[2013] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 153/2008

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

CARLINGTON TATE v R

Mrs Valerie Neita-Robertson for the appellant

Miss Meridian Kohler, Miss Lavern Walters and Mr Garcia Kelly for the Crown

7, 8, 9 February 2012 and 22 March 2013

HIBBERT JA (Ag)

[1] The appellant Carlington Tate was on 25 November 2008, convicted in the Home Circuit Court of the offence of murder, arising from the death of Roderick Beckford on 5 March 2003. For this, he was, on 27 November 2008, sentenced to be imprisoned for life with the stipulation that he should not be eligible for parole until he had served 30 years.

[2] At the trial, the prosecution relied on the evidence of Patrick Myers as the sole eyewitness who identified the appellant as the person who killed Roderick Beckford.

His evidence was contained in depositions which were taken at the preliminary enquiry by a Resident Magistrate for the Corporate Area, and which was adduced at the trial by virtue of the provisions of section 31D of the Evidence Act.

[3] In the deposition, Patrick Myers stated that, at about 11:30 am on 5 March 2003, he was at a domino table in Little Lane, Central Village, in the parish of Saint Catherine. While he was there with other persons he saw the deceased, Roderick Beckford, whom he knew as "Hulk Man" approach. They spoke and they, together with another person called "Parrot", left towards a dirt bed. He and "Hulk Man" rode on bicycles while "Parrot" walked. To get to the dirt bed they had to cross a river, and on reaching the river, he saw a tractor coming towards them. On this tractor, he saw the appellant Carlington Tate whom he knew as "Georgie". "Hulk Man" spoke to "Georgie" reprimanding him for mining sand in the river bed. Shortly after, "Georgie" came around the tractor with a gun in his hand which he pointed at "Hulk Man". Mr Myers said that he heard an explosion and he ran off. He turned and saw "Hulk Man" running towards him and "Georgie" still pointing the gun at "Hulk Man". He heard two other explosions and saw "Hulk Man" fall face down onto the ground. He continued running and went through bushes and eventually reached Little Lane with "Parrot" whom he met on the way.

[4] Later, the body of Roderick Beckford was found at the side of the track near the river. A post-mortem examination revealed that he died as a result of gunshot wounds to the neck and chest.

[5] After the appellant was detained by the police, he was on 13 June 2003 identified on an identification parade by Patrick Myers. Consequently, the appellant was charged for the offence of murder.

[6] In his defence, the appellant raised an alibi. He stated that on 5 March 2003 he arrived at Riverton Meadows at about 7:15 am and worked in that area, transporting garbage to the Riverton City dump and remained in the area until about 6:00 pm. He denied being by the river or being responsible for the death of Roderick Beckford. The appellant's alibi was supported by Mr Leroy Morant. He stated that he had contracted the appellant whom he knew as "Georgie" to transport garbage from Riverton Meadows to the dump at Riverton City. He stated that the appellant arrived at about 7:00 am and continued working until about 4:00 pm. Later, after food and drinks, he took the appellant to Central Village.

[7] On 2 September 2010, the appellant was granted leave to appeal by a single judge of this court. Consequently, counsel for the appellant on 1 September 2011, filed the following grounds of appeal, which were relied on, before us.

> "1. The Learned Trial Judge erred in law in applying the principles regarding the Crown's Application under section 31D (c) of the Evidence (Amendment) [sic] and thereby erroneously admitted into evidence the four (4) statements of Mr. V.C. Smith, consequently in the circumstances of the case caused a substantial miscarriage of justice.
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> 2. The Learned Trial Judge erred in law in admitted [sic] into evidence the deposition of the [sic] Mr. Patrick Myers under section 31D (d) of the Evidence

(Amendment) [sic] and thereby, in the circumstances of the case, caused a substantial miscarriage of justice.

3. The Learned Trial Judge erred in law by inviting the Jury to consider the evidence of Ms. Sandra Francis, the mother of the [sic] Mr. Patrick Myers, that she knew that the Appellant and Mr. Myers got into the same school as being supportive of Mr. Myers' evidence regarding the identification of the Appellant. This misdirection in law deprived the Appellant of a fair trial and thereby caused a substantial miscarriage of justice.

