

OBTAINING EVIDENCE OF UNAVAILABLE WITNESSES— JUDICIAL AND LEGISLATIVE ADVANCES

David M. A. Fraser
Senior Deputy Director of Public Prosecutions (Ag.)
Office of the Director of Public Prosecutions

Applicable reasons for Unavailability

- Death
- Illness (Physical or Mental)
- Absence from the Country
- Cannot be located
- Fear

The Common Law Response

- Only **transcript (sworn evidence)** from previous trial admissible at a subsequent trial, if witness unavailable.
- In *R v. Hall (Peter Barnabas)* [1973] 1 Q.B. 496, witness was **dead** at time of second trial.
- In *R v. Thompson* [1982] 2 W.L.R. 603 witness was **too ill to travel to court** at time of second trial.

**The Legislative Response
S. 34 Justices of the Peace Jurisdiction
Act (JPJA)**

- Deposition a) taken in presence of Accused where b) he or his Counsel had the opportunity to XXN witness and c) signed by the examining justice is admissible at time of trial if witness is:
 - i) dead ii) absent from island
 - iii) too ill to travel iv) insane
- Leave of Court required where relying on ii) or iv)
- See *R v. Scott and Walters* [1989] W.L.R. 924 & *Henriques and Carr v. R* (1990) 39 WIR 253
- Evidence only admissible if **prejudicial effect does not outweigh the probative value**

**The Legislative Response S. 31 D
Evidence Act**

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-

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

**The Legislative Response
S. 31 B Evidence Act**

"document" includes, in addition to a document in writing:

- any map, plan, graph or drawing;
- any photograph;
- any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
- any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.

**The Legislative Response
S. 31 D (a) Evidence Act**

■ DEATH

R v. Clarence Peck SCCA 68/97 Jud. Del. November 1, 1999

Witness's statement and further statement held admissible where witness had been killed before trial

R v Jeffrey Sutherland SCCA 116/00 Jud. Del. October 28, 2004

R v. Wallace, Masters and Lindsay SCCA 42, 33 and 40/03 Jud. Del. December 20, 2004

R v. Richard Brown SCCA 28/2003 Jud. Del. March 11, 2005

**The Legislative Response S. 31 D (c)
Evidence Act**

■ Witness absent from Jamaica and it is not reasonably practicable to secure his attendance

■ *R v. Rudolph Fuller* SCCA 55/2001 Jud. Del. December 19, 2003

Witness was overseas studying. There was an inference but no direct evidence that efforts had been made to secure her attendance. Deposition admitted under s. 31 D (c). Held whether or not deposition should have been admitted under s. 31, it was admissible with court's consent under s. 34 JPJA as witness off the Island and accused had opportunity to XXN witness at P.I.

■ *R v. Errol Smith* SCCA 71/2001 Jud. Del. July 30, 2004 (*Relied on Hurst* [1995] 1 Cr. App. R. 81 which established that assessment of the practicability of attendance may be considered in relation to efforts made before or at the time of trial)

**The Legislative Response
S. 31 D (d) Evidence Act**

■ Witness cannot be found after all reasonable steps have been taken to find him

R v. Christopher Brown SCCA 32/96 Jud. Del. 16th December 1996

R v. Michael Barrett SCCA 76/97 Jud. Del. 31st July 1998

R v. Barry Wizard SCCA 14/2000 Jud. Del. April 6, 2001

Orville Murray v. R SCCA 176/2000 Jud. Del. April 8, 2002

R v. Steven Grant SCCA 60/2003 Jud. Del. July 12, 2004 (CA); [2006] UKPC 2 (PC.)

R v. Oniel Smith SCCA 113/2003 Jud. Del. December 20, 2004

**The Legislative Response
S. 31 D (d) Evidence Act**

- Reasonableness of the steps have to be judged in light of the information available to the person (s) searching for the witness.
- Reasonable steps have in various cases included *inter alia*, checks:
 - a. at witness' last known abode and place of work, and other places frequented
 - b. with relatives, friends, co-workers of witness and calling witness' last known phone numbers
 - c. at lock-ups, remand centres, correctional institutions, hospitals and the Registrar General's Department
 - d. at Embassies and High Commissions and the international airports
 - e. through advertising in the media, locally and overseas for the witness
 - f. through Interpol for the witness overseas

**The Legislative Response
S. 31 D (e) Evidence Act**

- Witness is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.
R v. Nyron Smith SCCA 241/2001 Jud. Del. 11/4/2003
Witness refused to testify because he was in fear and Witness Protection Programme was unable to protect him as he was a businessman who earned high income and employed several people.

