IN THE HIGH COURT OF BELIZE A.D. 2023

(CRIMINAL JURISDICTION)

NORTHERN DISTRICT – ORANGE WALK TOWN

Indictment No. N11/2018

THE KING

v

HILMAR ALAMILLA

Appearances

Mr. Javier Chan, Sr. Crown Counsel} for the Crown
Mr. Dickie Bradley}
Mr. Leeroy Banner} for the Defence

Trial dates February 14, 15, 16, 17, 20, 21, 23, 24, 27, 28, 29
March 1, 3, 8, 9, 28, 2023

RULING ON NO-CASE SUBMISSION

The accused is charged with murder. The Crown has presented its case to the court, and at the close of the Prosecution's case, the Defence in the person of Mr. Leeroy Banner made a no-case submission as follows on behalf of the Defence –

> *"I raise to make a no-case submission under the second limb of Galbraight. That the evidence presented by the Crown is of a tenuous nature and so weak that even if properly directed a jury cannot come to a conclusion as there is no prima facie case against the defendant.*

The crux of the case (the Crown's case) rests on the hearsay evidence of Gustavo Hernandez (deceased) and Luis Briceno who was declared a hostile witness.

The two (2) witnesses who weaken the evidence are-

(1) Scenes of Crime and

(2) Peter Orellano

The Security Guard who saw Luis Briceno and Gustavo Hernandez walking in front of D'Victoria Hotel saying – "Boy Fuck look what this man do."

This is about 30 feet from where he was at the Gym Bar. The two witnesses said they ran away in different directions after the dun shot, and this witness is saying – the guys were not running away, I saw them walking away at 20 feet together and saying, "Boy look weh this man do."

Now since Gustavo Hernandez is dead – his evidence is hearsay –

Gustavo Hernandez, his evidence is so unconvincing as the other evidence contradicts and destroys it. Ref – Security Guard's evidence because Gustavo Hernandez is dead, he cannot be asked the questions. That is why it becomes unfair to the defendant.

The test is the inability to cross-examine. So, the defendant is prejudiced, and he is unable to cross-examine Hernandez.

According to the evidence Gustavo Hernandez was detained for the murder of Daniel Sosa. He gave a caution statement to the police in the morning, then in the night at 9:00 p.m., he gave an open statement which was tendered into evidence. Here is someone who is a murder suspect, and he did not tell the police what happened. He gave a caution statement first.

So, in law, once the person in law has an axe to grind, a personal interest he will shift the blame to someone else.

So, you will tell the police what they want to hear. This is very prejudicial to the defendant. He was in custody when he gave the open statement. The inference is – he gave the statement so he could be released from custody. This makes the statement unreliable as he would say anything to get away.

So, the court has to be extremely careful, this is very prejudicial to the defendant. This goes further, he is in custody as a murder suspect, and he was still in custody when he gave the open statement. He was released the next day after giving the open statement. We say there is a concern for the court.

So, we say when you look at all the factors so far, his (Gustavo Hernandez) evidence cannot be safely said to be reliable.

The Defence then made the shared comments as regard paragraph 115 <u>of the case of Japhet Bennett</u> which deals with the counterbalancing measures needed to ensure fairness and the admissibility of hearsay evidence – (e.g.)

1. *The circumstances in which the statement was made.*
2. *How reliable the evidence in the statement appears to be.*
3. *The amount of difficulty in challenging the statement (3e.g.) <u>Gustavo is not here.</u>*
4. *The extent to which the defendant Alamilla will face in challenging the statement.*

These are factors for the court to consider and look at."

The Sr. Crown Counsel, Mr. Javier Chan replied for the Crown as follows –

"The Defence's no case submission was on the second limb of Galbraight that a case was – to be stopped if the evidence was tenuous and the judge concluded that the Prosecution's evidence taken at its highest was that a properly directed jury could not properly convict on it.

The Counsel submitted that the hearsay evidence cans safely be held to be reliable and the judge must look at –

1. *<u>At its strengths and weakness</u>*
2. *<u>At the tools available to the jury for testing it</u>*

3. At its importance to the case as a whole

He continued; the judge should focus on the reliability of the hearsay evidence grounded in a careful assessment of –

(1) The importance of the evidence

(2) The risk of unreliability

(3) The extent to which the reliability of the evidence can safely be tested and assessed by the jury.