4. The Learned Trial Judge erred in law in allowing into evidence inadmissible hearsay evidence contained in the deposition of [sic] the Mr. Patrick Myers, which was not probative [sic] and highly prejudicial to the Appellant, in the circumstances thereby depriving the Appellant of a fair trial and causing a substantial miscarriage of justice.

5. The Learned Trial Judge erred in law by insufficiently directing the jury as to how they should assess the evidence contained in the deposition of Mr. Patrick Myers, thereby deprived the Appellant of his right to a fair trial and consequently caused a substantial miscarriage of justice."

[8] As grounds one and two concern the application of the provisions of section 31D of the Evidence Act, it is convenient to now state those provisions.

"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."

[9] The prosecution also adduced into evidence, the statements of Sergeant Smith, in order to lay the foundation for the admission into evidence of the deposition of Patrick Myers. He was initially in charge of the investigation into the death of Roderick Beckford. He was, however, shot and seriously injured and as a result remained off the job for more than a year. Consequent on the illness of Sergeant Smith, the responsibility was taken over by then Detective Sergeant Leighton Blackstock. Sergeant Smith subsequently opted for early retirement and is said to be residing in England since 2007.

[10] In order to meet the requirements of section 31D (c) of the Evidence Act, the prosecution relied on the evidence of Detective Sergeant Blackstock. He stated that Sergeant Smith, whom he supervised, never fully recovered from his injuries and had to seek regular medical attention. After Sergeant Smith left Jamaica, Detective Sergeant Blackstock said he spoke to him on occasions, by way of telephone, and noted that the calls emanated from outside of Jamaica. Sergeant Smith confirmed that he was

residing in England. Detective Sergeant Blackstock next saw Sergeant Smith in October 2008 when he came to attend the funeral of his mother. Sergeant Blackstock said he spoke to Sergeant Smith about attending court to give evidence at the trial. He further said that Sergeant Smith informed him that due to the state of his health, he would not be returning to Jamaica to give evidence at the trial. As far as Sergeant Blackstock was aware, the visit to Jamaica in October 2008 was the only one made by Sergeant Smith since he migrated from Jamaica.

Background

Ground one

[11] The ruling of the judge that the statements of Sergeant Smith were admissible in evidence was challenged by Mrs Neita-Robertson on two grounds. Firstly, she submitted that there was no evidence before the court to show that Sergeant Smith was outside of Jamaica as there was no evidence that he left the island after his mother's funeral.

[12] Although there was no direct evidence that Sergeant Smith left Jamaica after his mother's funeral, in his discussion with Sergeant Blackstock, he clearly indicated that he would be returning to England before the commencement of the trial. In all the circumstances of the case, the judge having accepted the evidence of Sergeant Blackstock could, in our opinion, have reasonably inferred that, at the time when the application to admit his statements were made, Sergeant Smith was outside of Jamaica.

[13] The second ground on which Mrs Neita-Robertson based her challenge was that the evidence adduced did not show that it was not reasonably practicable to secure the attendance of Sergeant Smith.

[14] What is considered to be reasonably practicable arose in **Luis Angel Castillo** [1996] 1 Cr App R 438. That case involved the application of section 23 of the Criminal Justice Act 1988 [UK]. It stated:

> "(1) … 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 …
>
> (2) … (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;…"

[15] Stuart-Smith LJ, in delivering the judgment of the Court of Appeal, referred to the following passage in the judgment of Beldam LJ in **Maloney** (unreported) 16 December 1993:

> "The word 'practicable' appears in many statutes as a qualification of duties or obligations imposed on those required to carry out the relevant acts by the statute. It is to be noted that in section 23, the statements referred to may be statements of the prosecution or of defence witnesses, and the obligation which normally attaches to those who are presenting cases in the Crown Court is to

