JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 60/2003

BEFORE: THE HON MR JUSTICE BINGHAM, J.A.
THE HON MR JUSTICE WALKER, J.A.
THE HON MR JUSTICE HARRISON, J.A. (Ag.)

REGINA V STEVEN GRANT

F.M.G. Phipps, Q.C., Walter Scott and Christopher Townsend instructed by Mrs Sharon Usim of Chancellor & Co. for the applicant.

David Fraser, Deputy Director of Public Prosecutions, for the Crown.

Mrs Susan Reid-Jones and Miss Kathryn Denbow of the Attorney General's Chambers instructed by the Director of State Proceedings as Intervenors.

March 8, 9, 10,11,12, 15, 16, 17 18,19 & July 12, 2004

BINGHAM, J.A:

The applicant Steven Grant, following a hearing in the Home Circuit Court before Mrs Justice Marva McIntosh sitting with a jury and occupying some ten days was tried and convicted on an indictment charging him with the murder of Kymani Bailey on April 18, 1999. He was sentenced to life imprisonment and ordered not to be eligible for parole until after he had served a period of twenty (20) years.

The applicant gave Notice of Appeal against his conviction and sentence. This application was considered and refused by the single judge. It is now renewed before us. Over a period of ten days this Court heard arguments from counsel for the applicant and the Crown. We were also assisted by the arguments of counsel from the Chambers of the Attorney General touching on the constitutional questions raised in grounds 3 and 6 of the appeal. At the end of the arguments we reserved our judgment. This judgment now follows.

The facts

The deceased Kymani Bailey, a seventeen year old school boy, was shot dead while in a car park which is situated to the rear of the Kentucky Fried Chicken Restaurant on Knutsford Boulevard in St Andrew. There is no dispute that he was shot several times by bullets from a firearm which was at all material times in the hand of the applicant. The medical evidence disclosed that of the thirteen bullet entry wounds seen on the body of the deceased at the post mortem examination, eleven of these entry wounds were to the back of the body.

The applicant made a report to the police shortly after the shooting. In his testimony at the trial, while he admitted discharging the weapon, he said that he did so in self-defence following an attack on him by the deceased who was armed with a gun. He was then in the process of walking in the car park to his pick-up which was parked there. He

recalled discharging the firearm at the deceased while he was facing him after which the deceased turned and was retreating. He continued to discharge several shots at the deceased who was moving away with his back turned to him. He was unable to say how many shots he discharged from the firearm. There is no evidence that at anytime during the incident as related by the applicant, did the deceased attempt to discharge the gun which he was armed with, nor was any gun found at or near the scene of the shooting or in the vicinity where the deceased fell.

Given the manner of the retaliation resorted to by the applicant, it is arguable as to whether such conduct on his part was necessary given the nature of the attack made on him by the deceased. The applicant discharged some thirteen bullets from the 9 m.m. semi-automatic pistol which holds fourteen rounds of ammunition when fully loaded. These bullets when discharged all found their mark on the deceased, eleven entering the back of the deceased's body.

The Crown in presenting its case called some eight witnesses. Four of these persons were called to provide the basis for the admission into evidence of the depositions and statements of relevant and material witnesses. Of these four persons, one had died following the post mortem examination and one could not be found after giving a statement to the police. Of the other two persons, one was abroad and unavailable after deponing at the preliminary examination and the other who took a

statement from the applicant had since left the Constabulary Force and the jurisdiction, and was residing in the United States of America working, having overstayed his time on a visitor's visa. Of these witnesses, the evidence contained in the medical report and depositions of Dr Ere Sheshaiah, who performed the post mortem examination on the body of the deceased and the statement of Xavier Newton Bryant were of crucial importance to the Crown's case.

It was given this factual background that learned Queen's Counsel for the applicant sought to mount his challenge to the conviction by relying on the following grounds of complaint viz:

1. The verdict was unreasonable having regard to the evidence.

2. The learned trial judge erred in admitting inadmissible evidence in support of the Crown's case.

3. The learned trial judge erred in law in failing to consider and to give effect to the Constitution of Jamaica.

4. The learned trial judge misdirected the jury on self-defence. This misdirection was carried over into her direction on provocation and in relation to her direction on inferences.

5. The sentence passed on the applicant was in the circumstances manifestly excessive. The applicant sought and obtained the leave of the Court to add the following ground viz:

6. The applicant was denied a fair hearing both at common law and within the meaning of section 20 of the Constitution of Jamaica by the failure of the prosecution to apply for the admission in evidence of the statement of Michael Kinlocke, or alternatively by

> the failure of the learned trial judge in all the circumstances to admit the said statement of Michael Kinlocke so that all relevant material would be before the jury.

Learned Queen's Counsel in outlining the approach to be adopted in presenting the submissions on behalf of the applicant stated that he would argue grounds 2 and 3 together followed by ground 1 and then ground 6. Mr Scott would then present the arguments in respect of ground 4.

Learned counsel for the applicant Mr Phipps, Q.C., submitted that the documents containing a statement made by Xavier Newton Bryant and the post mortem report of Dr Ere Sheshaiah were hearsay and wrongly admitted in evidence without the maker of the statement attending to give evidence. Section 31D(d) of the Evidence Act ("the Act") allows for the learned trial judge to exercise her discretion to admit into evidence a statement made in a document provided;

> "it is proved to the satisfaction of the court that such a person cannot be found after all reasonable steps have been taken to find him."

Counsel submitted that the admission into evidence of the statement of Xavier Newton Bryant and the reading by Dr Clifford of Dr Sheshaiah's report were in breach of section 20(6) of the Constitution of Jamaica. Counsel contended that these documents were admitted in evidence under the provisions of section 31D of the Evidence (Amendment) Act 1995 which section was inconsistent with section

20(6)(d) of the Constitution of Jamaica. It was therefore caught by section 2 of the Constitution and is therefore illegal, void and of no effect.

Moreover as the statement of Xavier Bryant and the post mortem report were read to the jury without the applicant having the opportunity to examine in person or by his legal representatives the maker of the statement or the report as provided in section 20(6)(d) of the Constitution, this resulted in the denial of a fair hearing and a serious miscarriage of justice.

Queen's Counsel contends that the right of an accused person to confront one's accusers and to be afforded the opportunity to cross-examine witnesses called to testify on behalf of the prosecution by virtue of section 20(6)(d) of the Constitution is an absolute right. In so far as section 31D of the Evidence (Amendment) Act 1995, when examined, can be seen as a derogation of such a right, it is consistent with this provision and subject thereby to the effect of section 2 of the Constitution.

Learned counsel for the Crown in responding submitted that the evidence contained in the statement of Xavier Newton Bryant was rightly admitted by the learned trial judge. In doing so she acted by virtue of the provisions of section 31D of the Evidence Act. This subsection creates a statutory exception to the hearsay rule by providing for the admissibility of first hand hearsay statements in criminal proceedings, once the learned trial judge is satisfied by cogent evidence presented that any one of the

five conditions listed in (a) to (e) of section 31D is satisfied. Section 31D states:

> "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 a person –
>
> (a) is dead;
>
> (b) is unfit by reason of 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 the person."

Given the above-mentioned conditions, it is necessary to examine the evidence adduced by the prosecution which formed the basis for satisfying the court that there were sufficient grounds shown for admitting the statement of Bryant in respect of section 31D(d) of the Act.

The learned trial judge heard the evidence of Constable Samuel Brown who took the statement from Xavier Newton Bryant, and the evidence of Constable Marvis Haughton and Detective Sgt. Michael Pommells as to the various steps that were taken to track down the witness. In particular, the evidence of Constable Haughton [see the

transcript of the trial (pp. 146 to 148)] showed that the steps taken to locate the witness were most exhaustive. In this regard the evidence could properly be regarded as satisfying the test and guidelines laid down by this Court in ***R v Michael Barrett*** SCCA No. 76/97 (unreported) delivered on July 31, 1998 and distinguished ***in R v Barry Wizzard*** SCCA No 14/2000 (unreported) delivered April 6, 2001.

Grounds 2 and 3 were argued together. The challenge made by learned Queen's Counsel, Mr Phipps, on behalf of the applicant was directed at contending that section 31D of the Evidence Act was unconstitutional. Counsel's attack was not only mounted at the legislation per se but sought to challenge the learned trial judge's exercise of her discretion to admit into evidence the statements of a number of witnesses viz Xavier Newton Bryant, Mark Williams and Dr Ere Sheshaiah. Learned Queen's Counsel rested his submissions on two main limbs.

Firstly – he submitted that the written statements provided the kernel of the prosecution's case without which the charge was bound to fail. He submitted that given the circumstances in which these statements were presented to the jury, this amounted to inadmissible hearsay evidence.

Secondly – counsel submitted that the effect of the ruling by the learned trial judge meant in effect that the applicant was denied the right to a fair hearing in keeping with the provisions of section 20 of the

Constitution. It followed that the verdict reached by that process was one arrived at without any proper basis in law.

The applicant's argument is to a larger extent grounded on the premise that section 31D of the Evidence Act is unconstitutional. He contends that this statutory provision by allowing the course of a criminal trial to be determined by evidence contained in the statements of witnesses, was in direct conflict with the right of an accused person to confront his accusers and, by cross-examination of their sworn testimony, to put their evidence to the test in keeping with the hallowed and acceptable norms of a criminal trial.

Counsel further submitted that section 31D is inconsistent with section 20 of the Constitution in so far as it seeks to protect the rights of the applicant; (1) by guaranteeing to him a fair hearing of any charge brought against him; (2) sets out the several safeguards by way of ensuring the protection of that right.

Section 20(6)(d) of the Constitution has now given statutory recognition to the common law right to the applicant to examine the witnesses called by the prosecution. Were Parliament to have the authority to enact such a provision, it would result in this fundamental and basic common law right which was now enshrined in the Constitution being lost to the applicant.

