IN THE HIGH COURT OF BELIZE, A.D. 2023

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C91/2019

THE KING

v.

ALBERT JONES SR.

BEFORE: **The Hon. Mr. Justice Nigel Pilgrim**

APPEARANCES: **Ms. Cheryl-Lynn Vidal S.C., Director of Public Prosecutions, for the Crown**

Mr. Marcel Cardona Cervantes for the Defence

DATE OF HEARING: 12th May, 2023

RULING ON THE ADMISSIBILITY OF THE EVIDENCE OF HENRY LOPEZ

1. Albert Jones Sr. ("the Accused") was indicted on 30th September, 2019 for the murder of Alaine Garcia ("the purported deceased") on 20th February, 2018, contrary to section 117 read along with 106(1) of the ***Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020***. The body of the purported deceased has never been found and whether Alaine Garcia is dead is a live issue in this trial.

2. In support of its case, the Crown is seeking to admit the evidence of witness statements of Albert Jones Jr. ("the Witness"), recorded by P.C. Henry Lopez ("P.C. Lopez"). This is reflected in the Crown's case management form. The Crown is not calling the Witness to give sworn testimony, and there is no indication that he is unavailable in the sense mentioned at section 105 of the ***Evidence Act, Cap. 95 of the Substantive Laws of Belize, R.E. 2020***, ("the *EA*") or section 123 of the ***Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize, R.E. 2020,*** ("the *IPA*") nor has any such application been made.

3. The Crown is also seeking to admit through P.C. Lopez a report made to him by the purported deceased ("the purported deceased's Report"). This application is being made pursuant to section 123 of the *IPA*.

4. Pursuant to the Court's duties to actively manage cases under the ***Criminal Procedure Rules 2016*** ("the Rules") and ensure that the evidence at trial is presented without avoidable delay, the Court of its own motion at case management, and under its power at Rule 4.2(i) of the *Rules*, invited the parties to address it on the admissibility of the evidence of the witness before trial. The parties have addressed the Court with helpful oral and written submissions.

5. The first issue to be determined in this ruling is whether the admission of the statements of the Witness through the evidence of P.C. Lopez would involve the Court permitting inadmissible hearsay. The second issue is whether the purported deceased's Report is admissible pursuant to section 123 of the *IPA*.

THE FIRST ISSUE

THE EVIDENCE

6. The Crown's case stands and falls, as has been conceded by the Crown[1], on the admissions allegedly given by the Accused orally[2]and later confirmed in a written caution statement. The Accused said that around the time that he killed the purported deceased he was contemplating the fact that the latter had assaulted his son:

> *"I saw Heights Alaine. He said "weh you the do fams" I told him "I just the throw a lil line" he said somebody want to kill him….so yes he had pistol wipped (sic) my son sometime, Albert Jones Jr….something just start tell me this man come in your hand who chance your son. So I just come and meet him the (sic) relax the (sic) sit down I just creep up on him. I then struck him back of the head on his neck. Then he was like this and I chopped him on his hand."*[3]

7. P.C. Lopez, in his deposition, testified that he had on 2nd December, 2017, a little over two and a half months before the killing subject of this indictment,

[1] Page 1 of their written submissions

[2] See the depositions of Leticia Matu Moguel at page 9 line 7; Lydia Kerr at page 32 lines 15-27; and Alejandro Cowo at page 35 lines

[3] Page 2 of the caution statement

that he received a report from the Witness. He subsequently recorded a statement from the Witness on the 3rd December, 2017 in which he alleged, though not pistol whipped, he was beaten by the purported deceased with his hands[4].

8. This evidence in the Court's view requires a consideration of the legal issues of relevance, hearsay and motive.

THE LAW

9. The legal test of relevance was set out by the Privy Council in the Trinidadian case of ***Jairam and Another v State [2006] 1 LRC 429***. There the Board opined as follows, per Lord Rodger of Earlsferry:

> *"[11]* ***It is accepted that, to be admissible, evidence must be relevant to some issue of fact that is in dispute in the trial****. In his Digest of the Law of Evidence (12th edn, 1936), p 3, art 1, Stephen gives a definition of relevance which has been widely accepted:*
> ***'The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other****.'" (emphasis added)*

10. The Court in *Jairam* noted that evidence must be firstly relevant and then also admissible.

11. A definition of hearsay was provided in the House of Lords decision of ***R v Sharp [1988] 1 WLR 7*** per Lord Havers, at page 11:

> *"I accept the definition of the hearsay rule in Cross on Evidence, 6th ed. (1985), p. 38: "****an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted*** *."*
> *The rule is so firmly entrenched that the reasons for its adoption are of little more than historical interest but I suspect that the principal reason that led the judges to adopt it many years ago was the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another." (emphasis added)*

[4] See page 32 of the depositions lines 12-16

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12. The issue of motive has been legislatively addressed in this jurisdiction. The *EA* provides as follows:

> *"43. In criminal cases, after proof that the offence has been committed, evidence may be given to show that the accused person–*
> *(a) had or had not a motive for committing the offence;"*

13. At common law the Privy Council in the Bermudan case of ***Myers v R [2016] 2 LRC 383*** said this about motive, per Lord Hughes:

> *"[43]* ***In a case of murder or attempted murder, as in most criminal cases, evidence of motive is relevant but not necessary****. Often the Crown may be able to prove what happened, and who did it, without knowing why.* ***But where there is evidence that the defendant had a motive to kill the victim, that goes to support the case that it was him, rather than someone else, and/or that he did it with murderous intent, rather than accidentally or without intent to do at least grievous bodily harm. It may equally be relevant to rebut asserted self-defence or provocation****." (emphasis added)*

ANALYSIS

14. The Court believes the order of consideration on this issue should be firstly whether the evidence is relevant and then whether the evidence is admissible.

