TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C. Cr. No 49/2007

THE STATE

V

DARROHN CAMPBELL

Before the Hon. Mr Justice Rajiv Persad**.**

Appearances:

Ms. Avion Gill for the State.

Mr. Richard Mason for the Accused.

The accused in this matter was charged with one count of rape arising out of an allegation made by the virtual complainant on or about the 26th December 2003.

In the course of the trial and while evidence was being led by one of the police officers Counsel for the State sought leave of the court to allow the witness to refresh his memory from a statement prepared by him in relation to the proceedings before the Court.

The court having considered the State's application and having considered the objection and matters raised by Defence Counsel the court was minded to refuse the application, however State Counsel having reconsidered the application sought leave of the court to withdraw her application. The court accordingly granted leave to the State, but it

was agreed by all parties that having regard to the submissions on the matter there was a need for guidance on this issue accordingly the court now seeks to do so.

As a general rule a witness may refresh his memory when giving evidence from any writing made and verified by himself concerning the facts to which he testifies provided that the writing was made or verified at the time when the facts were still fresh in his memory[1].

Accordingly for a witness to be allowed to refresh his memory from any writing it must have been written by the witness or if written by another it must have been verified by the witness and the witness must have written or have verified the writing while the facts were still fresh in the witness's memory.

The rule is neatly summarized by the Court of Appeal of Jamaica in **R v Edward Harvey 23 WIR 437 @439**.

> It is, perhaps, convenient to start with the proposition that certainly for more than 200 years a witness has not been allowed to give his evidence by reciting the contents of some document previously prepared. See, for example, *Anon* ((1753), 3 Keny 27, 96 ER 1295). During the course of his evidence, however, a witness has always been permitted to refresh his memory by reference to documents or memoranda of one kind or another, subject to certain well-defined conditions, eg contemporaneity, and the production, if required, of the document to the other party to the cause or his attorney to enable him to inspect it and, if he so wishes, to cross-examine the witness as to its contents. The jury are also entitled to see the document–*if* the witness is cross-examined as to parts of it not used by him to refresh his memory with the consequence that the document is rendered admissible *as an item of evidence* and may be so admitted at the instance of the party calling the witness–since it may assist them in assessing the witness's credit-worthiness.
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> But the first and essential prerequisite that must be demonstrated to the court *by the witness* is the necessity for *him* to refresh *his* memory. Unless it becomes manifest that his memory is faulty with respect to some particular matter on which he is being examined (including cross-examination and re-examination) no question can arise as to his memory being refreshed. Unless, therefore, a witness indicates *his* desire to refresh his memory because of *his* imperfect recollection as to some fact about which he is required to testify, it would be quite improper for an attorney to

[1] see Simmonds [1969] 1 QB 685, Richardson [1971] 2 QB 484

> suggest to a witness that he consult some previously prepared document in order to confirm his testimony. Clearly, any such course must be calculated to offend the rationale of the well-established rule against proof of consistency or, as it is sometimes called, the rule against self-corroboration. See *Gillie v Posho Ltd* ([1939] 2 All ER 196) and *Jones v South Eastern & Chatham Rail Co's Managing Cmttee* ((1917), 87 LJKB 775, 118 LT 802, 11 BWCC 38).

Accordingly under the common law rule that permits a witness to refresh his memory the document whether made or verified by the witness must have been written either at the time of the transaction or so shortly afterwards that the facts were fresh in his memory.[2]

The Court of Appeal in **R v Richardson [1971] 2 QB 484** had cause to comment on the definition mentioned above, according to the Court the definition provided 'a measure of elasticity and should not be taken to confine witnesses to an over short period'.

In the case of **Simmonds 1967 51 Cr App R 316** the Court of Appeal suggested that contemporaneity was a matter of fact and degree and that although literal contemporaneity was not necessary the permitted gap between the date of the statement and that of the date of the events to which it relates cannot be set with precision.

In terms of reported cases a period of three months was treated as too long in **R v Woodcock 1963 Crim LR,** a period of on month was considered doubtful in **R v Graham 1973 Crim LR 628**, and in **Fotheringham 1975 Crim LR 710 CA** a period of 21 days was accepted.

The cases mentioned above represent what may be described as the traditional approach to determining the issue of contemporaneity. More

[2] Phipson on Evidence (11th Edition 1970) p 634 para 1528

recently the case of **R v Da Silva 90 Cr App R 233 CA** appears to have reformulated the traditional common law approach to contemporaneity[3].

Accordingly to the Editors of Archbold 2007 para 8-75:-

> In two cases, however, the courts have made significant inroads into this formulation of the rule. First, in R. v. Da Silva, 90 Cr.App.R. 233, CA, it was held that it was open to the trial judge, in the exercise of his discretion and in the interests of justice to permit a witness who had begun to give evidence to refresh his memory from a statement made near to the time of the events in question, even though it did not come within the definition of "contemporaneous", provided the judge was satisfied: (a) that the witness indicated that he could not now recall the details of events because of the lapse of time since they took place; (b) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it; (c) that he had not read the statement before coming into the witness box; and (d) that he wished to have an opportunity to read the statement before he continued to give evidence.
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> It did not matter whether the witness withdrew from the witness box to read his statement or whether he read it in the witness box. What was important was that if the former course was adopted, no communication must be had with the witness, other than to see that he could read the statement in peace. Moreover, if either course was adopted, the statement had to be removed from him when he resumed his evidence and he should not be permitted to refer to it again, unlike a contemporaneous statement which could be used to refresh his memory while he gave evidence.
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> In the second case, R. v. South Ribble Magistrates' Court, ex p. Cochrane [1996] 2 Cr.App.R. 544, the Divisional Court went further. Considering Da Silva, it held that the Court of Appeal had not been intending to say that it was only where the four conditions there set out were satisfied that a witness could refresh his memory from a non-contemporaneous document.
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> In particular, it was held in relation to the third condition that there was no difference between a witness who has not read the statement before coming into the witness-box and a witness who has had that opportunity but failed to take in what he was reading for whatever reason.
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> The Divisional Court appears to have gone futher than the Court of Appeal in a second respect. In Da Silva, the court was explicit about the need to remove the document from the witness before he continued with his evidence, but the language of the Divisional Court suggests that the court thought that this was unnecessary and that magistrates or a judge had a discretion to allow a witness to use a non-contemporaneous document as a memory refresher whilst giving evidence. Henry L.J., giving a judgment with which Ebsworth J. agreed, said that in exercising such discretion, magistrates or judges should follow the twin lodestars of the requirements of fairness and justice. His Lordship instanced two