Evidence in Support of Application

- Should be led on *voire dire* unless entirely formal and there is no possibility of prejudicial material being elicited before the jury. See *Clarence Peck* and *Wallace, Masters and Lindsay*
- Is entirely a matter for the trial judge - *Michael Barrett* at page 8. Unlike for e.g. a cautioned statement where evidence in support of its admission is relevant to considering its weight, that is not the case in respect of applications pursuant to sections 34 JPJA and 31D Evidence Act

Collateral Issues

- Hearsay and the proof of conditions precedent
- Rule against Self Corroboration and the tendering of multiple statements of a witness
- Use of one statement to admit another statement
- The exercise of prosecutorial/judicial discretion in deciding which document (s) to tender/admit

Hearsay and the proof of conditions precedent

R v. Nyron Smith

- Evidence of court reporter who produced transcript of aborted trial and from member of witness protection unit (WPU) concerning his interview of the witness and his assessment of his suitability for the programme. Held (1) what witness told the WPU worker was not hearsay as it indicated the things operating on the mind of the witness whose state of mind was directly in issue. *R v. Blastland* [1986] A.C. 41 applied. (Per Lord Mustill in *Neill v. North Antrim Magistrates* (1993) 97 Cr. App. R. 121 at page 129 "...the evidence must not be that the witnesses were afraid (for that is an inference to be drawn by the court), but that they said they were afraid, and (if it be the case) that their demeanour was consistent with what they said.")

Hearsay and the proof of conditions precedent cont'd

- (2) The assessment of the WPU worker was not hearsay as distinct from what he was told by the witness, it represented direct evidence from a person responsible for providing protection for the witness, if possible, as to whether from a reasonable standpoint steps could be taken to protect the witness.

Hearsay and the proof of conditions precedent cont'd

■ Submitted similar reasoning has been implicitly utilized in respect of admitting the contents of information communicated to an officer by a third party concerning the location of a witness. That information goes to the state of mind of both the witness and the officer and may assist the court to determine whether the steps taken by the officer to locate the witness were in the circumstances of the case reasonable. Note in *R v. Oniel Smith* supra at pages 9-11, it was recognized that a witness' stated reluctance to be found was relevant to the determination of whether all reasonable steps had been taken to find the witness

Rule against Self Corroboration

■ **Orville Murray v. R**
Prosecution tendered deposition, defence tendered portions of written statement to police to show inconsistencies with deposition. LTJ directed jury on effect of discrepancies whether jury found them to be slight or serious especially in light of the fact witness not present to say which was correct.
Held direction was appropriate and there was no danger of jury believing statement capable of corroborating deposition evidence

Rule against Self Corroboration cont'd

Richard Brown v. R
Prosecution tendered both deposition and statement of witness. They were essentially the same save for critical differences in dates. The tendering of the statement was essentially to show that the witness could have been mistaken as to the date of the incident as stated in the deposition. Held (1) where two documents consistent in every respect only one should be admitted. (2) Given the differing dates in the two documents and the suggestions made at the PI the prosecution was correct to place both documents before the jury. (3) The LTJ should have directed the jury that neither document could provide corroboration for the other. (4) However in the circumstances of the case the failure was not sufficient to vitiate the conviction.

**Rule against Self Corroboration
cont'd**

Wallace, Masters and Lindsay v. R

- Prosecution tendered statement and further statement of witness. The second statement while repeating some material in the first mentioned other critical things for the first time. Held the second statement was put forward to ensure the jury obtained a full narrative of the witnesses evidence and not for the purpose of sustaining his credit. The defence addressed on the discrepancies between the statements and the jury were directed on how to treat these discrepancies. In the circumstances there was no need for any direction concerning the rule against self corroboration.

**Rule against Self Corroboration
cont'd**

Principles emanating from trilogy of cases:

- Where there is virtual similarity between statement and deposition, only one document should be tendered and admitted
- Where there is substantial similarity between the different documents, but a significant difference (s) remain, jury should be warned not to treat the similar sections as corroborative of each other
- Where two documents contain significant differences in detail and/or are discrepant and that/those difference (s) is/are highlighted for the jury it appears no warning is necessary

**Use of statement to admit another
statement**

- **Luis Angel Castillo** [1996] 1 Cr. App. R. 438 applied in **Steven Grant v. R** SCCA 60/2003 Jud. Del. July 12, 2004
- **Held** the reasons for the inability of a witness to attend a trial to give oral evidence can be proved by the statement of another witness admitted by virtue of the enabling statute

Which document (s) to tender/admit?