> secure, so far as possible, the attendance of witnesses to give evidence orally in court, but the word 'practicable' is not equivalent to physically possible. It must be construed in the light of the normal steps which would be taken to arrange the attendance of a witness at trial. Reasonably practicable involves a further qualification of the duty to secure the attendance at trial by taking the reasonable steps which a party would normally take to secure a witness's attendance having regard to the means and resources available to the parties." (Page 442 paras C-E)

[16] In applying what was stated by Beldam LJ, Stuart-Smith LJ stated:

> "Therefore, in our judgment, the mere fact that it is possible for the witness to come does not answer the question. The judge has to consider a number of factors. First, he has to consider the importance of the evidence that the witness can give and whether or not it was prejudicial, and how prejudicial it would be to the defence that the witness did not attend …
>
> Secondly, we have to consider the expenses and inconvenience of securing the witness's attendance …
>
> Thirdly, the judge has to consider the reasons put forward as to why it is not convenient or reasonably practicable for the (witness) to come. This is a question of fact, and this Court does not lightly interfere with findings of fact by the trial judge."

[17] The question of what was reasonably practicable also arose in this court in **Rudolph Fuller v R** (SCCA No 55/2001, delivered on 19 December 2003). In that case, the deposition of Tracey-Ann Brown, taken at the preliminary examination, was admitted into evidence under the provisions of section 31D (c) of the Evidence Act. Dianne Brown, Tracey-Ann's sister, testified that Tracey-Ann had left the country to attend university in the United States of America. She said that she did not know the

address of Tracey-Ann, nor did she have a telephone number for her, although Tracey-Ann had been in touch with her by telephone several times. She also said that she did not know of her sister returning to Jamaica in the near future.

[18] Panton JA (as he then was), at paragraph 9 of the judgment, stated:

> "In a matter of this nature it is desirable that evidence be given to show that efforts have been made by the prosecution to secure the attendance of the witness. There was no such direct evidence in this case."

After quoting a section of the record where Diane Brown, in cross-examination, stated that she did not know of her sister returning to Jamaica in the near future, Panton JA said:

> "This quotation from the record suggests that the witness was aware of an effort having been made to secure the attendance of her sister, but that the effort failed. In our view, there being no compulsory process available to the prosecution, and the Supreme Court not having extra territorial jurisdiction in this regard, the learned judge was correct in holding that it was not reasonably practical [sic] to secure the attendance of the witness at the trial."

[19] In support of her submissions, Mrs Neita-Robertson relied on the English Court of Appeal decision in **Gonzales and others** (1993) 96 Cr App R 399. In that case two potential witnesses who resided in Columbia stated, when requested to go to the UK to give evidence, that they could not. The trial judge admitted into evidence computer records on which their names appeared, on the basis that it was not reasonably practicable to secure their attendance. Their Lordships at the Court of Appeal, however, ruled that the judge did not have before him material on which he could have

properly concluded that it was not reasonably practicable to secure the attendance of those witnesses. Their Lordships found that there was no reason given for the inability of the witnesses to attend court in the UK and that insufficient steps had been taken to discover whether or not the witnesses could attend.

[20] The factual situation in the case before us differs significantly from that in **Gonzales**. In this case Sergeant Blackstock testified about his efforts to secure the attendance of Sergeant Smith. He also gave evidence of the reason of ill health stated by Sergeant Smith and his knowledge of Sergeant Smith's condition. We can, therefore, find no fault with the judge's ruling that the statements of Sergeant Smith were admissible. Consequently, we are of the view that ground one must fail.

Ground 2

[21] The admission of the deposition of Patrick Myers into evidence was challenged in ground two of this appeal. Mr Myers, in his deposition, stated that after he witnessed the killing of Roderick Beckford he, out of fear, left Central Village where he lived and where the appellant also lived. He only returned a few weeks later and gave a statement to the police upon hearing that the appellant was in police custody. He, on 23 August 2003, gave evidence on oath at the preliminary enquiry held at the Corporate Area Resident Magistrate's Court. After he gave his evidence-in-chief, cross-examination by counsel for the appellant commenced. It was, however, not concluded on that day and the preliminary examination was adjourned. Mr Myers was bound over

to attend for further cross examination. He failed to attend any further sitting of the court, neither did he attend to give evidence at the trial.

