IN THE COURT OF APPEAL OF BELIZE, A.D. 2007

CRIMINAL APPEAL NO. 15 OF 2006

BETWEEN:

TREVOR GILL	**Appellant**
AND	
THE QUEEN	**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**

David Morales for the appellant.
Miss Cheryl-Lynn Branker-Taitt, Deputy Director of Public Prosecutions, for the respondent.

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1, 7 & 8 March, 22 June 2007.

MORRISON JA

1. At the conclusion of the hearing of this appeal on 8 March 2007, the court announced that this appeal would be dismissed, for reasons to be given in due course. These are the reasons for that decision.

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2. The appellant was tried before Gonzalez J and a jury on an indictment containing a single count charging him with the murder of Anthony Flowers on 25 February 2005. At the appellant's trial, which was completed on 23 June 2006, the jury found him not guilty of murder but guilty of manslaughter and he was sentenced by the learned trial judge to thirteen years' imprisonment.

3. The cause of the deceased's death was a stab wound to his left chest inflicted by either a knife or some other such weapon which caused damage to his left lung, resulting in internal bleeding and his death shortly thereafter. The prosecution relied at trial on the evidence of three witnesses as to fact, Messrs. Kevin Thompson and Mark Rowley and Miss Tara Sebastian. None of these witnesses testified to actually seeing the appellant inflict an injury on the deceased.

4. Mr. Thompson's evidence was that on 25 February 2005 at about 10:00 p.m. he drove off in his motor car from the house of a friend of his named Rowley on Castle Street in Belize City, intent on going to his own home. Upon leaving, he reversed his motor car from Castle Street into Victoria Street and drove up into Lovely Lane, where he saw the appellant and Mr. Flowers on Lovely Lane about ten feet away standing by the gate of the lodge hall, which was also used for the purposes of a pre-school. They were facing each other, with the appellant also facing in the direction of the witness, holding a beer bottle in his hand. Mr. Flowers and the appellant were standing about two feet apart, talking to each other. There was nothing in Mr. Flowers' hands, as far as the witness could see. As Mr. Thompson's car started to pass the two men by the lodge hall gate, Mr. Flowers moved off and passed him, going in the opposite direction, that is, towards Victoria Street in the direction of Castle Street, while the appellant remained standing by the lodge hall gate. The witness did not observe any kind of hand movement from the appellant while he was

standing facing Mr. Flowers at the lodge hall gate. At the time when Mr. Thompson first saw the two men standing on Lovely Lane, the lighting conditions were good ("the regular lamp post light and thing were on") and his view of the men was unobstructed. Both the appellant and Mr. Flowers were known to Mr. Thompson before that night, the appellant, who was known as "Flouwa", "from ih small" and Mr. Flowers, known as "Pie Bwai", for about five years. Some five to six minutes later Mr. Thompson was to pick up Mr. Flowers, suffering from a severe wound to his chest, at a point close to No. 3 Castle Street and, with the assistance of his friend Mr. Rowley, put him in the back seat of his car and take him to the Karl Heusner Memorial Hospital, where he was pronounced dead later that night.

5. Mr. Mark Rowley gave evidence of himself and several others, including Mr. Thompson, having left a football game earlier in the evening of 25 February 2005 and congregating "on the corner of Victoria Street and Castle Street by No. 3 Castle Street by Miss Annie's yard". They were there discussing the football game from some time after 7:00 p.m. Mr. Rowley said that a little after 10:00 p.m. Mr. Thompson left the group in his vehicle, reversed up Victoria Street and drove down Lovely Lane. According to Mr. Rowley, Mr. Flowers (or Pie Bwai, known also as Anthony Palma) left from the same place in front of No. 3 Castle Street at the same time as Mr. Thompson, but about five minutes later came running back from Lovely Lane in his (Mr. Rowley's) direction, crossed Victoria Street into Castle Street, "running with his hand on his chest, his right hand on the left side of his chest". Mr. Flowers ran past him straight towards 8 Castle Street, which is where he lived, and Mr. Rowley ran following him until they got to 8 Castle Street, at which point Miss Tara Sebastian (Mr. Rowley's cousin) came out of the yard of that premises and asked Mr. Flowers "who stomped yuh in the drain?"

