IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CRIMINAL APPEAL NO 17 of 2018

BETWEEN

ERNEST THURTON Jr. **APPELLANT**

AND

THE QUEEN **RESPONDENT**

Before The Honourable:

Madam Justice Hafiz Bertram **President (Ag)**
Madam Justice Woodstock-Riley **Justice of Appeal**
Madam Justice Minott-Phillips **Justice of Appeal**

Appearances

Mr. Anthony Sylvestre for the Appellant
Ms Cheryl-Lynn Vidal SC, Director of Public Prosecutions for the Respondent

JUDGMENT

9 March 2022
Promulgated on 13 June 2022

HAFIZ BERTRAM P (Ag.)

Introduction

[1] Ernest Thurton Jr. ('the Appellant') was indicted on 19 March 2014 for the murder of Frank James and Robert Young ('the deceased men') which occurred on 25 October 2012 , in Belize City, by shooting. The appellant was tried by Lucas J, (the trial judge) between 6 July 2018 and 18 December 2018, on the indictment charging him with two counts of the offence of murder. In a judgment delivered by the trial judge on 12 September 2018, the appellant was convicted of the two counts

of murder. On 18 December 2018, the trial judge sentenced the Appellant to life imprisonment on each of the convictions, to run concurrently, with eligibility for parole after he has served 29 years of his sentence.

[2] This is an appeal against his conviction. The appeal was filed on 28 September 2018. The single ground of appeal was that the trial judge erred in admitting into evidence the statement of Eric Martinez ('Martinez'), who was deemed a hostile witness after retracting his previous statement given to the police. The appeal was heard on 9 March 2022 and the court reserved its decision. We now give our decision and the reasons for doing so. The Court is of the view that the trial judge did not err in admitting into evidence the previous inconsistent statement of Martinez and, therefore, dismisses the appeal and affirms the conviction of the appellant.

The Background Facts

[3] The Appellant and Jasper Brannon ('Jasper') were jointly indicted on 19 March 2014 for the murder of the deceased men. The judge alone trial commenced on 10 July 2018. At the close of the case for the Prosecution, a no case to answer submission was made on behalf of Jasper which was upheld by the trial judge and he entered a not guilty verdict on each of the two counts of murder. The trial then proceeded against the Appellant for the murder of the deceased men.

[4] The case for the Crown in relation to the shooting of the deceased men emanated from two witnesses, Kurt Pech ('Pech') and the statement of Martinez who was deemed a hostile witness by the trial judge. The other witnesses relevant to the appeal speak to the circumstances surrounding the taking and the recording of the statement from Martinez (which was done before a Justice of Peace) and the forensic evidence.

[5] The Appellant's case was a defence of alibi. He called one witness, his sister, Alicia Rancharan, ('Rancharan') in his defence.

The evidence for the Crown

[6] The first witness for the Prosecution was Pech, also known as Junior. He testified that on 25 October 2012, sometime after 9.00 pm, he was at his boathouse

on North Front Street, Belize City, with three friends, namely, Frank James ('James'), Robert Young ('Young') and Shabba. Young was cleaning fish and Pech was about to take a bath when he heard someone shouting "Junior, Junior." Pech went by the door and was followed by Shabba. He saw three men approaching, whom he knew by their aliases. The three men were Junior H (Martinez), the other person he knew as Dangalang ('the Appellant') and the other as Jasper. Junior H had a gun and he hit Young with the gun and compelled him to kneel. He then asked Young, "*whey my bike*?" Pech testified that he told Junior H "*H hold that down, no bring that in mi yard*." Dangalang then took the gun from Junior H and cranked it. Junior H then said to Dangalang "*No shoot di man. No shoot di man."* Pech then repeated to Junior H, "*H,H, hold dat down*". Pech said that he then walked to the house door and Shabba followed him. James was about to go behind them also but Junior H told him, "*whey you gwen, sit down*." Pech then went inside of the house.

[7] Mr. Pech further testified that a little while after that he heard gunshots and he went outside and saw the three men going up North Front Street towards Victoria Street. He saw Young in a pool of blood in the boat yard. He then secured his house and rode his bicycle contrary to the flow of traffic towards Belchina Bridge. On his way there, he saw James lying on North Front Street near Carpet Care Plus and he stopped and said, "Frank, Frank" and Frank groaned. Pech testified that he rode to Raccoon Street Police Station to make a report but was requested to go to Queen Street Police Station. A written statement was recorded from him, some months later, on 20 February 2013, at the Queen Street Police Station.

[8] There was no objection to the identification of the appellant by Pech in the dock. Pech knew the appellant for five years before the incident.

[9] The Crown then called Martinez, the witness who was deemed a hostile witness by the trial judge. On 25 October 2012, after the killing of the deceased men, Martinez gave an out of court statement to Sergeant No. 126 Mark Humes (Sgt. Humes) in the presence of Justice of the Peace Marva Reynolds. He denied making the statement and denied that his signature is on the statement. Martinez testified that on 25 October 2012, sometime after 7.00 pm he was at home at 19 Rhaburn's Alley in Belize City, with some friends including the Appellant, whom he knew as Danga,

and the other person Jasper. They were socialising, drinking and smoking. Martinez said that after a couple of hours of socialising he became intoxicated and he could not recall what happened. He cannot remember what he said to the Appellant and Jasper or what they said to him. He testified that he knew the appellant for 5 to 6 years and he would socialize with him about three times a week. When asked if he would be able to identify the Appellant in the dock by the Prosecutor, he said that he would be able to do so. However, he pointed to Jasper in the dock who was seated beside the Appellant. Further, he said that he would not be able to identify Jasper if he sees him.

[10] When he was further questioned by the Prosecutor about the previous inconsistent statement given to the Police, he testified that he recalled giving a statement to the police on 26 October 2012, but he did not sign the statement. The Prosecutor made an effort to have Martinez refresh his memory from the written statement. When the statement was shown to him he said, "It is not the statement I gave the police," and he denied that the signature on the statement is his.

[11] The Crown then made an application pursuant to section *73A of the Evidence (Amendment) (No. 2) Act, 2012* ('the Evidence Act') to treat Martinez as a hostile witness. Martinez was stood down for the purpose of proving the statement in accordance with section 71 of the Evidence Act. Sgt. Humes, the recorder of Martinez's statement was called to give evidence.

[12] Sgt. Humes testified that on 26 October 2012 around 3:42 pm he was on duty at Criminal Investigating Branch (CIB) Office at the Queen Street Police Station, when he escorted a male person who identified himself as Eric Martinez along with Ms. Marva Reynolds, Justice of the Peace to an office at CIB. He asked Martinez if he wanted to give a statement and he agreed to give an open statement (a witness statement). The statement was dictated by Martinez to Sgt. Humes in the presence of Ms. Reynolds. It was then read over by Sgt. Humes to Martinez and he signed three places on the statement in the presence of Ms. Reynolds who also signed the statement. Sgt. Humes testified that he did not promise, force or threaten Martinez to give the statement. That he gave the statement of his own free will. Sgt. Humes identified the statement which he recorded from Martinez. The statement was marked MH 'A' for identification.