Counsel argued that as the provision in section 31D of the Act clearly offends section 20(6)(d) of the Constitution and is inconsistent with it, it is therefore void being caught by section 2 of the Constitution, (referred to as the Supremacy Clause), which reads:

> **"2** Subject to the provisions of section 49 and 50 of this Constitution if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall to the extent of the inconsistency be void." (Emphasis added)

Counsel submitted that the Evidence (Amendment) Act, 1995, was not passed in keeping with the procedure laid down for enacting legislation in the manner provided for by sections 49 and 50 of the Constitution. As such it would not take on the immunity afforded the enactments so passed.

The applicants also submitted that no matter how bad the present conditions, these do not provide a lawful reason for breaching the Constitution by the use of any colourable device.

The question that readily comes to mind is to ask whether section 31D of the Evidence Act is inconsistent with section 20(6)(d) of the Constitution in so far as it allows, subject to the necessary safeguards, the admissibility into evidence of a statement in a document?

Section 31D when examined and considered, addresses a situation in which due to the absence of a witness for any of the reasons set out in the subsection, the prosecution may resort to applying to the trial court for

the statement or deposition of the witness to be read into evidence. This course is not an automatic one. It does not follow that in every case the requirements will be met in a manner sufficient to satisfy the standards for the exercise of the court's discretion to admit the document.

As the two unreported decisions of this Court referred to show, viz ***Regina v Michael Barrett*** and ***Regina v Barry Wizzard*** (supra), each case will depend for its outcome on the particular facts. In the ***Barrett*** case, this Court held that the evidence relied on by the prosecution aimed at establishing that "all reasonable steps were taken for ensuring the presence of the witness". Section 31D(d) of the Act was not sufficient for a proper exercise of the judge's discretion to admit the particular statement into evidence: thus allowing the appeal and setting aside the conviction and sentence. In the ***Wizzard*** case, the pre-conditions for the admissibility of the statement into evidence being satisfied, the conviction was upheld.

As the overall object of the exercise in any criminal trial is the standard of fairness to the accused person, the admissibility into evidence of the statement of the witness is not a sine qua non of the whole exercise. There remains the duty of the trial judge to warn the jury of the fact that they have not seen or heard the witness testify before them or cross-examined and so not having their evidence tested in such a manner, that it is a matter for them as the triers of the facts of the case to determine

what weight they were prepared to attach to the facts contained in the document.

Ground 6

Further on the question of fairness, the learned trial judge is faced with the over-riding duty of ensuring before leave is given to admit any document under section 31D that at least one of the conditions as set out in (a)-(e) is satisfied. When compared with section 26 of the English Criminal Justice Act 1988, there is no material difference in the two statutory provisions.

In this case there is no ground of complaint nor was it the contention of learned Queen's Counsel that defective directions were given by the learned trial judge to the jury as to how to weigh and assess the evidence contained in the statement of Xavier Newton Bryant and the other witnesses who were not available to testify at the trial. When all the circumstances are considered and the necessary safeguards are weighed in the balance, it is my opinion, that there is no valid basis for the complaint that the applicant did not receive a fair trial.

Ground 1

This was directed at the unsatisfactory nature of the evidence relied on by the prosecution to establish the guilt of the applicant.

Learned counsel for the Crown in responding submitted that it was not enough for the applicant to show that if the evidence for the

prosecution and the defence or the matters that fell in favour of and against the applicant are minutely examined and set out one against the other it may be said that there is some balance in favour of the applicant. For him to succeed on this ground, the applicant would have to show that the verdict is so against the weight of the evidence as to be unreasonable and unsupportable. Counsel cited in support of this submission ***Regina v Joseph Lao*** [1973] 12 J.L.R. 1238.

Crown counsel argued that in the instant case the verdict was entirely reasonable and strongly supported by the evidence. The weight of the evidence was in favour of the prosecution's case that the applicant was not acting in self defence at all material times during the incident. The evidence remained strong at the conclusion of the case and was not affected by any inherent weaknesses. In summary the following relevant facts were important:

(1) the deceased turned and ran from the appellant who pursued him and fired shots at him whilst he was running.

(2) The applicant fired several shots into the back of the body of the deceased whilst he laid helplessly, face down on the ground.

(3) The medical evidence disclosed that eleven of the thirteen entry gunshot wounds were to the back of the body of the deceased.

(4) The applicant admitted in cross-examination that:

(i) he was firing at the deceased as the deceased ran with his back to him;

(ii) the deceased was not firing at him at the time nor for that matter at anytime during the incident;

(iii) as he fired at the deceased it had not crossed his mind that he (the applicant) was in danger at that time.

The conduct of the applicant given the situation with which he was confronted raises the obvious question whether the manner of his retaliation was reasonable and necessary in the circumstances. If not, the actions of the applicant would have gone beyond what could properly be regarded as his acting in self-defence and amounted to pure naked aggression on his part having no link with the defence of self-defence: (vide ***Palmer v The Queen*** ([1974] 12 J.L.R. 311).

Learned Queen's Counsel, Mr Phipps, sought to raise the constitutionality of section 31D of the Evidence Act before the court of trial into the charge brought against the applicant. He relied in support on Rules 3(1) and (2) of the Judicature (Constitutional Redress) Rules 2000. This complaint was brought about as a result of a ruling by the learned trial judge that the court as constituted was not competent to deal with the matter touching on the Constitution sought to be raised by counsel.

The Deputy Director of Public Prosecutions in responding to this ground of complaint submitted that the stance taken by the learned trial judge was correct. He argued that there are now two ways in which the procedure laid down by section 25 of the Constitution may be followed

viz by motion before the Supreme Court and by argument before this Court. In support counsel placed reliance on the Civil Procedure Rules 2002, which came into operation on January 1, 2003. These rules expressly revoked the Judicature (Constitutional Redress) Rules 2003. The motion before the Supreme Court in the 2002 Rules refers to the Full Court of three judges sitting as a Constitutional Court to hear matters having far reaching implications and these Rules have been promulgated by a democratically elected Parliament. As the Attorney General ought to be a party to any challenge to the constitutionality of any legislation, it would be most impracticable for a trial below which has started to be interrupted by such an application being made challenging the Constitution on a matter having such a far reaching effect. Counsel relied in support on ***Thappar v Madras*** [1950] S.C. 124.

This contention on the part of the Deputy Director of Public Prosecutions is not only sound, but in my opinion, eminently correct. It is significant that learned Queen's Counsel, Mr Phipps in his reply did not seek to take the matter of the learned judge's ruling any further. It is also important that a similar stance was adopted by Mr Phipps at the hearing below. In the absence of the jury counsel had argued with great conviction but unsuccessfully that no valid basis existed for presenting an indictment against the applicant founded on statements in a document rather than by way of viva voce evidence of witnesses called to testify in

court. He alluded to section 20(6)(d) of the Constitution which since the coming into force of the Constitution now in statutory form allows for the common law right to cross-examine witnesses called to give evidence.

Chapter III of the Constitution of Jamaica entitled Fundamental Rights and Freedoms under which falls sections 13-25 has to be read and considered against the background that those fundamental rights and freedoms that are enjoyed by any individual;

> "does not prejudice the rights and freedoms of others or the public interest." (Emphasis supplied)

On a proper construction of section 13, it is clear that the effect of the proviso places a limitation on the rights afforded to the individual in Chapter III. To suggest otherwise would mean that no society subject to law could expect to be governed in an orderly manner. Parliament has from time to time enacted laws for the peace, order and good government of the people of Jamaica: (section 48(1) of the Constitution). Laws such as the Evidence (Amendment) Act 1995 have to be examined and considered to determine the purpose for which the enactment was brought into force. Here one begins on the premise that there is a presumption of constitutionality when one is considering the validity of Acts of Parliament. The onus is on the person or body challenging the validity of the legislation to show that the particular enactment was not reasonably required for the particular purpose for which it was passed. This burden is a high one. The *Board of the Privy Council* in ***Ramesh Dipraj***

Kumar Mootoo v Attorney General of Trinidad and Tobago [1978] 30 W.I.R. 411at 416 (G-H) per dictum of Sir William Douglas in following the test laid down by the Board in ***Attorney General v Antigua Times Ltd.*** [1976] 21 W.I.R. at 574 expressed itself in these terms:

> "Their Lordships think that the proper approach to the question is to presume until the contrary appears or is shown that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are to use the words of Louisy, J so arbitrary as to compel the conclusion that it does not involve an execution of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power."

In ***Farquharson Institute of Public Affairs Limited v The Attorney General of Jamaica and the Director of Public Prosecutions*** Claim No. H.C.V. 0543 (unreported) a decision of the Full Court delivered on December 19, 2001, reference was made to the purpose for the enactment of the Evidence (Amendment) Act 1995, ("the Act") and in particular section 31D which sought to enlarge the categories of hearsay evidence.

In the cited case the arguments advanced by learned counsel for the applicant challenging the constitutionality of section 31D of the Act were of a marked similarity to that advanced before us in the instant case. In dealing with the submissions of counsel, Marsh, J at page 15 observed that:

> "The admission of this statement was not automatic even if the circumstances mentioned in section 31D (a-e) were proven. The Court still had a discretion to exercise as to whether such a statement could be admitted. Section 31D should for its full effect be read with sections 31C and 31L of the said Evidence (Amendment) Act."

Having quoted these sections the learned judge then said:

> "Section 48 of the Constitution must be always uppermost in mind when the constitutionality of an Act of Parliament is being considered. Parliament's power to make laws for the peace, order, and good government of Jamaica.
>
> In cases where, as are very frequently reported, witnesses are threatened, spirited away or even killed it would be an affront to the peace order and good government of Jamaica, if there are no statutory provisions to deal with such situations. Miscreants could always be assured of success in criminal proceedings by putting the witness out of their reach of the Court."
>
> (Emphasis supplied)

If the contention of Queen's Counsel were right, in several cases in which the prosecution found itself faced with a situation in which it had to rely on either statements or depositions of witnesses who were dead, or, not available being kept out of Court through fear of bodily harm and other similar causes, that would mean that no accused person no matter how heinous the offence committed, could be brought to justice.