[22] Before us, Mrs Neita-Robertson submitted that the evidence adduced by the prosecution fell short of meeting the requirements as stated in section 31D (d) of the Evidence Act. She submitted that the efforts made by Sergeant Blackstock were only cursory and lacked specificity as to check on travel details. She further submitted that where a witness deliberately absents himself from court and no reason is given, fairness would dictate that the learned judge should have refused to admit the deposition, especially since identification was in issue.

[23] The evidence adduced by the prosecution in order to meet the requirements of section 31D (d) of the Act came from Sandra Francis, Detective Constable Andrey Smith and Detective Sergeant Blackstock. Miss Francis, the mother of Patrick Myers, testified that she was aware that her son was needed to give evidence in a case of murder. She stated that in or around November 2007, Sergeant Blackstock sought her assistance in locating her son. At that time, she did not know where her son was living. He would, however, visit her in Central Village where she lived and would stay for a day or two. She said that sometime between 2003 and 2007 her son left Jamaica to visit her sister in Antigua, but had subsequently returned to Jamaica. She further stated that when she spoke to Sergeant Blackstock, she promised to try to persuade her son to attend court. Sometime afterwards, her son telephoned her and she attempted to ask him to attend

court. She said he would not listen to her or say anything, but instead terminated the call. She had not spoken to her son Patrick Myers since then.

[24] Detective Constable Smith testified that he was stationed at the Central Village Police Station since May 2003. He stated that he came to know Patrick Myers and was accustomed to seeing him in the Central Village area. In June 2008, he received from Sergeant Blackstock a summons requiring Mr Myers to attend court to give evidence at the trial of the appellant for the offence of murder and was given certain instructions. Upon receipt of the summons, he took it to West Avenue in Central Village, where Mr Myers was said to reside, on about five occasions, but did not locate him. About twice per week for four weeks, he also visited areas in Little Lane where Mr Myers frequented, but failed to find him. He had not seen Mr Myers since. He last saw him in early 2008, before he knew that Mr Myers was needed as a witness. In addition to visiting areas in Central Village in order to serve the summons on Mr Myers, he also went to the area with Sergeant Blackstock in October 2008 to locate Mr Myers but this effort failed. He further stated that enquiries made by him to ascertain the whereabouts of Mr Myers bore no fruit.

[25] Detective Sergeant Blackstock testified that consequent on the injury suffered by Sergeant Smith, he took command of the case on 24 September 2007. Upon doing so, he visited Little Lane in Central Village with a view to locating Mr Myers. There, he made enquiries of several residents concerning the whereabouts of Mr Myers, but got no useful information. He again, on 27 October 2007, visited Little Lane and made

enquiries and again received no useful information. He also confirmed that on 6 November 2007, he sought the assistance of Miss Sandra Francis to secure the attendance of Mr Myers at court. He requested that she ask her son to contact him by telephoning him at numbers which he left with her, or to contact Detective Constable Smith or Sergeant Wright at the Central Village Police Station. Apart from making other visits to the Little Lane area, Detective Sergeant Blackstock also tasked Sergeant Wright and Detective Constable Smith to make periodic checks in the Little Lane area in order to locate Mr Myers and also used the services of other police officers. Additionally, he said, he used who he described as 'agencies' in the area, to give information of sightings of Mr Myers in the area. The last report he received from these persons indicated that Mr Myers was last seen in the area early in November 2008, a few days before the trial had begun. Having failed to locate Mr Myers, Detective Sergeant Blackstock also caused to be published in the Daily Observer, a notice seeking information about the whereabouts of Mr Myers. This also bore no fruit. He concluded that Mr Myers was deliberately avoiding the police in order not to attend court.