[13] The Crown thereafter applied pursuant to section 76(1) of the Evidence Act for Martinez to refresh his memory from the statement MH 'A'. There was no objection from defence counsel and the trial judge granted the application. The court adjourned for 10 minutes for Martinez to read the statement. When the court resumed, Martinez, having read the statement was asked by the Prosecutor what he said to Jasper or Danga (the Appellant) and what they said to him. Martinez said it was many years ago and he cannot recall giving the statement. Further, he said, "*I don't recall. I cannot remember anything."*

[14] Martinez was not cooperating and the Crown in accordance with section 71 of the Evidence Act applied for the trial judge to have Martinez deemed a hostile witness. There was no objection by each defense counsel, Mr. Sylvestre for the Appellant and Mr. Hamilton for Jasper, to this application. The trial judge granted the application deeming Martinez a hostile witness. The judge said:

> "The witness is a perfect example of a hostile witness. He is deliberately feigning insomnia [sic] and his demeanor in the witness box evinced that he does not want to cooperate with the party that called him - the prosecution. I am clearly of the view that this witness is adverse to the Crown. The Crown may ask him leading questions."

[15] After the ruling of the trial judge, Martinez returned to the court and the Crown was granted leave to cross-examine him once again in relation to the contents of the statement. Martinez maintained that he cannot recall if he gave the statement and that he cannot recall anything and he does not know why he is in the court. He answered all the questions the same way.

[16] Thereafter, Mr. Sylvestre cross-examined Martinez about previous convictions but he stated that he cannot recall anything. There were no questions in relation to the content of the statement in the cross-examination.

[17] The Crown then made an application for the statement marked for identification MH 'A' to be tendered and admitted into evidence pursuant to section 73A of the

Evidence Act. Mr. Sylvestre objected to the Crown's application and made submissions in support of his objection. Mr. Hamilton, who represented Jasper was concerned that Martinez is a person who had his own interests to serve.

[18] Mr. Sylvestre relied on the case of **Vincent Tillett Sr. v Queen**, Criminal Appeal No. 21 of 2013, of the Belize Court of Appeal, and submitted to the trial judge that the admission of the statement would put the appellant at an unfair disadvantage or alternatively deprive him of the ability to defend himself.

Ruling of trial judge on admissibility of Martinez's witness statement

[19] The trial judge gave a written ruling that Martinez was an accomplice (later changed to a person of interest) of the appellant to the shooting death of James and Young. The judge exercised his discretion pursuant to section 73A and admitted the statement into evidence. He said:

> "The crown wishes the tender into evidence a written witness statement of Eric Martinez Jr. (Martinez) given to then Corporal 126 Mark Humes on 26 October 2012. Martinez was called by the Crown to give evidence. However, his extreme lack of cooperation with the Crown and on the senior crown counsel's application I deemed him a hostile witness.
>
> Ms. Lovell learned Crown Counsel cross- examined Martinez pertaining to the content of his statement; his answers were, as before, he could not remember. The Counsel having finished the cross- examination of Martinez, the learned defense counsel Mr Anthony Sylvestre cross- examined him. The defence, like the Crown, did not fare off well. Martinez was uncooperative by his repetitive response, "I cannot remember," or words to that effect. Miss Lovell then applied for Martinez's statement to be admitted in evidence by virtue of section 73A of the Evidence Act as amended. The section is part and parcel of Act No. 6 of 2012. Section 73A states: …..
>
> Mr Sylvestre objected to the crown's application. The defence opposition are on two grounds. One of them refers to the unfair disadvantage to the accused persons if Martinez's statement was to be admitted into evidence and, in the alternative, the statement would deprive them unfairly of their abilities to defend themselves. The learned defence counsel submitted that an accused has the right to cross examine witnesses for the Crown and that right is not fully achieved when a witness not only is reluctant to answer questions put to him by the defence, but also when he does not answer the questions. Consequently, in this case, the defence is hampered from inquiring from the witness how and why the statement was given coupled with asking further questions in search of the truth of his statement.

Secondly, from the tone of the evidence adduced so far, Mr Sylvestre submitted that Martinez is an accomplice to the two murder counts for which the two defendants are charged and are being presently on trial and that in light of the judgement of **Eiley et al v The Queen** [2009] UKPC 40, the judge has the discretion to exclude the statement.

….. In terms of the unfair disadvantage to the defendants, she (Crown Counsel) argued that the content of the statement is highly probative and further the judge will have the opportunity to assess the statement in light of the totality of the evidence. Further to Eric being an accomplice, … crown counsel submitted that he is not an accomplice; his statement disclosed that he had withdrawn from the joint enterprise. Ms Lovell concluded by saying that the judge should exercise his discretion in admitting the statement.

The defence was given the opportunity and took the opportunity to cross-examine and did cross-examine Martinez pursuant to section 65 of the Evidence Act and section 6(3) (e) of the Belize Constitution. As already noted Martinez was also not cooperative with the defence in giving the desired answers to the questions asked of him. The conduct of such a witness deprived the defence in probing into matters that would assist the defence's case. However the action of the witness as described, in my view, is not a ground for me to exercise my discretion in refusing to admit the statement into evidence in accordance with section 73A of the Evidence Act.

In terms of Martinez being labelled as an accomplice, the evidence so far indicated that he was a party to a joint enterprise. He was in possession of the gun when the first accused took it away. Martinez told him not to shoot. However, case law is against him. In telling the first accused not to shoot is not sufficient act of withdrawal. **Regina v Rook** [1993] 1 W.L.R. 1005.

I ruled that Martinez is an accomplice of the first accused to the shooting death of the two deceased namely, Frank James and Robert Young. However, I will not exercise my discretion in declining to admit the statement although Martinez is deemed by me an accomplice. Section 92 (3) (b) of the Evidence Act, dictates to me the procedure a judge should adopt in terms of the evidence of an accomplice.

I rule that the Crown may tender the statement into evidence. **The mere fact that such statement is admitted does not end there. I will be required, at the opportune time, to assess the statement vis-à-vis other evidence as to its reliability**. This is my ruling" (emphasis added)

[20] Appellant's counsel, Mr. Sylvestre then made an application to the trial judge to exercise his discretion pursuant to section 65(4) of the Evidence Act for Martinez to be further cross-examined in the interest of justice after the admission of the hearsay statement of Martinez. The Crown objected on the basis that Mr. Sylvestre had the opportunity previously to cross-examine Martinez. The trial judge was of the view

that Mr. Sylvestre already did so on 19 July 2018. At this time, Mr. Sylvestre indicated that he wanted to cross examine on the content of the statement. The application was refused.

[21] There was a further ruling by the trial judge to exclude part of the statements which the trial judge thought was not admissible.

