THE PROBLEM OF RECOLLECTION CONCERNING STATEMENTS OF DECEASED PERSONS

Ong Her Hock v. *Public Prosecutor*[1]

Introduction

THIS case note is concerned with the treatment to be given to evidence of statements by persons since deceased[2] which are orally recounted in court by the person to whom they were made. Is it necessary for this witness to give the actual words which were spoken by the deceased? If the witness is unable to give the exact words, will his recollection of the words be sufficient? Is there an absolute rule or will the matter be decided according to the particular facts of the case?

Facts[3]

The accused was charged with murder. Part of the evidence considered by the Singapore High Court[4] consisted of statements made by the deceased (a Chinese), who had been stabbed and slashed with knives at Ang Mo Kio Avenue, to various people just before he died from these wounds. The deceased's brother asked the deceased whether the attack had anything to do with his (the deceased's) newspaper business. The deceased replied in the negative. He then asked the deceased who stabbed him. The deceased replied in Hokkien to the effect that he had been stabbed by "people from Tiong Gi Tiong triad society". The police then arrived and Corporal Subramani asked the deceased in Malay what had happened. The deceased replied that two Chinese unknown to him were responsible for his injuries. Corporal Subramani asked him what weapon had been used and he replied that they used a knife. The ambulance officer who conveyed the deceased to the hospital asked the deceased in Hokkien what had happened to him. The deceased told her that two male Chinese who were unknown to him had stabbed him. The accused was a member of the Tiong Gi Tiong society and admitted killing the deceased but maintained that he acted in self-defence.

The Decision

The High Court found the plea of self-defence unsupportable in the face of all the evidence and convicted the accused. The accused appealed against his conviction. One of the grounds of appeal was that the various statements made by the deceased to his brother, Corporal Subramani and the ambulance officer should not have been admitted because the exact words uttered by the deceased were not adduced in evidence. The Court of Criminal Appeal rejected this as well as the

[1] [1987] 2 M. L. J. 45.
[2] Section 32 (a) of the Evidence Act (Cap. 97, Statutes of the Republic of Singapore, 1985 Rev. Ed.).
[3] The facts are taken from the unreported judgment of the High Court.
[4] *Supra,* note 3.

other grounds of appeal and upheld the conviction. Wee C. J., giving the Judgment of the Court, stated:[5]

> "In our opinion, while it is settled law that 'if a dying declaration is reduced into writing - and this would invariably be the case in the event of the witness in question being an investigating police officer, Magistrate or someone of that kind - the actual words of the deceased must be recorded,' the recollection of the last words spoken by a dying man by a witness who is at the scene or arrives shortly thereafter and hears a dying declaration may be properly received in evidence."

Commentary

The question raised by *Ong Her Hock* is whether a witness's recollection of what the deceased said will always be sufficient for consideration as evidence against the accused. It is submitted that such an interpretation is not to be given to the decision in the case. Indeed, in *Toh Lai Heng* v. *P.P.*[6] (also a decision of the Court of Criminal Appeal), which was applied in *Ong Her Hock,* Rose C. J. specifically imposed the following qualification to the consideration of dying declarations not reduced into writing:[7]

> "In practice of course, such a witness would be required to give the exact words spoken by the deceased, and in so far as they are relevant, any words spoken to the deceased by the witness himself."

Generally a witness will not be able to remember the actual words spoken by the deceased. Thus if the court insisted on the exact words in every case it may be depriving itself of the only evidence against the accused. It follows that if he is able to recount in substance what the deceased said then there can be no objection to the consideration of such evidence against the accused[8] which will be given such weight as it deserves. It is otherwise if the witness is not able to do this so that there is a strong possibility of misrepresentation of vital details. In such circumstances the witness's evidence should not be considered at all because it may seriously prejudice the accused. Rose C.J.'s qualification recognises this.[9] The court has to be particularly cautious when considering dying declarations because the deceased is generally the only eyewitness to the crime against him and therefore what he says has considerable impact. Indeed it may be the sole basis for a conviction.[10] The fact that such evidence may give rise to serious prejudice has been constantly recognised. Thus the trier of fact is required to be cognisant of the absence of opportunity for cross-examining the declarant,[11] to be aware of the state of mind of the declarant[12] and to take into account all the circumstances in which the

[5] [1987]2M.L.J. 45 at p. 47.
[6] [1961]M.L.J. 53.
[7] *Ibid.,* at p. 54. Note that the *ipssissima verba* rule is a Common Law limitation and not a statutory requirement.
[8] This was the view of the then Federal Court in *Sum Kum Seng* v. *P. P.* [1981] 1 M.L.J. 244 at p. 245, a case on s. 27 of the Evidence Act.
[9] In *Mary Shim* v. *P. P.* [1962] M.L.J. 132 at p. 134, the Court regarded the witness's recollection as impaired and may not have admitted it if the written record of the declaration had not been available.
[10] *Nembhard* v. *R.* [1982] 1 All E. R. 183.
[11] This was taken into account by the High Court in *Ong Her Hock* at p. 258 of the unreported judgment.
[12] *Nembhard* v. *R.* [1982] 1 All E. R. 183.

