

IN THE HIGH COURT OF THE SUPREME COURT OF GUYANA
CRIMINAL JURISDICTION

Indictment No. 25/ 2011

THE STATE

V

GANESH NARINE called KANA

The Honourable Justice Navindra A. Singh, Puisne Judge

Ms. Dhanika Singh representing the State

Mr. Peter Hugh representing the Accused, Ganesh Narine.

DECISION

The Accused, Ganesh Narine, was charged with the offence of murder, contrary to Section 100 of the Criminal Law (Offences) Act, Chapter 8:01 of the Laws of Guyana on June 16th 2009, that he murdered Krishnadai Singh on June 12th 2009 in the County of Demerara, Guyana.

Following a Preliminary Inquiry, the Accused was committed to stand trial in the High Court of the Supreme Court of Guyana in its Criminal Jurisdiction on October 21st 2010.

The State presented an indictment for murder against the Accused on March 12th 2014, a jury was selected and a trial ensued.

On March 13th 2014, the State made an application to the Court under Section 95 of the Evidence Act, Chapter 5:03 of the Laws of Guyana to have the Magistrate's Court deposition of the State's witness, Amanda Singh, tendered into evidence and read to the jury.

The Accused was unrepresented in the Preliminary Inquiry at the Magistrate's Court and at this trial, the testimony of the witness, Amanda Singh, is the sole evidence in the State's case linking the Accused to the alleged murder of Krishnadai Singh.

It is clear, whether one follows the reasoning posited by Justice Crane in R v Edwin Ogle [1966] 11 WIR 439 or Chancellor Luckhoo in George Sutherland v The State [1970] 16 WIR 342, that a trial Judge has discretion to exclude admissible evidence, to wit, the deposition of a witness, if it is necessary to secure a fair trial for the Accused.

A position which is further buttressed in the dicta of Lord Salmon in R v Sang [1979] 2 All ER 1222 @ 1237 (g) which was referred to and cited with approval by Lord Griffiths in Barnes, Desquottes and Johnson v R; Scott and Walters v R [1989] 37 WIR 330 particularly @ 338.

In these circumstances the Court directed Counsel (both) to present arguments, prior to the presentation of evidence to satisfy the statutory requirements, addressing whether, on condition that the statutory requirements of Section 95 of the Evidence Act are met, it was fair in the circumstances of this trial for the Magistrate's Court deposition of Amanda Singh to be admitted into evidence and read to the jury.

Learned Counsel for the State and the Accused presented their arguments on March 13th 2014.

Following is the findings and ruling of the Court after careful consideration of the arguments presented and the particular facts of this case.

With respect to a Judge's exercise of his discretion to exclude a deposition, Lord Griffiths in Barnes v R; Scott v R [1989] 37 WIR 330 @ 340 - 341 said:

"... it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the

judge is satisfied that it would be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said: that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.”

In Cannonier v Director of Public Prosecutions; Isaac and Others v Director of Public Prosecutions [2012] 80 WIR 260 @ 290 – 292 Mitchell JA cited with approval the dicta of De La Bastide CJ in Nankissoon Boodram v The State [1997] 53 WIR 344 @ 383 where De La Bastide CJ stated:

“The statutory discretion to exclude is simply a re-statement of the common law and must clearly be exercised in the same way and in accordance with the same principles as the common-law discretion. The Privy Council in [Barnes v R, Scott v R (1989) 37 WIR 330, [1989] AC 1242] laid down the following guidelines: (i) the only justification for excluding an otherwise admissible deposition is when that is essential in order to ensure a fair trial for the accused; (ii) the determining factor in the exercise of the discretion must be the quality of the evidence in the deposition; and (iii) provided that the judge is careful to (a) warn the jury of the danger of acting on evidence which has not been the subject of cross-examination before them, (b) point out any discrepancies and weaknesses in the evidence contained in the deposition, (c) give them any other necessary warning such as the Turnbull direction (cf [R v Turnbull [1976] 3 All ER 549, [1977] QB 224]) with regard to the danger of acting on identification evidence, and (d) exclude any evidence which is hearsay or inadmissible for any other reason, it is only very rarely that it will be appropriate or necessary to exclude the deposition. (iv) It is not a ground for exclusion that the deposition contains the principal, or even the only evidence, on which the accused could be convicted.”

I readily accept that these are excellent general parameters and general guidance with respect to a trial Judge's exercise of his discretion to exclude a deposition, however, as alluded to by Lord Griffiths each case will turn upon its own peculiar facts and it will be for the trial Judge in each case to examine the facts of that case and make a determination.

In this case there exists all of the handicaps, as I will term them, referred to by Lord Griffiths and De La Bastide CJ, to wit;

- (1) The deposition of Amanda Singh contains the only evidence against the Accused.
- (2) The deposition contains identification evidence, albeit, recognition identification, since the Accused in two of his eight questions that he asked Amanda Singh in the Magistrate's Court is saying that he was not there.
- (3) As is obvious in the circumstances of this application, the Accused Counsel will not be able to cross examine Amanda Singh.

I believe that the Learned Law Lord and the Learned Chief Justice intended to enunciate as general guidance that, individually, each handicap was insufficient to justify the exercise of the discretion to exclude.