[22] Sgt. Humes who recorded Martinez's statement was recalled to the stand and allowed to read the statement which was admitted into evidence as MH '1'. The statement dated 26 October 2012, as read states:

> "I'm a supervisor for the conscious youth development programme (CYPD) presently residing at # 19 Rhaburn Alley, Belize City. On Thursday the 25th of October 2012 about after seven o'clock in the night, I was hanging out through Rhaburn Alley by my house along with a young man I know as Ernest Thurton Jr, also known as "DANGALONG" and another young man I only know as "JASPER". I know Ernest Thurton Jr for about 19 years now and he lives in the Pickstock Hutment Area, Belize city. I know his mother Ms. Allyson but her surname I don't know and his father Ernest Thurton Sr. Ernest Thurton Jr. begun hanging out with me through Rhaburn Alley last year 2011. We were drinking Belikin Stout. At that same time I told them that I just saw the person who stole Ms. Dorothy Gideon's bicycle earlier in the day. I saw him going to the dockyard on North Front St, Belize city. So I told Ernest and "JASPER" to let's go by the dockyard on North Front Street. We walked through Rhaburn Alley, through Price Alley into Victoria Street and then into North Front Street to the dockyard. When we got the dockyard, there were four other male persons there, one I only know as "Shabba", another red complexion dread male person and two other male persons. When Shabba and the red complexion dread male person saw us, they run into the boathouse, locked themselves inside and the two other male persons stayed there. I had a black in colour 9 mm pistol in my hand. Ernest Took the firearm from me and told both of the male persons to lay on the ground on their belly. At that time he had a firearm pointed on one of the male person who was lying on the ground. This male person was the one who stole Ms. Gideon's bicycle. Ernest was standing about three to four feet away from me and nothing was obstructing my view. (I knew that he wanted to kill someone – Excluded by trial judge as prejudicial) so I told him not to do it because the male person had already reason with me that he would get back the bicycle. I'm a person with understanding but Ernest just cocked the firearm and shot the male person in his head. As Ernest shot the male person in his head I just walked out of the yard. At that same time the other male got off the ground and ran but Ernest shot him also. I saw the male person run on North Front Street and collapsed on the street. Whilst I was walking out of the yard I heard several more gunshots but I can't say how much because I was not counting. Whilst I was walking down North Front Street toward Rhaburn's Alley, I saw Ernest and

> "JASPER" ran past me on North Front Street into Rhaburn's Alley. I don't know any of the male persons names who Ernest shot. I also did not know if any of the male persons had died. The area where the incident happened was kind of dark. The entire incident took about 5 to 10 minutes from the time we reach, up to the time after Ernest shot the male person and I walked out of the yard. "JASPER" was just there standing watching what was happening."

[23] The Crown then called Daniels Daniels, the Scenes of Crimes Technician who processed the crime scene. He testified that 29 October 2012, at around 1.30 am at the request of CIB, he visited the Karl Heusner Memorial Hospital (KHMH) Morgue to witness a post mortem-examination. The body of James was identified to him by his common-law wife, Radiance Flowers in the presence Doctor Mario Estrada Bran. Sgt. Humes was also present. He observed five suspected bullet holes on the body. Two suspected bullet holes were on the right leg while two were on the left hand and the last on the left side of the rib cage. He took photographs of the body.

[24] The Crown then called Dr. Mario Estrada Bran, a Forensic Doctor who performed the post mortem on both deceased men. In his opinion, Frank James cause of death was traumatic asphyxiation due to heart and lung injuries due to gunshot wounds to the abdomen. His examination revealed five orifices (hole) caused by projectile of firearm.

[25] As for Robert Young, Dr. Estrada Bran's external examination of the body revealed 11 holes caused by projectile of firearm. The cause of death, in his opinion was severe brain damage due to head injuries, gunshot type.

[26] Amelita Gumbs was then called by the Crown. She is the sister of the deceased Robert Young. She testified that she identified his body at the KHMH to Dr. Estrada Bran.

[27] Corp. Humes who at the time of giving evidence was Sgt. Humes was the investigating officer in the case. The Crown called him next to give evidence. He testified that on the 25 October 2012 at around 11:00 pm he was on duty at the CIB when he received information from the police control of a shooting incident on North Front Street which caused him and Corporal Arcadio Chun to go to the location. Upon reaching there, they did not find any person who was injured. However, Mr

Brian Lopez, a scenes of crime technician was there and he was taking photographs and processing the scene. He stated that himself and Corporal Chun then went to KHMH where he saw a motionless body on a bed with gunshot wounds to the left side of the abdomen and two to the left hand. The body was identified as James.

[28] Sgt. Humes testified that upon receiving further information, he went to the dockyard where a boat house was located. He observed a motionless person lying face up on the ground with a fish in his right hand. That person had gun shot wounds to the right side of his neck, to the left ear, two to the right hand and two to the left hand. He also saw three 9mm Aquila Brand expenditures beside the body and Mr Lopez processing the crime scene.

[29] On the 26 October 2012, Sgt. Humes informed all police patrols to be on the lookout for Eric Martinez, Ernest Thurton Jr. and Jasper Brannon who were wanted for questioning in relation to the killings of James and Young. About 30 minutes later Detective Constable Brian Miller escorted Martinez to Sgt. Humes. Martinez was informed by Sgt. Humes of the reason for his detention. He interviewed him and subsequently detained and placed him in the cell at Patrol branch. A statement was later recorded from Martinez and he was subsequently released.

[30] Ms. Radiance Flowers was then called by the Crown. She was the common law wife of Frank James. On 25 October 2012, she identified the body of Frank James at the KHMH to Dr. Estrada Bran.

[31] The Crown then called Mr. Brain Lopez, a Crime Scene Technician who gave evidence that he was requested by Sgt. Humes to process the shooting scene at North Front Street. He processed the crime scenes by taking photographs and samples of red substance resembling blood. He also found metal objects that he suspected to be bullet casings with markings 9mm on each of the base.

[32] The Crown then called Spt. of Police Alden Dawson who testified that on 26 October 2012, about 3.00 pm he was informed that Eric Martinez known as Junior H was in police custody and that he wanted to speak to him. A moment later he brought Martinez to his office at CIB building in Queen Street. He testified that when

Martinez arrived at his office he cautioned him since he was in police custody. He said that Martinez gave him certain information about the double murder that occurred the day before and he agreed to make a statement. Sergeant Dawson testified that because of the information that Martinez gave him, he decided to have a witness statement recorded from him. He informed Sgt. Humes to record the witness statement from Martinez. Sgt. Dawson further testified that at no time he threatened, offer or promise Eric Martinez any favour nor did he beat him.

Ernest Thurton's Defence

[33] The defence of the Appellant was that of an alibi. He testified that in October 2012, he was residing at No. 2 Frederick Alley, Belize city, along with his mother, three sisters and two brothers. On 25 October 2012, he was employed and about 5:00 pm he left his workplace and went to his grandmother's house in Belize City. After he left his grandmother's house he went home around 7.00 pm. He had a meal, watched television until 9:00 pm and thereafter he went to sleep. He testified that he slept in the same room with his sisters but in separate beds and when he went to sleep, his sister Rancharan was not sleeping as yet.

[34] The Appellant denied knowing Eric Martinez and stated that he did not associate with him. He had no prior knowledge of Jasper and only became aware of him when they were jointly charged for the two crimes of murder. In cross examination, he disclosed that his aliases are Danga or Dangalang.