The law has now gone through a stage of development in which it is now accepted in principle and by authority that provided the necessary safeguards are adhered to resort may be made to presenting a case

based solely on documentary evidence. In ***Scott et al v the Queen*** [1989] 2 W.L.R. 924 at 933 E-I 934 A.B. Lord Griffiths in delivering the advice of ***Her Majesty's Board of the Privy Council*** and having reviewed a number of authorities viz ***R v Linley*** [1959] Crim. L.R. 123, ***R v O'Loughlin*** [1988] 3 All E.R. 431, ***R v Blithing*** [1984] R.T.R. 18 ***R v White*** [1975] 24 W.I.R. 305 and ***Sutherland v The State*** [1970] 16 W.I.R. 342, all cases in which the Court exercised its discretion to exclude the evidence contained in the statement and depositions had this to say:

> "In the light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the

> deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will in addition be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.
>
> Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of the circumstances. This much however can be said that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion."
>
> (Emphasis supplied)

Further at paragraph C, the learned Law Lord said:

> "In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in summing-up and the depositions should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised, to exclude the deposition".
>
> (Emphasis supplied)

Parliament in enacting the Evidence (Amendment) Act, 1995 and given the wording of section 31D must have had regard to section 34 of The Justices of the Peace (Jurisdiction) Act. It is my considered opinion that the principles enunciated by the Board in ***Scott et al v the Queen*** (supra) apply with equal force to the exercise by a judge of his discretionary power in determining whether to admit a statement or a deposition of an absent witness into evidence. This is so irrespective of whether the document in question contains the only evidence against an accused person. Fairness born of a desire to achieve a just result as the basis of this exercise, the need to ensure a rigid adherence to the safeguards necessary to achieve the required standards is what must inform and determine the exercise of the discretion.

In exercising its discretion therefore, as to whether or not to admit into evidence the statement contained in a document, the learned trial judge had to satisfy herself that the pre-conditions to which the granting of the application was subject had been fulfilled. Even when admitted the party affected by the contents of the document has the right to call evidence in rebuttal or to challenge the credit of the maker of the statement. In this regard in challenging the admissibility of the evidence contained in the statement of Mark Williams, (the police officer who was responsible for taking a statement from the applicant following the shooting incident) the defence called one witness in rebuttal. It was

following this that the learned trial judge made her ruling and exercised her discretion to admit the statement into evidence under the provisions of section 31D (c) of The Evidence Act, she being satisfied that the person was outside of Jamaica and it was not reasonably practicable to secure his attendance.

Given the statutory safeguards required, section 31C and section 31L of the Act coupled with the primary duty placed on the learned trial judge to direct the jury as to how to approach the evidence contained in the document, clearly go towards meeting the standards of fairness required by section 20(1) of the Constitution.

Apart from the above safeguards, the trial court considering whether or not to admit the particular document under section 31 is called upon to go through a balancing exercise in coming to a decision as to whether the document ought to be admitted.

When the rights created by section 13 of the Constitution and compared with those guaranteed to an accused person by virtue of section 20 are examined what is called for in the final analysis is a standard of fairness to the applicant but which is subject to "the rights and freedom of others and of the public interest."

When considered against that background such rights under section 20(c) are not absolute rights but a right to a fair hearing which is

part of a wider public interest that justice be done. It is with this view in mind that section 13 of the Constitution provides that:

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of ..."

It is with this aim in mind that section 31D of the Evidence (Amendment) Act, 1995 upholds the interests of justice by discouraging interference with witnesses and ensuring that cases can proceed to trial. Given the necessary safeguards that have to be adhered to, the statute ensures the interests of justice as to the manner in which a trial takes place and does not, in any respect breach the right of an accused person to receive a fair hearing.

Having regard to the above views therefore, can one say that section 31D when examined and considered is inconsistent with section 20(6)(d) of the Constitution?

Mr Phipps, Queen's Counsel, submitted that this provision in the Constitution affords to an accused person the right to have counsel of his choice and to examine the witnesses called to give evidence by the prosecution as well as to summon witnesses to testify on his own behalf.

Section 31D, by creating a statutory exception to the hearsay rule by virtue of enabling the tendering into evidence of the statement of a

person in a document in proof of the facts stated therein, breaches the right of cross-examination guaranteed by section 20(6)(d) of the Constitution. In this regard a distinction ought to be made. By section 31D Parliament is seeking to provide through the necessary safeguards, that offenders who commit serious crimes and possess the necessary means to cause witnesses to be spirited away or by threats, or other measures, to be kept from testifying do not thereby escape being subject to the due process of the law.

The rights guaranteed under section 20(6)(d) on the other hand, clearly relate to prosecution witnesses who are present in court or who are available to be called to testify in court. In short, witnesses who are physically present and whose existence and whereabouts at the time of trial is known. Even where this state of affairs exists there is a further qualification. The particular witness must at the time of trial possess the necessary competence to be able to testify, failing which provided the reason for this changed circumstance is established, the trial judge has the over-riding discretionary power to admit the statement of the particular person into evidence in proof of the facts stated therein. As the statements tendered in evidence however, related to witnesses who were <u>not</u> physically present, this would render any further consideration of this matter redundant.

In conclusion when the arguments advanced in support of grounds 2, 3 and 6 are considered, there exists no valid basis for saying that the applicant did not receive a fair hearing or that the learned trial judge's exercise of her discretion to admit the statements into evidence as part of the prosecution's case was wrongly exercised. The further challenge to the constitutionality of section 31D of The Evidence Act, fails as the object of the enactment has been clearly shown to be what was reasonably required in the public interest. Moreover the burden which rested on the applicant to satisfy the test for striking down the enactment has not been met by any of the arguments raised in the matter. This ground accordingly fails.

Ground 4

This ground of complaint was advanced by Mr Scott for the applicant. The gravamen of his submissions were that the directions of the learned trial judge fell short of the legal requirements in relation to the defence of self-defence. These shortcomings were carried through into the directions on provocation and also in relation to inferences. Having examined the summation it is my view that this contention is totally unfounded and without any merit for the following reasons.

Counsel's submissions were focused on the directions on self-defence. While conceding that the directions were generally correct, he submitted that the learned trial judge ought to have told the jury that if

they were in a state of reasonable doubt about self-defence then they ought to acquit the accused. This she failed to do, while telling the jury earlier in the summation that if they entertained a reasonable doubt as to the general issues that doubt ought to be resolved in favour of the accused (applicant). He submitted that this direction required repeating when the jury came to consider the particular issue relating to self defence. This he said was not done hence, the matter was not properly left to the jury for their consideration.

Learned counsel for the Crown in responding submitted that the directions on the law in relation to self-defence were clearly adequate as it recognized the right of the applicant to raise self-defence and for the Crown to rebut that defence if they could. A failure to do so would result in an acquittal. The summation has to be looked at as a whole.

Counsel relied for support on ***R v Anthony Rose*** S.C.C.A. 105/97 (unreported) delivered July 31, 1998, and ***R v David Bell*** S.C.C.A. 74/95 (unreported) delivered on December 11, 1995.

He submitted that in the instant case the defence was contending that there was an attack being made on the applicant by the deceased which called for the use of force by the applicant in self-defence. In such a situation for the jury to have convicted the applicant, they must have concluded that the attack was no longer operative when the applicant

discharged the eleven shots into the back of the deceased. The verdict of the jury means in effect that the jury must have found either:

(1) There was no attack being made on the applicant.

(b) If there had been an attack it had been concluded and hence there was no need for the use of excessive force. Such a situation would also cover the case, when what was being advanced was a perceived attack.

As the applicant in his sworn testimony alluded to being held up by the deceased who had a gun pointing at him, the directions given by the trial judge to the jury on self-defence had of necessity, to be tailored in keeping with those particular facts. The learned trial judge taking this into consideration sought to structure these directions along lines similar to those adumbrated by Lord Morris in ***Palmer v The Queen*** [1971] 12 J.L.R. 311 at 322 B-G in delivering the advice of Her Majesty's Board of the Privy Council. In the instant case there is no complaint being advanced in relation to the directions given by the learned trial judge in relation to self-defence. Counsel's complaint is that there was no particular direction based on an honest belief on the part of the applicant that he was under an attack by the deceased.

This direction on honest belief was called for in the judgment of the Board of their Lordships in ***Solomon Beckford v The Queen*** [1987] 3 W.L.R. 641, 3 All E.R. 425, 85 Cr. App. R. 378. Such a direction was not given to the jury when the learned trial judge completed her summation. In

response to a request from Crown counsel the learned trial judge then directed the jury in the following manner:

> "Madam Foreman, members of the jury, before you rise let me tell you that when the law requires that the person should honestly believe he is under attack, it is something that has to operate in his mind, he has to have an honest belief that he is being attacked or is about to be attacked, and then it would be open to him to use such force as is necessary to defend himself; so that his state of mind is important, and you have to take that into consideration when you are deciding whether in fact this is a case where the accused did no more than was necessary to defend himself from an attack, which he apprehended was being made. So I say this to ensure that you are well aware of the requirements of the law. It has to be an honest belief, on the spot, that he was being attacked, so that if the circumstances are such that he couldn't possibly have thought that any attack was imminent or any attack was being made, then the defence of self-defence would not avail him. It is only if he honestly believed that he was being attacked or he was about to be attacked."

Having regard to what appears in the passages cited the jury were left in no doubt as to how they were to approach their task in determining the issue of self-defence.

The complaints raised in relation to provocation in law and inferences were not canvassed in argument before us by Mr Scott. The former was without any semblance of a factual basis to support it. In any event, it can be regarded as being abandoned by counsel as lacking in merit.

With regard to inferences a similar approach was adopted by counsel for the applicant. The matter of the complaint was raised but not pressed in argument. When the directions in this area of the summation are examined, it can clearly be seen that they were proper. At page 431 lines 6-25, and page 432 lines 1-12 of the transcript, the learned judge said:

> "Now apart from finding the actual facts proved in the case, you are entitled as jurors to draw reasonable inferences from such facts as you find proved in order to assist you in coming to a decision. Certain matters cannot be proved by direct evidence, that is by the evidence of a witness who saw or heard it happen. Certain matters can only be proved by inference drawn from other proved facts and it is for that reason why you are entitled to draw reasonable inferences.
>
> Madam Foreman and members of the jury, you must not draw an inference unless you draw it from proved facts. You must not draw an inference unless it is a reasonable one. You must be quite sure that it is the only inference which can reasonably be drawn in all the circumstances as you find them. Where the evidence is capable of two or more interpretations, my duty is to point out those possible interpretations to you, leaving it to you to see which one of them you are going to accept, having regard to the totality of the evidence in this case. When I leave all the possible interpretations to you, what you do then is to look at the whole picture and then decide which interpretation you are going to accept and act upon it."

