IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CRIMINAL APPEAL NO. 17 OF 2004

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

v.

AVONDALE TRUMBACH **Respondent**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Kirk Anderson, Director of Public Prosecutions, and Miss Cheryl-Lyn Branker-Taitt for the appellant.
Miss Merlene Moody for the respondent.

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23 February & 24 June 2005.

MORRISON JA

1. This is an application for leave to appeal by the Director of Public Prosecutions pursuant to section 49(1)(a) and section 49(2)(b) of the Court of Appeal Act, against a ruling by Gonzalez J made on 7 July 2004 at the respondent's trial on indictment for murder, as a

result of which the jury were directed to enter a verdict of not guilty and the respondent was accordingly acquitted.

2. The circumstances may be shortly stated. The respondent was charged with the murder by shooting of one Shawn Clother, arising out of an incident which took place on 5 September 2003 in Belize City. The sole witness to the shooting relied upon by the Crown was a Mr. Robert Flowers, from whom a statement was taken by Inspector Oscar Puga, who gave evidence that on 7 September 2003 he interviewed Mr. Flowers, whom he had known by that name for the past ten years, it was read over to him, its accuracy acknowledged and it was duly signed and witnessed by Mr. Flowers in the usual way. On 15 September 2003, the respondent was arrested by Inspector Puga and charged with the murder of Shawn Clother.

3. The respondent's trial for murder duly commenced on 2 July 2004, before Gonzalez J and a jury. But, by that date, Mr. Robert Flowers had himself lamentably succumbed to gunshot injuries on 9 May 2004. The Crown was accordingly obliged to attempt to establish its case against the respondent by seeking to have Mr. Flowers' statement given to Inspector Puga, as well as a second statement subsequently given to the police, admitted in evidence and this it sought to do pursuant to section 123 of the Indictable Procedure Act ("the Act"), which provides as follows:

> 123.-(1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in subsection (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.
>
> (2) The conditions hereinbefore referred to are that the deposition must be the deposition either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel or is absent from Belize.

4. Section 2 of the Act provides that 'deposition' "includes a written statement" and that a 'written statement' "means a statement made by a person about a crime which is reduced into writing by the person making the same or which is recorded by a police officer before whom it is made and signed by the maker". There was no question that the statements attributed to Mr. Flowers fulfilled these criteria.

5. In order for Mr. Flowers' deposition to be relied upon at the respondent's trial therefore, the Crown was required to prove "by the oath of a credible witness…" that Mr. Flowers was dead. This it attempted to do by calling Mr. Flowers' brother, Mr. Christino Madrill, whose evidence, so far as is relevant, was as follows:

"Q: Now, am I correct, Mr. Madrill, that on the 11th of May, 2004, at approximately 7:40 a.m. in the morning that you visited the Karl Heusner Memorial Hospital morgue. Am I correct, sir?

A: Yes.

Q: And there, Mr. Madrill, am I also correct that you saw the lifeless body of your brother, Robert Flowers?

A: (Witness nods head).

Q: And that you identify the body of your brother, Robert Flowers, to the police and also to one Dr. Sanchez?

A: Yes.

Q: Am I correct, sir, that your brother, Robert Flowers, whom you identified to the police and to the doctor was buried on the 13th of May, 2004?

A: Yes.

Q: By the way, may I ask, if your brother had a middle name?

A: Derrick.

Q: Could you say whether or not he was married?

A: He was married.

Q: Married to whom, please?

A: To Yvette August.

Q: When you say married, do you mean as in lawfully married?

A: Yes.

Q: So would her married name then be Yvette Flowers?

A. (Witness nods head).

Q: Would you be able to recognize his death certificate if you saw it, sir?

A: Yes.

MR. MASON: My Lord, am advised that there's no objection that the document be shown to the witness?

THE COURT: Yes.

MR. MASON: If it might be shown at this point.

Document shown to witness.

Q: Could you say whether or not that is the death certificate of your brother, Robert Flowers?

A: Dis dah noh di death certificate, dis dah di registration.

THE COURT: What's that?

WITNESS: Dis noh look like di death certificate.

THE COURT: Can I have a look at it?

Document shown to the court.

WITNESS: Noh di one I got frahn di doctor.

THE COURT: Yes. This person here is Robert Anthony Flowers, and his brother is Robert Derrick Flowers.

Q: Your brother, Mr. Madrill, you said married to Yvette Flowers. Am I correct?

A: Yvette August.

Q: Yvette August who is now Yvette Flowers.

A: Yes.

