LAW REFORM COMMISSION

Issue Paper

Evidence of Reluctant/Intimidated Witness in Criminal Proceedings: Proposal for Reform of the Law

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Port Louis, Republic of Mauritius

4th Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: lrc@mail.gov.mu

URL http://lrc.gov.mu

LAW REFORM COMMISSION

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About the Commission

The Commission consists of –

(a) a Chairperson, appointed by the Attorney-General;

(b) a representative of the Judiciary appointed by the Chief Justice;

(c) the Solicitor-General or his representative;

(ca) the Director of Public Prosecutions or his representative;

(d) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;

(e) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;

(f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;

(g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and

(h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

Executive Summary

Evidence of Reluctant/Intimidated Witness in Criminal Proceedings: Proposal for Reform of the Law

In some areas of criminality, such as organized crime, there is an increasing risk that witnesses will be subjected to intimidation. It is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgment because witnesses are effectively discouraged from testifying freely and truthfully. The issue of the admissibility of the previous statement of a witness in criminal proceedings has been studied. It is considered there is no constitutional impediment to the previous statement of a witness, given on oath or affirmation, being used in certain circumstances and with the leave of the court as evidence of any fact mentioned in it. The Commission therefore recommends that section 173 of the Courts Act be amended by adding the following new subsections (3) to (5)-

(3) Notwithstanding subsection (2), in any criminal proceeding, a previous statement made by a witness may, with the leave of the court, be admitted in accordance with subsections (4) and (5) as evidence of any fact mentioned in it if the witness, although available for cross-examination—

- *(a) refuses to give evidence,*
- *(b) denies making the statement, or*
- *(c) gives evidence which is materially inconsistent with it.*

(4) The statement may be so admitted under subsection (3) if—

- *(a) the witness confirms, or it is proved, that he made it,*
- *(b) the court is satisfied—*
  - *(i) that direct oral evidence of the fact concerned would be admissible in the proceedings,*
  - *(ii) that it was made voluntarily, and*
  - *(iii) that it is reliable, and*
- *(c) the statement was given on oath or affirmation and was video-recorded.*

(5) The statement shall not be admitted in evidence under subsection (3) if the court is of opinion—

- *(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or*
- *(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.*

(A) Introductory Note: The Problem

1. The Commission has, under section 5(2) (b) of the Law Reform Commission Act, examined the issue of the admissibility of the previous statement of a witness in criminal proceedings.

2. It has been recognized that:
   (a) In some areas of criminality, such as organized crime, there is an increasing risk that witnesses will be subjected to intimidation; and
   (b) It is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgment because witnesses are effectively discouraged from testifying freely and truthfully.[1]

3. Various approaches have been adopted to ensure that the evidence of reluctant/threatened witnesses may be used in court, such as giving evidence by means of a video-camera,[2] participation of witnesses in a Witness Protection Programme.[3] In addition, even if a witness retracts or alters his evidence as a result of threats, legislators have provided that such statements – in certain circumstances - may still be admissible in court.[4]

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[1] Vide Council of Europe Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Right of the Defence; Recommendation Rec(2005)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice.

Paragraph 9 of Recommendation No. R (97) 13 provides that, while ensuring that the defence has adequate opportunity to challenge the evidence given by a witness, the following measures should, inter alia, be considered:
- recording by audiovisual means statements made by witnesses during pre-trial examination;
- using pre-trial statements given before a judicial authority as evidence in court;
- revealing the identity of witnesses at the latest possible stage of the proceedings and/or releasing only selected details

[2] Vide UNODC [UN Office on Drugs and Crime], *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* [2008].

[3] Our law was amended in 2003 to allow a complainant in a sexual offence case to appear before it, and depose, through such live video or live television link system: Section 161B of Courts Act [added by Act 30/03].

[4] Section 9 Canada Evidence Act 1985 (as amended in 1994); section 120 UK Criminal Justice Act 2003; and section 16 EIRE Criminal Justice Act 2006.

4. Currently under our law [section 173(2) of the Courts Act], the previous statement of a reluctant/intimidated witness unwilling to depose in court [as happened with Cindy Legallant in Sada Curpen's case] would not constitute evidence of the proof of any fact or facts embodied in it.