15. The Court is of the opinion that the Witness's evidence is clearly relevant. The fact that (i) the son of the Accused is beaten by the purported deceased; and (ii) two and a half months later the Accused kills the purported deceased are, to use the language of the Board in *Jairam,* "two facts…which… are so related to each other that according to the common course of events one… by itself…proves or renders probable the existence …of the other". The Court is of the opinion that this is evidence of motive under the principles in *Myers*.

16. However, the Court notes that this finding of relevance is tied to the reliance on fact (i) above for its truth This evidence only becomes relevant if the Court acts on the statement of the Witness for its truth, that is, that the purported deceased in fact assaulted the son of the Accused. This would be relying on an assertion other than one made by a person, the Witness, while giving oral evidence in the proceedings which is inadmissible as evidence of any fact asserted under the definition of hearsay in *Sharp*.

17. The Crown has asserted that the evidence is not being relied upon for its truth and have cited the cases of ***Subramaniam v Public Prosecutor [1956] 1 WLR 965*** and ***Small and Gopaul v DPP [2022] CCJ 14 (AJ) GY***. The principle in *Subramaniam* is clear. It is however distinguishable from the instant case on its facts. In the latter case the threats made to the appellant in that well-known case were relevant to prove he acted in duress and were admissible to show the appellant's state of mind. It was admissible to show why the appellant did what he did. It was also admissible because the statement was made **to him**. This was the point of that judgment as noted by the House of Lords in ***R v Blastland [1986] A.C. 41*** at pages 54-55:

> *"The basic rule that,* ***when a person's state of mind is directly in issue, it may be proved by what was said by or to that person*** *is well illustrated by two very straightforward cases.*
> …
> *The classic illustration of a* ***statement admissible to prove the state of mind****, again directly in issue, of the person to whom the statement was made is Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965." (emphasis added)*

18. In the instant case the Witness's statements were not made to the Accused. They were made to P.C. Lopez. There is no evidence that the statements recorded by P.C. Lopez were passed to the Accused and he acted upon them giving rise to the situation in *Subramaniam* or the general principle in *Blastland*. In the Court's respectful view the case of *Subramaniam* does not assist the Crown on this issue.

19. The case of *Small*, in the Court's respectful view, is similarly unhelpful to the Crown. The learned Director of Public Prosecutions has quite frankly conceded[5]that the Court in that matter had not addressed the issue of hearsay. Indeed the word hearsay appears only once in the judgment[6] and in a completely different context.

20. The Court accepts that evidence of motive is admissible both at statute and common law. However, that evidence of motive must come from admissible evidence and not inadmissible hearsay, following the reasoning of the Privy Council in *Jairam* in the context of relevance, per Lord Rodger of Earlsferry:

> *"[13] Mr Knox accepted, of course,* ***that even though evidence is relevant it may not always be admissible. Most obviously, pure hearsay evidence may well be relevant, but it is not admitted***

[5] Paragraph 20 of the Crown's submissions
[6] Paragraph 132

> ***because its reliability is difficult to check****. Likewise, evidence of similar facts is generally inadmissible but will be admitted if its probative force is sufficiently great to make it just to admit it, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime…" (emphasis added)*

21. Indeed the Court is reinforced in its view that this evidence is inadmissible hearsay evidence by the guidance provided by two English cases.

22. The first is the Queen's Bench decision of ***Jones v Metcalf[1967] 3 All ER 205***. In that case an eyewitness to an accident had given the number of a lorry involved in the accident to the police and that was used to apprehend the appellant. At trial the witness forgot the number of the lorry involved in the accident and the Court held that it would be inadmissible hearsay to allow the police who received that number to fill the gap, per Lord Diplock, at page 208:

> *"The inference that the appellant was the driver of the lorry was really an inference of what the independent witness had said to the police when he gave them the number of the lorry,* ***and since what he had said to the police would have been inadmissible as hearsay, to infer what he said to the police is inadmissible also****." (emphasis added)*

23. The English Court of Appeal decision in ***R v Cook [1987] 1 All ER 1049*** referred to *Jones* with approval[7] and the Court further opined, per Watkins LJ at page 1054:

> *"****What… is clear is that what was said by a prospective witness to a police officer in the absence of a defendant is hearsay and cannot, therefore, be admissible as evidence****." (emphasis added)*

24. The Court finds that the relevance of the Witness's statements rests entirely on its testimonial value. The only useful value of those statements to the Crown is if it is relied upon for its truth. It was not made in the presence of the Accused, nor is there any evidence that the Witness's statements were brought to the attention of the Accused so it can be said to be probative of his state of mind.