Q: Can you say when it was that your brother died?

A. Age?

Q: What date?

A: Mother's day. Weh day Mother's day, 9th or something like dat.

Q: Of?

A: May.

THE COURT: 9th of May, I think.

Q: 9th of May which year?

A: 2004."

6. In this extract from Mr. Madrill's evidence can be seen the seeds of the confusion which ensued in the case. In the first place, according to Mr. Madrill, his brother's middle name was Derrick, and not Anthony, as the death certificate apparently showed. And

then there was Mr. Madrill's insistence that "Dis noh look like the death certificate …" "Noh di one I got frahn di doctor."

7. The next witness called by the Crown on the point was Ms. Lovinia Daniels, the Assistant Registrar of Births, Deaths and Marriages, who produced a certified copy of the death certificate of Mr. Robert Anthony Flowers, whose death was registered on 14 May 2004 on information supplied by his wife, Mrs. Yvette Flowers. The certificate, which was duly tendered in evidence, without objection, and marked as an exhibit in the case, recorded the death at the Karl Heusner Memorial Hospital in Belize City of Mr. Robert Anthony Flowers on 9 May 2004.

8. And finally, on this point, the Crown called Police Constable #35, Darius Ramos who testified that on 11 May 2004 he attended at the Karl Heusner Memorial Hospital Morgue for the purpose of observing a post mortem examination in relation to one Robert Anthony Flowers. The body of the late Mr. Flowers, said P.C. Ramos, "was identified to myself and Dr. Hugh Sanchez by his brother one Christino Madrill"; who had been known to P.C. Ramos for "two years or more" as "Tino". Cross examined on behalf of the appellant, P.C. Ramos, after some vacillation, stated that the name that Mr. Madrill had given him at the morgue as that of his deceased brother was "Robert Flowers" and that he had in fact

himself gotten the name “Robert Anthony Flowers” from the post mortem form “that was prepared”.

9. On the basis of this evidence, counsel for the Crown then applied to the Court for the statement of Mr. Flowers to be read to jury, pursuant to section 123 of the Act. Counsel who appeared for the respondent at the trial objected on the basis that, Mr. Madrill having stated his brother’s name to be “Robert Derrick Flowers”, there was “absolutely no evidence before this court that in fact Robert Flowers, the person who went to the police station and made the statement is the person who is dead”. In addition, it was submitted, even if the statutory pre-conditions had been satisfied, the admission of the deposition was a matter of discretion and the court ought not to admit it unless it was satisfied that “it would not be prejudicial to the accused person”. The submission in fact consumed some twenty four pages of the printed transcript and we hope that we do it no injustice by summarizing its two basic elements in the way that we have done.

10. Counsel for the Crown replied, contending that the pre-conditions of section 123 had in fact been satisfied and that the admission of the deposition would cause no undue prejudice to the respondent. Again we summarize and, again, we hope not unfairly, as counsel for the Crown, hardly to be outdone, himself devoted another

twenty pages of transcript to the point, promptly followed by another eleven pages of a reply by counsel for the respondent.

11. Gonzalez J, having considered the matter overnight, gave his ruling on 6 July 2004 and refused to allow the Crown to tender the statements of Robert Flowers "because there is no proof, in my view, that the same Robert Flowers is the same person, the very person who gave this statement to Insp. Puga". Having upheld the objection on the first ground, the learned judge accordingly declined to make a ruling on the second ground, that is, the question of prejudice. Counsel for the Crown, obviously – and understandably – severely discomfited by this ruling, sought and was granted a short adjournment to enable him to consult with the Director of Public Prosecutions "as to how to proceed from here". When court resumed, he then sought to call yet another witness, Corporal Mark August, to, as the learned judge himself put it, "try to establish that the witness, Robert Flowers, is now dead or deceased". This evidence was also objected to and, again after lengthy submissions on both sides, including some citation of authority, the learned trial judge ruled as follows:

> "Yes, Mr. Mason and Mr. Arnold, this morning am going to make a ruling on the submissions made by Mr. Mason and Mr. Arnold, and though I have written a long ruling, am only

> going to read the conclusion so that I can take no time later to have the whole ruling reduced into writing which I will pass onto you. The ruling I am going to give this morning that it is my view that having heard the submission of both Mr. Mason and Mr. Arnold, that neither the witness, Cpl. Mark August or any other witness which the prosecution is seeking to call as a witness to prove the maker of the statement can't be allowed to testify at this time, not after I have heard earlier submission in this regard, had made a ruling which in my view had dispose of the matter. That then is the extent of my ruling so that neither this witness, Mark August, or any other witness can be called to prove the maker of the statement which the prosecution is seeing to tender. Ruling accordingly. The jury can be called back."