[35] Alicia Rancharan testified on behalf of the Appellant. She supported his alibi. She testified that she was at home on the 25 October 2012, between 5:30pm and 7:00 pm and the Appellant and her other siblings were also at home. That he was home throughout that night. Further, that she went to sleep at 9:30 pm and the Appellant went to bed before her. She testified that throughout the night she got up to go to the bathroom and on each occasion he and her siblings were in bed.

Issues raised at trial by counsel for Appellant

[36] The issues raised by Mr. Sylvestre in the court below and determined by the trial judge, in the view of the Court, are relevant to the appeal, as they concern the reliability of the statement given by Martinez. Mr. Sylvestre, during the trial, submitted

that those issues weakened the case for the prosecution. The trial judge listed the issues raised by Mr. Sylvestre as:

(i) "There are doubts as to the person who fired the gunshots which killed Frank James and Robert Young;
(ii) The evidence of Pech and the contents of Martinez's statement cannot corroborate each other;
(iii) There is discrepancy between Pech's evidence and the statement of Martinez;
(iv) The judge is required to treat Martinez statement with caution pursuant to section 92(3) of the Evidence Act;
(v) Further, as it pertains to Martinez, in addition to treating his statement with caution, it ought not to be accorded with any weight in light of him being a witness of bad character, and is attempting to distance himself from his involvement in the murders."

The issues were determined by the trial judge as shown below.

Whether doubts as to person who fired gunshot

[37] The judge referred to the testimony of Pech and found that although he did not see the appellant shoot any of the deceased men, circumstantially his evidence strongly points to the Appellant as the shooter. He was the last person who Pech saw with the gun. Junior H (Martinez) told the accused not to shoot Robert Young. Pech went into his house and shortly thereafter he heard gunshots.

Whether Pech evidence and contents of Martinez statement corroborate each other

[38] The trial judge stated that Mr. Sylvestre's submission that the evidence of Pech and the contents of Martinez's statement cannot corroborate each other, was unsound because Martinez statement was accepted in evidence by virtue of section 73A of the Evidence Act (MH '1'). Further, the judge found that Pech testimony supports two points: (1) That as it relates to the Appellant being the shooter, Pech testimony provides circumstantial evidence of him being the shooter; The judge considered that the contents of Martinez statement disclosed that he had the gun previously and on the scene, the Appellant took it away from him; and (2) Martinez had advised the Appellant not to shoot Robert Young; Martinez statement furnishes direct evidence that the accused was the shooter who caused the deaths of the deceased men.

The discrepancy between Pech's evidence and the statement of Martinez

[39] Mr. Sylvestre submitted that Martinez in his statement stated that when they got to the boat yard there were four male persons there but when they saw them Pech and Shabba entered the boathouse and lock themselves inside and the two other male persons stayed outside. On the other hand, Pech stated in his evidence that he saw three men entered the yard and described the events in the yard before he and Shabba walked into the house and thereafter heard a number of gunshots.

[40] The trial judge found that Pech evidence revealed that he was not saying that he saw the person who shot the two men. He stated that after the Appellant took away the gun from Martinez, Pech told Martinez "hold it down" and Martinez replied, "stop holler my name". Thereafter Pech went into the boathouse. The trial judge believed the testimony of Pech although there exists discrepancy between Pech testimony and Martinez statement. The trial judge noted '*I observed the demeanor of Pech while he was testifying, and he impressed me that he was speaking the truth.*'

The judge is required to treat Martinez statement with caution pursuant to section 92(3) of the Evidence Act

[41] In relation to Martinez, the judge stated that he is a person who has an interest to serve. Therefore, he was required to warn himself of the special need for caution before acting on the evidence of him and explained the reasons for doing so. These reasons are:

(a) Martinez was present with the Appellant before, during and after the shooting;
(b) Martinez was in possession of the gun before the usage of it by the appellant;
(c) Therefore the judge warned himself of the special need for caution before acting on the statement of Martinez because he may have been trying to distance himself from the crimes for which the Appellant was charged;

As it pertains to Martinez, in addition to treating his statement with caution, it ought not to be accorded with any weight in light of him being a witness of bad character, and is attempting to distance himself from his involvement in the murders.

[42] Mr. Sylvestre submitted that in addition to treating Martinez statement with caution, because of his bad character, his statement ought not to be given any weight. The trial judge accepted Martinez is a person of bad character based on evidence which showed his previous convictions. However, the judge found that a person's bad character does not necessarily mean that he was telling lies when he mentioned in his statement that the appellant was the person who shot the two deceased men. Nevertheless, the judge stated that he will take Martinez bad character into account when deciding whether the prosecution had made him feel sure that the appellant was the person who shot and killed the deceased men.

The finding of the trial judge on Martinez statement after assessment of the evidence

[43] The trial judge having considered the evidence and the issues raised by Mr. Sylvestre stated that although Martinez did not endorse his written statement when he testified, he found his statement 'MH1' to be lucid and credible. The judge stated that the important contents of the statement which he found reliable are: (a) in terms of the identification of the appellant by his alias and Christian names and (b) the accused took the gun from Martinez which he used to shoot the two deceased men. Further, the judge stated that the important parts of M.H.1 are supported by Pech's evidence. He said despite Martinez' bad character and his hostility when he was testifying , he found the contents of M.H. '1', reliable.

[44] Pech's evidence which the trial judge found reliable supported Martinez account as to the shooting. The judge did not find the alibi defence credible and he was sure from the whole of the evidence that the Appellant caused the death of the two deceased men.

[45] The trial judge, who was sitting alone, having heard the case for the Prosecution and Defence assessed the statement as shown by his judgment. The judge found that the evidence of Pech and the witness statement of Eric Martinez countered the testimonies of the Appellant and his witness Rancharan. Further, from the whole of the evidence, the judge was sure that it was the appellant who caused the death of each of the two victims.

The Appeal

[46] The sole ground of appeal is that the trial judge erred in admitting into evidence the hearsay statement of Eric Martinez. The Appellant urged the court to quash the conviction for murder and set aside the sentence passed.

Whether Martinez's previous inconsistent statement should have been admitted into evidence

[47] Martinez's statement was admitted into evidence by the trial judge after the application of section 73A of the *Evidence Act.* Learned Counsel, Mr. Sylvestre submitted that the case for the Crown rested on the evidence of Pech and the statement of Martinez, and the trial judge acted on that evidence to find the Appellant guilty. The crux of the argument (as in the court below) was that the Appellant had been put at an unfair disadvantage or alternatively unfairly deprived of the ability to defend himself. As such, the trial judge should have excluded the statement. Counsel relied on **Vincent Tillett Sr. v Queen, Criminal Appeal No. 21 of 2013**, an appeal from the Court of Appeal of Belize.

Admissibility of previous inconsistent statements in Belize – statutory provisions

[48] Section 73A of the Evidence Act provides for previous inconsistent statements (hearsay evidence) to be admissible as evidence. Section 73A provides:

> "73A. Where in a criminal proceeding, a person is called as a witness for the Prosecution and –
>
> (h) he admits to making a previous inconsistent statement; or
>
> (i) a previous inconsistent statement made by him is proved by virtue of section 71 or 72,
>
> the **statement is admissible** as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case."