[26] The statements of Sergeant Smith (retired) which were admitted into evidence also showed the efforts made by him, before his injury, to locate Mr Myers. He stated that prior to giving evidence at the preliminary enquiry, Mr Myers had expressed fear for his life and had stated that he was living in Trelawny but gave no specific address or contact telephone number. He stated that after Mr Myers failed to attend court on 28 August 2003, 5 and 9 September 2003, 2, 16 and 31 October 2003, he visited Little Lane in Central Village where he knew Mr Myers was from in order to locate him. He

also sought the assistance of the Central Village police and the widow of the deceased. In June 2005, he received a telephone call from Mr Myers and made arrangements to meet him at the Central Village Police Station. Mr Myers did not show up and consequently, Sergeant Smith checked with the Spanish Town, Linstead and St Ann's Bay Hospitals as well as the St Catherine District Prison and the General Penitentiary, he also made checks with the Immigration Department. On receipt of certain information, he solicited the assistance of police officers in Wait-a-Bit in Trelawny. Having had no success in his efforts to locate Mr Myers, he caused a notice to be published in the Star newspaper on 21 March 2006, seeking information on the whereabouts of Mr Myers. This also bore no fruit.

[27] The learned judge, after reviewing the evidence, found that, in the circumstances of this case, all reasonable steps were taken to secure the attendance of Mr Myers. At pages 150-151 of the transcript, he said:

> "It is therefore my opinion that for reasons best known to the witness the witness is, in fact, not prepared to come to court and is keeping himself away from the court but one has got to balance what, in fact, are interest of justice on one hand and fairness to the accused on the other."

[28] In **R v Michael Barrett** SCCA No 76/1997, a decision which was delivered on 31 July 1998 and on which Mrs Neita-Robertson relied, the question of what constituted "all reasonable steps" was addressed. At the trial, Corporal Davidson gave evidence that he made unsuccessful efforts to find a Mr Brady who was required to give evidence. Corporal Davidson gave evidence that he made enquiries of Mr Brady's son

"Anthony and other people". He also looked for Mr Brady in the Portmore area, Sundown Crescent and Weymouth Drive, but without success. On the basis of this evidence, the deposition of Mr Brady was admitted into evidence. This court in the judgment delivered by Rattray P stated:

> "In our view the requirement of all [emphasis mine] reasonable steps being taken to find the maker of the statement as a pre-condition to its admissibility were not met in the perfunctory evidence of such efforts given by the Crown witness and without any indication of what information could have led the police to carry out the search in the areas which they indicated and from what sources the information was obtained. Indeed Anthony Brady, Mr Herbert Brady's son was not called as a witness."

[29] The question was also addressed in **R v Barry Wizzard** SCCA No 14/2000 in a judgment which was delivered on 6 April 2001. In that case, at the trial, the statement of Emile Lundy was admitted into evidence after the learned judge was satisfied by the evidence of Deputy Superintendent Laing that Emile Lundy could not be found after all reasonable steps had been taken to find him. The evidence of Deputy Superintendent Laing showed that he made exhaustive enquiries to track down Emile Lundy. He contacted his estranged wife, Andrea, and visited the address which he had been given on more than 20 occasions. He checked the prisons and hospitals and secured the co-operation of the security forces through radio control. He also conferred with immigration authorities at the two international airports as well as the Registrar General's Department to ascertain if Lundy was registered as dead. It was found on appeal that the efforts made satisfied the requirements of section 31D (d) of the Act.

[30] The case of **Barry Wizzard** should not, however, be taken as laying down what ought to be done in order to constitute reasonable steps. In **R v O'Neil Smith** SCCA No 113/2003, in a judgment delivered on 20 December 2004, the issue of 'all reasonable steps' was again addressed. At the trial in that case, the prosecution successfully applied to have the deposition of a witness, Mrs McDonald, admitted into evidence under the provisions of section 31D (d) of the Evidence Act. Her father, in evidence, told the court that his daughter had run away from the home in which she had resided for over 20 years. He said that at one stage she was living in Saint Catherine but he did not know exactly where. She visited him occasionally. At the time of the trial he did not know whether or not she was in Jamaica, but she had telephoned him to say that she was not interested in the case and that she was then living in England and did not intend to return to Jamaica. When asked if he wanted the police to locate his daughter he said:

> "I could not say yes. I don't want her to be found. She says she is not interested."