12. It is in these circumstances that the Crown, not without some further hesitation, indicated to the Court that, "in the light of your ruling, the crown has no choice but to close its case at this time …", following upon which counsel for the respondent submitted that his client had no case to answer. That submission, as was by that time inevitable, succeeded and the jury in due course returned the formal verdict of not guilty that was required of them by the judge.

13. It is from this ruling and the resultant verdict that the Director filed the following grounds of appeal:

a. The learned trial judge erred, in so far as he refused to allow the Prosecution to call Mark August or any further witnesses to testify at the trial, with a view to establishing that the deponent Robert Flowers and the deceased are one and the same as is required by s.123(2) of the Indictable Procedure Act.

Further or alternatively, that,

b. The learned trial judge erred, in so far as he refused to admit into evidence the sworn deposition of Robert Flowers, a witness, who had died before trial, on the basis that the Prosecution had not sufficiently established that the deceased and the deponent are one and the same as is required by s.123(2) of the Indictable Procedure Act.

14. Before this court, the learned Director accepted in his printed Skeleton Argument that “some confusion existed between prosecution witnesses as to the middle name of the person deceased”, but submitted nevertheless that it had been established beyond reasonable doubt “that the deponent – Robert Flowers was,

at the date of commencement of trial, then deceased". The printed argument on the point merits quotation in full:

> "In this regard, the prosecution had put into evidence, the death certificate of Robert Anthony Flowers and had brought to Court the brother of Mr. Flowers – Christino Madrill, who testified that he had visited the Karl Heusner Hospital morgue and there seen the lifeless body of his brother – whose name he gave to the Court as Robert Derrick Flowers, but whom he stated had died on the 9th May and that the doctor at the morgue was one Doctor Sanchez. The death certificate of Robert Anthony Flowers, bears the date of death as being May 9th and the name of the certifying medical practitioner, as having been Dr. Hugh Sanchez. There was also evidence coming from Christino Madrill, that Robert Flowers' wife's married name, is Yvette Flowers and this is also supported by the death certificate for Robert Flowers. Furthermore, the address of Yvette Flowers as duly noted on that death certificate is No. 18 "T" Street, Belize City, which incidentally, is the same address as provided by Robert Flowers in his statement of 7th September, 2003. It is also recorded in the death certificate that Mr. Flowers' occupation was, "vendor," which again is borne out in Robert Anthony Flowers' statement of 7th

September, 2003. Bearing all of the aforementioned in mind, there could have existed no reasonable doubt in anyone's mind, that the deponent had "passed away" subsequent to the recording of statement from him and prior to the commencement of the trial of Avondale Trumbach for the Murder of Shawn Clother. It should be noted too in this regard, that that was not an issue in respect of which the defence brought before the Court any evidence whatsoever, to suggest that the deponent was then still alive. Whilst undoubtedly the defence need not have done so, nonetheless, in the absence of any such evidence, there can hardly be any doubt, much less reasonable doubt, that the prosecution had met the requirements of Section 123(2) of the Indictable Procedure Act (Cap. 96) for the admission into evidence of the statements of Robert Anthony Flowers, unless the trial Judge was not properly satisfied that such statements were more prejudicial than probative – which incidentally, was not the basis for the trial Judge's ruling against the admissibility of the said statements into evidence, but which nonetheless, is an important consideration and is therefore dealt with further below.

Prior to addressing that issue however, the prosecution wishes to address one other issue and it is as regards the

refusal of the trial Judge to allow the prosecution, prior to the close of its case, to have called one other witness, namely, Mark August, whose statement to the police has been marked as exhibit, "C.M.3" and appended to the affidavit of Carlo Mason, as was sworn to on the 1st day of October, 2004. The transcript records, from pages 139 – 162, the arguments advanced in support of and against the Crown's request of the Court to enable relevant and perhaps important evidence to have been given from Mark August, to establish beyond all doubt that the deponent was by then, deceased. The Court ruled against the Crown in this regard (See page 162), even though as at the stage when that application was made, the Crown had not yet even closed its case. Essentially therefore, the Court forced the prosecution to close it case without having called all of the evidence that the prosecution wished to call in support of its case." (See page 165 of transcript).