[49] Sections 71 and 72, referred to in section 73A of the Evidence Act provide as follows:

> "71.-(1) A witness under cross-examination may be asked whether he has made any former statement relative to the subject-matter of the cause or matter and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion and,

if he does not distinctly admit that he has made that statement, proof may be given that he did in fact make it.

(2) The same course may be taken with a witness upon his examination-in-chief, if the judge is of opinion that he is adverse to the party by whom he was called, or that his memory is in good faith at fault, and permits the question.

72.-(1) A witness under cross-examination, or a witness whom the judge, under section 71 (2), has permitted to be examined by the party who called him as to previous statements, inconsistent with his present testimony, may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause or matter, without the writing being shown to him or being proved in the first instance but, if it is intended to contradict him by the writing, his attention must, before contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him.

(2) The judge may, at any time during the hearing or trial, require the document to be produced for his inspection, and may thereupon make any use of it for the purposes of the hearing or trial if he thinks fit."

Section 73A as explained in Tillet's case

[50] Mr. Sylvestre in the court below submitted to the trial judge that the admission of the statement would put the appellant at an unfair advantage or alternatively deprive him unfairly of the ability to defend himself. In this Court, Mr. Sylvestre repeated his arguments made in the court below. He referred and relied on ***Tillett's* case** where Morrison J.A. as he was then, in looking at sections 71 and 72 said at paragraphs 9 and 10:

> "[9] The rule at common law was, as is well-known, that a previous inconsistent statement proved by means of section 71 was not admitted as evidence of the truth of its contents, but went "*merely to the consistency and credit of the witness*" (Adrian Keane, *The Modern Law of Evidence*, 5th edn, page 181). However, by virtue of section 3 of the Evidence (Amendment) (No 2) Act, 2012, the Act was amended to insert a new section 73A, as follows:
> ……
> [10] A previous inconsistent statement, which is either admitted or proved by virtue of section 71 or 72, is therefore now **admissible** in Belize as evidence of the truth of its contents." (emphasis added).

[51] The hearsay statement is therefore admissible in Belize if admitted or proved by virtue of section 71 or 72, but still subject to the rule at common law. Morrison JA, after conducting a review of the common law position in Canada and statutory provision (Criminal Justice Act, 2003) in England, postulated that:

"[41] This brings us back then to section 73A. As in section 105 of the Act, the legislature has chosen the phrase "**is admissible**" to describe what use may be made of a previous inconsistent statement which a witness for the prosecution admits having made or which is proved to have been made by him. Unlike in section 125 of the English Criminal Justice Act 2003, there is no provision further limiting or qualifying the circumstances in which such a statement may be admissible. However, we consider that, as this court held in relation to section 105 in **Micka Lee Williams**, 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 or depriving him unfairly of the ability to defend himself." (emphasis added)**

Section 73 A and the decision in ***Japeth Bennett v The Queen***

[52] Subsequent to the trial of the Appellant in August of 2018, there was a further development in the law in relation to hearsay statements. In October 2018, the Caribbean Court of Justice delivered its decision in the appeal of **Japeth Bennett v The Queen** [2018] CCJ 29 (AJ). In that appeal, the appellant challenged the admission of the statement of an adverse witness under section 73A, and his subsequent conviction. Bennett's appeal was allowed and he was discharged. In that appeal, the CCJ referred to the **Tillett's case** in addressing admissibility of hearsay statements in Belize. The Director has referred the Court to, and relied on, **Bennett's** case in this appeal. The Director submitted that the trial judge properly exercised his discretion in admitting Martinez statement in accordance with the guidance in **Bennett's case.** Mr. Sylvestre is also relying on **Bennett's case** as stated in his oral arguments.

[53] In relation to section 73A Wit JCCJ, who delivered the majority judgment in **Bennett** for the Court, endorsed the principles in **Tilletts's case.** He said at paragraph 12:

"In Belize, no statutory provisions exist that limit or qualify the circumstances under which a previous inconsistent statement, or more generally hearsay evidence, can be admitted. Nevertheless, the power of the judge not to admit admissible evidence was correctly recognized by the Court of Appeal in *Tillett*

v R, a case which dealt with a hearsay statement admissible under section 73A, where the court stated, referring to its earlier decision in *Micka Lee Williams*, 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."

[54] In the instant case, the trial judge applied section 73A and the common law principles. Some prejudicial remarks were excluded from the statement. This shows the judge must have addressed his mind to the probative value of the statement. The trial judge also addressed the unfair disadvantage point raised by Mr. Sylvestre.

The argument to exclude the statement in the court below

[55] In the court below, Mr. Sylvestre relied on the second limb as shown in **Tillett's** case for the exclusion of the statement. That is, that the statement has put the appellant at an unfair disadvantage or alternatively deprived him of the ability to defend himself. Learned counsel referred this Court to his submissions made to the judge below on the objection of the admission of Martinez' statement. In this Court, Mr. Sylvestre reproduced the arguments at paragraph 19 of his submissions which states:

> "So that brings us to the part of the evidence of Eric Martinez with respect to his total repudiation of the taking of the statement and the contents of the statements. Ordinarily where such a statement to be admitted into evidence, it is true that the defendant would have the facility to cross examine the witness; but whereas, as here, the witness disassociate not only the contents of the statement but that even the fact that the statement was recorded by Sergeant Mark Humes. In this regard we refer to specific questions in the cross examination of the witness of whether he was at the police station on the 26 of October 2012 and whether he was interviewed by Sergeant Mark Humes, his response of not being able to recollect effectively stonewalled the defendant's right to cross examine him on the very pertinent facts of how and why the statement was given and also searching questions as to the truth of the content of the statement. In this regard, my Lord, the defence submits that the defendants have been put to an unfair disadvantage and have been deprived unfairly of the ability to defend themselves. In these circumstances, the justice of the case requires the exclusion of the statement, as there is no direction which can be given to cure this unfairness."

[56] The complaint therefore by the Appellant in the court below was that he was unable to cross-examine Martinez on pertinent facts as shown above. In this Court, Mr. Sylvestre submitted that the trial judge accepted the following in his ruling:

> "Ms. Lovell learned Crown Counsel cross- examined Martinez pertaining to the content of his statement; his answers were, as before, he could not remember. The Counsel having finished the cross- examination of Martinez, the learned defense counsel Mr Anthony Sylvestre cross- examined him. The defence, like the Crown, did not fare off well. Martinez was uncooperative by his repetitive response, "I cannot remember," or words to that effect."

[57] Mr. Sylvestre then relied on part of the conclusion reached by the trial judge, that is, "*the conduct of such a witness deprived the defence in probing into matters that would assist the defence's case."* Mr. Sylvestre submitted that the Appellant was put at an unfair disadvantage and deprived him unfairly of the ability to defend himself and this was accepted by the trial judge. Yet, the trial judge refused to exclude the statement. As such, counsel submitted that the trial judge erred in admitting the statement.