6. At this point, Mr. Rowley's narrative was interrupted by an objection from Mr. Morales (who appeared on behalf of the appellant at the trial as he did in this court) on the ground that whatever response Rowley might make to Miss Sebastian's question would be hearsay and inadmissible. Miss Matura, who appeared for the prosecution at the trial, then sought and received the learned trial judge's permission to "address a matter of law in the absence of the jury", whereupon the jury were duly excused for this purpose. Somewhat unusually (since, as the learned judge observed belatedly, Mr. Morales would ordinarily have been expected to go first in support of the objection and Miss Matura to respond) detailed submissions followed first from Miss Matura, who sought to justify the introduction in evidence of what Mr. Rowley heard Mr. Flowers say in response to Miss Sebastian's question under the principle of res gestae, as an exception to the rule against hearsay. Mr. Morales for his part amplified and developed his objection to the evidence being allowed, followed by a rebuttal from Miss Matura and various exchanges between the court and both counsel. At the end of the submissions, Gonzalez J ruled the evidence admissible under the principle of the res gestae exception to the hearsay rule, whereupon it was indicated to the court by Mr. Morales that to the extent that the depositions revealed that Miss Sebastian would in due course when called give similar evidence, he would not then pursue any further objection to her giving that evidence in the light of the ruling in respect of Mr. Rowley's evidence. Gonzalez J. regarded that position as having been quite properly taken by Mr. Morales, a view from which this court does not dissent in the circumstances.

7. Resuming his evidence before the jury, Mr. Rowley answered the question that had sparked Mr. Morales' unsuccessful objection in this way:

"A: Tara was coming out and I - -

THE COURT: She was coming out of 8 Castle Street?

WITNESS: Yes.

THE COURT: And she said something to Pie Bwai?

WITNESS: Yes. I could mention what Pie Bwai seh?

THE COURT: No. You have to be careful here. He can say it but you have to be careful.

Q: You need to say only what Pie Bwai said in respond (sic) to what Tara Sebastian said.

A: Pie Bwai mentioned –

THE COURT: No. Something was told or asked of Pie Bwai and he gave an answer, what is the answer he gave?

Q: What did Pie Bwai say?

A: Dah ih get juck down. He mentioned who juck ahn down too.

Q: You could say the exact words as close as you know it.

A: Pie Bwai mentioned dah Flouwa juck him down.

THE COURT: The first thing is Pie Bwai said that he got juck down?

WITNESS: Yes, sir.

THE COURT: And the next thing you said is what?

WITNESS: He got juck down from Flouwa.

THE COURT: What were the exact words he said as you can recall?

WITNESS: Flouwa juck mi down."

Mr. Rowley's evidence was that the distance from where he had seen Mr. Flowers running on Lovely Lane to Castle Street was approximately fifty feet (estimated by the court as sixty feet) and that Mr. Flowers had passed him running fast at a distance of about seven feet, holding the left hand side of his chest "and blowing like he was on his last … Like he trying to ketch his breathe (sic)". Mr. Flowers' shirt was red with what he took to be blood and Mr. Rowley turned and followed him to a point right beside 8 Castle Street where Mr. Flowers sat down on a step.

8. Thereafter, Mr. Rowley testified, he ran back in search of a vehicle on Lovely Lane, found and summoned Mr. Thompson, who "reversed back into Victoria Street and headed into Castle Street, at 8 Castle Street, then me and one [of] my cousin (sic) put Pie Bwai to the back of the vehicle", which then transported him to the Karl Heusner Memorial Hospital. Mr. Rowley stated that the appellant was the person known to him (and "the whole neighbourhood") as Flouwa. It was suggested by Mr. Morales to Mr. Rowley that he did not see Mr. Flowers running from Lovely Lane into Castle Street, that he was not present and so did not hear when Miss Sebastian asked Mr. Flowers the question to which he responded, and that he did not run behind Mr. Flowers, as he had testified. Mr. Rowley disagreed emphatically with all of these suggestions.

9. Miss Sebastian's evidence was that she resided at 8 Castle Street and that on 25 February 2005 sometime after 10:00 p.m. as she was leaving her home and going through her gate onto Castle Street she "buck up to" Mr. Flowers. This is how she described what happened next:

"Q: And when you buck up into Pie Bwai, can you tell the court what if anything happened?

A: Well, he was staggering headed for the gate which I was coming out of.

Q: And what if anything happened next?

A: Well, he was staggering heading for the gate which I was coming out of, so I had asked him, I said, "Pie, who stamp you in the mud, in the drain" because around our area, the drain is always clogged up with mud instead of water, and he then groaned. So, I was still standing at the gate so he couldn't come in, so he went and ease himself on the step of #6 Castle Street which is also our family house. He then sat down in a crunched position and mentioned, "Dah Flouwa juck mi down."

