

**IN THE SUPREME COURT OF BELIZE, A.D. 2022
CRIMINAL JURISDICTION**

CENTRAL DISTRICT

Indictment No. C2 of 2018

THE QUEEN

v.

MELVIN BUDNA

- Murder

BEFORE Honourable Justice Mr. Francis Cumberbatch

APPEARANCES Ms. Natasha Mohamed – Counsel for the Crown
Mr. Arthur Saldivar – Counsel for the Accused

TRIAL DATES 21st, 22nd, 23rd, 24th, 29th, and 30th of June 2021; 5th of July 2021; 27th of September 2021; 22nd of November 2021; 7th and 15th of February 2022; 15th and 31st of March 2022.

RULING ON *VOIR DIRE* (Notes of Interview)

{1} The Accused was indicted by the Director of Public Prosecutions for the offence of murder for that he on the 19th day of February 2017, in San Ignacio Town in the Cayo District, murdered Alvaro Aldana (the “Deceased”). To this indictment the Accused entered a plea of not guilty, hence, a judge alone trial was held pursuant to the provisions of section 65A of the *Indictable Procedure Act*.

{2} The Defence challenged the admissibility of the Notes of Interview which the Crown sought to tender into evidence on the grounds that:

- The Accused was not cautioned immediately after he was detained by the police;
- The Accused was subjected to force and violence by CPL Requeña prior to the taking of the Notes of Interview;
- The interview was conducted without the presence of a Justice of the Peace contrary to the provisions of section 6.2 of the *Commissioner of Police Rules*;
- The interview was not electronically recorded contrary to the provisions of section 7.1 of the *Commissioner of Police Rules*.

{3} The Court held a *voir dire* to determine the admissibility of the Notes of Interview.

The Evidence

{4} CPL DANIEL REQUEÑA testified. He stated that on the 20th of March 2019, he was attached to the Major Crimes Unit at Police Head Quarters, Belmopan. He was tasked to detain the Accused who was being arraigned at the Belmopan Magistrate's Court on firearm related charges and escort him to the San Ignacio Police Station for questioning in a murder investigation.

{5} He said he escorted the Accused to the San Ignacio Police Station where he requested the assistance of SGT McCulloch to witness the interview of the Accused which he did. He informed the Accused of the reason for his detention and informed him of his constitutional rights. He proceeded with the interview and at the end read it over to the Accused who said it was true and correct, made no changes, and placed his signature thereon. He said he did not use any force, coercion, intimidation, nor did he make any promises, or offers to the Accused for his participation in the interview. He did so of his own free will.

{6} The witness stated that he asked the Accused if he is willing to give a caution statement and he said, "yes". He sought the assistance of Desol Neal, Justice of the Peace. On the Justice of the Peace's arrival he allowed her five minutes in private with the Accused and shortly after that meeting the Justice of the Peace informed him that the Accused did not wish to make the caution statement and he escorted him to the cell block.

{7} **UNDER CROSS-EXAMINATION** this witness stated that he was one of the lead investigators in the case but he did not know that PC Anthony had detained the Accused since 4:05 p.m. on the 18th of March 2017. He picked him up at the Belmopan Magistrate's Court on the 20th of March 2017. He was there for gun offences. He would assume that after being arraigned and

charged the Accused spent more than 24 hours in police custody. He was aware that the Accused was a suspect in murder cases and that meant that the moment he met him in Belmopan he should have cautioned him but he did not do so in this case.

{8} The witness admitted that because he wanted to do a Notes of Interview he should have had a Justice of the Peace waiting at the station. He was aware that from 2016 according to the Commissioner of Police Rules, all Notes of Interview's must be conducted in the presence of a Justice of the Peace and be video recorded or he must get permission from a senior officer. He agreed that the caution in the Notes of Interview does not state that the Accused was cautioned for murder.