Conclusion

While in the process of preparing this judgment I have taken the opportunity of examining in draft, the judgments prepared in this matter by Walker, J.A. and Karl Harrison, J.A. (Ag.), I am in agreement with the manner in which they have dealt with the issues raised in the matter and with their reasoning and the conclusions reached by them. The appeal is dismissed.

WALKER J.A:

In the early morning of April 18,1999, within hours after celebrating his 17th birthday on the previous day, Kymani Bailey, a student of Dunoon Technical High School, was shot to death in New Kingston. As a consequence of this shooting incident, the appellant was charged and tried for the murder of Bailey. At the appellant's trial the medical evidence revealed that Bailey had been shot a total of thirteen times, eleven bullets having entered his body through the back. In his defence the appellant, who was at the time a licensed firearm holder, admitted shooting Bailey but said that he did so in self-defence. This was the substance and tenor of a report which the appellant made to the police shortly after the shooting occurred. In that report the appellant told the police that Bailey had attacked him with a gun and that it was in order to repel this attack that he shot Bailey. Although Bailey died on the scene of the incident no firearm was recovered from him. Following his trial and conviction of the non-capital murder of Bailey the appellant was sentenced by the trial judge, Marva McIntosh J, to imprisonment for life with an order that he should not become eligible for parole before serving a sentence of 20 years.

On the appeal against conviction the arguments advanced on behalf of the appellant were, firstly, that section 31D of the Evidence Act

("the Act"), pursuant to which certain vital evidence for the prosecution was admitted, was unconstitutional in that it contravened section 20(6)(d) of the Constitution of Jamaica ("the Constitution"). Accordingly, it was contended that the evidence admitted in pursuance of s.31D was from a legal standpoint, and for all intents and purposes, inadmissible. That evidence consisted of the statement of Xavier Newton Bryant, the deposition of Detective Sergeant Lloyd Warren, the deposition and personal notes, including a diagram, of Dr. Ere Seshaiah and the deposition of Constable Mark Williams. Secondly, it was argued that in the event that section 31D was found to be constitutional, the evidence to which exception was taken was, nevertheless, wrongly admitted by the trial judge. Thirdly, the argument was that the trial judge in her summation misdirected the jury on the appellant's defence of self-defence and thereby deprived the appellant of a fair chance of acquittal. Fourthly, it was argued that the trial judge erred in not, herself, putting in evidence pursuant to section 31D (d) of the Act, the statement of a reputed eye-witness to the incident named Michael Kinglock.

Is section 31D of the Evidence Act unconstitutional?

Now in determining this question it is important first to recognise that there exists a presumption of the constitutionality of legislation. The presumption is, of course, a rebuttable one, the burden being on the party alleging unconstitutionality to prove the same beyond all

reasonable doubt: see ***Ramesh Dipraj Kumar Mootoo v Attorney General of Trinidad and Tobago*** [1979] 30 WIR 411. The burden of proving the invalidity of an Act of Parliament is a heavy one (ibid at p.415).

As to the presumption of constitutionality the test to be applied was that laid down by their Lordships' Board in ***Attorney-General v Antigua Times Ltd.*** [1975] 21 WIR 560. That test was there expressed (at p.574) in the following terms:

> "Their Lordships think that the proper approach to the question is to presume , until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J' so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power".

The test was applied in ***Mootoo*** (supra) and is the test that is applicable in the present case.

It is a notorious fact that for some time prior to 1995 Jamaica had been ravaged by crime and violence. The country had gained the unenviable reputation of having a murder rate which was one of the highest in the world. Hapless members of the public were being murdered with impunity on a daily basis. The criminal justice system was seriously threatened with witnesses to crime being terrorized or, as happened in many cases, themselves killed before testifying in court. As

Wolfe CJ so aptly described the situation in ***Farquharson Institute of Public Affairs v The Attorney General of Jamaica and Another,*** Claim No. HCV 0543 of 2003 (unreported) delivered December 19, 2003:

> " Jamaica Land We Love, for sometime now has literally become immobilized by the activities of criminal elements in the society. The level of criminality has had a debilitating impact upon the economy and the quality of life. Citizens have virtually become prisoners in their homes.
>
> In addition to the above, persons who are witnesses to criminal incidents have been so intimidated by the viciousness of the criminal elements that they are reluctant to appear in court to testify.
>
> Witnesses in criminal cases have been murdered on their way to court to give evidence.
>
> This situation has made it extremely difficult for the Prosecuting Authority to successfully prosecute persons charged with serious criminal offences."

There was a public outcry at this state of affairs. Something had to be done and it fell to the Government to take appropriate and urgent action. In this instance Parliament did, in fact, take action. That action consisted in part of the enactment of the Evidence (Amendment) Act,1995 ("the1995 Act") which included the now controversial section 31D. Section 31D ordains as follows:

> **"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) is 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 the person."

Section 31 G which is referred to in section 31D provides for the admissibility of computer evidence constituting heresay and is not relevant for present purposes. In juxtaposition to section 31D, section 20(6) (d) of the Constitution is set out hereunder. It reads:

"(6) Every person who is charged with a criminal offence-

(a)...
(b)...
(c)...
(d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those

applying to witnesses called by the prosecution; and

(e)..."

For the appellant Mr. Phipps QC submitted that section 20 (6) (d) conferred on a person charged with a criminal offence an absolute right in respect of the matters stated therein. That right, said Mr. Phipps, was one of the rights and freedoms enshrined in section 13 of the Constitution. Section 13 provides:

> **"13.**-Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The constitutional protection conferred by section 20(6)(d) was not subject to any limitation and could only be taken away by legislation passed in accordance with the special procedures prescribed in sections 49 and 50 of the Constitution, said Mr. Phipps. Section 31D had the effect of limiting the right conferred by section 20(6)(d) and, therefore, since section 31D was not enacted in accordance with sections 49 and 50, section 31D was unconstitutional, void and of no effect. In support of his submissions Mr. Phipps drew the attention of the court to section 2 of the Constitution which reads:

> "**2.** Subject to the provisions of section 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The pith of Mr. Phipps' submission was that the admissibility of a statement in a document as evidence of fact pursuant to section 31D of the Act was, in essence, "the same thing" and had the same effect as the evidence of a witness who was called before the court within the contemplation of section 20(6)(d) of the Constitution.

The provisions of section 31D and the provisions of section 23 of the English Criminal Justice Act 1988 ("the English Act") are similar in many respects. Section 23 of the English Act provides as follows:

> "**23** - (1) Subject –
>
> (a) to subsection (4) below;

(b) to paragraph 1A of Schedule 2 of the Criminal Appeal Act 1968 (evidence given orally at original trial to be given orally at retrial); and

(c) to section 69 of the Police Criminal Evidence Act 1984 (evidence from computer records),

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 –

(i) the requirements of one of the paragraphs of subsection (2) below are satisfied; or

(ii) the requirements of subsection (3) below are satisfied.

(2) The requirements mentioned in subsection (1) (i) above are-

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b) that –

(i) the person who made the statement is outside the United Kingdom; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

(3) The requirements mentioned in subsection (1) (ii) above are -

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

> (b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.
>
> (4) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984."

Again, Article 6 of the Convention for the protection of Human Rights and Fundamental Freedoms 1950 ("the Convention") contains provisions that are similar in terms and effect to section 20(6)(d) of the Constitution. Article 6 (paragraphs 1 and 3(d)) reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair...hearing... by an independent and impartial tribunal...
> ....
> 3. Everyone charged with a criminal offence has the following rights:-
> (a)...
> (b)...
> (c)...
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

In ***R v Thomas, Flannagan, Thomas and Smith*** [1998] Crim. L.R. 887 the English Court of Appeal (Criminal Division) had to consider whether sections 23-26 of the English Act contravened Article 6 of the Convention. The headnote to ***Thomas*** usefully encapsulates the salient facts of that case and the decision of the Court. It reads:

"The appellants were charged with conspiracy to supply a Class A drug (heroin). The first two appellants were also charged with causing grievous bodily harm with intent. The prosecution case was that the prime movers in the conspiracy targeted vulnerable heroin addicts, who were sometimes small dealers, to sell heroin on their behalf. Threats, intimidation and violence would be used to achieve the purpose of the conspiracy. At their trial the appellants denied the conspiracy and maintained that the witnesses called by the prosecution were those who were involved in the supply of heroin in the area and were giving false evidence for the prosecution against the appellants in order to escape criminal responsibility themselves. One of these prosecution witnesses was C, whose evidence was that he had wanted to stop dealing but was given a severe punishment beating by the first two appellants and another man. The trial judge found that C was in fear and allowed his statement to be read to the jury under section 23 of the Criminal Justice Act 1988. The appellants were convicted and appealed against conviction and/or sentence on the grounds, ***inter alia,*** that the judge's decision to allow C's evidence to be read under section 23 was in breach of Article 6 of the European Convention on Human Rights which was a matter to which the judge should have had regard even though the Convention was not yet part of the law of this country.

Held, dismissing the appeals, that the judge's opinion that the statement should be admitted in the interests of justice was entirely, reasonable; he considered the contents of the statements and the opportunities that the appellants would have to controvert C's evidence if C did not give oral evidence; he took account of the fact that the jury would know of C's conviction and that he had given assistance to the prosecuting authorities to mitigate any sentence passed; the judge was aware that the appellants would be

> able to give evidence controverting C's account as to how he had come by his injuries; and he also took into account the fact that at the magistrates' court C had given evidence in the presence of both these appellants and had been cross-examined, albeit briefly, by their solicitors. The narrow ground which the trial judge had to be sure existed before he could allow a statement to be read to the jury, coupled with the balancing exercise that he had to perform and the requirement that having performed that exercise he should be of the opinion that it was in the interests of justice to admit the statement, having paid due regard to the risk of unfairness to the accused, meant that the provisions of sections 23-26 of the 1988 Act were not in themselves contrary to Article 6 of the Convention; that view was confirmed by the decision of the Commission in ***Trivedi v United Kingdom*** [1977] 89 D.R. 136. Accordingly, the convictions of the first two appellants were safe, the conviction of the third appellant was dismissed on different grounds and the fourth appellant appealed against sentence only."