[31] Constable Roderick Brown who assumed the role of investigating officer gave evidence of his efforts to locate Mrs McDonald. He said he visited her last known address on several occasions but did not locate her there. On one occasion he spoke to a sister of the witness but failed to get any assistance from her as to Mrs McDonald's whereabouts. He also spoke to Mrs McDonald's father but had no success. He was not able to get an address or telephone number for her. Because of the information he

received he had no reason to believe that it was necessary to place an advertisement in the newspaper or that Mrs McDonald was in a hospital or in prison.

[32] The correctness of the admission of the deposition was challenged on appeal. Smith JA, in delivering the judgment of the court at page 10 said:

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

At page 11 Smith JA went on to say:

> "As to whether all reasonable steps have been taken must be assessed on the particular circumstances of each case. We do not agree with Mr Equiano that in the circumstances of this case it was reasonable to expect that the police should have checked the hospitals and prison and should have placed advertisements in the newspapers."

[33] In **Brian Rankin and Carl McHargh v R** SCCA Nos 72 and 73/2004, Panton JA (as he then was) at paragraph 18A of the judgment which was delivered on 28 July 2006, approved the statement of Smith JA at page 11 of the judgment in **R v O'Neil Smith** and went on to add:

> "The taking of all reasonable steps does not mean that every hospital and lockup in the country should be checked. What it means is that checks should be made at the places with which the witness has a contemporary connection, and contact made with known relatives or friends with whom he would have been reasonably expected to be in touch."

[34] In our view, the learned judge was correct in concluding that Mr Myers was deliberately, for reasons best known to him, avoiding the police in an effort to ensure his unavailability to give evidence at the trial. We believe that on the basis of the evidence presented to him, the judge was correct in ruling that in the circumstances of the case, all reasonable steps were taken to secure the attendance of Patrick Myers at court. Accordingly, this ground must also fail.

Ground three

[35] At the trial Miss Rhea McCalla testified that she knew the deceased Roderick Beckford whose body she identified at the post mortem examination. She also stated that she had known the appellant for about 30 years. He lived at Big Lane which was about two chains from West Avenue, commonly called Little Lane, where she lived and who attended school with her son. She also stated that she knew Patrick Myers for over 25 years and used to take him to the clinic when he was a baby.

[36] During his summing up to the jury, the judge at page 407 of the transcript, while dealing with the question of identification said, in referring to the evidence of Patrick Myers:

> "Remember, not only did the witness say that, although they were not friends he knew the accused man very well. He saw him sometimes as often as four times a day. We have evidence from Miss McClara [sic], if you believe. Miss McClara [sic] said that her son and that gentleman, Mr Tate had gotten in the same school."

[37] This passage forms the bases for ground three. Mrs Neita-Robertson submitted that in making reference to the evidence of Miss McCalla, the judge thereby invited the

jury to use this as evidence in support of the identification made by Patrick Myers. We cannot agree with this submission. This clearly was born out of a mis-interpretation of the evidence. Counsel ascribed this bit of evidence to Miss Sandra Francis and interpreted the reference to "son" to be a reference to Patrick Myers. At no time did the learned judge invite the jury to use this as supportive of the identification by Patrick Myers. The reference to the evidence of Miss McCalla could only be described as an unfortunate juxtaposition and in no way was intended to or could have bolstered the identification made by Patrick Myers. Accordingly, this ground must also fail.

Ground four

[38] Relative to ground four, Mrs Neita-Robertson submitted that the deposition of Patrick Myers which was read into evidence contained inadmissible hearsay evidence and should have been excluded by the judge. Reference was made to two portions of the deposition. The first concerned an exchange between the witness Mr Myers and a man called "Parrot" whom he encountered while making a hasty retreat from the scene of the shooting. The passage reads:

> "I said to Parrot, Parrot, it look like Georgie a kill Hulk man… Same time Parrot said, 'A him a fire de shot dem wey me a hear' and I said yes."