[Witness indicates.]

Q: When he said this, how did he say it?

A: He say it in a manner of, "Dah Flouwa juck mi down."

[Witness demonstrates.]

THE COURT: Will I be correct in writing down he said it in a soft voice?

WITNESS: No, he said it loud enough for me to hear.

THE COURT: Yeah, but the way you said it wouldn't that consider to be soft?

WITNESS: Well, he was in pain.

THE COURT: Isn't that soft? He didn't yell?

WITNESS: No, ih didn't yell.

THE COURT: So to you, he spoke in a normal voice?

WITNESS: Yes."

According to Miss Sebastian, there were dark stains "coming down" on the left side of the front of Mr. Flowers' shirt, which she took for mud and when she asked him who had "stamped" him in the drain, his answer "took a while" in coming. At this point Mr. Rowley, who was right there, spoke to him, went away and returned with Mr. Thompson and his car, in which Mr. Flowers was placed by Mr. Rowley, Mr. Thompson and another and driven off. After they had left, Miss Sebastian observed blood on the step where Mr. Flowers had been sitting and directed someone to wash it off. The appellant was known to her as Flouwa, while Mr. Flowers was known to her as Pie Bwai. She had known both of them from she was a child, having attended primary school in Belize City with the appellant and having grown up with Mr. Flowers, who had in fact been more of an uncle to her.

10. In cross examination, it was put to Miss Sebastian by Mr. Morales that in her statement to the police after the incident she had said that Mr.

Flowers' answer to her question who had "stamped" him in the drain was "da Flower juck mi down" and not "da Flouwa juck mi down", but she maintained that the word "Flower" in the statement was a mistake on the part of the statement taker to which she had in fact drawn his attention, but had been assured that it would not be a problem. She also agreed with the suggestion that in her statement to the police she had said that it is she who had told Mr. Rowley that Mr. Flowers told her that the appellant had stabbed him and that it was after she told him this that he went to get help. She agreed further that the police statement was given at a time when the events were fresh in her mind and that whatever she had said in that statement was the truth.

11. The only items of evidence relied on by the prosecution against the appellant on the charge of murdering Mr. Flowers (apart from the evidence of police personnel, forensic evidence and the like) were Mr. Thompson's evidence, which placed the appellant on or close to the scene in the company of Mr. Flowers and the statements attributed to Mr. Flowers ("da Flouwa juck mi down") as to the identity of his assailant by Mr. Rowley and Miss Sebastian. The appellant, after an unsuccessful submission of no case to answer had been made on his behalf, made an unsworn statement by which he raised an alibi to the effect that he was at the material time in the company of a friend, one Ordel Fitzgibbon, on North Front Street by the dockyard from about 7:30 p.m. onwards, having "wahn lee drinks, couple beers, couple of us". It was while so engaged, the appellant stated, that he received a call from his sister to say that he was being sought after by the police and that she would come to collect him and take him to the station, which she did, whereupon the police "dehn just lock me down and that is it right there". The defence called no witnesses and the prosecution was permitted to call a witness in rebuttal, the mother of Mr. Fitzgibbon, whose evidence was that her son had since died, but that on the evening in question, 25 February 2005, he had taken

her and her daughter to Ladyville, where they were all living at the time and had remained there with them for the night.

12. The appellant appealed against his conviction, filing in all five grounds of appeal. However, when the appeal came on for hearing, Mr. Morales indicated that he would not pursue four of the grounds filed and the appeal thereafter proceeded on the basis of the single remaining ground, which was as follows:

> "The learned Judge erred in allowing the evidence of "Da Flouwa juck me down" under the res gestae rule. The learned judge in the circumstances should have held a voir dire before rejecting Counsel's objections".

13. In support of this ground, Mr. Morales referred the court to the decisions of the Privy Council in **Ratten v R [1971] 3 All ER 801**, the House of Lords in **R v Andrews [1987] AC 281**, the Court of Appeal of Guyana in **Martin v The State (1987) 43 WIR 201** and **Jainarine Prashad v The State (1998) 58 WIR 236**, and Archbold 2005, paragraphs 11-30 to 11-37, under the rubric "The res gestae principle". On the basis of the authorities he submitted as follows:

> (a) The practical considerations outlined by R v Andrews approving Ratten v R. (1972) A.C. 378 that should be considered by a judge in determining the admissibility of hearsay evidence having been properly considered should not have lent itself to the learned judge allowing the hearsay evidence to be admitted as part of the res gestae doctrine.
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> (b) The learned judge failed to consider that the hearsay evidence was made after several special features including but not

limited to the fact that a question was posed to the deceased prior to his statement of "Da Flouwa juck mi down" and that that bit of evidence was the only evidence linking the appellant to the crime.