{9} The witness denied that he hit the Accused in his stomach and that he assaulted him when they got to the San Ignacio Police Station. After he recorded the Notes of Interview he called the Justice of the Peace. He agreed that he should have called the Justice of the Peace to be present at the Notes of Interview. The Accused changed his mind about giving the caution statement after he spoke with the Justice of the Peace. He denied that he did not have a Justice of the Peace at the Notes of Interview because the Accused was beaten.

{10} That was the case for the Crown in the *voir dire*.

The Defence

{11} After the Accused was told of his rights he elected to make an unsworn statement.

{12} **ACCUSED UNSWORN** The Accused stated that he was picked up by the police at San Ignacio Police Station on the 18th of March 2017, for gun related offences. There was no Magistrate in San Ignacio so he was taken to Belmopan Magistrate's Court where he was charged and remanded for firearm offences. When he left the Court PC Requeña came to him and told him he will be transferred back to San Ignacio. At that time, he did not tell him the reason for this.

{13} On the way to San Ignacio, Requeña started to question him about the murder and when he did not answer he started to hit him. He told him he has an incision in his stomach, but he said, if I want him to stop I must answer him. That happened all the way to San Ignacio. At the station, he was taken into a room where he met another officer. Requeña continued to ask him questions and when he did not give an answer he would hit him on his face which he did on three occasions. He said, he pleaded with him to stop but he told him if he wanted him to stop he would have to give a statement. When he agreed to do so he contacted the Justice of the Peace.

{14} The Accused said he took that opportunity to explain to the Justice of the Peace that he was being abused and his rights violated. She asked Requeña to come back to the room and she told him and another officer that she would have no part in witnessing the caution statement because I had told her that I was abused and my rights were denied. He said he was escorted to the cell block and the Justice of the Peace made checks to see if he was all right. The Justice of the Peace told him not to worry and the police would not have any more involvement with him. She returned the next morning to see if he was remanded and if he was still okay.

{15} That was the case for the Defence.

{16} Mr. Ramirez for the Crown submitted thus:

1. The absence of the Justice of the Peace is not of such significance, nor is it a substantial breach sufficient to exclude the Notes of Interview as to have adverse effect on the proceedings.
2. The Accused gave an unsworn statement from the dock in the *voir dire* and he makes no allegation that he complained to SGT McCulloch that CPL Requeña used violence against him, nor did he complain to the Magistrate when he was arraigned that CPL Requeña had used violence against him. The Accused speaks of

having told, Mrs. Desol Neal, Justice of the Peace but did not call the Justice of the Peace to testify on his behalf.

3. The absence of a Justice of the Peace is not of such significance or it is not a substantial breach to exclude the Notes of Interview as to have an adverse effect on the fairness of the proceedings. Other matters which contribute to the fairness of the trial which are present include: the presumption of innocence of the Accused, the Accused has legal representation, the burden of proof lies upon the prosecution, and the rules of evidence and procedure are all afforded to the Accused.
4. The Court, therefore, ought to exercise its discretion and admit the Notes of Interview in respect to this heinous murder case.

{17} Crown Counsel relied on the *dictum* of the Board in the PC decision of ***Shabadine Peart v The Queen*** to wit:

“23. In their Lordships’ opinion the overreaching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the Accused must be voluntary in order to be admitted in evidence... ..”.

{18} Paragraph 24:

(i) The Judges Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed;

(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding breach of the Judges' Rules; conversely, the Court may refuse to admit it even if the terms of the Judges' Rules have been followed.

... ..

(iv) The criterion for admission of the statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the Court may rule that it would be unfair to do so even if the statement was voluntary".

Defence Submissions

{19} Mr. Banner for the Accused, submitted thus: It is common ground that when CPL Requeña was told that the Accused was at the Magistrate's Court in Belmopan, he was already a suspect in the murder investigation and

therefore he should have been cautioned immediately upon arrest and detention. This was not done.

