[2013] JMGCCDD 1

IN THE GUN COURT

IN THE CIRCUIT COURT DIVISION

HCC 104/12

REGINA

v

ADIDJAH PALMER

LENBURGH McDONALD

NIGEL THOMPSON

MURDER

Maxine Jackson, Melissa Simms and Broderick Smith for the Crown

Thomas Tavares Finson for Adidjah Palmer

Michael Deans for Lenburgh McDonald

Tamika Harris for Nigel Thompson

July 16, 17, 18, 22, 23, 24 and 26 2013

APPLICATION UNDER SECTION 31D (d) OF THE EVIDENCE ACT – WHETHER WITNESS CANNOT BE FOUND AFTER ALL REASONABLE STEPS HAVE BEEN TAKEN TO FIND HIM

SYKES J

[1] On July 16, 2013 a voir dire began after an application by the prosecution to have admitted into evidence statements given by two prosecution witnesses. The application was made under section 31 D (d) of the Evidence Act (EA). On July 23, 2013, I excluded the statements. These are my reasons which have now been put into writing following oral reasons given. This judgment is much shorter than my oral reasons given on July 23, 2013.

[2] I should point out that the trial commenced in the Circuit Court Division of the Gun Court, a court created by the Gun Court Act. Trials in this court, by virtue of the statute, are in camera, that is the public do not have a right of access. The purpose was to preserve the identity of the witnesses. In these reasons no witness will be identified by name and neither will any details of the evidence be given other than what is necessary to make the context in which the issues that arose for decision understandable.

The legal principles

[3] Section 31 D (d) of the EA is as follows:

> *Subject to section 31 G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –*

…

(d) cannot be found after all reasonable steps have been taken to find him;

[4] It is well established that the strong general rule is that whenever the prosecution make applications of this nature the standard of proof is proof beyond reasonable doubt. This is so even though the words of the statute are 'proved to the satisfaction of the court.' The understanding in this jurisdiction is that this means the criminal standard in respect of the prosecution and the civil standard in respect of the defence. The section can be utilised by both the prosecution and the defence although more often than not it will be the prosecution who will be seeking to rely on it.

[5] This provision was introduced into Jamaica by an amendment to the EA in 1995 because there was and still is a serious problem in Jamaica with witness intimidation and, unfortunately, the murder of witnesses.

[6] These provisions are statutory exceptions to the common law rule that 'the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence' (**R v Davis** [2008] 1 AC 1128 **[5]**). Since there is a departure from the general rule there would need to be adequate safeguards for the rights of the defence. One of those 'is the requirement that all reasonable steps must have been taken to secure the attendance of the witness' (**Grant (Steven) v R** (2006) 68 WIR 354 **[21] (1)**).

[7] The purpose of the section was explained by the Judicial Committee of the Privy Council in **Grant (Steven) v R [11]**:

The plain purpose of s 31D is to permit the admission of an unsworn statement made out of court, where the statutory conditions are met and subject to the exercise of any

relevant judicial discretion when, but for the section, the statement would have been inadmissible as hearsay.

[8] Despite this recognition the Board also stated at **[14]:**

The evidence of a witness given orally in person in court, on oath or affirmation, so that he may be cross-examined and his demeanour under interrogation evaluated by the tribunal of fact, has always been regarded as the best evidence, and should continue to be so regarded. Any departure from that practice must be justified.

[9] From this the Board recognised that despite the statutory provision permitting to be admitted what would have been excluded, that possibility should not obscure the fact that the admission of statements under the section is not ideal and any evidence so admitted is not regarded as the best evidence.

[10] Their Lordships also held at **[21] (3)**:

In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself.

[11] What this means is that the trial judge may yet exclude a statement even if the statutory basis of admissibility has been met by the prosecution. In other words, the fact that the prosecution have proved beyond reasonable doubt that all reasonable steps have been taken to find a witness does not mean that the statement automatically comes in. Not only is there a discretion at common law

but the EA under section 31L confers on the trial a statutory discretion to exclude the statements if the prejudicial effect is greater than or so out of proportion to the point that the evidence was used to prove that it would be unfair to the defendant if the statement were to be admitted.