[58] The Court does not agree with Mr. Sylvestre that the trial judge erred in admitting the statement since the conclusion reached by him (the trial judge) was that "*the conduct of such a witness deprived the defence in probing into matters that would assist the defence's case."* The trial judge had other evidence to test the reliability of the statement from Martinez and he properly assessed the statement. Further, that statement referred to by Mr. Sylvestre was only a part of the conclusion given by the trial judge. The entire conclusion reached by the judge shows that he stated the following thereafter: "…*the conduct of such a witness deprived the defence in probing into matters that would assist the defence's case. However the action of the witness as described, in my view, is not a ground for me to exercise my discretion in refusing to admit the statement into evidence in accordance with section 73A of the Evidence Act*."

[59] The trial judge was sitting alone but did not automatically admit the statement. In his ruling, he relied on *section 73A* and obviously addressed his mind to the criteria necessary to admit the statement subject to the common principles in **Tillett's case.** At the time of admitting the hearsay statement, the judge had heard the evidence from Pech which in material respects confirmed Martinez account in his

statement and shows reliability. He also heard the examination of Martinez by Crown Counsel in relation to the statement. Further, he heard the evidence of Sgt. Humes who recorded the statement from Martinez which he said was done in the presence of Ms. Reynolds, the Justice of the Peace. Sgt Humes testified that there was no threat or promise to Martinez which shows that it was made voluntarily by him. Mr. Sylvestre also cross-examined Martinez.

[60] The crux of the objection by Mr. Sylvestre in the court below was that Martinez answer to questions by the Prosecution stonewalled the Appellant's right to cross-examine him on pertinent facts as to how and why the statement was given and also the truth of the contents of the statement. Martinez denied making the statement and denied that it was recorded by Sgt. Humes. Hence the appellant submitted that he had been put to an unfair disadvantage and deprived him unfairly of the ability to defend himself. The judge addressed the cross-examination point and said that counsel did in fact cross-examine Martinez. This is in fact so, although counsel did not cross-examine on the contents of the statement. Mr. Sylvestre cross-examined Martinez only on his bad character.

[61] The trial judge had to decide both facts and law since he was sitting alone. He had to determine the truth of the contents of the statement and the judge was fully aware of his duty of fairness to the appellant. The admission of the statement did not mean he accepted the contents as the truth. Upon admitting the statement, the judge said:

> "The mere fact that such statement is admitted does not end there. I will be required, at the opportune time, to assess the statement vis-à-vis other evidence as to its reliability."

[62] The judge was aware that there was other evidence to be led by the Prosecution which was sufficient for him to test and assess the reliability of the statement. Although, the judge had Pech's evidence which supported material aspects of Martinez hearsay statement, he stated he was required to assess the statement in relation to other evidence. Further, the judge excluded prejudicial statements from Martinez statement after it was admitted into evidence.

[63] The issues raised by Mr. Sylvestre at trial which were determined by the trial judge showed that the trial judge had sufficient evidence to test the reliability of the statement from Martinez and determine whether it is true. The evidence led by the Crown after the admission of the statement was from Sgt. Humes who read the statement into evidence, Daniels Daniels, Dr. Mario Estrada Bran, Amelita Gumbs, Radiance Flowers, Brian Lopez, and Alden Dawson. The Appellant gave evidence and his defence was alibi. He called his sister Rancharan as his witness.

[64] The judge assessed Martinez statement in relation to the other evidence including the evidence of the Appellant and his alibi witness, Rancharan. Martinez statement was considered by the judge with the exception of prejudicial and/or unnecessary matters.

[65] The trial judge considered Sgt. Humes evidence who testified as to the shooting incident at North Front Street on 25 October 2012. Also, that of Mr. Lopez, the scenes of crime technician who was on scene and he took photographs and processed the scene.

[66] The trial judge also considered how the Police was able to find the person responsible for the death of the deceased men and also the circumstances under which the statement was recorded from Martinez. He stated that on 26 October 2012 , Sgt. Humes informed all police patrols to be on the lookout for Eric Martinez, Ernest Thurton Jr. and Jasper Brannon who were wanted for questioning in relation to the killings of James and Young. About 30 minutes later Detective Constable Brian Miller escorted Martinez to Sgt. Humes. Martinez was informed by Sgt. Humes of the reason for his detention and he was interviewed by him. Subsequently, Martinez was detained and placed him in a cell at Patrol branch. A statement was later recorded from Martinez by Sgt. Humes upon instructions from Spt. Dawson. The recording of the statement was done in the presence of the Justice of the Peace, Ms. Reynolds.

[67] The trial judge also heard evidence from Superintendent Dawson who testified as to the circumstances under which Martinez gave the statement. Spt. Dawson testified that on 26 October 2012 about 3.00 pm he was informed that Martinez

known as Junior H was in police custody and that he wanted to speak to him. He testified that when Martinez arrived at his office he cautioned him since he was in police custody. He said that Martinez gave him certain information about the double murder that occurred the day before and he agreed to make a statement. Sgt. Dawson testified that because of the information that Martinez gave him, he decided to have a witness statement recorded from him. He informed Sgt. Humes to record the witness statement from Martinez. Spt. Dawson further testified that at no time he threatened, offer or promise Martinez any favour nor did he beat him.

[68] The trial judge did not believe the evidence of the Appellant and his witness, Rancharan. He rejected the defence of alibi. The trial judge believed Pech and Martinez that the Appellant was present at the shooting at North Front Street and he shot the deceased men. The trial judge found Pech to be credible and his evidence supported the reliability of Martinez statement.

Was the threshold reliability test satisfied as in Bennett's case?

[69] Madam Director referred the Court to the factors stated by Wit JCCJ, in the majority judgment, which she argued was met by the Crown. The Director relied on paragraphs 22, 23 and 24, of **Bennett's** case, where His Honour, Wit JCCJ considered the question as to "*when or on what basis can hearsay evidence safely be held to be reliable..*"

> "[22] The first question was thus answered by Hughes LJ in *Riat:* to ensure that the hearsay evidence can *safely* be held to be reliable, the judge must look (1) at its strengths and weaknesses, (2) at the tools available to the jury for testing it, and (3) at its importance to the case as a whole. In *Friel* the Court of Appeal indicated that judges should focus on the reliability of the hearsay evidence, grounded in a careful assessment of (1) the importance of the evidence, (2) the risks of unreliability and (3) the extent to which the reliability of the evidence can safely be tested and assessed by the jury.
>
> [23] The requirement that the jury must have sufficient tools to test and assess the hearsay evidence also figures prominently in the Canadian case-law: "threshold reliability" can in the first place (and should preferably) be established "by showing that there are adequate substitutes for testing the evidence which provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement" ("**procedural reliability")**. As a substitute for the traditional safeguards is mentioned a video (or audio) recording of the entire statement."

> [24] Threshold reliability can also, although it would seem to a lesser extent, be established when there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy **("substantive reliability").** Whether this is the case may depend on the circumstances in which the statement was made and on evidence (if any) that corroborates or conflicts with the statement. Another factor may be whether or not the maker of the statement had any reason to misrepresent the matter stated or whether the statement was made spontaneously, or against his or her own interest (factors that can be found on the "checklist" of section 114(2) CJA)."

