was not renewed.

32. Mr. Walters' attack was the same as with the District Constable.

33. Dr. Sheshiah's was examined with a view to establishing his familiarity with Dr. Mynedi's signature. Dr. Sheshiah also testified that he has not seen Dr. Mynedi since July 2008 when Dr. Mynedi was last at work.

The analysis

34. None of the evidence presented by the prosecution sought to get at why the witness was reluctant to attend. No one seemed to have enquired of the witness whether he would be prepared to travel to Jamaica if his passage was paid. Dr. Mynedi was not asked whether his employment circumstances would have permitted him to travel outside of India for the time required to travel to and from Jamaica. There was no evidence indicating whether the cost of bringing the witness to Jamaica was prohibitive.

35. There was no evidence of any contact with his employers assuming he was not self-employed to see whether his employer would release him for the time required.

36. The evidence presented by the prosecution, in my view, fell short of what is required under section 31D (d).

37. In my view, all that the testimony from the District Constable and Mr. Hood, established is that Dr. Mynedi was off the island. The first part of the statutory test was met. Regarding the second part of the statutory criterion, I have concluded that the prosecution has failed.

38. The statement of Dr. Mynedi contained in the post mortem examination is not admissible.