(c) The learned judge after having heard submissions from both counsel or before hearing such submissions should have exercised his discretion and had a voir dire as submissions alone could not have allowed the learned judge to make a proper preliminary ruling.

14. The learned Deputy Director of Public Prosecutions on the other hand, submitted that the learned trial judge had exercised his discretion correctly in not holding a voir dire in this case. There was no rule of law, she submitted, that a voir dire should invariably be held and in the circumstances of this case there was no need to hold one since at the point when the learned trial judge was called upon to rule on the admissibility of the evidence, he had virtually all of the facts before him. Mr. Thompson had completed his evidence and Mr. Rowley had already testified in chief to what had taken place immediately before the making of the challenged statement. She pointed out that in Belize all prosecution statements are available before trial and were before the judge for his consideration and that whether or not a voir dire should be held will depend on what the issues in each case were: in this case, there was sufficient evidence to enable the learned trial judge to apply the test of admissibility laid down by the authorities.

15. The appellant's submissions raise, as will be seen, two distinct, though obviously related, questions with regard to, firstly, the admissibility of the statement relied on by the prosecution as falling under the res gestae exception and, secondly, the procedure to be adopted by a trial judge whenever it is sought to tender in evidence such statements on the basis of the exception. It may, however, be convenient to deal with these

questions in the reverse order, as indeed Mr. Morales did in his extremely helpful submissions before us, since if he is correct in the contention that a voir dire should in all (or most) circumstances be held as a pre-condition to the admission of statements said to fall within the res gestae exception, then that could well suffice to dispose of this appeal in the appellant's favour. But first, a brief consideration of the general principles relating to the admissibility of res gestae statements in the modern law is necessary.

16. There is not now any question on the authorities that the correct approach to the admissibility as an exception to the rule against hearsay of statements said to form part of the res gestae is authoritatively established by **Ratten** in the following terms ([1971 1 All ER 801, 802]):

> "In determining whether evidence should be admitted of statements made as part of the 'res gestae' as an exception to the rule against hearsay evidence, the test to be applied should not be the uncertain one whether the making of the statement was in some sense part of the event or transaction; the proper test is whether the statement was so clearly made in circumstances of spontaneity and involvement in the event that the possibility of concoction or fabrication by the maker of the statement can be disregarded; conversely, if the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, it should be excluded: and the same is in principle true of statements made before the event."

17. Cross on Evidence (6th edition, 1985, page 585), in a passage quoted with approval by Lord Ackner in his judgment in the subsequent case of **Andrews**, described the impact of the decision in **Ratten** in this way (at pages 295-6):

"Before Lord Wilberforce's important review of the authorities in Ratten v The Queen the law concerning the admissibility of statements under this exception to the hearsay rule (the res gestae doctrine) was in danger of becoming enmeshed in conceptualism of the worst type. Great stress was placed on the need for contemporaneity of the statement with the event, but, what was far more serious, much attention was devoted to the question whether the words could be said to form part of the transaction or event with all the attendant insoluble problems of when the transaction or event began and ended".

18. **Ratten** was approved and applied in England by the Court of Appeal in **R v Nye & Loan (1978) 66 Cr. App. R. 252** and **R v Turnbull (1984) 80 Cr. App. R. 104** and was in due course approved by the House of Lords in **Andrews**, in which Lord Ackner, with whose speech all of their Lordships concurred, summarized the correct approach of a trial judge to the admissibility of res gestae statements in the following terms (at pages 300 – 301):

"1. The primary question which the judge must ask himself is – can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or

distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was

> evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error."

19. That Lord Ackner's summary describes the correct approach to the admissibility of res gestae statements in Belize is not, in our view, in doubt. Indeed, it is clear from the language used by Gonzalez J in his ruling on the challenged evidence in the instant case that he accepted and sought to apply this approach. But save for dicta in the two decisions of the Court of Appeal of Guyana to which we were referred by Mr. Morales, the authorities are not explicit in their guidance on the question of whether the admissibility of such statements is invariably, as Mr. Morales was driven to submit, to be determined by the trial judge, on the voir dire.