15. On the question of prejudice, the Director relied on the judgment of the Privy Council in **Barnes, Desquottes & Johnson v R., Scott & Walters v R. (1989) 37 WIR 330** and submitted "that the mere fact that purported eyewitness evidence is given in a statement and used as the only primary evidence upon which the case for the prosecution at trial rests, is not to be considered, in and of itself, as

being so prejudicial that the reception of such evidence, albeit in a statement form and therefore not susceptible to testing by means of cross examination, should not be allowed by the Court".

16. Miss Merlene Moody, who appeared for the respondent in this court, submitted that the learned trial judge was correct in his ruling in that, in the circumstances, the prosecution had failed to prove that the witness Robert Flowers was dead. In any event, it was submitted, the trial judge had always a discretion, with which an appellate court should not lightly interfere, to decline to admit a deposition in these circumstances and that the admission of the deposition in this case would have resulted in prejudice to the respondent far beyond any probative value. Finally, on this point, Miss Moody submitted that the learned trial judge acted correctly and within his discretionary powers in refusing to allow the Crown to call additional evidence in the person of Corporal Mark August after he had ruled that the deposition could not be read to the jury on the basis of the evidence then before the court.

17. Miss Moody, additionally, referred this court to section 105 of the Evidence Act which provides as follows:

> "(1) Notwithstanding anything to the contrary contained in this Act (or any other law), but subject to subsections (4) and (5), a statement made by a person in a document shall be admissible in criminal proceedings (including a preliminary inquiry) as evidence of any fact of

which direct or oral evidence by him would be admissible if -

(a) the requirements of one of the paragraphs of subsection (2) are satisfied; and

(b) the requirements of subsection (3) are satisfied;

(2) The requirements mentioned in subsection (1)(a) are -

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b)

(c)

(3) The requirements mentioned in subsection (1)(b) are that the statement to be tendered in evidence contains a declaration by the maker and signed before a Magistrate or a Justice of the Peace to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true."

18. Miss Moody referred further to sections 2 and 10 of the Police Act, which provide respectively that "Superior officer" means any Police Officer above the rank of Inspector, and that "Every Superior officer of the Department shall be ex-officio a Justice of Peace for Belize…", to make the point that Inspector Puga was in fact a Detective Sergeant of police at the time when he recorded the statement of Mr. Flowers and did not therefore fall within section 105(3) of the Evidence Act. In addition to the reasons given by

Gonzalez J, therefore, Miss Moody submitted that the deposition of Mr. Flowers would in any event have been inadmissible because the pre-conditions of section 105 of the Evidence Act had not been satisfied.

19. In response to this submission, which had not been made before Gonzalez J, the Director pointed out that section 105 of the Evidence Act had entered the law by way of two amendments (Acts 26 of 1992 and 18 of 1998) and that it made general provisions governing the admission of statements in evidence in criminal cases, while section 123 of the Act made special provisions with regard to the admission into evidence in criminal cases before the Supreme Court at trials on indictment of depositions. In the result, he submitted, these were general provisions and special provisions appearing to run contrary to each other, in which case the maxim *generalia specialibus non derogant* would apply. He also pointed out that both sections 105 of the Evidence Act and 103 of the Act had been amended (in respects not presently material) by Act 18 of 1998 (The Law Reform (Miscellaneous Provisions) Act, 1998), thereby inviting an inference that had there been an intention on the part of the draftsperson to do away with section 123 of the Act, or to circumscribe it in terms of section 105 of the Evidence Act, this would have been done in express terms.

20. In so far as the ruling of Gonzalez J on the material before him is concerned, we are satisfied that he fell into error. To take the issue of whether the death of the witness Robert Flowers had been satisfactorily established for the purposes of section 123 of the Act first, we do not think that at the end of the day it can be seriously contended that it was not proved that the Robert Flowers who gave a statement to Inspector Puga was the same person whose death was recorded in the certificate tendered in evidence, for the several reasons very helpfully identified by the learned Director before this court and set out in full at paragraph 14 above. Despite Mr. Madrill's insistence that the middle name of his deceased brother was Derrick, while the relevant records showed it to be Anthony, it is clear that the brother whose body he identified at the post mortem examination was in fact that of the person described in the death certificate as Robert Anthony Flowers. The death of that person, the witness upon whom the Crown wished to rely, had in our view been proved "by the oath of a credible witness".