[12] The Privy Council expressly referred to the Court of Appeal's decision in R v Michael Barrett in two respects. First, the Board accepted that the Court of Appeal was correct to stress that the statute requires all reasonable steps to be taken to find the witness. Second, their Lordships agreed with the Court of Appeal's recognition of the discretion of the judge's power to exclude evidence if it will put the defendant 'at an unfair disadvantage or deprive him unfairly of the ability to defend himself.' I will now turn to the relevant decisions of the Court of Appeal of Jamaica on this provision.

[13] The first case in which a written judgment was produced by the Court of Appeal on the section is that of **Michael Barrett** (1998) 35 JLR 468. In that case Rattray P stated that '[d]espite the legislative provision the admissibility of a statement is first determined by the trial judge who must decide whether in all the circumstances it is fair that [the] statement should be admitted' (470A) His Lordship indicated that 'the requirement of <u>all</u> … reasonable steps being taken to find the maker of the statements' is the important pre-condition for admissibility' (470C) (emphasis in original). This statement of principle has not been modified down or departed from by any subsequent decision of the court. The Privy Council, in **Grant**, agreed with this approach.

[14] In the case of **R v O'neil Smith** SCCA No 113/2003 (unreported) (delivered December 20, 2004). The Court of Appeal stated that under section 31D (d) the prosecution must prove (a) the witness cannot be found; and (b) that all reasonable steps have been taken to find the witness. Smith JA, who delivered the judgment of the court, held if the prosecution 'can satisfy the court that the deponent cannot be found after all reasonable steps have been taken to find [him],

the court has a discretion to admit the deposition. That is to say, a statement may be excluded even if the prosecution meets the statutory test. An important feature of the case is that Smith JA held that 'whether all reasonable steps have been taken must be assessed on the particular circumstances of each case' (slip op 11).

[15] Smith JA was emphasising that it is really a case by case analysis, meaning that what may be reasonable in one case may well be inadequate in another if there are circumstances that suggest more ought to have been done before it can be said that **all reasonable steps** have been taken to find the witness.

[16] The next case of significance is that of **Brian Rankin and Carl McHargh v Regina** SCCA Nos 72 & 73/2004 (unreported) (delivered July 28, 2006). Panton JA stated because 'the witness is not available for visual assessment by the jury, it has to be stressed that great care has to be taken to ensure that the requirements of the legislation are met before permission is sought, or granted for the documents to be read into evidence' **[18A]**. His Lordship stated:

> *In respect of paragraph (d) of section 31D of the Evidence Act, it is imperative that **all** reasonable steps be taken to find the witness. … 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 relative or friends with whom he would have been reasonably expected to be in touch.* (emphasis in original)

[17] Ten years after **Barrett**, the Court of Appeal is insisting that **all reasonable steps** must be taken to find the witness. The latest case on this issue from the Court of Appeal of Jamaica has not altered this position (**Tate v R** [2013] JMCA Crim 16).

[18] The legal position is quite clear. All reasonable steps must be taken to find the witness. What is reasonable is to be assessed in the context of the particular case. What is reasonable in one case may well fall short in another. Applications under section 31D are intensely fact sensitive and so the resolution of such an application in one case cannot establish any general principle so far as the analysis of facts is concerned. Nonetheless, it is expected that enquiries would be made at places where the witness has a contemporary connection and with persons who could be reasonably be expected to be in contact with the witness. The trial judge has a discretion to exclude the statement even if the statement is admissible under section 31D (d) if it would be unfair to admit it into evidence. The statute also confers a statutory discretion under section 31L to exclude statements if the prejudicial effect is greater that its probative value.

[19] It is crucial to observe that the statute does not say all possible steps but all reasonable steps. The issue is not whether the proponent of the evidence could have done more but rather whether what was done was reasonable in all the circumstances. It is important to bear this in mind because it is tempting to think, with the benefit of hind sight and an active imagination, to come up with other steps that may have been taken. The statute does not require perfection but reasonableness.