- **Steven Grant v. R [2006] UKPC 2**
Prosecution tendered the statement of Xavier Newton-Bryant but not that of Kinglock. Kinglock's statement largely corroborated the defendant Grant as to how the fatal incident began but did not speak to the period when the fatal shots were fired.
- Held in fairness the prosecutor or the judge should have had Kinglock's statement admitted as:
 - i. the prosecution had given a notice to adduce the statement of Kinglock
 - ii. there was no suggestion that his evidence was incapable of belief or immaterial
 - iii. the defence did not wish to weaken what was thought then, (though mistakenly), a valid constitutional objection to s. 31D

Which document (s) to tender/admit? cont'd

- **R v. Oniel Smith**
Deposition tendered by the crown and foundation laid for the statement of the witness to be tendered by the defence, but defence choose not to do so
- **Held**, though there was one obvious discrepancy with the deposition, presumably defence counsel thought the statement with the detailed description of the applicant would do more harm than good to the defence. The admission of the statement would not have affected the verdict of the jury therefore its omission did not result in an unfair trial
- ***It appears defence counsel did not consider the approach taken in Orville Murray v. R supra to tender only the section of the statement inconsistent with the deposition***

Which document (s) to tender/admit? cont'd

Principles emanating from cases

- The principles regulating the calling of witnesses (see *R v. Russell-Jones* [1995] 3 All ER 239 and *R v. Japheth Johnson* SCCA 118/98 Jud. Del. December 3, 1999) apply mutatis mutandis to the tendering/admission of statements/documents in the absence of witnesses (*Note the difficulty in assessing whether witness is "incapable of belief" when witness is not available to be interviewed by prosecuting counsel*)
- Fairness to the accused is the overarching goal. This pursuit of fairness is the responsibility of prosecuting counsel and the trial judge, not the defence
- **Each case will have to be decided on its own peculiar facts**

The Constitutional Challenge — The Steven Grant Case

- Defence Contention → Section 31 D Evidence Act unconstitutional as it contravened the right of an accused to confront and XN his accuser, a common law right which was enshrined in the Jamaican Constitution in S. 20 (6) (d)
- Section held to be constitutional

Some Key Points in Court of Appeal Judgment

- Rights under S. 20 (6) (d) of the Constitution are not absolute rights. They are rights to a fair trial which is part of a wider public interest that justice be done
- S. 20 (6) (d) only applies to witnesses who are actually before the Court and capable of testifying. S. 31 D therefore widens the pool of available evidence
- Section 31 D was an appropriate and proportionate response to a serious societal problem

Some Key Points in Court of Appeal Judgment Cont'd

- Response appropriate and proportionate due to safeguards in legislation and at common law:
 - a) Conditions precedent have to be established beyond reasonable doubt
 - b) Judge has discretion under statute (S. 31 L Evidence Act) and common law to exclude evidence where the *prejudicial effect outweighs the probative value*
 - c) Section 31 J Evidence Act permits oral or documentary challenges to credibility of maker of statement
 - d) Directions Judge required to give to the jury

Some Key Points in the Privy Council Judgment

Largely for the reasons outlined by the Court of Appeal section 31D is constitutional. In particular:

1. The presumption of constitutionality. Burden is on challenger and is a heavy one - ***Mootoo v Attorney-General of Trinidad and Tobago*** [1979] 1 WLR 1334, 1338-1339.
2. Sections 13 and 20(6)(d) of the Constitution do not preclude, (without constitutional amendment), further statutory exceptions to the hearsay rule post 1962

Key Points Privy Council cont'd

3. Strasbourg jurisprudence on art. 6(3) of ECHR does not suggest unconstitutionality of s. 31 D as:
 - a. *Though the right to a fair trial can never be compromised in any circumstances, the constituent rights in article 6 and section 20(6) are not themselves absolute. Derogation is possible once the proceedings remain fair*
 - b. *Individual rights have to be balanced against the rights of the general community*
 - c. *The law of Jamaica, properly applied, provides adequate safeguards for the rights of the defence*

Key Points Privy Council cont'd

4. The right to legal representation in section 20(6)(c) of the Constitution is not an absolute right
5. English courts have not interpreted article 6(3)(d) of the European Convention as imposing an absolute prohibition on the admission of hearsay evidence against criminal defendants

Key Points Privy Council cont'd

6. The right to confrontation expressed in the sixth amendment to the US Constitution is not matched by any corresponding requirement in English law

Key Points Privy Council cont'd

7. The law of Jamaica, properly applied, provides adequate safeguards for the rights of the defence when it is sought to admit a hearsay statement
 - a. *Conditions precedent to be met*
 - b. *Greater ability to challenge credit s. 31J*
 - c. *Statutory discretion to exclude evidence if prejudicial effect outweighs probative value s. 31L*
 - d. *Directions of the learned trial judge*

World Wide Trend

- United Kingdom, Several European Union States, South Africa all have similar provisions permitting the use of the statements of unavailable witnesses
- **Key consideration for constitutionality**
Legislation must be proportionate to problem it seeks to address and there must be adequate safeguards protecting the rights of the Accused

Conclusion

- **Judicial and Legislative advances** concerning the admissibility of evidence of absent witnesses constitute another useful tool in the effort to bring all available evidence before the Court
- **Investigators and Counsel on both sides** need to ensure that only cogent testimony is put before the Court in support of applications to admit such evidence
- Incumbent on **Judges** to carefully rule on applications to admit such evidence and where admitted give thorough directions to the jury to adequately strike the balance between the rights of the accused and the wider public interest

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