In ***Trivedi*** to which reference was made in ***Thomas*** the European Commission of Human Rights sitting in private on May 27, 1997 (ibidem at page 10, para. 27) had occasion to observe:

> " The Commission further recalls that, according to its own case-law and that of the European Court of Human Rights, all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use of statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 (Art. 6) of the Convention, provided that

> the rights of the defence have been respected. As a rule, these rights require that the defendant be given adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings."

In ***R v Martin*** [2003] EWCA Crim. 357 (20 February, 2003) the verdict of a jury based upon the untested evidence of a witness which was read to the jury pursuant to section 23 of the English Act was called into question. In delivering the judgment of the English Court of Appeal (Criminal Division) Potter LJ having referred to several cases on the point decided by the European Court of Human Rights including ***Luca v Italy*** App. 33354/96 went on to say:

> "In ***Luca v Italy*** where, in very different circumstances, the defendant was unable to demand the presence of an important witness at trial or to cross-examine him, the court observed at paragraph 40 of the judgment:
>
> > 'As the court has stated on a number of occasions... it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3(d). *The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that have been made by a person whom the*

> *accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6'. (emphasis added)*

The judge rejected the submission for the defence that the last sentence of that paragraph could admit of no exceptions. Certainly, if it did, then sections 23 and 26 of the 1988 Act could never apply in a case such as the present where the essential or only witness is kept away by fear. That would seem to us an intolerable result as a general proposition and could only lead to an encouragement of criminals to indulge in the very kind of intimidation which the sections are designed to defeat. Certainly, decisions of this court before the passage of the *Human Rights Act* 1998, as well as common sense, suggest that no invariable rule to that effect should be either propounded or followed. Where a witness gives evidence on a *voire dire* that he is unwilling to give evidence as a result of a threat which has been made to him, and the judge draws the inference that the threat was made, if not at the instigation of the defendant, at least with his approval, this should normally be conclusive as to how the discretion under section 26 should be exercised: see ***R v Harvey*** [1998] 10 Archbold News 2,CA. So too, as made clear in a case concerning a witness too ill to attend who gave clear identification evidence in his witness statement, this Court observed:

> 'The fact there is no ability to cross-examine, that the witness who is absent is the only evidence against the accused and that his evidence is identification evidence is not sufficient to render the admission of written evidence from that witness contrary to the interests of justice or

> unfair to the defendant *per se*. What matters in our judgment, is the content of the statement and the circumstances of the particular case bearing in mind the considerations which section 26 require the judge to have in mind' per Lord Taylor CJ in ***R v Dragic*** [1996] 2 Crim App R 232 at 237.
>
> In ***R v Gokal*** [1997] 2 Crim. App. R 286 this court, considering in advance of the Human Rights Act the assistance from the European cases then available, and with express reference to the ***Unterpertiner*** case and the ***Kostovski*** case, concluded that, when considering the question of the likelihood or otherwise that the defendant could controvert the statement of one absent witness, the court should not limit itself to the question of whether the accused himself could give effective evidence so as to do so; it should also consider the reality of his opportunity to cross-examine or call other witnesses as to the relevant events, or to put the statement maker's credibility in issue by other means. That being so, we would not subscribe to any formulation of the approach to be adopted which states without qualification that a conviction based solely or mainly on the impugned statement of an absent witness necessarily violates the right to a fair trial under Article 6."

I extract from a careful analysis of these observations of Lord Justice Potter, and particularly from the quoted dictum of Lord Taylor CJ in ***Dragic*** (supra) a fundamental principle. It is this: that in dealing with the admission in evidence of a statement of an absent witness the consideration of fairness is of paramount importance. As the learned Chief Justice said, the fact that there is no ability to cross-examine does

not, per se, render the admission of written evidence from a witness contrary to the interests of justice or unfair to a defendant. That, as I understand it, is how the English Court is content to approach the matter. So should we.

Now adopting such an approach in considering the present case one finds that section 31 of the Act contains certain safeguards designed to ensure fairness to a defendant in respect of whom evidence is admitted pursuant to section 31D(d). Such safeguards include those to be found in sections 31J and 31L of the Act. Section 31J reads:

> "31J.(1) Where in any proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence pursuant to section 31D, 31E, 31F or 31G –
>
> (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 the proceedings for that purpose;
>
> (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as 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 has contradicted himself.

> (2) References in subsection (1) to a person who made the statement and to his making the statement shall be construed respectively as including references to the person who supplied the information from which the document containing the statement was derived and to his supplying that information."

In section 31L the ultimate safeguard is prescribed in the following terms:

> "31L. It is hereby declared that in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value."

I conclude, therefore, that the right to cross-examine conferred by section 20(6) (d) of the Constitution is not an absolute right. Such a conclusion is, I think, fortified by the decision of the Supreme Court of South Africa (South-Eastern Cape Local Division) in ***Klink v Regional Court Magistrate NO and Others*** [1996] 3 LRC 667. I do not find, as Mr. Phipps submitted, that the provisions of section 31D of the Act and the provisions of section 20(6) (d) of the Constitution are one and the same thing. It is true to say that both sections are designed to produce a similar result, that is admissible evidence before a court of law, but there the similarity ends. For whereas section 20(6) (d) contemplates and provides for a situation in which a live witness is present in court and available for cross-examination, section 31D contemplates and provides for a situation where a witness is deceased, or otherwise not present in court for

specified reasons and, therefore, not available for cross-examination. There is, in my opinion, no inconsistency between these two pieces of legislation which are mutually exclusive of each other. Neither section takes away from the other any right conferred by that other upon a person charged with a criminal offence. The provisions of section 20 of the Constitution do no more than codify the common law right of such a person to a fair trial. This was made clear in ***Franklyn and Vincent v R*** [1993] 42 WIR 262, a judgment of the Privy Council, the headnote to which reads, inter alia, as follows:

> "The provisions of section 20 of the Constitution of Jamaica (right of a person charged with a criminal offence to a fair hearing) do no more than codify the common-law right to a fair trial. They do not contain any specific requirement as to what is to be provided to an accused before trial and a determination whether the Constitution has been contravened by the non-provision of statements of prosecution witnesses depends on an assessment of the facts of the particular case as against the general standards of fairness prescribed by the Constitution."

Thus, the guarantees prescribed in section 20(6)(d) are, simply, specific aspects of the general and wider concept of a fair trial.

A determination of whether the Constitution would be contravened by the admission in evidence in criminal proceedings of a statement made by a person in a document pursuant to section 31D of the Act, depends on an assessment of the facts and circumstances of the present case as against the general standards of fairness prescribed by the

Constitution. Section 48(1) of the Constitution gives to the Jamaican Parliament the power to make laws for the peace, order and good government of Jamaica. In exercise of that power Parliament may make all such laws as are enacted in conformity with the provisions of the Constitution. Otherwise, the plenitude of the legislative power of Parliament may not be limited by any speculative or opportunistic application of doctrinaire logic. Indeed, the supremacy of the Jamaican Parliament was expressly recognised and acknowledged by the Judicial Committee of the Privy Council in the recent decision in ***Dave Antonio Grant v The Queen***, Privy Council Appeal No. 27/2004 delivered by their Lordships' Board on June 14, 2004. Furthermore, section 25 of the Constitution provides for challenges to the constitutionality of legislation and ordains that an application for constitutional redress may be made before the Supreme Court. Section 25 reads as follows:

> "25- (1) Subject to the provisions of subsection(4) of this section, if any person alleges that any of the provisions of sections 14 to 24(inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) the Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of

enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

(4) Parliament may make provision, or may authorise the making of provision, with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorise the conferment thereon of such powers, in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section."

The present complaint, that is an alleged contravention of section 20(6)(d), clearly falls within the ambit of section 25 and, therefore, is justiciable before the Supreme Court following the procedure prescribed in the Civil Procedure Rules, 2002. In Jamaica the 1995 Act was passed by Parliament to counter the mischief which endangered the country. Its provisions seek to do that while ensuring fairness to a person charged with a criminal offence. That is the perspective from which the 1995 Act must be assessed. Such an assessment must be undertaken dispassionately

and not with a pre-occupation as to the constitutionality of the legislation. As Frankfurter J observed in ***Dennis v United States,*** 314, U.S. 494 at 555[1951]:

> "Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Even those who would most freely use the judicial brake on the democratic process by invalidating legislation that goes deeply against their grain, acknowledge, at least by paying lip service, that constitutionality does not exact a sense of proportion or the sanity of humor or an absence of fear. Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom."

At the trial of the appellant it obviously appeared to the trial judge that Mr. Phipps who represented the appellant was taking the point that the court should then and there determine the constitutionality of section 31D before ruling on the admissibility of the questioned documents. Mr. Phipps' submissions at the time evoked the following comment of the trial judge:

> "Being (sic) that as it may, it is a constitutional point and this court is not constituted to hear such arguments"

Again before this court Mr. Phipps appeared to have been advancing the same argument, so much so that it prompted a reply from Mr. Fraser for the Crown. However, Mr. Phipps assured us that that was never his contention. It is as well that this assurance should have been given; for it

cannot be doubted that the comment of the trial judge was entirely correct. A trial judge cannot be expected to determine questions as to the constitutionality of legislation in the midst of a criminal trial, especially a trial with a jury. At this stage the presumption of constitutionality must prevail.

For the foregoing reasons, I am of the view that section 31D of the Act is constitutional and has full force and effect.

Were the controversial documents properly admitted in evidence?