25. In those premises the Court finds that the statements of the Witness recorded by P.C. Lopez are inadmissible hearsay and are excluded from evidence.

THE SECOND ISSUE

[7] Page 1053

THE EVIDENCE

26. The purported deceased's Report contains the following evidence:

> *"I then quickly lashed Albert Jones to the neck with the machete I had in my hand where I then dropped the machete and held Albert Jones' right hand that had the firearm and jumped on him throwing Albert Jones' on the ground where I started punching him with my right hand in an attempt to take the said firearm from him…..I then choked Albert Jones and bite his hands where he suddenly then released the gun and if fell into the swampy bushy lot. I must say I continued beating Albert Jones…"*[8]

27. The Crown is relying on the evidence of several admissions allegedly made by the Accused to establish the fact of death of the purported deceased as well as circumstantial evidence of his not being in contact with persons whom he is usually in contact, such as Kellyn Neal and Alessa Garcia, his spouse and daughter respectively.

THE LAW

28. Section 123 of the *IPA* provides, where relevant:

> *"123.–(1) Where any person has* ***been committed for trial*** *for any crime****, the deposition of any person*** *may****, if the conditions set out in 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."*

29. This provision has been considered by our Court of Appeal in ***Harrim Perez v R, Crim. App. 18/12***, per Sir Manuel Sosa P:

> *[55]…****The section clearly provides for four entirely separate and distinct categories of case in which a deposition may be read in***

[8] Page 29 of the depositions lines 2-9

evidence, viz, (i) death, (ii) insanity, (iii) illness which prevents travel and (iv) absence from Belize*. The only criticism which may fairly be levelled at the drafting of this section … is that it fails neatly to connect the last of these categories with the phrase 'proved at the trial by the oath of a credible witness'. The cause of this failure is, of course, the presence of the word 'is' (instead of the words 'to be') in the phrase 'or is absent from Belize'. The sole result of such failure, however, is that the manner in which absence from Belize is to be established, as it plainly has to be, is left unstated. In the view of this Court, the use of 'is', instead of 'to be' in the phrase in question is a manifest drafting error in the face of which, as a matter of necessary implication, absence from Belize, too,* ***must, at any relevant trial, be proved by the oath of a credible witness****.*

…

[57] …A little over five years after the decision in Sánchez, Lord Griffiths, writing for the Board in Barnes, Desqouttes and Johnson v R and Scott and Walters v R (1989) 37 WIR 330, appeals to the Judicial Committee from the Court of Appeal of Jamaica, said, at p 340 :

'… their Lordships are satisfied that ***the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. 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****.'*

Admittedly, the Board was there concerned with a judicial discretion arising at common law as opposed to a statutorily conferred judicial discretion such as the one under consideration in the instant case. Section 34 of the Jamaican statute, viz the Justices of the Peace Jurisdiction Act, conferred no discretion on the court of trial in cases where the witness was dead (as was the case in Barnes) or too ill to attend court, ***whereas section 123(1) of the Act contains a proviso under which the relevant Belizean court must be satisfied that the accused will not be materially prejudiced by the reception of the evidence in the deposition. This Court is unable to see why the remarks of the Board quoted above should not be regarded as equally applicable to the statutorily conferred discretion with which the present case is concerned."*** *(emphasis added)*

30. The Court also notes the views of our apex Court, the Caribbean Court of Justice, in ***Dioncicio Salazar v R [2019] CCJ 15 (AJ) BZ***, per Wit JCCJ:

"[36] ***It would appear that in Belize the unsworn statement of a person to a police officer is in principle admissible as evidence in criminal proceedings if the maker of the statement dies before the trial****.* ***However, the statement needs to contain a declaration by that person to the effect that it is true to the best of his***

knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true. ***The printed forms that are used by the police in Belize, to write down a witness statement contain that declaration***. *Such out of court statements are regularly used in Belize and are admitted either under section 123 IPA or section 105 Evidence Act.* ***Section 123 IPA is restricted to those cases where the accused has been committed for trial for any crime. In such a case the deposition, which under section 1 IPA includes a written statement recorded by the police, of a witness may without further proof be read as evidence at the trial of the accused, "provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence". The provision does not say anything about the weight of such evidence****." (emphasis added)*

ANALYSIS

31. The Court interprets section 123 of the *IPA,* in light of *Perez* and *Salazar,* as requiring the evidence on oath of credible witnesses to speak to the death of the purported deceased, before engaging its fairness discretion to determine the admissibility of the puported deceased's Report. It seems clear that a critical part of the Crown establishing the fact of death is reliance on the alleged admissions of the Accused which have yet to cross the bridge of section 90 of the *EA*. In that regard, the Court in its discretion would defer its decision on this application until after it rules on the admissibility of those statements.

Dated 19th May, 2023

NIGEL C. PILGRIM
JUDGE OF THE HIGH COURT OF BELIZE
CENTRAL DISTRICT