{20} Defence Counsel further submitted that likewise, when they arrived at the San Ignacio Police Station the Notes of Interview should have been conducted in front of a Justice of the Peace and it should have been video recorded. Also, this was not done and it is our humble submission that this is fatal to the Crown's case. CPL Requeña was aware of these requirements but decided to go ahead and interview the Accused in the absence of the Justice of the Peace. The rules were put in place to protect the rights of the Accused and the police officers as well. Due to the fact that the Notes of Interview was not video recorded and done in the absence of a Justice of the Peace, the Crown cannot prove affirmatively that the Accused was not assaulted in the manner in which he said he was.

{21} Mr. Banner submitted that, the fact that the Accused brought to the attention of the Justice of the Peace the fact that his rights were violated as a result of which she advised him that in the circumstances he should not give the caution statement is a matter of great significance. Moreover, the Accused himself said that is why he did not give the police a caution statement.

{22} Counsel further contended that, the Crown failed or omitted to call the Justice of the Peace as a witness because they were well aware that she was

instrumental in causing the Accused to resile from his previous decision to give a caution statement.

{23} Mr. Banner submits that, the Accused was in custody for more than 48 hours when he was detained by CPL Requeña, therefore, he should have been cautioned before he was questioned contrary to his constitutional rights.

{24} In closing, Mr. Banner urges the Court not to accept the Notes of Interview into evidence.

The Law

{25} The governing legislation is to be found in section 90 (1) (2) of the *Evidence Act* which provides thus:

“1. An admission at any time by a person charged with the commission of any crime or offense which states, or suggests the inference, that he committed a crime or offense may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely and voluntarily made.

2. Before such admission is received in evidence the prosecution must prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority”.

{26} The *Commissioner of Police Rules* of February 2015 made pursuant to section 7 of the *Police Act* CAP 138 of the Laws of Belize provides the statutory Guidelines for the Interviewing and Treatment of persons in police detention. I find therefore, that these rules are subsidiary legislations and are not merely optional rules bereft of legal status.

{27} Section 2.3 provides:

“A person must be cautioned immediately, and in any event, before any questions (or further questions) about an offence are put to him in the following circumstances:

2.3.1 Where there are grounds to suspect that person of having committed or being about to commit an offence;

2.3.2 Where any significant statement is made, whether as a result of field questioning or otherwise”.

{28} Section 6 (6.2) provides that

“all police station interviews must take place in the presence of a Justice of the Peace”.

{29} Section 7 (7.1) provides that all station interviews,

“All police station interviews carried out under Part 6 and all caution statements shall be electronically recorded.

{30} Section 7 (7.3):

“Notwithstanding Rules 7.1 and 7.2, a senior police officer may authorise an officer not to electronically record the police station interview or caution statement or to use another recording medium where it is not reasonably practicable to comply with these Guidelines because of reasons not limited to, the non-availability of recording equipment, the failure of the recording equipment or the non-availability of a suitable interview room and the senior police officer considers on reasonable grounds that the police station interview or the taking of the caution statements should not be delayed until the failure has been rectified or a suitable room or recording equipment becomes available”.

Analysis of Evidence

{31} I accept the evidence of CPL Requeña that he cautioned the Accused and told him of his rights prior to the commencement of the interview. Though he did not do so at the time of the Accused’s detention I find that that omission did not in the circumstances amount to a miscarriage of justice.

{32} It is common ground that a Justice of the Peace was not present during the recording of the Notes of Interview. The evidence of CPL Requeña discloses that he was at that time well aware that a Justice of the Peace

should have been present when he took the Notes of Interview from the Accused and that the interview should have been video recorded. I therefore find that, though this officer was well aware of the legal procedures to be complied with prior to and during the interview he nevertheless went ahead and conducted the interview without observance of the rules. He offered no reason for his failure to comply with the rules.

{33} The Crown submitted that the *Commissioner of Police Rules* should be considered in the same light as the Judges' Rules which have been described as administrative directions and not rules of law.

{34} I do not accept Crown Counsel's submission as to the legal status of the *Commissioner of Police Rules* having found that they constitute subsidiary legislation made by the Commissioner of Police with the expressed approval of parliament as provided under section 7 of the *Police Act* aforesaid. Unless and until they are found to be *ultra vires* or unconstitutional the Court must observe and enforce them having regard to the circumstances of the case.