(a) The statement of Xavier Bryant

This statement was admitted in evidence pursuant to section 31D (d) of the Act. The contents of the statement cast Bryant in the role of an eye-witness to the shooting of Kymani Bailey. The foundation for the reception of the statement consisted in the evidence of the prosecution witnesses Constable Marvis Haughton, Detective Sergeant Michael Pommells and Constable Samuel Brown. Constable Haughton testified that on one occasion, probably in July, 2001, he saw and warned Bryant personally to attend the Resident Magistrate's Court for the purpose of giving evidence at the preliminary stage of these proceedings. To the witness' knowledge Bryant did not attend court at this time. The appellant having been subsequently committed to the Home Circuit Court for trial, the witness made several unsuccessful attempts between December, 2002 and the date of the appellant's trial in February, 2003 to locate

Bryant. Constable Haughton gave the court an impressive list of the places visited by him in search of Bryant. They included several public offices, three major public hospitals, the major prisons as well as various lock-ups across the island, all to no avail. In addition to all of the above a Notice was published in the Star newspaper of December 27, 2002 in an attempt to locate Mr. Bryant.

Detective Sgt. Pommells gave evidence that he also searched without success for Bryant. His efforts took him to Bryant's last known place of employment and last known place of abode. He visited these places on several occasions commencing in the year 2002 and up to two days before his testimony given in February, 2003. His enquiries revealed that Bryant no longer worked or lived at these addresses and no one could give any useful information as to the whereabouts of the missing man. On his part Constable Brown identified Bryant's statement as having been taken down in writing by him (Brown). Accordingly, present here were such "exhaustive enquiries" as the court referred to in ***R v Barry Wizzard*** SCCA No 14/2000 (unreported) judgment delivered April 6, 2001, and which distinguished that case from the case of ***R v Michael Barrett*** SCCA No. 76/1997 (unreported) judgment delivered July 31, 1998, both being cases in which statements were admitted in evidence pursuant to the provisions of section 31D.

(b) <u>The statement of Detective Sergeant Lloyd Warren</u>

This statement, in the form of a deposition, was admitted in evidence pursuant to Section 31D (a) of the Act.

The foundation for the reception of this evidence was provided by Detective Sergeant Pommells. This witness to whom Warren was personally known gave evidence that Warren died and was buried on May 11,2002. After the death of Warren who had been the investigating officer in charge of the appellant's case he (Pommells) was assigned and took charge of the case. Pommells identified Warren's signature on the document.

(c) The statements (comprising a deposition, the original post mortem report and a diagram) of Dr. Ere Seshaiah

These documents were admitted in evidence pursuant to section 31D (c) of the Act. Dr. Seshaiah, a registered medical practitioner and forensic pathologist, had performed the post mortem examination of the body of Kymani Bailey. At the time of the appellant's trial Dr. Seshaiah was unavailable and so the prosecution called Dr. Royston Clifford to provide the evidential basis for the reception in evidence of Dr. Seshaiah's deposition, the original post mortem report and a diagram prepared by the doctor. Dr. Clifford, himself a consultant forensic pathologist and the Director of the Legal Medicine Unit of the Ministry of National Security, gave evidence as to his personal knowledge of Dr. Seshaiah who he said worked with him and under his supervision for at least six years previously. Dr. Clifford identified all the documents as being

Dr. Seshaiah's documents. Dr. Clifford also testified that Dr. Seshaiah was at the time of trial outside of Jamaica on account of the illness of his wife. The date of Dr. Seshaiah's return to Jamaica was uncertain. Dr. Clifford's evidence was not controverted and was accepted by the trial judge.

It should be noted that, essentially, the value of Dr. Seshaiah's evidence lay in establishing the cause of death which was not in dispute in the case. There was never a challenge to the fact that Kymani Bailey expired soon after he had been shot several times at close range by the appellant. In these circumstances the cause of death could quite properly have been inferred in the absence of medical evidence on the point. It should also be noted that Dr. Seshaiah's statements were put in evidence through Dr. Clifford who, though himself a forensic pathologist, was not asked to give, and did not give, any opinion on Dr. Seshaiah's work or findings.

(d) The statement of Mark Williams

This statement, in the form of a deposition, was admitted in evidence pursuant to section 31D (c) of the Act. Its reception in evidence was grounded on the testimonies of Corporal Colin Roberts and Marjorie Duncan. Corporal Roberts gave evidence that Mark Williams was outside of Jamaica and was then living and working in the United States of America. The witness testified that Williams was not likely to return to Jamaica in the near future since he had travelled abroad on a non-

immigrant visa, had already overstayed the time allowed him and so would not be able to visit the United States of America again were he to come back to Jamaica at that time. On her part Marjorie Duncan identified Williams' deposition through which a statement in writing made by the appellant and recorded by Constable Williams shortly after the shooting incident occurred also became evidence in the case. It was submitted by Mr. Phipps that, received in evidence in this way, the appellant's statement was in the nature of second-hand hearsay. As such it was not admissible under section 31D which applied exclusively to first-hand hearsay.

Luis Angel Castillo [1996] 1 Cr. App. R. 438 is a case in point. In that case the headnote reads that "the appellant was convicted of importing cocaine from Venezuela. At trial the defence objected to the admissibility of a statement of J.M., regarding the issue of airline tickets in Venezuela to the appellants. Evidence in relation to J.M.'s inability to attend was provided by T, a drugs liaison officer based in Caracas. During a *voire dire*, the officer in charge of the case gave evidence of his discussions with T as to the inability of J.M. to attend. The judge ruled that it was not reasonably practicable for the prosecution to call T and that he was entitled to receive his statement under section 23 of the Criminal Justice Act 1988. Having admitted T's statement, the judge then ruled that it was not reasonably practicable for J.M. to attend to give evidence,

admitting his statement under section 23. It was contended on appeal that section 23 could not be applied twice". It was held that:

> "(1) The reasons for the inability of a witness to attend a trial to give oral evidence could be proved by the statement of another witness which was itself admitted under section 23(2)(b) of the Criminal Justice Act 1988. (2) In deciding whether it was reasonably practicable for a witness to attend, the mere fact that it was possible for the witness to attend did not answer the question. The judge had to consider a number of factors. First, the importance of the evidence that the witness can give and how prejudicial it was to the defence that the witness did not attend. Secondly, the expense and inconvenience of securing the witness's attendance. Thirdly, the reasons put forward as to why it was not reasonably practicable for the witness to attend."

In the present case the statement of the appellant was an integral part of the evidence of Constable Williams and, insofar as it amounted to an admission of the facts, it was admissible in evidence as an exception to the hearsay rule. It was fallacious to argue, as Mr. Phipps did, that the appellant's statement thereby became second-hand hearsay. But, in any event, no prejudice to the appellant could possibly have been occasioned by the admission of this statement since the contents of it were entirely consistent with the defence put forward by the appellant at his trial.

In my opinion the several documents referred to at (a) – (d) above were properly admitted in evidence under section 31D of the Act. No

valid reason has been advanced for saying that the trial judge was at fault in exercising her discretion to admit them as she did. Further, it is to be noted that the depositions of Warren, Dr. Seshaiah and Williams might also have been admitted in evidence pursuant to section 34 of the Justices of the Peace Jurisdiction Act, the prosecution having in each case laid the necessary evidential foundation therefor. It is entirely possible for a deposition to be receivable in evidence either in the character of a deposition under section 34 of the Justices of the Peace Jurisdiction Act or, as it was in the present case, in the character of a statement made by a person in a document under section 31D of the Act: see ***Rudolph Fuller v R.*** Supreme Court Criminal Appeal No. 55/2001 (unreported) judgment delivered December 19, 2003.

The directions of the trial judge on self-defence

The complaint here was that in her summation the trial judge omitted to direct the jury that a defence of honest belief might yet avail a defendant even in circumstances where such a belief in the state of things was found to have been mistakenly held.

It is not necessary for a trial judge to direct a jury on honest belief in every case in which a defendant puts forward a defence of self-defence: see ***Solomon Beckford v R*** [1987] 3 All ER 425; ***David Bell v R*** Supreme Court Criminal Appeal No. 74/1995 (unreported) judgment delivered December 11, 1995. The necessity for such a direction depends on the

facts and circumstances of the particular case. In a case where a defendant gives evidence or, for that matter, an unsworn statement of an actual attack such a direction is unnecessary. This was such a case. It is to be observed that here the direction was given at the last minute on the promptings of prosecuting counsel. It appears to have been given **ex abundanti cautela** by the trial judge who had previously given impeccable directions on the appellant's cardinal defence of self-defence. It was inconsequential and only of academic interest that the trial judge failed to give the fullest directions on honest belief in the terms of the present submission. There really is no merit in this complaint.

Next it was argued that the trial judge erred in not requiring the prosecution to put in evidence the written statement of Michael Kinglock or, alternatively, in not, herself, having done so. This statement which was taken by the police was made available to the defence after all efforts made by the prosecution to locate the witness had failed. Kinglock's name was never listed on the back of the indictment as a prosecution witness. The prosecution did not seek to put Kinglock's statement in evidence pursuant to 31D as it might have done. Neither did the defence team led by most experienced Queen's Counsel choose to make the statement evidence for the defence using section 31D as they might have done. Why then should the trial judge have interfered one might ask? Although a judge does have the right to call a witness who is not called

either by the prosecution or the defence, it is clear from the authorities that that right should be carefully and sparingly exercised: see ***John Marcus Roberts*** [1985] 80 Cr. App. R 89. In ***Cleghorn*** [1967] 51 Cr. App. R 291,293,294; [1967] 2 Q.B. 584, 587, Lord Parker CJ said:

> "It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have a right to call a witness who has not been called by either party. It is clear, of course, that the discretion to call such a witness should be carefully exercised, and indeed, as was said in ***Edwards*** [1848] 3 Cox C.C. 82 by Erle J. (at p.93): 'There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but generally speaking; we ought to be careful not to overrule the discretion of counsel who are, of course, more fully aware of the facts of the case than we can be'."