[20] The case of **Sebert Morris and others v Regina** SCCA Nos 80, 81 & 82/2001 (unreported) (delivered December 20, 2007) Panton JA made an important statement regarding proof of all reasonable steps to find a witness at page 10. His Lordship was responding to the submission that the statute refers to admission of first-hand hearsay and therefore only first hand hearsay was admissible. His Lordship refuted this when he said:

> *There can be no argument, for example that an investigator who visits places such as hospitals searching for a witness may give evidence that he made such visits and came away empty-handed. Such evidence implies at least that he was*

told (by hospital administrators, for example) that the witness being sought was not at that location. Criminal trials that are facilitated by the use of section 31D of the Act would become impossible if it were required that all persons consulted in the search for witnesses had to attend in person, in order that the judge may have first-hand evidence from them to decide whether the evidence of the missing witness may be read. Further, as in this case, it would not be possible for a statement made by the missing witness to be adduced through the very person to whom the statement was made. Clearly, the Court (sic) cannot, if the Act is to function effectively, be placed in a straight-jacket when a voir dire is being conducted for the purposes of the Act.

The facts the case

[21] There were statements from two witnesses that the prosecution sought to admit. There was the usual trilogy of checks with morgues, prisons and hospitals (mph) and publication in the newspapers. It is not proposed to recount all the evidence but to focus on the reasonable steps that were not taken in relation to both witnesses.

[22] Witness A indicated in his statement that he had relatives in a particular community. In fact, that witness who would now be at least forty years old, stated that he would visit his relative at least once per week and he had been doing this since he was a small child. This information was known to the police. The police did not know the precise location of the addresses but stated that he could have found out if he wanted. The police officer stated that he made the decision not to seek out these relatives because of the influence of the defendants in the community where the relatives lived. He felt that it would not be prudent to contact them. The evidence did not explain the nature of the influence. There was no evidence that the relatives might not have cooperated with the police.

[23] As Rattray P and Panton JA have stressed, **all reasonable steps** must be taken. It cannot be said that all reasonable steps were taken in the case of witness A. The police did not make any attempt to find the relative despite having reasonably clear evidence of where they were located. This to my mind was a serious omission and so the conclusion must be that the statutory standard was not met.

[24] In the case of witness B, the evidence is that although he had not given an address in the statement to the police, he made a statement to a public official in which he stated his address. This address turned out to be an apartment complex. The police went there and spoke to one person only who said that she did not know the witness. No one else at the complex was spoken to by the police and neither did the police search the property or attempt to do so. They did not knock on any doors there in order to speak to residents of the complex. Again, it cannot be said that all reasonable steps were taken to find the witness.

[25] There is a further point to be made with respect to witness B. The police made the unfortunate decision not to have any contact with the witness since late 2011 because he alleged impropriety on the part of a particular police officer. This meant that for over one year the prosecuting authorities did not know anything about the witness. In fact no attempt was made to find witness B until after the empanelling of jurors began in this matter on July 11, 2013. With the voir dire commencing on July 16, 2013, it was always going to be an uphill task to show that all reasonable steps were taken to find the witness when no one sought to contact him over one year. In this regard it would be helpful if the prosecuting authorities were to bear in mind the words of Hugh LJ in **R v Adams** [2008] 1 Cr App R 35 at **[13]**:

> *All the experience of the criminal courts demonstrates that witnesses are not invariably organised people with settled addresses who respond promptly to letters and telephone calls and who manage their calendars with precision. They*

often do not much want to come to court. If they are willing they may not accord the appointment the high priority that it needs. Even if they do both of those things, it is only too foreseeable that something may intervene either to push the matter out of their minds or to cause a clash of commitments. Holidays, work, move of house, illness of self or relative and commitments within the family are just simple examples of the kind of considerations which day in, day out, lead to witnesses not according the obligation to appear at court the priority that they ought to do. We are told that in the present case it turned out that Mr Chambers had taken his wife to hospital. If he had to do that, and it may be he did, that should have been found out at the very least the previous week and then consideration could have been given to whether the trial had to go back or whether alternative arrangements could be made to get the lady to hospital, or whether the trial could start a little later in the day, or some other adjustment made to enable the process of justice to take place. All of that was simply rendered impossible by the wholly inadequate approach of those whose duty it was to keep in touch with the witness. It may very well be that, however regrettably, the police are no longer able themselves to undertake the care of prospective witnesses. That is not a matter on which it is right for us to express any view. But whoever it is who does undertake it, the need to keep in touch, to be alive to the witness's needs and commitments is not less now than it ever was; if anything it is rather greater now than it used to be. Leaving contact with a witness such as this until the last working day before the trial is not good enough and it certainly is not such steps as it is reasonably practicable to take to find him. In