21. With regard to Miss Moody's argument on the question of prejudice and the judge's discretion, as Gonzalez J had expressly declined to rule on this aspect of the matter in the light of his ruling on the first point, it cannot, in our view, avail the respondent at this stage. In other words, the question of prejudice will only arise where it is established that the primary pre-conditions of admissibility of the

deposition have been met and that will always be in the first place a matter for the trial judge. If, or when, that time comes the trial judge will no doubt be able to derive considerable guidance from the judgment of the Privy Council in **Barnes et al v R.** (see paragraph 15 above).

22. With regard to the evidence of Corporal Mark August, we think it is pertinent to bear in mind that, at the point when it was sought to be adduced, the Crown had not yet closed its case. So that the only real limitations on the Crown at this stage were the requirement to give notice to the defence of the intention to call additional evidence (if this evidence had not been relied on at the committal stage), and the possible consequence, in the absence of such (or of adequate) notice, that the interests of justice might oblige the court to allow the defence an adjournment if applied for to consider its response to this evidence (see Blackstone's Criminal Practice, 2004, paragraph D14.24). As it appears from the Record that a notice was served in relation to Corporal August, it is difficult to identify the basis upon which the Crown was prevented from placing his evidence before the jury, for whatever it might have been worth, to clarify the true identity of the late Mr. Flowers in the light of the learned judge's ruling on the point. The decision in **Watson v R [1980] 1 WLR 991** confirms that a trial judge may in exceptional circumstances be invited to reconsider his decision to admit

disputed evidence with regard to the admissibility of a confession and, as the editors of Blackstone's Criminal Practice 2004 observe, in my view correctly, the "general principle stated in Watson was no doubt intended to apply to any disputed evidence, whatever its nature, and not just to possibly inadmissible confessions" (paragraph 14.70). It is, however, worth repeating the caution given by Cumming Bruce LJ in **Watson** that "the occasions on which a judge should allow counsel to invite him to reconsider a ruling already made are likely to be extremely rare" (995d). In my view, the highly unusual circumstances of the instant case vividly describe such an occasion. (It may be of interest to note that **Watson** was applied by the Court of Appeal of Trinidad & Tobago in **Benny v The State (1981) 34 WIR 236**).

23. Which leaves the objection raised for the first time in this court, based on section 105 of the Evidence Act. It is not irrelevant, we think, to point out that that section, which was introduced as the Director pointed out into that Act by way of amendment by Act 26 of 1992, was designed to provide a statutory exception to the rule against hearsay in criminal cases along the lines of the UK Criminal Evidence Act 1968. It is therefore in our view a provision which facilitates the admission in evidence of statements that would at common law be excluded as hearsay and provides for the pre-conditions to their acceptance by the court. Section 123 of the Act,

has a much longer provenance: it was part of the original Act passed in 1953 and carries even now essentially the same language of the UK Criminal Justice Act 1925 (see Archbold's Criminal Pleading, Evidence & Practice, 36th edition, paragraph 1239, and see now the UK Criminal Procedure and Investigations Act 1996). The editors of Blackstone's Criminal Practice 2004 in fact treat the modern UK equivalents of both sections under the general rubric "Exceptions to the rule against hearsay" as providing alternative bases of admissibility of what are essentially hearsay statements (subject to overlapping but in some respects different pre-conditions - see paragraphs F16.3 to 19).

24. To treat section 123 of the Act as subject to section 105 of the Evidence Act, as Miss Moody in effect contends, would in our view require a gloss on the clear language of section 123 that is not warranted either by the language of the Evidence Act or the legislative history of the two provisions. While we are acutely aware that this aspect of the matter was not as fully argued before us, as it might have been, we are nevertheless satisfied that had the legislature intended by the introduction in 1992 of section 105 of the Evidence Act to circumscribe the scope of the operation of section 123, which had previously been applied in Belize for many years, in the manner contended for by Miss Moody, it would have done so in express terms. Given that section 105 of the Evidence

Act, as amended, sought to introduce a new departure from the venerable rule against hearsay of general application in criminal cases, we do not regard the opening words of the section "Notwithstanding anything to the contrary contained in this Act (or any other law) …" as having been intended to convey anything more than the scope of the new exception. So that other, more limited, exceptions such as that provided by section 123 of the Act, remain unaffected by section 105. In our view, therefore, the objection of Miss Moody to the admissibility of the deposition of Mr. Flowers on the basis of section 105 of the Evidence Act must fail.

25. In the result, the application for leave to appeal is granted, the hearing of the application is treated as the hearing of the appeal, and it is ordered that the respondent be re-tried on the charge of murder of Shawn Clother, as early as it is convenient.

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MOTTLEY P

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SOSA JA

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MORRISON JA