Counsel also submitted that the reliability test is the threshold test for admitting a hearsay statement that it must be shown to be reliable, as the decisions in the Canadian cases and Ibrahim confirms.

He also referred to paragraph 131 of Japhet Bennett case, and he concluded in R v Kelawon it was clarified that threshold reliability is, mainly concerned not with whether the statement is true or not, which is a question of ultimate reliability and is a matter for the jury. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness."

Therefore, the court now looking at the circumstance surrounding the statement itself it is noted that the deceased Gustavo Hernandez whose statement became admissible under Section 123 of Chapter 96, Laws of Belize on proof of his death by the

witnesses who provided this evidence in trial by agreed evidence and was accepted by Defence without objection based on these statements. However, the evidence of Inspector Desmond Francisco, the Inspector who was the Investigating Officer under cross-examination accepted that both Hernandez and Briceno were at the station on the day of the shooting. He also agreed that both persons were at the station for a day and were released the following day.

Questions by Defence Counsel

Q. The caution statement was taken in the first morning they were at the police station.

A. Yes.

Q. The open statement was taken the night.

A. Yes.

Q. A caution statement would be a caption saying I have been notified I am a suspect in the murder of Daniel Sosa.

A. Yes.

It is noted then that Gustavo Hernandez gave a caution statement in the morning and an open witness statement 9:00 p.m. in the night while still in custody of the police. He was subsequently released the following day from custody and never charged.

His statement was given some twelve (12) or more hours after being in custody and after giving a previous caution statement which was not introduced into evidence in the present trial.

It is also noted that at the time Hernandez gave the statement he was still a suspect in the commission of the crime of murder in the death of Daniel Sosa. Hence the submission of Defence Counsel that he had an axe to grind, and a personal interest to protect. So he will shift the blame to someone else, so now noting the check list at Section 13 and looking at –

1. How much probative value the statement has (assuming it to be true in relation to the matter is issue) the court notes the probative value is strong in the present proceedings.
2. How important is the matter or evidence mentioned in paragraph (a). The court's answer is it is extremely important in the context of this case.
3. As noted above the circumstances under which the statement was made shows the deceased gave the statement, a second statement – the open statement while in custody and being in custody as a suspect in the death of Daniel Sosa (deceased).
4. The amount of difficulty in challenging the statement is noted to be great as the maker of the statement is deceased and cannot be cross-examined,

at this juncture so great care must be taken in consideration of the statement (the hearsay evidence).

5. The extent to which the difficulty would be likely to prejudice the party facing it.

The party facing it would encounter great difficulty and likely prejudice but that is not insurmountable, and the prejudicial effect could/would in this case be outweighed by the probative value of the statement.

The court also further noted (paragraph 16) of said case of Japhet Bennett which states –

> *"If an untested hearsay statement is not shown to be reliable and it is a statement that is part of the central corpus of evidence without which the case on the relevant count cannot proceed, then we think that statement is almost bound to be "unconvincing" such that a conviction based on it will be unsafe."*

The court is concerned at several stages with-

(i) the extent of the risk of unreliability, and

(ii) the extent to which the reliability of the evidence can safely be tested and assessed.

The job of the judge was, either at admission stage or after the close of the Prosecution's case – "to ensure that the hearsay can safely be held to be reliable", and not whether it has been shown to be reliable."

Further, now looking carefully at the evidence before the court it is noted that Inspector Luis Rodriguez who recorded the witness statement from Gustavo Hernandez stated –

> *"I recall 29th July, 2017 I was a Corporal and attached to Orange Walk Police. At 8:40 p.m. I was approached by Sgt. Francisco to record a witness statement from Gustavo Hernandez. I asked JP Carlos Peralta to assist in witnessing the recording of the statement. He agreed and at 9:00 p.m. JP Peralta arrived. I took him to the Traffic Office on the lower flat of the Orange Walk Police Station. I later took Gustavo Hernandez to the office where Carlos Peralta was present. In the presence of the JP I asked Hernandez if he wished to give a statement in relation to the death of Daniel Sosa. He agreed to it, I then proceeded to record the statement (typewritten) in the presence of JP Peralta. At the conclusion I printed the statement. I asked Gustavo Hernandez if he would like to read the statement or me to read it for him. He agreed to my reading over the statement, and I read it. I asked if he agreed with it and he said yes. I invited him to sign the statement and he did.*

I then asked the JP Mr. Peralta to sign as a witness which he did, and he placed his seal."