{35} Crown Counsel further contended that the Court should not believe and accept the allegations made by the Accused of being beaten because he made no complaints to the Sergeant. It is to be noted that the Accused said he was beaten in the presence of the Sergeant, thus, there was no need to

complain to him as he was present when that happened. However, the Accused said he complained to the Justice of the Peace as a result whereof she removed herself from the proposed taking of the caution statement.

{36} At the conclusion of the Notes of Interview, a Justice of the Peace was readily available to witness the recording of the caution statement. Thus, it was not for a lack of availability that the interview was conducted without the presence of a Justice of the Peace.

{37} I now turn to consider the failure to comply with rule 7.1 concerning the failure to have the interview video recorded. Once again no reason was proffered by CPL Requeña for the breach of this rule. Though the evidence discloses that SGT Mc Culloch was present at the interview, this officer did not testify as to whether or not he authorised CPL Requeña to do so pursuant to the provisions of rule 7.3 aforesaid. Thus, here again no reason has been proffered for the breach of this rule.

{38} The Accused was detained and questioned about the commission of the offence of murder which is considered to be the most serious offence in this jurisdiction. Immediately prior to his detention he was remanded by the learned Magistrate at the Belmopan Magistrate's Court on firearm offences and most importantly was at all material times unrepresented by Counsel.

{39} In the circumstances aforesaid, I find that it is of utmost importance that he be provided with the services and assistance of the Justice of the Peace, a neutral person from whom he could obtain advice in private about his rights. What makes the absence of the Justice of the Peace that much more egregious is that after having spoken with the Justice of the Peace, the Accused stated that he was advised not to proceed with the recording of the Caution Statement because his rights were violated. It is quite likely in the circumstances that had the Accused benefitted from the services of a Justice of the Peace earlier he may not have participated in the interview.

{40} Most astonishingly, however, the Crown did not call the Justice of the Peace to testify on their behalf either as a part of its case or to rebut the unsworn statement of the Accused that the Justice of the Peace told the police that she will not witness the Caution Statement and seemed concerned about his condition and visited him in the cell block offering her assistance to him.

{41} Section 90(2) aforesaid, places the burden of proof exclusively on the Crown that the interview was conducted in a manner bereft of force, violence, etc. The Accused stated that after he told the Justice of the Peace that he was abused she declined to witness the taking of a Caution Statement and advised him not to agree to give a Caution Statement because his rights were violated. Apart from the denial by CPL Requeña there is no independent

medical evidence adduced by the Crown to support the assertions by CPL Requeña nor was the Justice of the Peace called to deny what the Accused said in his unsworn statement. I find this to be powerful evidence in support of the contentions made by the Defence aforesaid.

{42} Accordingly, I am reminded of the *dictum* of the Board in ***Shabadine Peart*** to wit:

“(iv) The criterion for admission of the statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges’ Rules; but the Court may rule that it would be unfair to do so even if the statement was voluntary”.

{43} Save and except for the administering of the caution the Court has found non-compliance with all of the other relevant rules in circumstances as hereinbefore stated, the absence of a Justice of the Peace, and the failure to video record the interview against the background of the Accused being unrepresented by Counsel and just remanded to prison by the Magistrate. The Accused is questioned about a most serious offence which is homicide and has not had the benefit of independent advice of his rights by a Justice of the Peace. Moreover, this Court is unable to review the proceedings during

the interview because of the absence of a video recording. Thus, I consider it to be a significant miscarriage of justice.

{44} Thus, I find at the end of the day that the Crown has not satisfied me to the extent that I feel sure that the interview was not freely and voluntarily given pursuant to the provisions of section 90(2) of the *Evidence Act*. The Crown's application fails.

Dated this **31st day of March 2022**.

Honourable Justice Mr. F M Cumberbatch
Justice of the Supreme Court
Central Jurisdiction
Belize C.A.