[70] The Director, relying on the above principles submitted that the circumstances of this case satisfied both threshold tests. Further, the trial judge took all the relevant factors into consideration. She referred to the evidence of (1) Senior Spt. of Police Alden Dawson who testified as to what transpired that led to his directive to Sgt Mark Humes to record a statement from Martinez (2) Martinez statement was recorded by Sgt Mark Humes in the presence of the Justice of the Peace; (3) Martinez signed acknowledging that he was telling the truth in the statement.

[71] Further, the Director submitted that Martinez's statement was confirmed in material respects by the testimony of Pech, the forensic evidence in relation to the cause of death and the location of the bodies. The description of the scene and the photographs taken offer further support. This evidence led by the Crown enabled the court to determine the procedural and the substantive reliability of the statement.

[72] It is to be noted that in **Bennett's** *case*, the accused was on trial before a judge and jury. In the instant case, it was a judge alone trial, the trier of both facts and law. It was for the judge to make a preliminary assessment of the reliability of the hearsay statement and after admittance to further test and assess its reliability in relation to other evidence.

[73] Further, in **Bennett's case**, the hearsay evidence (previous inconsistent statement) was the only identification evidence of the appellant as the shooter. In the instant case, the identification of the Appellant as the shooter was the direct evidence of Martinez and circumstantial evidence from Pech. Pech's evidence strongly suggests that the Appellant was the shooter since he took the gun from Martinez, cranked it and was told by Martinez not to shoot. Pech statement also supports Martinez statement in other material aspects as discussed above. The trial judge

therefore, had an indication from this early stage as to the strength of Martinez's statement and its importance to the case. There was also other evidence to test the weight and credibility of the statement.

[74] Mr. Sylvestre referred the Court to the factors mentioned by Justice Barrow at paragraph 155 of his decision in **Bennett's case.** He made the point that the trial judge was operating under the **Tillett's** principle and the law has now been modified by the **Bennett's** decision (after the trial of the instant matter) in relation to factors to be considered.

[75] The Court will consider whether the threshold reliability test has been satisfied. Threshold reliability is met when the hearsay is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. The difficulty here being that Martinez recanted as he continuously testified that he cannot recall the shooting incident. Wit JCCJ at paragraphs 23 and 24 of his judgment gave guidance as to how these dangers can be overcome. These include: (a) Adequate substitutes for testing the evidence for truth and accuracy of the hearsay statement (procedural reliability); or (b) that there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability).

[76] To determine whether substantive reliability is established, (unlikely to change during cross-examination), the trial judge can consider the circumstances in which the statement was made and evidence (if any) that corroborates or conflicts with the statement.

[77] In the instant matter, the trial judge had evidence showing the circumstances under which the statement was made and evidence from Pech to corroborate Martinez statement. Evidence was led by the Crown to show the circumstances under which the statement was recorded as required by section 71 of the Evidence Act. The circumstances under which the statement had been recorded from Martinez was given by the evidence of Sgt. Humes and Sgt. Alden Dawson. Before the admittance of the statement by the judge pursuant to section 73A, Sgt. Humes testified as to the circumstances under which he recorded the statement after he was contacted by Sgt. Dawson. He had escorted Martinez along with Ms. Reynolds, Justice of the Peace

(JP) to an office at CIB. He asked Martinez if he wanted to give a statement and he agreed to give an open statement. The statement was dictated by Martinez to Sgt. Humes in the presence of Ms. Reynolds. It was then read over by Sergeant Humes to Martinez and he signed three places on the statement in the presence of Ms. Reynolds who also signed the statement.

[78] Sgt Alden Dawson also testified as to what transpired that led to his directive to Sgt Mark Humes to record a statement from Martinez. This evidence further shows the substantive reliability of the statement.

[79] The evidence from Pech before the admission of the hearsay statement supported material aspects of Martinez statement and strong circumstantial evidence that the Appellant shot the two deceased men. Although Pech did not see the shooting, circumstantially, the evidence suggested that the Appellant shot the deceased men. The cause of death as shown by the forensic evidence was by gunshot wounds.

[80] Mr. Sylvestre, in his arguments contended that Pech did not see the actual shooting as he had turned and went inside the house, therefore, this cannot be regarded as strong circumstantial evidence that the appellant was the shooter. The Court disagrees with counsel as the trial judge considered the statement made by Martinez that the Appellant took the gun from him and cranked it and this was supported by Pech. Further, Martinez told the Appellant not to shoot the man and this was also supported by Pech. The evidence from Pech as to the shooting was:

> "…well I see one of them had a gun. So the one with the gun, Junior H, he come to Rabbit. Soh he box Rabbit with the gun and put Rabbit pan ih knee. Then I hear ih ask Rabbit, "weh my bike?" So then I talked to he, I tell the man, "boy H, hold dat down, noh bring dat dah my yard". So well I the halla and I the talk to the man, H. Soh the next guy weh deh with ah, Dangalang, he tek the gun from H. He tek the gun and he crank the gun when he get the gun. When he cranked the gun, well I say this thing get serious, so I say, "*H, H, hold that down.* Junior H then said "*boy stop the halla out my name.*" Junior H tell the man ("the appellant") "**man, noh shoot the man."** "Well I walk gone ena my door and Shabba the come behind me right, then Frank mi di come to and H tell he, "*weh you gwen, sit down*." I gone in the fidget with my clothes but my focus deh outside, noh. A while after I heard gunshot, you know, noh one noh two but some gunshots, I noh know how much. ..then em you had wah lee

> pause, then after that I hear more gunshots. Then I see somebody or wah figure fly pass the door, yu dig. A while maybe a minute or half minute, whatever, Shabba say, "boy Ras I gwen." Then he walked through the door when he look soh, he said boy Ras this one dead. …"

[81] The appellant had cranked the gun when Martinez said to the Appellant, "*man, noh shoot the man.*" Pech turned and went "ena my door" and fidget with his clothes. A while after he heard gunshot. That "a while after" was not an issue for the trial judge as the appellant had cranked the gun when Martinez told him not to shoot. So although Pech had not seen the Appellant pull the trigger, the evidence points to him as the trigger man showing the truthfulness as to Martinez hearsay evidence.

[82] On the issue of corroboration as raised by Mr. Sylvestre, the trial judge found that Pech testimony supports two points: (a) As it relates to the Appellant being the shooter, Pech testimony provides circumstantial evidence of him being the shooter. The judge considered that the contents of Martinez statement disclosed that he had the gun previously and on the scene, the appellant took it away from him; and (b) Martinez had advised the Appellant not to shoot Robert Young. The trial judge stated that Martinez statement furnishes direct evidence that the accused was the shooter who caused the deaths of the deceased men, Young and James.

[83] The Court agrees with the submissions of the Director that the evidence in this case satisfied the threshold reliability test as stated by Wit JCCJ. The trial judge in the instant matter spoke of "reliability". The assessment by the trial judge in fact satisfied the threshold reliability, as in **Bennett's** case.