Where they all exist, the Court must necessarily engage in a much more detailed analysis of the circumstances to determine whether, as Luckhoo C stated in Sutherland v The State [1970] 16 WIR 342, the evidence sought to be tendered is likely to produce injustice of a kind inconsistent with a fair trial.

In this regard I have examined the statement given by Amanda Singh to the police on June 12th 2009 and have found that there exist material inconsistencies with her deposition testimony.

This I find to be of importance since there will be no way for the Defence to explore or probe the witness in this regard in the presence of the jury in the absence of an opportunity to cross examine her in this trial.

Her evidence, being substantially the case for the State, would inevitably be challenged for accuracy as can be deduced from the few questions the Accused asked at the Magistrate's Court. This was the situation in R v Linley [1959] Crim LR 123 where the Accused was facing a charge of robbing with violence at the Leeds Assizes and Ashworth J ruled to exclude the deposition of the victim where Linley was not represented before the Magistrate. See also R v Christopher George Blithing [1983] 77 Cr App R 86 (Watkins LJ).

I also find it rather unfortunate and disturbing that the Prosecutor at the Leonora Magistrates' Court did not disclose to the Accused or for that matter, the Magistrate, considering that the Accused was unrepresented at the Preliminary Inquiry, these inconsistencies.

Further, there exist discrepancies between the deposition testimony of Amanda Singh and Corporal Jomo Williams' and Sergeant Narine Lall's testimony in this trial.

Haynes C in The State v Albert Stanislaus Browne [1977] 25 WIR 51 @ 56 in interpreting what Luckhoo C meant by "... *the question must be asked and satisfactorily answered: Is the evidence sought to be tendered likely to produce injustice of a kind inconsistent with a fair trial?*" in Sutherland v The State [1970] 16 WIR 342 opined that it meant the Judge must ask himself "*In this case, would it be or might it be unfair, and so, unjust, to ask the jury to believe and act on this evidence, without the advantage of seeing and of hearing and of questioning the witness?*"

The disadvantages that are generally encountered by an Accused where the deposition of a witness is admitted is magnified where the Accused is unrepresented at the Preliminary Inquiry.

Article 144 (2) of the Constitution of the Republic of Guyana states;

“It shall be the duty of a court to ascertain the truth in every case provided that every person who is charged with a criminal offence

(d) Shall be permitted to defend himself or herself before the court in person or by a legal representative of his or her own choice.”

Article 144 (13) of the Constitution of the Republic of Guyana states;

“Nothing contained in paragraph (2) (d) shall be construed as entitling a person to legal representation at public expense but, subject thereto, it shall be the duty of the State to ensure every person charged with a criminal offence is given a fair trial and accordingly to make provisions for legal aid to be given in suitable cases.”

It is clear from the circumstances brought to bear in this case that conceptually a fair trial can only be had, especially in a capital case, if provisions for legal aid are made from the commencement of the Preliminary Inquiry if not from the time a charge is instituted.

Further, Article 39(2) of the Constitution of the Republic of Guyana reads:

“In the interpretation of the fundamental rights provisions in this Constitution a Court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights.”

Article 154A (1) and (2) of the Constitution of the Republic of Guyana reads:

(1) *“Subject to paragraphs (3) and (6), every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which Guyana has acceded is entitled to the human rights enshrined in the said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government and, where applicable to them, by all natural and legal persons and shall be enforceable in the manner herein prescribed.”*

(2) *“The rights referred to in paragraph (1) do not include any fundamental right under this Constitution.”*

Article 14 (3) of the International Covenant on Civil and Political Rights, to which Guyana has acceded to and is set out in the Fourth Schedule to the Constitution of the Republic of Guyana, reads, in relevant part:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his presence, and to defend in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

In the opinion of this Court in keeping with our international obligations under the Constitution, Accused persons facing capital charges without sufficient means to pay for legal assistance ought to be provided with such legal assistance at the commencement of the Preliminary Inquiry of the charge.

The opportunity to cross examine witnesses is really no opportunity if an Accused person does not possess the ability to make use of the opportunity.

Another disadvantage that the Accused faces in this particular case is that the only person through whom he can fully expound his defence in front of the jury is through the very witness, Amanda Singh, which will obviously be impossible if her evidence is introduced through her Magistrates’ Court deposition.

In the circumstances of this case I believe it will be of utmost importance whether the jury believes this witness’ evidence to be truthful and accurate, since there really is no other evidence implicating the Accused in this trial.

Such conclusions, based on the circumstances of this case, can only fairly and reliably be determined by the jury after seeing and hearing the witness gave *viva voce* evidence.

I do appreciate that without the evidence of Amanda Singh, the State will be unable to prove all of the elements of the crime charged, however, I feel compelled to answer Luckhoo C and Haynes C questions in the affirmative in the particular circumstances of this case.

Based on the foregoing I find that, even if the State were able to satisfy the statutory requirements of Section 95 of the Evidence Act, this is a fit and proper case to exercise my discretion to exclude the Magistrates' Court deposition of the witness Amanda Singh.

Justice N. A. Singh
PUISNE JUDGE

Dated the 14th day of March, 2014.