Under cross-examination by Defence Counsel, the question was put to the witness Inspector Luis Rodriguez as follows –

Q. He was still in custody.

A. He was not in custody because the Investigator approached me, he said (he) Hernandez was not in custody.

Q. I am suggesting to you that was never told to you, he was not in custody.

A. That is what I was told by Sgt. Francisco.

Q. I am saying Gustavo Hernandez was in custody when he gave the statement.

A. No, he was not in custody.

However, it is noted that the Investigator then Sgt. Francisco now Inspector Francisco in his evidence before the court under cross-examination stated in answer to questions as follows –

Q. Were statements recorded from Gustavo Hernandez?

A. Yes, statements were recorded. (1) a caution statement and an open statement from Gustavo Hernandez after consultation with the DPP.

Q. These two (2) persons, Hernandez and Briceno were at the Orange Walk Police Station on the day of the shooting.

A. Yes, both of them, they were at the station after the shooting.

Q. You sent your officers to pick them up and detain them.

A. Yes.

Q. Are you able to say how long they were at the station?

A. About one (1) day.

Q. They were in the station up until the following day. Then they were released.

A. Yes.

Q. The caution statement was taken in the morning they were in custody at the Police Station.

A. Yes.

Q. The open statement was the night.

A. Yes, after consultation with the DPP.

Q. A caution statement is a caption saying – I have been notified I am a suspect in the murder of Daniel Sosa.

A. Yes.

Q. That would be on both Gustavo and Luis's statements.

A. Yes, that is the caption.

The Court here notes that evidence and answers to questions under cross-examination show the court both officers to be contradicting each other. However, the Investigator confirmed that both Briceno and Hernandez were in custody until the following day after the shooting and accepted both were in custody during the taking of the caution statements which were never produced in evidence. However, the open statement is now being sought to be accepted (the hearsay statement) and allowed to go on for the jury to consider.

Through the evidence of the officers, they both from the evidence before the court both failed to explain to the court how or what happened or caused the deceased Gustavo Hernandez to change his mind after giving a caution statement which was not brought into evidence and then some twelve (12) hours later to agree it seems so easily/voluntarily to give a witness statement.

Thus, now the obvious questions which arise are –

1. <u>Was the witness charged or held in custody at any time in connection with this matter?</u>

The answer here is yes, the witness was held in custody in connection with this matter and during the time of being in custody-

(1) A caution statement was given in the morning of the shooting.

(2) Twelve (12) or more hours later after still being in custody an open or witness statement in the night was again taken or given by the now deceased witness in connection with this matter while still in custody.

2. Could he (Gustavo Hernandez) be considered an accomplice or a person with an interest to serve?

The inference here is it is so the deceased Hernandez could be considered a person with an interest to serve.

3. The real likelihood that in circumstances aforesaid the witness was coerced or felt compelled to give a statement that may well be untrue implicating the accused who at that time was held in custody also for this offence.

Here it is noted that matters arising out of the content of the first statement given under caution remain unaddressed at the end of the Prosecution's case.

The answer here may well be yes.

It is noted, the Crime Scene Technician submitted a number of exhibits to the National Forensic Science Service for examination including but not limited to blood stains on clothing and articles in the residence of the accused, and swabs taken from the Red Dodge Ram belonging to the accused.

The results produced by the National Forensic Science Service produced no matching results implicating the accused in anyway in this crime. There was no match with the suspected blood stains on clothing and articles in the home of the accused and the blood samples taken from the deceased.

So, now at the end of the day, there is no forensic evidence connecting or implicating the accused with the offence so far except for his motor vehicle.

I return to the taking of the statement Cpl. Rodriguez #1426 stated that around 9:00 a.m. on said date 29th July, 2017 JP Carlos Peralta arrived at the station to witness the taking of the statement from Gustavo Hernandez.

However, the JP Carlos Peralta states in his evidence which was agreed evidence and read into the evidence at 8:40 p.m. on request of Cpl. Luis Rodriguez I visited the Traffic Office in Orange Walk where I witness an open statement recorded from Gustavo Adolfo Hernandez, 20 years, Belizean Labourer of Ascencion Street, Orange Walk Town.

However, the Corporal stated in his evidence-in-chief "In the presence of JP Carlos Peralta I asked Mr. Hernandez if he wished to give a statement in relation to the death of Daniel Sosa. He agreed to it. I then proceeded to record the statement. The evidence of the JP is completely silent on this point.