   It is proposed in the light of approach taken in Canada, UK and EIRE, to amend the law so that, in any criminal proceeding, a previous statement given on oath or affirmation by a witness may be used in certain circumstances and with the leave of the court, as evidence of any fact mentioned in it.

(B) A Comparison: the UK and EIRE Approaches to Admissibility of Previous Statement by Witness

5. Section 120 of the UK Criminal Justice Act 2003 provides as follows:

   120 Other previous statements of witnesses

   (1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.

   (2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

   (3) A statement made by the witness in a document—
   (a) which is used by him to refresh his memory while giving evidence,
   (b) on which he is cross-examined, and
   (c) which as a consequence is received in evidence in the proceedings,
   is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

   (4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—
   (a) any of the following three conditions is satisfied, and

(b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5) The first condition is that the statement identifies or describes a person, object or place.

(6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.

(7) The third condition is that—
(a) the witness claims to be a person against whom an offence has been committed,
(b) the offence is one to which the proceedings relate,
(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,
(d) the complaint was made as soon as could reasonably be expected after the alleged conduct,
(e) the complaint was not made as a result of a threat or a promise, and
(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.

(8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.

6. Section 16 of the EIRE Criminal Justice Act 2006 reads as follows:

16. Admissibility of certain witness statements.

(1) Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as "the statement") may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—
(a) refuses to give evidence,
(b) denies making the statement, or
(c) gives evidence which is materially inconsistent with it.

(2) The statement may be so admitted if—
(a) the witness confirms, or it is proved, that he or she made it,

(b) the court is satisfied—
- *(i) that direct oral evidence of the fact concerned would be admissible in the proceedings,*
- *(ii) that it was made voluntarily, and*
- *(iii) that it is reliable, and*

(c) either—
- *(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or*
- *(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.*

(3) In deciding whether the statement is reliable the court shall have regard to—
- *(a) whether it was given on oath or affirmation or was video recorded, or*
- *(b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability, and shall also have regard to—*
  - *(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or*
  - *(ii) where the witness denies making the statement, any evidence given in relation to the denial.*

(4) The statement shall not be admitted in evidence under this section if the court is of opinion—
- *(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or*
- *(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.*

(5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(6) This section is without prejudice to sections 3 to 6 of the Criminal Procedure Act 1865 and section 21 (proof by written statement) of the Act of 1984.

(C) The Constitutional Requirement for Admissibility of Previous Statement by a Witness as spelled out by the Supreme Court of Canada

7. In *R v B* (K.G.) [1993] 1 S.C.R. 740, the Supreme Court of Canada had this to say about the admissibility of previous out-of-court statement under section 9 of the Canada Evidence Act[5]:

> "The time has come for the rule limiting the use of prior inconsistent statements to impeaching the credibility of the witness (the "orthodox rule") to be replaced by a new rule recognizing the changed means and methods of proof in modern society. The history of the orthodox rule demonstrates that it has not enjoyed consistent or unqualified support. Considering a change to the orthodox rule is not a matter better left to Parliament; the rule itself is judge-made and lends itself to judicial reform, and it is a natural and incremental progression in the development of the law of hearsay in Canada by this Court. The guidelines which direct this Court's exercise of its jurisdiction to overrule its previous decisions adopting the orthodox rule do not suggest that it should do anything other than what it thinks best in reconsidering the orthodox rule: a reformed rule would not violate the *Charter*, the existing rule has been attenuated by developments in the law of hearsay and is somewhat, if not overly, technical, and reforming the rule would not directly expand the scope of criminal liability.
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> A reformed rule must carefully balance the accused's interests in a criminal trial with the interests of society in seeing justice done. Since the orthodox rule is an incarnation of the hearsay rule, a reformed rule must also deal with the "hearsay dangers" of admitting prior inconsistent statements for the truth of their contents -- namely, the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour, and therefore the

[5] Section 9 of the Canada Evidence Act 1985 [C-5], as amended in 1994, reads as follows:

(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

credibility, of the declarant when the statement was made, and the lack of contemporaneous cross-examination by the opponent.