declaration was made. Further, the Court will not allow an incomplete declaration.[13] The prejudicial effect of such evidence is exacerbated if the witness's oral recollection is based on memory and therefore possibly inaccurate. In *Ong Her Hock* the decision to receive the evidence of the dying declarations was justified by the facts. There, dying declarations had been made to three persons successively and there was no reason to doubt that the witness recounted in substance what the deceased had said. All the statements were consistent with each other. Further, the accused had admitted killing the deceased and his plea of self-defence was clearly unsupported by the evidence. It may have been for these reasons that the court did not strictly apply the rule requiring *ipssissima verba.* However, there are situations in which the court ought to direct itself to disregard evidence of such declarations, situations in which the accuracy of vital details recounted by the witness cannot be verified. Some examples illustrate the point: The deceased may have said prior to his murder that he was going to meet "Lee" at a certain place. The deceased is found murdered there. Wee (not Lee) is charged with murder. At his trial the witness (who misheard the deceased) gives evidence that the deceased said Wee (not Lee). Wee is known to have a motive against the deceased and there is evidence to show that Wee was around the area of the murder at the time. If the witness indicates that he is not absolutely sure that he heard "Wee" and not "Lee" *(i.e.,* according to his recollection it was "Wee") or evidence in the case indicates that the deceased could have been referring to Lee, then the witness's evidence gives rise to the possibility of grave prejudice to Wee resulting from the inaccurate recollection of a vital detail. The facts may be varied for a further illustration: The deceased may have said that he was going to meet X *after* going to a certain place (where he was murdered). X has a motive against the deceased and is unable to raise an alibi defence. If the witness gives evidence that according to his recollection (he states that he is not sure of the actual words), the deceased said that he was going to meet X *at that* place then again the judge ought to direct himself not to consider such evidence. In *Ong Her Hock* if the witness's recollection of the name of the secret society could have been different to that stated by the deceased *(e.g.,* a similar sounding name) so that the murderer could have belonged to either secret society, the judge may have been justified in ignoring such evidence especially if the accused had not admitted that he killed the deceased. The reason is that the only evidence which connects the accused to the killing is the witness's testimony as to the name of the secret society to which the murderer belonged, a fact which is as likely to be false as it is likely to be true. Again, what if in *Ong Her Hock* the deceased had in fact said his assailant had attacked him because *he* (the deceased) was a member of that secret society? There was no danger of this on the facts of the case but if the witness or other evidence had indicated this possibility, then the witness's account may have been ignored on the basis that his recollection (that the deceased identified the murderer as a member of the secret society) did not reflect the true facts.

This problem is magnified when the declarant speaks in a language or dialect to which the witness is not accustomed. In such circumstances the recollection is likely to be very much more doubtful. Thus in *Toh Lai Heng* v. *P. P.* Rose C. J. said "... the importance of recording the actual words is clearly demonstrated... where the deceased and the witness conversed in Malay, which was not the mother tongue

[13] *Waugh* v.*R.*[1950] A. C. 203 (P. C.).

of either and the conversation was recorded in English."[14] In *Naranjan Singh* v. *P.* P.[15] the Court regarded the presence of an interpreter as indispensable in situations where the witness did not understand the language spoken by the deceased. In *Ong Her Hock* the conversation between the deceased (who was Chinese) and the policeman (whose name[16] indicates that he was Indian) appears to have been in Malay. The policeman was still able to recount substantially what the deceased had said. It is submitted that if he had not been able to do this, the Court would have been justified in directing itself not to consider such evidence.

It has also been judicially recognised that in some situations the declarant's mental state after being attacked is such that there is a "very great danger of leading questions being answered without their force and effect being fully comprehended."[17] In *R.* v. *Mitchell*[18] the Court was concerned with a dying declaration which had been taken down in writing. The Court held that the evidence was inadmissible because the failure to record the actual words of the questions put to the deceased prevented the Court from discovering how much of the answers were suggested by the questioner and how much was the production of the deceased. As was pointed out in *R.* v. *Bottomley,*[19] it is not always necessary to record the actual words of the questions if the questions are obvious from a consideration of the answers. Although both cases involved declarations which had been reduced into writing there is no reason why the same principle should not apply to declarations orally recounted in court. In *Toh Lai Heng* Rose C.J. specifically indicated this.[20] Thus if the witness is unable to recollect the substance of the questions he asked the deceased and the questions are not obvious from the answers given, then the declarations may have to be disregarded for the same reason stated in *R.* v. *Mitchell.*

