IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL JURISDICTION)

INDICTMENT NO: C0001/2023

BETWEEN:

THE KING

and

MALIQUE GENTLE

Defendant

Before: **The Honourable Madame Justice Candace Nanton**

Appearances:

Ms. Portia Staine-Ferguson Counsel for the Crown.

Mr. Norman Moore Counsel for the Defendant.

2024: **February 29**

March 01

MURDER-

Ruling on the Admissibility of the Statement of Deceased Witness Darnell Puerto

History of the Matter

[1] NANTON, J.: Malique Gentle (hereinafter referred to as "the Accused") was indicted for the offence of murder, contrary to section 106 and read along with **section 117 of the Criminal Code[1],** (hereinafter "the Code") which is alleged to have occurred on 7th November, 2021.

[2] The Trial by Judge Alone began with the arraignment of the Accused on 29th February, 2024 before this Court pursuant to **Section 65 A (2)(a) of the Indictable Procedure Act[2]** (hereinafter the IPA).

[3] The Crown made an application to admit the deposed statement of witness Darnell Puerto. The Court delivered an oral ruling refusing the Crown's application and promised to deliver a written ruling in respect of same. This is the Court's written ruling on whether to admit the hearsay statement of Darnell Puerto.

The Crown's Application to Admit the Hearsay Statement of Darnell Puerto

[4] The Crown made its application pursuant to **Section 105 of the Evidence Act**.

> **105.–**(1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to sub-sections (4) and (5) of this section, 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–
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> *(a)* the requirements of one of the paragraphs of sub-section (2) are satisfied; and
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> *(b)* the requirements of sub-section (3) are satisfied.
>
> (2) The requirements mentioned in sub-section (1) *(a)* are–

[1] Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020
[2] Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020

(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;

(3) The requirements mentioned in sub-section (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 wilfully stated in it anything which he knew to be false or did not believe to be true.

[5] It is clear that the statement could also be admitted pursuant to **Section 123 of the Indictable Procedure Act:**

(1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in sub-section (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.

[6] In support of its application the Crown relied on the agreed evidence of David Griffith who testified that on 6th January 2024 he attended the funeral of his friend Darnell Puerto who died on the 24th December 2023.

[7] Justice of the Peace Andrew Godfrey also testified that on the 8th November 2021 he received a call from Inspector Cawich to witness the recording of a statement from Darnell Puerto. He was introduced to Mr. Darnell Puerto and was given the opportunity to speak with him privately. During that conversation he informed Mr. Puerto that he was present to ensure that his constitutional rights were not violated. He also asked Darnell Puerto if he was beaten and he said that he was not. He stated that Inspector Cawich returned to the room and informed Mr. Puerto of the reason for his detention and that if he wanted he could speak to an attorney. He said that Inspector Cawich cautioned Darnell Puerto in his presence. A caption was written on the statement to the effect that the statement is true and that Darnell Puerto would be liable to prosecution if he stated anything in it which he knew to be false or did not believe to be true. Mr. Puerto indicated that he understood the caption and he signed same. Mr. Puerto dictated the statement and Inspector Cawich typed on his computer as Mr. Puerto spoke. At the conclusion of the statement JP Godfrey instructed Inspector Cawich to read over the statement to Darnell Puerto which he did then Darnell Puerto read the statement to himself. He then signed the statement followed by JP Godfrey who also signed and affixed his stamp to the statement. He said that Darnell Puerto appeared very calm during the recording of the statement. The statement was marked **X** for identification. In cross examination he stated that Mr. Puerto did not act as if he was in fear.

[8] The Crown next called Inspector Carmelito Cawich who gave evidence on oath that he is the investigator in this matter and during the course of his investigation he recorded a statement from Darnell Puerto. Darnell Puerto dictated to him and he typed what he said on his computer. This was done in the presence of Justice of the Peace Andrew Godfrey. During the recording of the statement Inspector Cawich said that Darnell Puerto appeared to be normal. After he finished recording the statement he informed Darnell Puerto that he can add alter or correct anything in his statement and that he did not

correct anything. At the conclusion of the statement Darnell Puerto read the statement aloud. Inspector Cawich read the caption that he had written on the statement before he started to type which stated that *"the statement consisting of 3 pages each signed by me is true to the best of my knowledge and belief and I make it knowing that if it is tendered into evidence I am liable to be prosecuted If I have stated in it anything I know to be false or which I believe to be untrue".* Inspector Cawich asked Darnell Puerto to sign at the end of the caption which he did followed by the JP Mr. Andrew Godfrey. At the end of the statement Inspector Cawich wrote his certification that he had recorded the statement from Darnell Puerto. He said that Darnell Puerto appeared normal. The witness identified the document marked **X** as the statement he recorded from Darnell Puerto.

