
O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

NEVILLE NEMBHARD

Appellant

- and -

THE QUEEN

Respondent

C A S E F O R T H E R E S P O N D E N T

Record

- 10 1. This is an appeal from the order of the Court of Appeal dated 9th November, 1979, dismissing the application for leave to appeal against conviction and sentence of detention during the Governor General's pleasure imposed by Smith C.J. and a jury on the 15th April, 1977. p.167
p.165
2. The ground of appeal filed and argued by leading counsel was that the verdict was unreasonable and having regard to the evidence could not be supported. Against that background the Court of Appeal did not find it necessary to give reasons in writing in refusing the application for leave to appeal.
- 20 3. The trial was in respect of a charge of murder and the facts leading thereto were carefully summarised by Smith C.J. who said that the deceased was a detective in the police force and on the morning of January 13th, 1974 he was accompanied to the bus stop by his wife who was a nurse. He was in possession of his service revolver at that time. At about 8 o'clock that night while she was at home she heard shots and she went out to investigate, whereupon she found her husband bleeding and he was taken to the hospital where he died. p.132
ll. 25-51
- 30 4. Additionally in directing the jury, the Chief Justice said that the medical evidence revealed that four(4) bullet wounds were detected and it was not disputed that the bullet wound to his abdomen caused death. The body was identified by Ronald McNeish to the doctor who performed the post mortem examination. p.133-134
- 40 5. The Chief Justice further said that the principal witness for the Crown was Mrs Marcia Campbell who testified that when she saw her husband outside their home he was bleeding and that he had told her that he was going to die. She reported that he said it was the appellant Nembhard who took his gun from him and shot him. Moreover she reported p.135

that he said that he had not troubled Nembhard in any way. The Chief Justice emphasized that the Crown was relying on a dying declaration and circumstantial evidence to prove that the accused Nembhard was guilty of murder.

6. In his defence at the trial Nembhard relied on an alibi and he was supported by two witnesses.

pp.151-156

7. The jury returned a verdict of guilty and the conviction and sentence were affirmed by the Court of Appeal. Subsequently, the appellant successfully petitioned the Privy Council by way of Special leave which was granted on 20th December, 1978, and the order pursuant thereto made on 6th February, 1979.

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pp.168-169

8. Your Respondent contends that there are three issues of law to be determined and they are:-

(i) Whether the directions in law in the the summing-up as regards a dying declaration were correct.

(ii) Whether the rule of practice which obtains in East African Commonwealth jurisdictions, namely, that where the sole evidence which implicates the accused is a dying declaration, that such evidence must be corroborated for there to be a verdict of guilty.

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(iii) Whether in the circumstances of the instant case the appellant can establish that there was a miscarriage of justice.

9. As to paragraph 8 (1) it was recognised from the outset by the Chief Justice that where a dying declaration was the only evidence to connect the accused with the crime it was of an unusual character which had to be scrutinised with care and that such testimony could not be tested and amplified by cross examination. Further he acknowledged that it was his duty to impress those considerations on the jury. In particular the Chief Justice emphasised that there had to be a settled hopeless expectation of death and that the reason for that requirement was that it was akin to a person taking an oath. Further the Chief Justice in deciding to admit the evidence in the presence of the jury said that he was satisfied that Nembhard the accused was being tried for the murder allegedly inflicted and that the deceased has stated how he had received the injuries. Your Respondent's submission is that those directions cannot be faulted.

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10. As to paragraph 8 (ii) the Chief Justice further emphasised that as a dying declaration could not be tested by cross examination, it suffered from a disadvantage. The common law recognised this disadvantage but had to balance this against the public interest that the guilty be convicted.

p.141
11.30-40

It is submitted that the classic common law approach does not require a mandatory or other direction concerning the necessity or desirability of corroboration. If there were such a requirement, it would be adverted to in Waugh -v- Regina /1950/ A.C. at page 203 nor was such a requirement thought necessary in jurisdictions where the Indian Evidence Act (1872) obtained. See Pakala Naravena Swami -v- King Emperor /1939/ L.R. 66 1A or /1939/ 1 All E.R. 396 and Chandrasekera alias Alisandiri -v- Rex (1937) A.C. 220 at page 229 where the following passage appears:-

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"Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction but at the same time that other evidence was not merely consistent with the deceased's statement, but pointed in the same direction. It was a case on which if the deceased's statement was received and was believed, as it evidently was by the jury and be clear and unmistakable in its effect, then a conviction was abundantly justified and indeed inevitable."

11. Your Respondent would also contend that in the instant case, the evidence apart from the dying declaration also tends to implicate Nembhard. When he was told that Mrs Campbell was asking for him and that her husband was shot, his response under examination in Chief was instructive. It runs thus -

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"A: Yes sir, and by that time Dolly has heard and everyone was speaking about it. Everyone was giving their different opinion, making all kinds of expression. Well, me and Norman Fraser and Olga and Lascelles Samuels and a couple more - about two more youths that live in the yard, came back on the scene, the scene of the crime, but I didn't see anyone."

p. 75

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When he was cross-examined his explanation as to why he used the words 'came back on the scene was that he had lived there.

