

Joseph Melville - - - - - Appellant

v.

The King - - - - - Respondent

FROM

THE SUPREME COURT OF TRINIDAD AND TOBAGO

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
DELIVERED THE 21ST NOVEMBER, 1945

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*Present at the Hearing:*

VISCOUNT SIMON

LORD HANKERTON

SIR JOHN BEAUMONT

[*Delivered by* VISCOUNT SIMON]

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This is an appeal *in forma pauperis* by special leave from a decision of the Court of Criminal Appeal of Trinidad and Tobago, on a question of law reserved for the opinion of the Court by the trial judge in a case of murder. The appellant, who is an adult, was indicted before Mr. Justice Smith in the Supreme Court of Trinidad and Tobago for the murder of a boy of between 7 and 8 years of age. He was convicted by the jury and sentenced to death, subject to the determination of a question of law raised by way of Case Stated by the trial judge for the opinion of the Court of Criminal Appeal of the Colony. The point of law is whether the unsworn evidence of two children, one of 9 or 10 years of age and the other of 11 years of age, was rightly received at the trial. Mr. Justice Smith, while of opinion that the two children possessed sufficient intelligence to justify the reception of the evidence and sufficient understanding to realise the duty of speaking the truth, considered that they did not understand the nature of an oath and they testified unsworn. He took the view that their unsworn testimony was admissible under the authority contained in section 19 of the Children Ordinance of Trinidad and Tobago (Revised Ordinance, 1940; Chapter 4, No. 21).

The Court of Criminal Appeal in Trinidad decided that the evidence was rightly admitted under the authority conferred by the section, which authorises, in certain classes of offences therein referred to, the reception of unsworn evidence from a child of tender years if the child is considered by the Court to be possessed of sufficient intelligence and of an understanding of the duty of speaking the truth even though the child does not understand the nature of an oath. The whole question now to be decided is whether, when the offence charged is the murder of a child by an adult, this section applies.

Section 19 of the Children Ordinance enacts as follows:—

“ 19. Where, in any proceeding against any person for an offence under this Part of this Ordinance, or for any of the offences mentioned in the Schedule hereto, the child in respect of whom the offence is

charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; . . ."

There follow provisos requiring that there must be corroboration before a person is liable to be convicted under the testimony thus admitted, and providing for the punishment of an unsworn child witness who wilfully gives false evidence.

The offences included in the Part of the Ordinance referred to do not include murder, and the question therefore comes down to this: Is murder, or at any rate murder of a child, an offence mentioned in the Schedule to the Ordinance?

The Schedule runs as follows:—

" Any offence under sections 25, 49, or 55 of the Offences against the Person Ordinance, and any offence against a child or young person under sections 6, 36 to 42 inclusive, 46 or 62 of that Ordinance, or under sections 4 or 5 of the Summary Offences Ordinance.

" Any other offence involving bodily injury to a child or young person."

The first sentence of the Schedule thus picks out from the Offences against the Person Ordinance (Revised Ordinances, 1940; Chapter 4, No. 9) certain offences, some of which in their nature cannot be committed against an adult, viz. section 25 (exposing children under the age of 2 years); section 49 (abduction of girl under 14 years) and section 55 (child stealing); and others all of which might in their nature be committed against persons of any age, but which are only included in the Schedule when committed against a child or young person, viz. section 6 (manslaughter); sections 36-42 (defilement of women, etc.); section 46 (indecent assault) and section 62 (gross indecency). It is particularly to be noted that murder (section 4 of the Offences against the Person Ordinance) is not included in the Schedule, nor attempt to murder (section 9). Similarly rape (section 35) is not included, though lesser offences of a sexual character are, and sodomy and attempted sodomy are also left out. It is manifest, as far as this part of the Schedule is concerned, that the policy of the legislature was to regard sworn evidence as the only evidence to be admitted in the most serious of the offences against the person.

If, therefore, the first sentence of the Schedule is to be understood as taking the whole list of offences in the Act under review and including some as capable of being tried with the help of unsworn children while the rest of such offences are excluded from the operation of section 29, it is plain that the children's unsworn evidence in this case of murder was improperly admitted, and the trial judge expressly stated that if this evidence were inadmissible, he would not have called on the defence and the conviction would have to be quashed.