[9] In cross examination Inspector Cawich stated that he had known Darnell Puerto before the recording of the statement and that Darnell Puerto was someone *"known to the police".* When he met Darnell Puerto the day before at the scene, he observed that Darnell Puerto had what appeared to be bloodstains on his foot and on his slippers. He denied that he had promised anything to Darnell Puerto in exchange for the statement. He stated that Darnell Puerto had been detained based on information he received. He said that during the night of the 7th November, 2021 he clarified that information and Darnell was released the next day. He denied that Puerto volunteered money to him or that Puerto had met him at an establishment where he did off duty work or that he had tried to elicit funds from Puerto not to charge him. The witness accepted that Britney Davis was present when the incident happened but he said that she had not seen anything. He accepted that he probably should have interviewed her; however, he stated that she did not want to speak to the police.

Submission by the Parties

[10] Both **Sections 105 of the Evidence Act and Section 123 of the IPA** allow for the admission of hearsay statements where the maker of the statement has been proven at trial to be dead.

[11] The Court holds that the Crown has satisfied the statutory precondition for admissibility i.e. that the deposition/statement seeking to be tendered is that of Darnell Puerto who has been proven by the oath of a credible witness, to be dead and that the statement to be tendered in evidence contains a declaration by the maker and signed before 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 wilfully stated in it anything which he knew to be false or did not believe to be true. The Defence has not objected to this conclusion.

[12] It is the Defence contention however that the Court ought to exercise its discretion to refuse admission of the statement on the basis that the Accused will be materially prejudiced by the reception of such evidence. Learned Counsel for the Accused cited the prejudice on the following grounds:

a. Darnell Puerto is a material witness for the Crown and the only witness alleged to have witnessed the stabbing of the deceased.
b. The Defence would be prejudiced by the inability to cross examine Darnell Puerto and explore his credibility/reliability.
c. There is no supporting or corroborative evidence for the evidence of Darnell Puerto.
d. The evidence of other witnesses such as Wallace Meighn contradicts key aspects of the statement of Darnell Puerto such as whether the Accused left the premises with a knife in his hand.

[13] The Crown in response stated:

a. That there is supporting evidence from Wallace Meighn who corroborates that the Accused was seen leaving the scene immediately after the stabbing.
b. The Crown relied on the "res gestae" utterance alleged to have been given by Darnell Puerto to Wallace Meighn to the effect that the Accused had just stabbed the deceased. It should be noted this

utterance was conditionally admitted by this Court subject to a ruling on its admissibility. The Defence objected to its admission on the basis that contemporaneity with the stabbing incident had not been established to support its admission.

c. There is supporting evidence of the statement of Darnell Puerto in that human blood was found on the slippers of the Accused.

Analysis

[14] The Court is satisfied that the Crown has proven that the witness is dead and that the statement was made in accordance with the legislation cited. The Court next has to determine whether to admit the statement.

[15] **Section 123 of the IPA** allows for such statements to be admitted where the Accused would not be materially prejudiced by the reception of the evidence. The Court notes that **Section 105 of the Evidence Act** contains no such limitation; however, the Court is satisfied that the power of the Judge to exclude admissible evidence was correctly recognized by the Court of Appeal in **Dean Tillett v R**[3], a case which dealt with a hearsay statement admissible under S 73A, where the court stated, referring to its earlier decision in **Williams v R**[4], that—

> *"'the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage of depriving him unfairly of the ability to defend himself."*

[16] The CCJ case of **Japhet Bennett**[5] is binding authority on this point. In that case it was stated that during a trial, the Judge basically had two opportunities to evaluate and assess the necessity and reliability of the hearsay evidence, and to decide whether it

[3] Privy Council Appeal No. 56 of 1998
[4] (Criminal Appeal No 16 of 2006) (22 June 2007)
[5] (2018) 94 WIR 126

should be left to the Jury. The first occasion occurred when the hearsay evidence was introduced, and the Judge had to decide whether, at that stage, to admit it. The evidence having been admitted, the second occasion occurred when at the close of the prosecution case a no case submission was made, and the Judge had to decide whether to uphold that submission.

[17] If, on the first occasion, the Judge, *exceptionally,* was clear in his mind that the hearsay evidence could not in reason safely ever be held to be reliable, he had to exclude it and, where the prosecution's case wholly or substantially rested on that evidence, he should stop the trial and direct the Jury to acquit the Accused. If; however, there was a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge given which the hearsay evidence could in the end safely be held to be reliable, the Judge should in principle admit the evidence. That was the more so if at that stage it was already clear that that test was or would be met.