[3] It is useful to note that the Criminal Justice Act 2003 UK has also reformulated the common law rule on memory refreshing.

> cases where the interests of justice would require permission to use a statement as a memory refresher, regardless of whether it was contemporaneous. The first was the case of an elderly witness who was nervous and confused. The second was the witness in a serious fraud case whose statement had required considerable preparation and might be hundreds of pages long.
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> His Lordship rejected "emphatically" what he described as the familiar floodgates objection. There is a danger, however, that these decisions will lead to the routine use of witness statements as memory refreshers. A more satisfactory solution would be to re-cast the rule so as to avoid altogether the use of the word "contemporaneous" and to substitute as the only requirement that there is good reason to believe that the witness would have been significantly better able to recall the relevant events at the time of making or verifying the document than at the time of giving evidence. This would cover the case of a statement made much nearer the time, albeit it could not be described as contemporaneous, the case of the witness who could not possibly be expected to remember the detail of a series of transactions and the case of the witness whose ability to give a coherent account is quite obviously affected by the experience of giving evidence, whether through nervousness or confusion. Such cases apart, magistrates and judges will no doubt take account of twin phenomena within the daily experience of practitioners in the criminal courts. First, a witness statement often bears little relation to the evidence given by the witness. Secondly, a witness who is permitted to have his statement in front of him frequently latches onto it and sticks to it as if it were a script.

The above analysis seems to establish clearly that it is open to the trial judge, in the exercise of his discretion and in the interests of justice to permit a witness who had begun to give evidence to refresh his memory from a statement made near to the time of the events in question, even though it did not come within the definition of "contemporaneous".

Such a discretion could be reasonably exercised once the under-mentioned pre requisites were satisfied:

(a) that the witness indicated that he could not now recall the details of events because of the lapse of time since they took place;

(b) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it;

(c) that he had not read the statement before coming into the witness box; and

(d) that he wished to have an opportunity to read the statement before he continued to give evidence.

While the court accepts that strictly speaking it has a discretion to have allowed this witness to refresh his memory notwithstanding the fact that the statement was not contemporaneous there are a number of reasons that militate against this court exercising that discretion in the circumstances of this case.

In this matter the witness a police constable in giving evidence testified that he recorded his statement in August of 2005. The subject matter of this trial relate to an incident that took place on the 26th December 2003, the totality of the witnesses involvement in this matter relate to events occurring on the 26th December 2003. It was therefore clear that the court was being asked to allow a witness to refresh his memory from a statement that was made some 18 months after the event.

Under cross examination this witness (who accompanied the complainant to the scene and was present when the accused made an oral statement) admitted making no entries in the station diary, he also testified that although he had a diary he made no notes and took no initiative to make notes.

When he came to prepare his statement in August 2005 (some 18 months after the alleged incident) the witness gave evidence that he did not use the station diary, and he was able to recall the contents of what became his statement from his memory of what took place 18 months previously without the assistance of any note.

It is perhaps appropriate at this stage to refer to the Trinidad and Tobago Police Service Standing Orders, and in particular S.O 16 which includes the under-mentioned sub sections:-

S.O.16 - Rule 5

Police Officers shall have in their possession at all times their officially issued pocket diaries.

S.O. 16 -Rule 6

The Pocket Diary is the Police Officer's best safeguard against allegation of dishonesty and acting in bad faith when performing his/her duties.

Therefore the officer shall -

(a) record therein all activities connected with the performances of his duties;

(b) record any details of all reports made to him including the name(s) and address(es) of person(s), observation, details of any investigations made and statements (where necessary);

(c) record descriptions of wanted, kidnapped and missing persons, stolen and lost property, lighting-up hours and any other matter which it is necessary to record.

S.O. 16 Rule 9

(1) Police Officers attending Court Orderly Room and Court shall take with them their official pocket diaries in which there are entries relating to the specific cases in which they have to give evidence.

(2) The Pocket Diaries shall be regarded as exhibits and will be available for reference or production to the court and shall be kept until the expiration of such cases.

S.O. 16 Rule 10

(1) It shall be the duty of all Police Officers to secure their pocket diaries against loss.

(2) A Police Officer shall immediately report the loss of his Pocket Diary as soon as such loss is discovered, giving details of such circumstances surrounding the loss.

S.O. 16 Rule 11

> It shall be the duty of all Police Officers to whom Pocket Diaries have been issued to keep them in a safe place under their control. The diaries must be available for inspection for a period of two (2) years after the date of completion or until any matters in connection with which there are entries in such pocket diaries have been completed in Court, whichever is the latter. At the expiration of that period, they may be destroyed.

Having regard to the clear stipulations outlined in the Standing Orders to members of the police service and what appears to be an deliberate failure by the officer to follow procedures critical to the investigative process the Court felt that it would be contrary to the interests of justice for this court to exercise it's discretion to allow the witness in these circumstances to refresh his memory from his statement.

Dated this November 19, 2009

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Rajiv Persad

Judge