[84] It is noted that the trial judge in his written judgment stated that upon reflection, having reviewed the judgment of **The Queen v Jeremy Harris and Deon Slusher,** Criminal Appeal Nos. 1 and 2 of 2004, Martinez was not an accomplice. That the shootings of the two deceased persons were not part of a joint enterprise. The trial judge corrected his earlier ruling and ruled that Martinez is a person who has an interest of his own to serve and therefore he found it appropriate to warn himself of the special need for caution before accepting his statement. The judge further stated that because of Martinez's hostility to the prosecution, an assessment had to be done of

his statement by considering other evidence, including the evidence from the appellant and his witness.

[85] On the whole of the evidence, the judge found that although Martinez did not endorse his written statement when he testified, he found his statement MH '1' to be lucid and credible. The important contents of Martinez hearsay statement which the judge found reliable as shown above and worth repeating are: (a) in terms of the identification of the appellant by his alias and Christian names and (b) the accused took the gun from Martinez which he used to shoot the two deceased men. Further, the judge stated that the important parts of M.H. '1' are supported by Pech's evidence. He said despite Martinez' bad character and his hostility when he was testifying , he found the contents of M.H. '1' reliable.

[86] In the opinion of the Court, the threshold reliability had been met by the evidence from the Crown. Pech's evidence strengthened Martinez statement and in material respects corroborated Martinez statement. As shown above, the other evidence led by the Prosecution also supported the threshold reliability of the hearsay statement from Martinez.

Further argument on challenges to cross-examination

[87] The Director referred the Court to the comments of Rajnauth-Lee JCCJ in her dissenting judgment in **Bennett's** case, on the issue of the inability to cross-examine a hostile witness. Her Honour said at paragraphs 73 – 74:

> "[73] I am also not convinced that the trial judge ought to have excluded Middleton's statement because the Defence was unable to cross-examine him. In the case of *R v Bennett and Turner* the English Court of Appeal made it clear that the appellants had been perfectly entitled to and able to cross-examine the witness who had recanted. "Clearly, the fact that he was purporting not to remember what happened meant that they were unable to ask him to replicate the account but that did not prevent them from putting to him their case, cross-examining him in relation to the account, in relation to its internal inconsistencies such as they were or external inconsistencies such as they were; and of course it did not preclude them in any event from them being able to give their account, if they so wished, to the jury at a subsequent stage." I note that Middleton was cross-examined by both the Crown, who called him as a witness, and by the Defence. The essence of the cross-examination was to assess whether Middleton had identified Bennett at the scene of the crime;

whether he had given a previous inconsistent statement to the police that he had seen Bennett holding a gun two (2) feet away from the deceased in circumstances from which it could be inferred that Bennett was the shooter.

[74] Additionally, in the case of *R v B (K.G.)* earlier referred to, Lamer CJ had noted (and I agree) that commentators had observed that "the witness's recantation has accomplished all that the opponent's cross-examination could hope to: the witness now testifies under oath that the prior statement was a lie, or claims to have no recollection of the matters in the statement, thus undermining its credibility as much as cross-examination could have." Lamer CJ further noted that Lee Stuesser had pointed out at page 60 of his article "Admitting Prior Inconsistent Statements For Their Truth" (1992), 71 *Can. Bar Rev.* 48], that "the mantle of a `hostile' cross-examiner in the case of a recanting witness is taken up by the caller of the witness.""

[88] The Director further referred the Court to the judgment of the Board in **R v Barnes**; **R v Scott,** Privy Council Appeals Nos 2 of 1987 and 32 of 1986, which was referred to in the **Tillett's** case at page 11. In that judgment, the witness had died whereas in this case Martinez recanted. We however, find the authority to be relevant. The Court said:

" The mere fact that the deponent will not be available for cross examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence."

[89] The Director accepted that there may be a case in which the inability of the accused to cross-exam the maker of a statement may be a proper basis upon which a judge can exercise his discretion to exclude a statement. However, she contended that this was not such a case. The Court agrees with the Director as there was other evidence to test and assess the reliability of the statement from Martinez. There was supporting evidence from Pech and strong circumstantial evidence from him that the Appellant was the shooter.

[90] The trial judge in his judgment noted that the Appellant did not fare better during cross examination of him by Mr Sylvestre who cross examined only on previous convictions before the statement was admitted by the court. Mr. Sylvestre had applied to cross-exam after the statement was admitted but this was refused. This Court is of the view that Mr Sylvestre should have been granted permission by the trial judge

to cross examine Martinez after his statement was admitted. Nevertheless, in the opinion of the court, Mr. Sylvestre would not have fared better than the Prosecution. Martinez continuously stated that he cannot recall anything. He also said he went his separate way after socialising. As stated by Rajnauth Lee, in **Bennett**, "….*the witness recantation has accomplished all that the opponents cross examination could hope to: the witness now testifies under oath that the prior statement was a lie, or claims to have no recollection of the matters in a statement, thus undermining its credibility as much as cross examination could have."* It is to be noted that the defence was not prevented from putting its case to the recanting witness. Mr. Sylvestre did have an opportunity to cross-examine Martinez before the admittance of the statement.

[91] Mr. Sylvestre's argument was that the appellant was put at an unfair disadvantage because Martinez, being a hostile witness could not be cross-examined. Mr. Sylvestre submitted that as stated by Barrow JCCJ in **Bennett's** case, the effect of inability to cross examine did not in and of itself justify the exclusion of a hearsay statement. However, the learned judge made the distinction between a deceased witness and one who recants his statement. In this case, Martinez recanted but the trial judge had other evidence to test the reliability of his hearsay statement. In **Bennett's** case there was no other evidence to support the statement or corroborate the recanting witness. In the instant matter, there is the supporting evidence of Pech who witnessed what transpired up the cranking of the gun, though not the shooting itself which occurred when he turned and went into his house.

Sufficiency of evidence to ground charges against the appellant

[92] The Appellant argued that the evidence of the Crown was insufficient to ground the charges against the Appellant. The Director contended that there was sufficient evidence to prove the case against the appellant even if the statement of Martinez had not been admitted into evidence. The trial judge accepted that Pech's evidence was strong circumstantial evidence to prove that the Appellant was the shooter. He nevertheless, did not rely solely on Pech's evidence. Pech's evidence was used to corroborate material aspects in Martinez statement. This Court is of the view the evidence led by the Crown which includes the evidence of Pech was sufficient to ground the charges against the Appellant.

Conclusion

[93] In the opinion of the Court, for the reasons discussed above, the trial judge did not err in admitting and relying on the previous inconsistent statement of Martinez. There was sufficient evidence before the trial judge to determine the threshold reliability of the statement, not only from Pech but the other Prosecution witnesses. Therefore, the verdict of the trial judge is safe warranting the dismissal of the appeal.

Disposition

[94] The appeal is dismissed, and the conviction of the appellant affirmed.

_____
HAFIZ BERTRAM P(Ag)

_____
WOODSTOCK-RILEY JA

_____
MINOTT- PHILLIPS JA