Counsel submitted that this exchange was hearsay and was inadmissible as it did not form a part of the res gestae.

[39] In **Ratten v R** [1972] AC 378, R's wife died from gunshot wounds which R said were inflicted accidently while he was cleaning his gun. At the trial the prosecution

sought to adduce evidence of a telephone call from R's house received at the local exchange from a female who was described as hysterical, who said, "get me the police" and gave R's address. An objection was raised on the ground that the statement made in the telephone call was hearsay. The objection was overruled and the statement was admitted in evidence. R was convicted for the murder of his wife and his appeal was dismissed. It was held, among other things, that the evidence of the statement made in the telephone call was not hearsay and was admissible. At page 387, paragraphs B-E, their Lordships in the Privy Council stated:

> "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially," i.e., as establishing some fact narrated by eke [sic] words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in ***Subramanian v. Public Prosecutor*** [1956] 1 W.L.R. 965, 970:
>
> > 'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.' "

[40] The witness Patrick Myers was merely giving evidence of a factual situation which occurred and was not relied on "testimonially". This, in our view, was therefore admissible.

[41] The second passage complained of was the following:

> "I then heard that Georgie got shot at Mineral and that he was held by the police."

This passage ought to be taken in its proper context. He said:

> "I did not make any report to the police because I was scared. I spent about two weeks in the country. I then heard that Georgie was shot at Mineral and that he was held by the police. It was at that stage that I return to Little Lane. I get link up with the police and I gave a statement to the police."

[42] This bit of evidence from Mr Myers was merely to indicate his reason for contacting the police and giving a statement at the time he did. He was in no way seeking to establish, as a fact, that Georgie was shot at Mineral and was held by the police. Since the apprehension of persons who are alleged to have committed criminal offences is the natural precursor to instituting court proceedings, evidence of a report of the apprehension of the appellant by the police could not be held to be unfairly prejudicial to him. Neither could it be held that a report that the appellant was shot was unfairly prejudicial to him as nothing was said of the circumstances and who was responsible. Further, no wrongdoing was ascribed to him. We cannot, therefore, agree with the submission made by Mrs Neita-Robertson that the statement was inadmissible hearsay and prejudicial to the appellant.

Ground five

[43] Relative to ground five, Mrs Neita-Robertson, while accepting that the learned trial judge gave proper directions to the jury as to the fact that the witness Myers was not present in court so that his demeanour could be observed and was also not subject to cross examination before them and consequently, it was for them to attach whatever weight they thought fit to the deposition, submitted that in the circumstances of this case, this was insufficient. This, she submitted, was so especially in light of the fact that the witness was not fully cross-examined at the preliminary enquiry and chose thereafter to avoid the police and stay away from court. She further submitted that the judge ought to have directed the jury to pay particular attention to these features when assessing the credibility of Patrick Myers and that his failure to do so deprived the appellant of a fair trial.

[44] The learned judge, in outlining to the jury their functions, told them that the credibility of the witnesses is a matter for their determination. In reviewing the evidence of Mr Carl Brydson, the Deputy Clerk of Courts, who was present during the preliminary examination when Patrick Myers gave his evidence, the judge reminded the jury at page 384 of the transcript, that Mr Myers was bound over to return to court to continue his evidence but failed to return. At page 391 of the transcript, the judge also reminded the jury of the efforts of Detective Sergeant Blackstock to locate Mr Myers in order to have him attend court to give evidence at the trial. He also reminded the jury that the efforts of Detective Sergeant Blackstock failed to secure the attendance of the witness and that Detective Sergeant Blackstock concluded that the witness Mr Myers

was not co-operating. The judge, having brought these to their attention, we do not believe there was the need for any further special directions, and therefore cannot agree that the appellant was deprived of a fair trial. This ground too must accordingly fail.

Conclusion

[45] It is our opinion therefore that the appeal should be dismissed and the conviction and sentence affirmed. The sentence imposed by the court should commence on 25 February 2009.