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12. Despite these authoritative rulings on the Indian Evidence Act (1872) which were binding in East Africa there were a series of decisions from Dala Mkwage -v- Regina (1956) E.A.C.A. at page 163 to Okethe Okale and Others -v- Republic (1965) E.A. 555, and Terikabi -v- Uganda (1975) E.A. 60 which laid down a rule of practice that a conviction could not stand if there were a failure to give a warning on the necessity for corroboration where

where a dying declaration was the only evidence implicating the accused. It is respectfully submitted that those decisions erred in requiring corroboration as they paid no heed to the decisions of the Privy Council. Moreover to add corroboration as a requirement would be to tilt the scales too much in favour of the accused and manifest injustices would result. The directions of the Chief Justice were ample and gave the accused all the protection of the law that was necessary and desirable.

10 13. Your Respondent would respectfully point out that this was the second trial in respect of the same offence as Nembhard was previously tried by the Senior Puisne Judge Mr Justice Parnell and a jury and convicted. Thereafter the Court of Appeal ordered a new trial. It is in respect of this new trial and the order of the second appellate hearing that the instant proceeding has arisen.

20 14. Since the dying declaration was the only evidence as to identification it is pertinent to address Your Lordships on the use of hearsay evidence for the purpose of visual identification. Teper -v- The Queen (1952) A.C. at page 480 gives some guidance on the matter. At page 498 the following passage appears -

30 "Hearsay evidence for the purpose of identification should only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstance and in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the res gestae is the commission of the crime itself."

40 15. The Chief Justice emphasised the actual words used by Mrs Campbell in relating the dying declaration. He pointed out that as regards identification she reported that her husband said that it was Neville Nembhard, Miss Nembhard's grand-son who shot him and that he had not done him anything. He further said that just as he came through the gate and turned to lock it he saw Nembhard over him and that he, the deceased, could not help himself.

50 16. The Chief Justice continued to direct the jury as to how to treat the issue of visual identification and warned them of how frequently in human affairs, mistaken identity occurs. He told them that the accused admitted he knew the deceased for upwards of nine (9) years and that he was his neighbour. Moreover, he the accused did not deny that he lived with his grand-mother. Additionally the Chief Justice directed that from the evidence it was open to the jury to find that there was adequate lighting to enable the deceased to see the accused.

p.141
11.41-56

17. On this important matter of identity it is prudent to quote the exact words of the summing-up. At page 145 of the record it is as follows -

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"The question of knowing the accused very well, the accused admitting this, the question of the light - you will have to say whether there was sufficient light and the question of proximity, those are matters which are relevant to the question of identity."

Then again on page 157 towards the end of the summing-up the Chief Justice put it thus:

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"You have to take into account the caution that I have given about mistaken identity and whether the circumstances were such having regard to distance, light, and so forth, that you can feel that a mistake was not made in the identity of the accused."

It is respectfully submitted that these directions were ample and accurate.

18. Additionally the jury sought further directions on the question of identity and the Chief Justice reiterated and expanded on the version he had previously given.

pp.150-160

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19. As to paragraph 8 (iii) Your Respondent would submit that the grounds on which it appears, that the appellant will rely that there has been a miscarriage of justice are firstly that the evidence of Lascelles Samuels was hearsay and should not have been admitted and secondly that there was a contradiction between what Mrs Campbell had said concerning her husband when she said 'He did not tell me how he felt' and her report that he said 'I am going to die'.

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20. With respect to the evidence of Lascelles Samuels Your Respondent, will contend that the Chief Justice specifically told the jury that frankly he did not see how it could help the prosecution. Samuels' evidence was to the effect that he heard Mrs Campbell asking for Neville and he proceeded to look for Neville and when he had found him, reported to him that Detective Campbell was shot and Mrs Campbell was asking for him. The Chief Justice further specifically directed the jury that Nembhard did not by his conduct admit any accusation, that Samuels might have purported to make and that in his opinion Samuels' evidence could not help the jury at all.

p.147

p.150

21. As for the alleged contradictions, the Chief Justice in his summing-up pointed out to the jury that when Mrs Campbell had said 'He didn't tell me how he felt' at

the Preliminary Enquiry, she had explained that, that was in relation to what her husband had said at the hospital and that was not contradictory of what she reported her husband had said at the gate. Further the Chief Justice added that the defence had not sought to put in the deposition at the trial.

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22. Your Respondent respectfully submits that on the basis of these complaints the defendant will not be able to discharge the onus on him to satisfy Your Lordships that there has been a miscarriage of justice.

23. In view of the foregoing circumstances Your Respondent submits that the order of the Court of Appeal affirmed and that the appeal should be dismissed for the following among other

R E A S O N S

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(1) BECAUSE the general directions of the Chief Justice, on the issue of a dying declaration were correct.

(2) BECAUSE the common law has never required corroboration where the sole evidence implicating the accused was a dying declaration.

(3) BECAUSE the common law as developed on the basis of the Indian Evidence Act does not require corroboration where the sole evidence against the accused was a dying declaration.

(4) BECAUSE the practice as developed in East African Commonwealth jurisdictions of requiring corroboration where the sole evidence was a dying declaration was wrong in law and should not be extended to other jurisdictions as it is against precedent and sound judicial policy.

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(5) BECAUSE the Chief Justice's directions on the important question of identity were ample and correct in law.

IAN X. FORTE

HENDERSON DOWNER

IN THE PRIVY COUNCIL

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Appellant

- and -

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CASE FOR THE RESPONDENT

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