In ***Roberts*** (supra) after referring to the above dictum of Lord Parker, May LJ who read the judgment of the Court went on to observe:

> "In the unreported case of ***Baldwin,*** heard in the Court of Appeal (Criminal Division) on April 28, 1978 (1989/C/77) Roskill L.J. (as he then was), commenting upon a direction which a trial judge had given to counsel for the Crown to call a witness whose statement had been supplied by the prosecution to the defence, said: 'With respect to the learned judge, we think that the course he took was wrong and ought not to be taken. The question who should be called to give evidence for the Crown is a matter for counsel for the Crown. It is true that in a criminal case a judge has power to call a witness himself. But that is a power which should be most sparingly and rarely exercised, as a number of

> decisions of this Court and of the Court of Criminal Appeal show.
>
> It is interesting that in ***Edwards*** (supra) to which we have already referred, Erle J, related an experience of his own in these terms: ' I recollect a remarkable case of murder, in which I was counsel for the prisoner, in prosecuting which three or four witnesses, who had been before the grand jury were not called. It was most material for the prisoner that he should not be obliged to call them, but the learned judges who tried that case resisted every effort I made to induce them to interfere with the discretion of the prosecuting counsel; and in the end I was compelled to make them my witnesses'.
>
> Further, it is clearly a matter for the trial judge's discretion whether or not he does call a witness himself. This Court would be very reluctant to say that a verdict of a jury had been unsafe or unsatisfactory merely because the learned trial judge, who of necessity has the feel of a case as it progresses, in the exercise of his discretion had refused to call a witness whom neither prosecution nor defence wished to call themselves. Although there are some cases in which a judge's exercise of his discretion at a particularly late stage of the trial has been held to have been wrong and an appeal allowed, counsel told us of none nor do we ourselves know of any case in which there has been any successful challenge to a jury's verdict in a case where a judge has refused to call such a witness himself."

The principles applicable to prosecution witnesses at the trial of a defendant were stated by Kennedy L.J. in the judgment of the Court given in ***Kenneth Russell-Jones*** [1995] 1 Cr. App. R 538 (C.A.). They are conveniently set out in the headnote to that case and read as follows:

> "(1) Witnesses who are on the back of the indictment ought to be at court, if the defence want those witnesses to attend.
>
> (2) The prosecutor has a discretion whether or not to call them to testify, depending on the particular circumstances of the case.
>
> (3) The discretion is not unfettered, and must be exercised in the interests of justice.
>
> (4) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case although normally all such witnesses should be called or offered to be called.
>
> (5) The prosecutor is the primary judge of whether or not a witness to the material events is credible, or unworthy of belief. Thus, a prosecutor properly exercising his discretion will not be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies."

These principles were applied by this Court in ***R v Japheth Johnson,*** Supreme Court Criminal Appeal No. 118/1998 (unreported) judgment delivered December 3, 1999. They are also applicable to the present case where the statement of Michael Kinglock, did not coincide exactly with Xavier Bryant's account of the shooting incident. From listening to the argument of Mr. Phipps one got the distinct impression that the admission in evidence of Kinglock's statement was desired and canvassed in order to give the defence material with which to attack the credit of Bryant. However, the fact of the matter is that at the time of the

appellant's trial Kinglock could not be found and in his absence his statement was only admissible pursuant to statutory authority i.e. section 31D of the Act. As has already been observed neither the prosecution nor the defence sought to adopt this course. Nor was the trial judge invited to take the initiative to proceed in this way. Further, it is doubtful whether had the judge been minded to do so, she could properly have put Kinglock's statement in evidence using section 31D. Indeed, it is likely that had the trial judge acted **suo motu** she would in so doing have exposed herself to the criticism of acting without legal authority or, what would be equally objectionable, of adopting a course which ran counter to the tactical approach of the defence: see the dictum of Erle J as quoted by Lord Parker CJ in ***Cleghorn*** (supra). It bears mention that inasmuch as the contention of the defence was that section 31D was unconstitutional and rendered Bryant's statement inadmissible under it, the defence could hardly have urged the admission of Kinglock's statement by the same route. All things considered, I think that the approach of non-interference adopted by the trial judge in respect of Kinglock's statement was eminently correct.

Lastly, it was argued that the sentence in terms of the judge's order that the appellant should serve a term of imprisonment of 20 years before becoming eligible for parole was harsh and manifestly excessive. The facts and circumstances of this case disclose a particularly brutal murder.

As observed at the outset of this judgment the deceased was shot a total of thirteen times , eleven bullets entering his body through the back. This was a callous display of deliberate, prolonged, deadly gunfire which occurred in circumstances where, as the jury found, the appellant was not acting to defend himself from attack. I see no reason to interfere with the judge's order on sentence.

In the result I would dismiss this appeal and affirm the conviction and sentence herein.

HARRISON J.A. (Ag.)

I have read the draft judgments of my brothers Bingham and Walker and I am in full agreement with their reasons and the conclusion arrived at in dismissing the appeal. However, I wish to say a few words on the issues complained of in **grounds 2 and 3**.

This appeal raises an important issue regarding the constitutionality of section 31D of the Evidence (Amendment) Act 1995 ("The Act") and whether or not it is inconsistent with section 20(6)(d) of the Constitution of Jamaica ("The Constitution"). It calls into question, firstly, the determination of a jury based on the untested evidence of a witness whose evidence is read to the jury pursuant to section 31D of the Act and secondly, whether or not the appellant was afforded a fair hearing within section 20 of the Constitution.

A proper starting point in my view is the consideration of section 2 of the Constitution which states:

> "2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with the Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

The first question for determination therefore, is on whom does the burden of proof lie where it is alleged that section 31D of the Act is inconsistent with the Constitution? In my view, the proper approach is to presume that until the contrary is shown, it is the person who challenges the constitutionality of a

particular provision in the law who must prove beyond reasonable doubt that the legislation does not conform to the Constitution. This is so because there is a presumption of constitutionality. See **Donald Panton and Janet Panton v The Minister of Finance and The Attorney** General SCCA 113/96 (unreported) judgment delivered on the 26th November 1998 and **Hinds v R** (1975) 24 W.I.R 326. The burden has been described as a "heavy one" and in delivering the opinion of the Board in **Ramesh Dipraj Kimar Mootoo v Attorney General of Trinidad and Tobago** (1979) 30 WIR 411 at page 415, Sir William Douglas said:

> "It is not in dispute between the parties that in a case involving an Act of Parliament the presumption of constitutionality applies, and that the burden cast on the appellant to prove invalidity is a heavy one".

In the instant case, the prosecution had relied inter alia, upon statements in documents at the trial in order to secure the conviction of the appellant. In the circumstances, Mr. Phipps Q.C, submitted that the appellant had no opportunity at trial to examine in person or by his legal representative the maker of the statements as provided in section 20(6)(d) of the Constitution. Section 20(6)(d) provides:

> "20 (6) Every person who is charged with a criminal offence-
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses,

> and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and..."

One of the questions therefore for determination, is whether or not a defendant has an absolute right under section 20(6)(d) (supra) to examine and/or cross-examine the maker of the statement at trial.

To my mind, section 20(6)(d) raises three issues:

1. Is the right to examine a witness an absolute one?

2. Does the right to examine mean a right to put questions to the witness directly? and

3. What is the position if the witness is not physically present to give evidence?

Mr. Phipps Q.C argued that the section conferred upon a defendant, an absolute right which is enshrined in section 13 of the Constitution. This section provides:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law . . .
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such

> limitations of that protection as are contained in these provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest." (Emphasis supplied)

He further submitted that when there is an entitlement to a right protected by a provision in the Constitution, there can be no presumption against enjoyment of the right. Furthermore, he submitted that a law that seeks to limit or restrict the enjoyment of the right must be clearly identified as a limitation in the constitutional provision establishing the right and there was no such limitation or restriction under section 20(6)(d). He argued that section 31D of the Act had the effect of limiting the right under section 20(6)(d) and that section 31D was not enacted in accordance with sections 49 and 50 of the Constitution. In the circumstances, he submitted that since the appellant was denied his right to cross-examine the makers of the statement in the documents the hearing was unfair and resulted in a grave miscarriage of justice.

At this point, it may be useful if we examine some of the authorities and see if they can be of assistance in resolving the issues raised by Mr. Phipps Q.C.

In **John Franklyn and Ian Vincent v The Queen** (1993) 30 JLR 135 the appellants complained that the prosecution did not disclose the evidence on which they were proposing to rely on prior to the commencement of the trials, consequently they were not afforded a fair hearing nor adequate facilities for the preparation of a defence. The appellants had relied upon section 20(6)(b) of the Constitution which provides:

> "(6) Every person who is charged with a criminal offence –
>
> ...
>
> (b) shall be given adequate time and facilities for the preparation of his defence".

Lord Woolf in the course of his judgment in the Judicial Committee of the Privy Council stated [at p 139] inter alia:

> "The provisions of section 20 do no more than codify in writing the requirements of the common law which ensure that an accused person receives a fair trial. They would therefore be part of the law of Jamaica even in the absence of the Constitution. They do not contain any specific requirement as to what is to be provided to a defendant before trial and a determination of whether the Constitution has been contravened by the non-provision of statements of witnesses who are to be called by the prosecution before a trial depends upon assessment of the facts of a particular case as against those general standards of fairness prescribed by the Constitution".

At page 141 His Lordship said:

> "While the language of that subsection does not require a defendant always to be provided with copies of the statements made by the prosecution witnesses, where the provision of a statement of a witness is reasonably necessary for such purpose, it should be provided as being a facility required for the preparation of his defence".

In **Dunkley and Robinson v R** (1994) 31 JLR 442, counsel representing the appellant Dunkley had withdrawn his services and the trial proceeded without him. Dunkley appealed his conviction on the grounds that he was prejudiced by the fact of non-representation. The Judicial Committee of the Privy Council held inter alia, that there is no absolute right to legal representation at a

trial although it is highly desirable that a defendant in a murder trial should be continuously represented where possible.