Following this Court's decisions in *Khan* and *Smith*, evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity. These criteria, however, must be adapted to the present context. As a threshold matter, the prior inconsistent statements will only be admissible if they would have been admissible as the witness's sole testimony, lest what would be excluded as the witness's primary evidence be admitted under the reformed rule simply because the witness has recanted.

The focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial. Additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must thus be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence. In this context, the absence of an oath and the inability of the trier of fact to assess the declarant's demeanour are the only "hearsay dangers" which present real concerns. The criterion of reliability will therefore be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to these two dangers.

There will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement: (1) if the statement is made under oath, solemn affirmation or solemn declaration following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement; (2) if the statement is videotaped in its entirety; and (3) if the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness at trial respecting the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires. With the oath, solemn affirmation or solemn declaration and the warning, the first "hearsay danger" is satisfied. The witness is clearly made aware of the gravity of the situation and his duty to tell the truth. The presence of an oath, solemn affirmation or solemn declaration also increases the evidentiary value of the statement when it is admitted at trial. The trier of fact will have the opportunity to choose between two sworn statements and will not be asked to accept unsworn testimony over sworn testimony, or to render a verdict based on unsworn testimony. While it is true that the oath in itself has no power to ensure truthfulness in some witnesses, the fact that both statements were made under oath removes resort to the absence of an oath as an indicium of the alleged unreliability of the prior inconsistent statement. With a videotaped statement, the second "hearsay danger" is also satisfied. The indicia of credibility, and therefore

reliability, are available to the trier of fact. Not only does the trier have access to the full range of non-verbal indicia of credibility, but there is also a reproduction of the statement which is fully accurate, eliminating the danger of inaccurate recounting. In a very real sense, the evidence ceases to be hearsay, since the declarant is brought before the trier of fact. Finally, while a cross-examination of the witness at trial does not satisfy entirely the absence of contemporaneous cross-examination, given the other guarantees of trustworthiness, the third "hearsay danger" is not a sufficient reason to exclude the statement from the jury as substantive evidence. The practical difficulties in requiring contemporaneous cross-examination tip the balance in favour of allowing cross-examination at trial to serve as a substitute."

(D) Concluding Observation: Proposal for Reform of the Law

8. In line with constitutional safeguards laid down by the Supreme Court of Canada, it is proposed that section 173 of the Courts Act[6] be amended by adding the following new subsections (3) to (5)-

(3) Notwithstanding subsection (2), in any criminal proceeding, a previous statement made by a witness may, with the leave of the court, be admitted in accordance with subsections (4) and (5) as evidence of any fact mentioned in it if the witness, although available for cross-examination—
(a) refuses to give evidence,
(b) denies making the statement, or

[6] Section 173 of the Courts Act reads as follows:

173 Statements of witnesses

(1) (a) Any witness may be cross-examined at any trial as to previous statements made by him in writing or reduced into writing relative to the subject matter of the trial, without the writing being shown to him, or read, but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him.
(b) The Court may at any time during the trial require the production of the writing to be used for the purposes of the trial in any way that to the court seems proper.

(2) (a) It shall be competent to examine any witness who may be called in any judicial proceeding as to whether he has on any specified occasion made a statement on any matter pertaining to the issue which is different from the evidence given by him in that proceeding, and it shall be competent in the course of such proceeding to adduce evidence to prove that the witness, whether he has shown himself hostile or not, has made a different statement on the occasion specified.
(b) Nothing in paragraph (a) shall make any such statement of itself evidence of the proof of any fact or facts embodied in it.

(c) gives evidence which is materially inconsistent with it.

(4) The statement may be so admitted under subsection (3) if—

(a) the witness confirms, or it is proved, that he made it,

(b) the court is satisfied—

(i) that direct oral evidence of the fact concerned would be admissible in the proceedings,

(ii) that it was made voluntarily, and

(iii) that it is reliable, and

(c) the statement was given on oath or affirmation and was video-recorded.

(5) The statement shall not be admitted in evidence under subsection (3) if the court is of opinion—

(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or

(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.