First Test – Admission Stage

[18] This Court is of the view that at this first stage of admission, the test for exclusion is whether the Court is clear in my mind that the hearsay evidence could not in reason safely ever held to be reliable. If; however, there is a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge given which the hearsay evidence could in the end safely be held to be reliable, the Court can in principle admit the evidence. That was the more so if at that stage it was already clear that that test was or would be met.

[19] In accordance with the dicta in **Japhet Bennet** the Court is not required at this stage to make a finding on the reliability of the hearsay evidence, but to limit itself to the question of whether the hearsay can safely be held to be reliable.

[20] It has been suggested that the **Section 114 (2)** factors outlined under the **UK Criminal Justice Act** can be a useful guide to the Court in its assessment:

a. *how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;*
b. *what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);*
c. *how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;*
d. *the circumstances in which the statement was made;*
e. *how reliable the maker of the statement appears to be;*
f. *how reliable the evidence of the making of the statement appears to be;*
g. *whether oral evidence of the matter stated can be given and, if not, why it cannot;*
h. *the amount of difficulty involved in challenging the statement;*
i. *the extent to which that difficulty would be likely to prejudice the party facing it.*

a. Probative value of the statement

[21] The evidence of Darnell Puerto is that he saw the Accused stab the deceased with a knife. He is the only witness for the Crown who directly witnessed the stabbing of the accused. Without his evidence the Crown would not be able to prove its case against the Accused.

b. Supporting evidence

[22] The Crown cites the evidence of the 'res gestae' statement of Darnell Puerto to Wallace Meighn as supportive evidence. The Court considers that this contention is unsustainable for two reasons stated below.

[23] Res gestae refers things said or done contemporaneously and, typically in close proximity to an event at issue. Something said res gestae is often considered to be a spontaneous response to stimuli and generally considered to be credible pieces of evidence, an exception to or not at all hearsay. An example would be the statement of

a person, as witness to a crime, so emotionally overwhelmed by an event there is no possible way for distortion or concoction of the utterance: **Andrews**[6].

[24] The Court finds that the Crown has not proven that the statement meets the criteria of contemporaneity which is a necessary precondition to its admission. The witness Wallace Meighn stated that when he arrived at #80 Vernon Street he saw the Accused leaving the premises. Wallace Meighn stated that he saw Britney Davis leaving the premises with her two brothers and they were headed towards a vehicle. She looked angry or sad. At that same time he saw Darnell Puerto standing in the verandah and the body of the deceased was lying motionless on the ground. He asked Darnell Puerto what happened and Darnell said that *"Malique just stab bally".* It is noted that apart from the use of the word "just" there is no evidence as to how soon after the event (the stabbing) Wallace Meighn arrived on the scene. It can be deduced that some time had passed as Britney had already packed to leave with her brothers and a taxi had arrived for her (see statement of Darnell Puerto). The Court finds that insufficient evidence has been led to establish that Darnell Puerto had been so overwhelmed by the stabbing so as to remove the possibility for distortion or concoction.

[25] Even if the Court had exercised its discretion to admit the hearsay evidence of Darnell Puerto pursuant to the res gestae principle, the Court finds it difficult to consider it as corroborative of Darnell Puerto's written account as it comes from the very same source. While the statement if found to form part of the res gestae, would itself be admitted for the truth of its contents and would show consistency in the account given by Darnell Puerto, the Court considers that it would not be corroborative. Corroborative evidence is relevant, admissible and credible evidence which is independent of the source requiring corroboration, and which implicates the accused. The hearsay evidence of Darnell Puerto (the res gestae statement) could not be corroborative of the hearsay evidence of Darnell Puerto (the written statement).

[6] [1987] AC 281 (HL)

[26] The Crown has asked the Court to consider the presence of human blood on the slippers of the accused as supportive of Darnell Puerto's account. The Crown contended that the weight of the evidence of the human blood on the person of the Accused in light of his defence of alibi is significantly a factor to be considered. Taken at its highest the evidence can only show that the Accused had human blood on his person and potentially cast doubt on his intended alibi. While it may be consistent with Darnell Puerto's account that the accused was on the scene it cannot support Darnell Puerto's account that it was the Accused who stabbed the deceased. The Court also notes that the Accused was in fact brought to the scene upon his arrest and that (more) human blood was actually found on the clothing and shoes of Darnell Puerto. When considered against the other evidence in this case its significance can easily be diluted.