In the recent case of **Farquharson Institute of Public Affairs Limited v The Attorney General of Jamaica and the Director of Public Prosecutions** Claim HCV 0543 of 2003 judgment delivered on the 19th December 2003, a claim was brought before the Full Court seeking a declaration that accused persons who were tried and convicted on the basis of documents admitted in evidence as witness statements pursuant to the Evidence (Amendment) Act 1995 were denied a fair hearing at trial by not being afforded the facility to examine in person or by their legal representatives the witnesses called by the prosecution. The Court dismissed the Claim and in the course of his judgment Wolfe C. J, stated:

> "The enactment of section 31D of the Evidence (Amendment) Act was no colourful device or act or expediency. The nation faced a real problem in which the peace, order and good government were seriously threatened. Parliament as the guardian of the nation, in so enacting, acted in the best interest of the citizens of Jamaica to ensure a stable society. A society in which all Jamaicans can feel safe"

At page 17 of the said judgment Marsh J said:

> "In cases where as are very frequently reported, witnesses are threatened, spirited away or even killed, it would be an affront to the peace, order and good government of Jamaica, if there are no statutory provisions to deal with such situations. Miscreants could always be assured of success in criminal proceedings by putting the witness out of the reach of the Court".

In **R v Thomas, Flannagan, Thoams and Smith** [1998] Criminal Law Review 887 the English Court of Appeal had to determine whether sections 23-26 of the Criminal Justice Act 1988 were inconsistent with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"). These sections are similar to the provisions in section 31 of the Act. The Court held that the provisions of the Criminal Justice Act were not inconsistent with Article 6 and in so holding the court said:

> "The narrow ground which the trial judge has to be sure existed before he could allow a statement to be read to the jury, coupled with the balancing exercise that he had to perform and the requirement that having performed that exercise he should be of the opinion that it was in the interest of justice to admit the statement, having paid due regard to the risk of unfairness to the accused, meant that the provisions of sections 23-26 of the 1988 Act were not in themselves contrary to Article 6 of the Convention".

The relevant parts of Article 6 of the Convention state inter alia:

> "(1) In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time. . .
>
> (2) ...
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> ....
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

It is readily seen that the above Article has similar provisions to those set out in section 20(1)(6)(d) of the Constitution. The European Court of Human Rights ("The Strasbourg Court") has decided in **Unterpertinger v Austria** (1991) 13 EHRR 175 and **Windisch v Austria** (1991) 13 EHRR 281 that Article 6(1) guarantees the defendant a trial that is in broad terms fair, and that Article 6(3) gives him or her certain minimum rights without which the trial cannot be fair. In later decisions the Strasbourg Court has accepted however, that criminal proceedings can be "fair" despite the use of statements from witnesses whom the defence was unable to question. See for example, **Asch v Austria** (1993) 15 EHRR 59.

R v Kay Jason Martin [2003] EWCA Crim. 357 an unreported case of the English Court of Appeal, Criminal Division, demonstrates where there could be injustice in a situation when the entire case for the prosecution rested upon the statements of a witness. The facts briefly are that, the appellant was said to be a member of a group of youths that had chased the deceased resulting in the stabbing to death of the deceased. The prosecution had relied upon evidence in a statement where the appellant was said to be seen after the chase with a knife which he wiped clean, and had made comments amounting to an admission that he had taken part in the stabbing. This statement was read to the jury at the trial of the appellant pursuant to section 23 of the Criminal Justice Act 1988 on the basis that the witness was in fear. The appellant was convicted of the

offence of murder and on appeal Lord Justice Potter delivering the judgment of the Court had this to say at paragraph 61:

> "...having considered the matter anxiously in this case, we find ourselves unable to support the judge's exercise of his discretion to admit the statement of Tamba Bona. It is not in dispute that the entire case for the prosecution rested upon Tamba Bona's statement. Thus, while it was plainly in the interests of justice so far as the prosecution was concerned that the statements should be before the jury, it was also in the interests of justice from the point of view of the defendant that he should not be unduly disadvantaged by admission of the statements in circumstances where they could not be made the subject of cross-examination. This was particularly so, as it seems to us, because Tamba Bona was potentially a completely flawed witness. He had initially been approached by the police on the basis that he was suspected of being a member of the group which had chased and killed Hamza and had, in those circumstances, refused to answer any questions. On that view, his evidence, would need to be approached with the same caution as that of an accomplice. His apparent change of heart had come at a time when he himself on bail in respect of a charge of robbery and appears to have been directly motivated by the offer of a reward for information in respect of the murder. He had considerably 'improved' his evidence between the time of giving his first and second statements. There was every reason to question his motive and his veracity in pinning the murder on the defendant, a person with the mind of a child....This was not a case where it would reasonably be suggested, nor did the judge suggest, that the defendant had the opportunity to call witnesses to establish his innocence..."

At paragraph 62 his Lordship concluded:

> "The real point, as it seems to us, was that with a client in the position of the appellant, his counsel's only opportunity positively to demonstrate lack of

> credibility on the part of Bona or his deficiencies as a witness, was by cross-examination and, in particular, by testing his reaction to the various points which could be put up against him ...We simply do not see how, in the circumstances of this case, the jury could be sure of the truth of Tamba Bona's evidence, which the judge correctly directed them was necessary before they could come to a conclusion that he committed the act of murder."

Of course, one must also be mindful of section 48(1) of the Constitution that reads as follows:

> "48(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

Having considered the above authorities, it is my view that the right provided for in section 20(6)(d) is not an absolute one. There are factors that have to be considered in deciding a broader question: Did the appellant receive a fair trial as required by section 20 of the Constitution? On any interpretation given to section 13 of the Constitution (supra) the right aforesaid, must be subject to the "rights and freedoms of others and for the public interest". This right is part of a wider requirement that justice must be done.

It is also my considered view that "witnesses" referred to in section 20(6)(d) must of necessity be live witnesses. It follows therefore, that where a witness is not physically present to give evidence then the right to cross-examination which is contemplated by section 20(6)(d) does not arise. It is further my view, that section 31 D of the Act addresses a situation that is not contemplated by section 20(6)(d). It deals with the mode of adducing evidence

before a Court where a witness is unavailable through death, illness, absence from the Island, disappearance or intimidation. I do agree with the Deputy Director of Public Prosecutions, that the section was enacted in order to widen the pool of evidence that may be brought before the Court. It is therefore my view, that there is no inconsistency between section 31D of the Act and section 20(6)(d) of the Constitution.

The next issue to which I turn is whether the documents relied on by the Prosecution were properly admitted in evidence. Mr. Phipps Q.C submitted that the learned trial judge was in error when she admitted documents containing statements made by witnesses pursuant to section 31 D of the Act since they amounted to hearsay evidence. This objection is strongly pressed, because it is a well recognized principle that the truthfulness and accuracy of the person whose words are spoken to by another are unable to be tested by cross-examination.

This complaint must be examined in light of the legislative purpose for the enactment of the Evidence Act. Section 31D of the Act creates a statutory exception to the hearsay rule by providing for the admissibility of first hand hearsay statements in criminal proceedings, once the trial judge is satisfied by cogent evidence that any one of five conditions of section 31D have been satisfied. The section provides as follows:

> "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) is unfit, by reason of his body, 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 the person".

The prosecution must therefore adduce evidence beyond a reasonable doubt to prove that a defendant will receive a fair trial once any of the five conditions is relied upon. But even if the statement is admissible under section 31D, the Court still has an overriding discretion to exclude it in the interests of justice. In **Richard Scott and Another v R; Winston Barnes and Ors v R** (1989) 2 WLR 924 their Lordships in the Privy Council in commenting on section 34 of the Justice of the Peace Jurisdiction Act (Jamaica) held:

> "that although a trial judge had no statutory discretion under section 34 to exclude the sworn deposition of a deceased witness, in the exercise of his duty to ensure a fair trial for the defendant he had power at common law to refuse to allow the prosecution to adduce in evidence a deposition even though it was highly probative of the offence charged...."

The House of Lords in **Reg. v. Selvey** [1970] A.C. 304 and **Reg. v. Sarig** [1980] A.C. 402 also reiterated the principle that there is always the

discretion of a judge in a criminal trial to exclude admissible evidence if it is necessary in order to secure a fair trial for the accused. Once adequate safeguards are in place to protect the rights of an accused person and to ensure that he receives a fair trial, the Court must weigh several factors to determine whether or not the statement ought to be admitted.

Having perused the Evidence Act I am satisfied that section 31 of the Act contains several safeguards which are designed to ensure fairness to a defendant where evidence is admitted under section 31D of the Act. In the instant case, the witness Xavier Bryant could not be found after all reasonable steps were taken to find him. Both Dr. Seshaiah and Constable Williams were outside of Jamaica at the time of trial and Detective Sgt. Warren had died before the trial commenced.

What will constitute "reasonable steps" to find a missing witness will differ from case to case. Where a witness is dead at the time of trial there is no ground for complaint that the deposition is wrongly admitted in evidence provided the necessary foundation is laid. In this case, proper evidence was laid before the Court in respect of Detective Sgt. Warren who was the investigating officer.

An issue was raised also by Mr. Phipps Q.C that the Crown did not seek to have the postmortem examination report and depositions of Dr. Seshaiah and Constable Mark Williams admitted in evidence pursuant to section 34 of the Justice of the Peace Jurisdiction Act. Instead, they were tendered and admitted under section 31D of the Act. He submitted that a proper foundation was not laid

for their reception in evidence since there was no application for leave of the Court for their admission. In respect of Constable Williams he argued that insufficient evidence was led to conclude that he was abroad. Reliance was placed on the authority of **Henriques and Carr v R** 39 WIR 253. With respect to the postmortem report and what was led in evidence before the jury was much more than the report itself. He argued that what was presented was an opinion by Dr. Clifford of Dr. Seshaiah's report as well as what could be gleaned from his notes. The evidence presented was sufficient in my view to prove the absence of Dr. Seshaiah from the Island at the time of trial and that it was not reasonably practicable to secure his presence.

I do agree with Mr. Fraser for the Crown that the notes and postmortem examination report could not have been admitted in evidence under section 34 of the Justice of the Peace Jurisdiction Act, so the Crown would have had to rely on section 31D of the Act. It is further my considered view that section 31D of the Act is wide enough to accommodate any document including a deposition. See **Regina v Fuller** SCCA 55/01 (unreported) judgment delivered on the 19th December 2003. In the circumstances, it is also my considered view, that the statements and documents were properly admitted together under section 31D of the Evidence Act.

I am also of the view that the absence of Dr. Shessiah at the trial was not prejudicial to the appellant's case. No conflict of evidence arose, as was the case in **Henriques** (supra) and the major value of the Doctor's evidence was to the