The argument that the children's unsworn evidence is admissible, even in a case of murder, is advanced under two heads:—

(a) It is first said that section 2 of the Evidence Ordinance of Trinidad and Tobago (Revised Ordinance, 1940; Chapter 7, No. 9) justifies what was done. This section provides that " Whenever any question shall arise in any action, suit, information, or other proceeding whatsoever in or before any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, touching the admissibility or the sufficiency of any evidence, or the competency or obligation of any witness to give evidence, or the swearing of any witness, or the form of oath or affirmation to be used by any witness, or the admissibility of any question put to any witness, or the admissibility or sufficiency of any document,

writing, matter, or thing tendered in evidence, every such question shall be decided according to the law of England for the time being in force." The argument then is that section 38 of the English Children and Young Persons' Act, 1933 (23 Geo. 5, Chapter 12), generalises the admission of unsworn testimony by a child of tender years who is considered by the court to have the qualities of mind and morals before-mentioned, but subject to a proviso requiring corroboration and that consequently the same latitude of admissibility of such evidence must now prevail in Trinidad. Their Lordships agree with the Court of Criminal Appeal in Trinidad that this argument is unsound. Section 2 of the Evidence Ordinance applies only in cases where there is no specific provision to the contrary in Trinidad law. It refers mainly to rules about hearsay, corroboration, and the like and does not purport to make the provisions of an English Statute a Master code which automatically nullifies the express law enacted for Trinidad and Tobago.

(b) The second, and more substantial, argument used by the respondent turns on the second section of the Schedule to the Children Ordinance which includes "any other offence involving bodily injury to a child or young person" among the offences in respect of which the unsworn evidence of a child may be admitted. It is contended that the charge of murder of a child falls within these words. Their Lordships are of opinion that the short and conclusive answer to this argument is that it would give to this general expression an effect which would over-rule the specific exceptions involved in the first sentence of the Schedule of which the offence of murder is one. It may not be easy to give a confident interpretation to these final words, but there are offences not included in the Offences against the Person Ordinance which might involve personal injury to a child or young person, e.g., the offence of driving a motor-car to the public danger in a case where the motor-car injured a child; but whatever may be the difficulty of giving practical illustrations of the "other offences" referred to, it would not be a proper construction of the Schedule to allow these general words to nullify the provision in the first sentence which in effect excludes such grave offences as murder, or rape, or sodomy.

The words of the Schedule and indeed of the whole Children Ordinance are lifted bodily from the Children's Act of 1908 of this country, and a similar arrangement of specified sections in the Offences against the Person Act, 1861, followed by "any other offences involving bodily injury to a child under the age of 16 years" appeared in the Prevention of Cruelty to Children Act, 1894 (57-58 Vict., Chapter 41). In connection with section 12 of that Act this concluding sentence in the Prevention of Cruelty to Children Act has been the subject of consideration in two reported cases, one from England and the other from Scotland, not indeed where the evidence of a child was involved, but where it was sought, by virtue of section 12 and the Schedule, to justify the calling of a wife as a competent though not compellable witness against her husband when accused of cruelty to a child.

The English case (*R. v. Roberts* [1896] 18 Cox, 530) was a trial for causing grievous bodily harm to a child under 16 years of age, tried at Liverpool Summer Assizes before Mr. Justice Cave. The Crown contended that the offence charged came within the concluding clause of the Schedule, but Mr. Justice Cave ruled that the "other offences" contemplated by these words are offences of which it is an essential part that the person injured is a child under 16 years of age. The correctness of this decision has been doubted in the textbooks, and certainly could not be applied in a case like the present where some of the offences specifically brought by the Schedule within the operation of the section permitting unsworn evidence are offences which are not in their nature essentially perpetrated against children and not against adults. But in any case their Lordships do not consider that the right decision in the present appeal should be influenced by Mr. Justice Cave's ruling in the case referred to.

In Scotland, on the contrary, in a case (*Lord Advocate v. Fraser* [1901] 3 F. (J), 67) where a husband was being tried for culpable homicide of a daughter, aged 12, Lord Justice-General Balfour ruled that the wife of the accused was an admissible witness, and thus in effect gave to the concluding sentences of the Schedule an interpretation which cancelled out the omission of the section relating to the same offence in the Offences against the Person Act, 1861. The last named Act, however, did not apply to Scotland and the offence charged was an offence only at Common Law. The argument unsuccessfully advanced for the accused was that "any other offences" in the Schedule must be "statutory offences of which the essence was that the victim was under 16 years of age" and that this construction, therefore, excluded the Common Law crime of culpable homicide.

Their Lordships do not think that they can take this ruling as a guide in construing the Children Ordinance and applying it to this case.

Dealing with the matter as untrammelled by authority, their Lordships, as already stated, hold that the general words of the concluding sentence in the Schedule to the Children Ordinance ought not to be read as admitting unsworn evidence in a class of offence already excluded by the effect of the first and more specific sentence.

Their Lordships have therefore humbly advised His Majesty that the appeal must be allowed and the sentence quashed.



In the Privy Council

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JOSEPH MELVILLE

v.

THE KING

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DELIVERED BY VISCOUNT SIMON

Printed by His Majesty's STATIONERY OFFICE PRESS,  
DRURY LANE, W.C.2.

1946