20. In **Ratten** itself (at page 807), Lord Wilberforce had stated that –

> "As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded" (emphasis supplied).

21. In the three subsequent English cases referred to at paragraph 18 above, the preliminary ruling was in fact made after a voir dire (although it is not entirely clear from a reading of the reports what form the voir dire took in each case, in **Andrews** it appears to have proceeded on the basis of agreed witness statements – see [1987] 1 AC 281 at page 294).

However, there does not appear to have been any discussion as to whether this was a procedure that was mandatory in the circumstances.

22. It is against this background that the Court of Appeal of Guyana concluded in **Martin v The State (1987) 43 WIR 201** that though there is no rule of law requiring that a voir dire be held in every case in which the admissibility is sought of a res gestae statement, it is only in a rare case that a trial judge should be satisfied that such statement has not been concocted or adapted without embarking on a voir dire. On this point, George C concluded as follows (at pages 216-217):

> "As a counsel of caution, therefore, and except possibly where counsel for an accused desires such evidence to be led or his objection is based on the 'evidence led in open court up to then' (per Haynes C in The State v Gobin and Griffith (1976) 23 WIR 256 at page 265)) a voir dire should be held. How else, for example, could the judge be satisfied that the statement or indeed the reporter of the statement was not motivated by malice, if the accused was denied an opportunity to lead evidence in support of any such allegation".

23. Kennard JA also agreed that in the case under consideration by the court it would have been "the wiser course" to have held a voir dire into the circumstances in which the alleged statement came to be made, given that the learned trial judge did not appear to have had before her all the material relevant to the decision to admit the evidence that she was called upon to make. However, Kennard JA's conclusion on the point was fairly guarded (at page 238):

> "I am far from saying that in every case where the issue arises that a voir dire must be held, because there may very well be cases

where all the relevant facts would be before the trial judge, thus, requiring no voir dire. But those cases would be very rare indeed."

24. Churaman JA agreed, though he put the matter somewhat higher than George C and Kennard JA had done. Churaman JA referred to the requirement in **Ratten** that judge satisfy himself by "preliminary ruling", as having created a "'judicial sieve' so that the trial judge may test the allegation in an uncribbed and unconfined way to satisfy himself that the possibility of concoction or fabrication could be disregarded" (page 247). That learned judge accordingly concluded as follows:

> "I cannot think of any way that a trial judge could 'satisfy himself' other than by way of a proper inquiry. And to suggest that an inquiry into something that borders on the metaphysical (the abstraction of a victim's mind) can be said to be proper if confined to hearing arguments or by reading statements (the latter of course contemplates examining the truth of hearsay by a consideration of hearsay!) would be to subvert the whole spirit of Ratten v R and give more lip service to its caveat. I am therefore of the view that the issue of admissibility ought to have been determined on a voir dire: I go further and express the considered view that for the future objections to admissibility of evidence of the kind discussed herein ought, as a rule of practice, to be determined on a voir dire. In that process the accused person would be entitled to test and probe the evidence by cross-examination, and, if he so wishes, to himself give evidence including evidence of such relevant matter as, for example, spite or ill-will. This process would thus give the accused person the opportunity to expose the existence of matters which may bear directly upon the very matter which a trial judge is required to satisfy himself did not exist. The only proper procedure for this, I need hardly say, is 'a trial within a trial'; and I venture here

and now to express the view that any conclusion reached other than by way of a voir dire will not be a conclusion which I am likely to feel able to embrace with any degree of equanimity."

25. It is primarily on the basis of those strong statements from a strong court that Mr. Morales submitted that Gonzalez J ought to have held a voir dire in the instant case to determine the admissibility of the res gestae statements. However, it is clear that the Court of Appeal of Guyana itself puts the matter no higher than that, as a rule of practice a voir dire should be held in these cases (per Churaman JA at page 247) or that "as a counsel of caution" a trial judge should embark upon a voir dire as "the wise course" where it is sought to have such statements admitted in evidence (per George C at pages 216-17 and per Kennard JA at page 23; see also **Jainarine Prashad v The State (1998) 58 WIR 236**, especially the judgment of Kennard C at page 239).