It is submitted that the Court in *Ong Her Hock* did not impose a rigid distinction between declarations reduced into writing and declarations orally recounted such that actual words are always essential in the former situation and recollection is always sufficient in the latter. The real basis for distinguishing these two forms of evidence is that in most situations it is a public officer such as a policeman or magistrate or security official who records the declaration. As he is entrusted with the specific duty of being thorough in his investigation the court must ensure that the proper standards for recording vital evidence such as this are maintained.[21] Although such a necessity does not arise in the case of declarations orally recounted they are capable of being just as prejudicial as declarations reduced into writing. It follows that the court may be justified in disregarding declarations in one form as in the other. Even in the case of declarations reduced into writing there are authorities which indicate that the actual words of

14 [1961]M.L.J. 53 at p. 54.
15 [1949] M.L.J. 122.
16 *I.e.,* Subramani.
17 *Per* Cave J. in R. v. *Mitchell* (1892) 17 Cox C. C. 503 at p. 507.
18 (1892) 17 Cox C.C. 503.
19 (1903) 118 L.T. 88.
20 [1961] M.L.J. 53 at p. 54.
21 *Sum Kum Seng* v. *P. P.* [1981] 1 M. L. J. 244 at p. 245. This case indicates that there is both a reliability as well as a disciplinary principle involved.

the deceased are not always a condition precedent to admissibility.[22] Sarkar[23] cites Indian authorities for the proposition that "while the rule *of ipssissima verba* is a very salutary one, it is not essential that in every case the actual words should be repeated ..."[24] Rose C. J. said in *Toh Lai Heng:* "This would seem to be a question of fact, depending upon the particular circumstances of each case."[25] Section 378 (2) of the Criminal Procedure Code[26] specifically allows an oral statement which is substantially reduced into writing (subject to certain conditions) to be admitted as evidence "of any fact stated therein" under section 378 (1) of the Code. It is therefore arguable that whether or not an orally recounted declaration will be considered depends on the situation before the court *i.e.,* whether the witness is able to recount in substance what the deceased said and the possibility of error as to vital details.

Conclusion

The principle that there should not be an absolute rule making all forms of recollection admissible is consistent with law and policy. Section 32 (a) of the Evidence Act[27] provides that it is the deceased's statement - not anyone else's - which is relevant. Therefore, unless the substance of the statement is conveyed by the witness, the evidence does not come within the scope of the provision. Policy considerations favour a discriminating approach as evidence of such declarations are admitted as an exception to the general rule excluding hearsay evidence. Section 32 (a) of the Evidence Act, which constitutes the exception, is comparatively wide: there is no requirement that the declarant be dying at the time of declaration let alone under a "settled hopeless expectation of death."[28] These conditions must be satisfied in English Law before evidence of the declarations are admitted, the rationale being that they ensure reliability.[29] It is therefore arguable that in the absence of such safeguards the court should adopt a strict approach in deciding on whether evidence of the declarations should be considered.[30] A liberal approach would exacerbate the problem of undependable evidence. Thus, where the witness is unable to substantially recount what the deceased said the court should ignore his evidence altogether.[31] Otherwise the basis for allowing hearsay evi-

[22] See for instance, *R.* v. *Smith* 10 Cox C. C. 82 (in which the Court considered the record of the declaration even though it was made two to three hours after the deceased had spoken) and *R.* v. *Bottomley* (1903) 118 L. T. 88 (in which the Court did not insist on the actual words of the questions asked). In *R.* v. *Fitzpatrick* (1910) 46 I. L. T. R. 173 it was held that the form of the questions and answers did not affect admissibility.

[23] *Sarkar on Evidence* (13th ed., 1981).

[24] *Ibid.,* at p. 386.

[25] [1961] M. L. J. 53 at p. 54.

[26] Cap. 68, Statutes of the Republic of Singapore, 1985 Rev. Ed. (hereinafter, referred to as "the Code").

[27] *Supra,* note 2.

[28] *Yeo Hock Cheng* v. *R.* [1938] M. L. J. Rep. 99.

[29] The theory being that no one would wish to die with a lie on his lips: *R.* v. *Woodcock* (1789) 1 Leach 500.

[30] Special caution might take the form of corroboration as a matter of practice *i.e.,* the court should warn itself not to act on it unless it is supported in some material way by other independent evidence. However, according to *Nembhard* v. *R.* (*ante,* note 12), corroboration is unnecessary.

[31] The question arises as to whether the Judge should exclude this evidence altogether or admit it and give it what weight it deserves *(i.e.,* if the declaration is wholly unreliable, no weightage ought to be given at all.) The principle that the Judge should have all relevant evidence before him would favour the second alternative. However, it may well be that the declaration is not deemed to be relevant under s. 32 (a) of the Evidence Act for the reasons already discussed in this paragraph.

dence as an exception to the general rule - that in the particular circumstances the evidence is reliable[32] — is wholly undermined.

JEFFREY D. PINSLER*

[32] See explanation of exceptions to the rule against hearsay, *Phipson on Evidence* (13th ed., 1982), at paragraph 16-16 and the paragraphs referred to therein.

* LL.B. (L'Pool), LL.M. (Cantab.), Barrister (M.T.), Advocate and Solicitor Singapore, Lecturer, Faculty of Law, National University of Singapore.