> *addition to that, once the message was not known to have been received on the Friday and there was doubt about it, we agree with Mr Lynn that reasonably practicable steps which ought to have been taken included a visit to his address and/or to his place of work or agency, or at least contact with those places, perhaps by telephone.*

[26] The message is there for all to read. Last minute efforts to locate a witness who had promised to be at trial were found to be inadequate. Here, no promise was made by the witness to attend trial which made contact with him all the more important, or at the very least, the effort to find him should have begun in earnest much earlier. It is true that the police officer testified that during the week of the voir dire he heard from the witness by telephone after an advertisement was placed in the newspaper. However, despite the best effort of the police, the witness indicated he would not attend until Thursday, July 18. He did not attend. But when the search went to his last known address (the apartment complex) the effort to see if he was really there or whether anyone could provide information about him fell short of what was required.

Other matters

[27] The defendants Mr Lenburgh McDonald and Mr Nigel Thompson adduced evidence to suggest that witness A had not attended a number of schools he alleged he attended. The principals stated that their records did not show that a person with the given name, date of birth and parents attended those schools. Evidence was adduced from the Registrar of Births and Deaths as well as the Electoral Office to say that no one with witness A's name, date of birth and parents, was registered as being born or registered with the Electoral Office.

[28] There is no requirement that all electors should be registered voters. Thus the evidence from the Electoral Office was, in my view, quite beside the point. The evidence from the Registrar of Births and Deaths was inconclusive because the

witness readily admitted that there were Jamaicans who did not have any birth records but they were alive and well. In addition, there is no requirement of compulsory registration of births.

[29] As far as the school records were concerned, to my mind, they did not establish on a balance of probabilities that witness A did not exist. The principals agreed that sometimes students are registered with incorrect information and the accuracy at the time of the registration of the student depended on the accuracy of the person who turned up with the child.

[30] On the other hand, there was evidence that witness A gave statements to the police and attended an identification parade at which counsel was present. I am sure that witness A exists and he was the person who gave the initial statement and attended the identification parades.

[31] Mr Deans and Miss Harris submitted that the inability to cross examine the witnesses should lead to the exclusion of the statement. This proposition is not supported by the authorities. The Privy Council had indicated that the fact that a witness was unavailable for cross examination at trial when reliance was being placed on section 34 of the Justices of the Peace Jurisdiction Act was not in and of itself a reason to exclude the statement (**Barnes, Desquottes and Johnson v R, Scott and Walters v R** (1989) 37 WIR 330, 340). The reason was stated by Lord Griffith: it must have been contemplated that the witness would be unavailable for cross examination at trial when the statute was passed. The legislature took account of that possibility and nonetheless passed the law enabling admission of deposition of absent witnesses. If that is the case in respect of depositions, then surely the legislature must have contemplated the same issue when enacting section 31D of the EA. The logic of both counsel is deeply flawed because it would mean that no statement could ever be admitted under section 31D since it necessarily follows that the reason for reliance on this section is the fact that the witness is not present and therefore unavailable for cross examination.

[32] The other reason for rejecting this submission is this. Section 31D applies to defendants as well. The consequence of learned counsel's submission would be that a defendant would be deprived of adducing evidence under this provision since the prosecution could argue that the witness is unavailable for cross examination. The submission has fallen on its own sword.

[33] Miss Harris also submitted, relying on **Davis**, that the defendants would be unable to adduce evidence undermining the credibility of witness A and putting questions to the witness regarding his identity. The problem with this submission is that the defence in fact adduced evidence to suggest that the witness was not who he claimed to be. They called five witnesses to that effect. The irony of the submission is that the information given by the witness in his witness statement enabled the defendants, Messieurs McDonald and Thompson, to call evidence from the very institutions that the witness claimed he attended. The real complaint then must be that the witness A would not be available for the suggestions to be put to him.

[34] This last submission by Miss Harris is not well grounded because section 31J 'gives new rights to a person against whom a statement is admitted under section 31D' (**Grant v R [10]**. These new rights enable the defendant to adduce evidence of any matter which could have been asked of the witness who made the statement had he given evidence. Section 31J permits proof that the person made a statement inconsistent with the evidence contained in the statement. The point is that the legislature took into account the loss of opportunity to cross examine the witness and made clear and simple provisions for the use of evidence to contradict or undermine the credit of the testimony in the statement. The unfairness that may arise has been mitigated by the creation of new rights. The solution then is not to exclude the statement but make use of the statute.