26. In our view, the authorities cited, including **Martin v The State**, do not support a general proposition that the preliminary ruling mandated by Lord Wilberforce in **Ratten** must in all cases be sought by way of a voir dire. The appropriate course must in each case be a matter for the discretion of the trial judge, in respect of which, as Lord Wilberforce observed on a slightly different aspect of the inquiry in **Ratten** itself. "Facts differ so greatly that it is impossible to lay down any precise general rule" (at page 809). Among the factors relevant to the exercise of the discretion will no doubt be the circumstances in which the res gestae statement was allegedly made, the precise nature of the challenge to its admissibility and whether that challenge is based on agreed or disputed facts. There may be any number of other factors, depending on the particular circumstances of each case. Allegations of bias, malice, possible concoction, adaptation or error may lend themselves particularly to a more structured inquiry, but care must be taken always to ensure that such inquiry and the resultant

ruling on the admissibility of the statements are not pre-emptive of what is essentially a jury function (which is the context in which Lord Ackner obviously thought that the possibility of error in the facts narrated in the statement, which had been suggested by the Court of Appeal in **R v Nye & Loan** as an added "gloss" on the **Ratten** test, should be viewed – see **Andrews** at page 301). The broad generality of some of the dicta in **Martin** may, in particular, need to be read subject to this caveat. Ultimately, as Lord Griffiths observed in **R v H** [1995] 2 AC 596, 614, "It is the function of the jury not the judge to decide whether a witness is to be believed", the House of Lords in that case rejecting a suggestion that a voir dire should be conducted to determine the admissibility of similar fact evidence where there is an issue as to its independence. But if the trial judge in his discretion deems a voir dire to be a necessary pre-requisite to a ruling on the admissibility of the evidence in the circumstances, this is clearly one of the situations in which it is accepted on the authorities "that it may be appropriate to hear evidence in the absence of the jury" (Archbold 2000, paragraph 4-288).

27. In the instant case, Gonzalez J obviously had some misgivings about the way in which the determination of the admissibility of the res gestae statement had been gone about, observing somewhat ruefully just before he announced his ruling that "because of how the evidence flowed, the best approach would have been the voir dire". And it is clear that, whether there had been a voir dire or not, the issue of the admissibility of the res gestae statement would have been more tidily dealt with (by way of preliminary ruling) at the outset of the trial, so that once the judge's ruling had been made the trial could have proceeded smoothly and without any need to send the jury out of court for an extended period. However, we cannot say that in the circumstances of this case the learned judge fell into error in not having held a voir dire, particularly given the somewhat unusual manner in which the admissibility of the statement was dealt with.

Despite Mr. Morales' efforts in his submissions to this court, it is far from clear whether and to what extent the learned trial judge's ability to determine the contemporaneity, spontaneity and absence of opportunity for concoction of the res gestae statement might have been enhanced by a trial within trial on the issue. It is true that a conflict did emerge on the evidence as to whether Mr. Rowley actually himself heard what Mr. Flowers reportedly said, as he asserted, or whether it was reported to him by Miss Sebastian, as she said under cross examination, and this may well have emerged during a voir dire, had one being held (which is, of course, one of the points which Mr. Morales makes). But it does not follow from this, without more, given the way in which this discrepancy emerged, that Gonzalez J erred in not embarking on a voir dire in the first place. Ultimately, this was in our view a conflict to be resolved by the jury once the reported statement itself satisfied the test of admissibility and this particular conflict was in fact specifically left to the jury by the learned trial judge with an appropriate direction in respect of which Mr. Morales makes no complaint. In the light of the nature in particular of the appellant's defence, there was at the end of the day very little by way of disputed facts surrounding the circumstances in which the statement was allegedly made that had a bearing on the issue of its admissibility.

28. The only remaining question is therefore whether at the end of the day the evidence was properly admitted by Gonzalez J and on this question we are clearly of the view that it was. The statement attributed to the deceased, Mr. Flowers, within minutes of his having received a wound that turned out to be fatal, had all the hallmarks of a statement made in circumstances of such approximate contemporaneity, spontaneity and involvement in the event that the possibility of concoction or distortion by him could be disregarded. While it is true that on the evidence the statement was made in answer to a question from Miss Sebastian, it was clear that the mind of Mr. Flowers must inevitably have been still

dominated by the event which provided "the trigger mechanism for the statement" (per Lord Ackner in **Andrews**, at page 301): the statement, in other words derived the required spontaneity from its being so closely associated with the infliction of the mortal wound which Mr. Flowers had received. The possibility of error or concoction through malice or ill will to the appellant on the part of Mr. Flowers accordingly appeared remote.

29. It is for these reasons that this court came to the conclusion that the evidence of the res gestae statement had been properly admitted and that in the circumstances the appeal from the resultant conviction should be dismissed.

MOTTLEY P

SOSA JA

MORRISON JA