[27] The evidence of Wallace Meighan supports the deceased' witness evidence that the Accused was on the scene at the time the deceased was killed; however, he did not see the actual stabbing nor did he see any weapon in the Accused's hand. Although it is accepted that this evidence does support some aspects of Darnell Puerto's statement he did not testify relative to the actual killing of the deceased.

c. Importance to the Case as a Whole

[28] It is undisputed that the statement of Darnell Puerto is the sole and decisive evidence that the Crown will rely on against the Accused.

d. The Alleged Circumstances Surrounding the Giving of the Statement

[29] The witness Darnell Puerto had been informed that he was a suspect in this murder and had been detained on the 7th November 2021. He was not released until after he gave his statement on the 8th November 2021. At the time he gave his statement he was cautioned and it is evident that he was still in police detention and still being treated as a suspect. Interestingly, Inspector Cawich stated that on the night of the incident he had received information which led to the arrest of Darnell Puerto. Although he stated that that information was clarified on the same night he never released Darnell Puerto until 8th November, 2021 after he gave the written statement.

[30] To this end it is also noted that apparent blood stains had been observed by the police officers on the person of Darnell Puerto- specifically on his toes and on his slippers. CST Peters also stated that she observed stains on the clothing of Darnell Puerto. These items were submitted for analysis and found to be human blood.

[31] The Court has therefore concluded that based on the evidence advanced that Darnell Puerto, at the time of giving his statement, was a suspect for the murder of the deceased. It is evident that there was suspicion by the police as to his involvement, which resulted in his apprehension and continued detention.

[32] It is regrettable that the circumstances surrounding the taking of the statement were not fully explored by the Crown to clear up any such ambiguity as this may have had a direct effect on the exercise of the Court's discretion.

[33]On the face of the evidence there is clearly a factual basis to cast an imputation on the circumstances surrounding the taking of the statements. Whether the witness Darnell Puerto has an improper motive for giving the statement is thus something the Court must give due consideration in the exercise of its discretion of whether to admit the hearsay statement. The Court considers that this significantly undermines the reliability of the statement.

e. The Reliability of the Maker of the Statement

[34] The credibility of Darnell Puerto may impact on his reliability as a witness. This is a matter in issue which is of substantial importance in the context of the case. If Darnell Puerto had been called the Defence may have chosen to cross examine the witness on his character and such evidence if it existed may have been of substantial probative value to the resolution of that issue. In this case Inspector Cawich testified that Darnell Puerto is a person *"known to the police".* The Court notes that there was no further elaboration of what that statement means however it does strike this Court as something that could have been explored further by Counsel on behalf of the Accused as it is no

doubt an issue which may have a bearing on the credibility of Darnell Puerto. Bad character evidence may in certain circumstances demonstrate a propensity for untruthfulness. Regrettably the issue was not developed further through cross examination of Inspector Cawich.

f. Can the Reliability of the Evidence be Safely Tested and Assessed?

[35] There will be no cross examination and as such the Accused's ability to test the reliability of the witness' account would be materially handicapped. The Court has considered that the absence of cross examination, even where the evidence is that of the sole eye-witness, by itself does not necessitate exclusion- **R v Horncastle**[7]. The inability to cross examine is clearly a factor which would have been contemplated by the legislative drafters when enacting this particular statute. The Court however considers that the absence of additional means of testing the reliability of Darnell Puerto's statement does not favour admission.

[36] The Court has considered the potential admission of the witness' statement in light of the Defence that is to be advanced and finds that it bears direct relevance on that defence. It is clear that the Defence would be advancing that the Crown's case is one of fabrication. In order to probe its allegation of fabrication on the part of Darnell Puerto the Defence would be incapable of testing his evidence.

g. Whether Oral Evidence can be given and if Not Why Not?

[37] The Court notes that the police never obtained statements of Britney Davis and her two brothers and Inspector Cawich specifically stated that Britney Davis was unwilling to give evidence. The Court will not speculate as to what Britney Davis may or may not have said. The fact remains that there would be no oral evidence in relation to the main evidence in dispute i.e. whether the Accused stabbed the deceased.

h. The Difficulty in Challenging the Evidence

[7] 2009 UKSC 14

[38] As stated above it would be near impossible for the Accused to challenge the veracity of Darnell Puerto's statement.

i. The Extent that Difficulty would Prejudice the Accused

[39] The truthfulness of Darnell Puerto's account is the sole decisive factor in this case and the Accused's inability to test same would put him at a significant disadvantage.

DISPOSITION

[40] For the reasons advanced above the Court finds exceptionally that it can be concluded at this stage that to admit the statement would be inherently unfair to the Defendant. For these reasons I hold that it is in the interest of Justice to refuse the Crown's application to admit the statement of deceased witness Darnell Puerto.

[41] The Crown closed its case upon the delivery of the Court's ruling. This being a case where the Prosecution's case wholly rested on the admission of the hearsay evidence, the Court stopped the trial and acquitted the Accused.

Candace Nanton
High Court Judge
Senior Courts Belize
Delivered 1st March 2024