Final thoughts

[35] In reading the cases on this subject it appears that there is now the practice that no subpoenas are prepared for the witnesses. The assumption seems to be that

the witness will not be found. But what if the witness is found, is told of the court date, he promises to attend and then does not? Can it be said that he cannot be found? The answer must be that he has been found and his non-attendance is not a basis for admissibility. In this case, there was evidence that the witness B was in telephone contact with the police who went in search of him having used tracing techniques to localise the source of the phone being used to speak to the police. The police did not find him. However, no subpoenas were prepared and so had the police found him, he could not be served with court process. This would mean that there would be no legal basis for issuing a warrant for his arrest. In this case, the matter was brought to the Gun Court by way of a voluntary bill of indictment. There was no preliminary enquiry and so the witness was never bound over by any court to attend trial. There is no evidence that he was served with any court process or even told that he was wanted for court well over one year. In these circumstances, why would the witness be making himself available to the court? He was under no legal obligation to attend court because he was never bound over or served with process.

[36] It is my considered opinion that had witness B been found, informed for court and he declined to attend there would be no basis for admitting the statement under section 31D (d) because that provision requires proof that he cannot be found not proof that he was found and did not attend. The assumption of the legislature seems to be that if he is found and reluctant to attend then the court should use its coercive powers to compel his attendance provided that the legal requirements for the exercise of such power are met. After all, under the Charter of Fundamental Rights, no one is to be deprived of his liberty except in accordance with the law. Section 14 (1) of the Charter states that no person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the circumstances listed in the section. The failure to attend is not necessarily evidence that he cannot be found. Had the police had process, served it and then the witness failed to attend a warrant may be issued (provided the other legal requirements are met) for his arrest.

[37] The statute does not say that the statement is admissible if the witness having been found, warned for court, fails to attend but rather, he **cannot be found after all reasonable steps have been taken to find him**. Found in this context means locating the witness who was 'lost.' In other words the fact that a witness is proving difficult to convince to attend does not mean that he cannot be found. This perhaps explains why section 114 (1) (d) of the Criminal Justice Act 2003 (UK) makes provision for the admissibility of statements 'if the court is satisfied that it is in the interests of justice for it to be admissible.' Let me repeat there the Jamaican statute has no such provision and there is no discretion to admit statements which do not meet the statutory criteria.

[38] Interestingly, it was under section 114 (1) (d) and not section 116 (2) of the same Act (the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken) that the statement was admitted in **Ishmael Adams**. It is to be observed that in England the current provision does not have the words '**all** reasonable steps' as the Jamaican statute has but yet the Court of Appeal in England, despite the lower standard, held that contacting the witness on the Friday, before the Monday when the trial was due to start even though the witness, four months earlier, had given his promise to attend, was not sufficient to meet the lower test. If that is so in the context of the English statute then it is extremely unlikely that similar conduct in the context of the Jamaican statute would suffice. In **Adams**, the prosecuting authorities had secured a promise from the witness four months earlier. In the present case, no contact of any kind was made with witness B for over eighteen months. Also in **Adams**, all that had happened on the Friday was that the witness was called and message left on his telephone and he was called again on the Monday, the day of trial and was not contacted.

[39] It would seem to me that if the quality of evidence adduced in **Adams** was insufficient to meet the weaker statutory test then it would quite be remarkable in

the absence of some other evidence that the same quality evidence could meet the standard of a stricter statute.

[40] The point is that a day may well come when the prosecution finds itself caught out by the practice of not securing subpoenas to serve on witnesses who are proving difficult to find if the application is made under section 31D (d). The witness may well be found, promises to attend, does not attend but cannot be compelled because he was not served with court process and in those circumstances it cannot be argued that he cannot be found because he was in fact found but the prosecution may have disabled itself from asking for a warrant for his arrest because no process was served on him.

Conclusion

[41] The prosecution did not prove beyond reasonable doubt that all reasonable steps were taken, in the context of this case, to find both witnesses and therefore, the statements were not admitted into evidence.