The Defence is submitting that here someone who is a murder suspect did not tell the police what happened, he gave instead a caution statement first.

So, the defence submitted that in law the person has an axe to grind, a personal interest. Therefore, he will shift the blame to somebody else. So, you will tell the police what they want to hear. So, this statement is very prejudicial to the Defence. He was in custody when he gave the open statement. The inference is he gave the statement so he could be released from custody.

The Crown it is noted submitted that both persons gave statements and did not remain silent as Middleton did in Japhet Bennett.

The court noted here the CCJ case at para 40 of Bennett where Justice Wit stated –

> *"We note that fairness in this context is not limited to the defendant, the trial should be fair to all defendants, victims, witnesses, and society as a whole. As section 6(2) of the Belize Constitution puts it. If any person is charged with a criminal offence; then – the case shall be afforded a fair hearing.*
>
> *Procedural fairness is therefore an overriding objective of the trial. Verdict accuracy, however, is equally important and must also be considered. Although it is possible (but surely not proper) to reach an accurate verdict through an unfair process."*

The court therefore in looking at the importance of this statement to the case as a whole noted after careful observance and evaluation of the total evidence, this court concludes this witness's evidence/deposition as noted that the importance of this evidence when looked at as a whole is that it is central to the Prosecution's case, and it provides strong evidence as against the accused in this case.

However, the court also looked at the recording of the deposition further and it noted that the time sequence before the recording of the statement was some twelve (12) hours later after and during which the deceased Hernandez was in custody. The court, therefore, concludes after a very careful study of the circumstance of the recording of the deposition that –

(i) The deceased Hernandez was facing a possible charge of murder.

(ii) He had ample time to consider and decide how to best if possible save himself possible further incarceration and or problems.

(iii) The inference that can be drawn here is he could have concocted the deposition he gave to the police.

(iv) Like Luis Briceno also in custody he could have felt pressured to the extent that he agreed to give such evidence now in his deposition before the court.

It is noted he did not go to the police and volunteer any evidence. He only first gave a caution statement when first detained and later, much later after being detained for many hours he agreed to give a second statement, an open statement to the police.

So, the court notes that the sequence is very telling in this situation.

So, as noted above from the evidence this does not remove the possibility of any concoction or fabrication on his part instead it only reinforces that trend or thought.

From the tools available to test the deponent's evidence as to reliability and accuracy of the content of the deposition, it is noted using paragraphs 22-24 of the case of Japhet Bennett v The Queen.

(1) The court notes the statement was given and taken twelve (12) or more hours after the incident purportedly witnessed by the JP.

(2) The witness only gave a statement (caution statement) content unknown after he was detained by the police and was in jeopardy of being charged for murder of Daniel Sosa.

(3) The court notes (Sergeant) now Inspector Francisco and (Corporal) now Inspector Rodriguez confirms the taking of the said statements.

(4) The court notes that in noting the voluntariness of the open statement, the deceased gave this after many hours (e.g.) after spending a large amount

of time (e.g.) twelve (12) or more hours in custody and facing charges of murder at 9:00 p.m. that night of 29th July, 2017.

(5) The court notes in his open statement Hernandez speaks of going straight home after the incident. However, Luis Briceno states in his witness/open statement – we went by Hi-5 to catch a cab, after which we gone home, thereby contradicting Hernandez's statement of going straight home.

Here too the court noted the weakness of the deposition are: -

(1) The witness/deponent did not give viva voce evidence under oath.

(2) The witness/deponent was not subjected to cross-examination.

(3) The court did not have the opportunity to observe the demeanour of the witness whilst giving his testimony.

(4) The accused here lost the opportunity to cross-examine the witness on his claim of knowing him for the length of time he claimed.

Here the court noted the Prosecution requesting the court to rule there is a case to answer, whilst the Defence is requesting the court to accept its submission as made to the court of no case to answer. Further, here it is noted the Defence Counsel also stated the inability of the defence to cross-examine the witness has seriously prejudiced his defence since all the evidence was untested.

So, the court noted –

(1) That the statement in the deposition now before the court that this was not sworn on oath.

(2) The accused here lost the ability to put to the witness (e.g.) that he did not know him at all.

(3) That the accused here lost the opportunity to put to the witness in cross-examination that he could have been mistaken in his identification of the person he claimed to be the shooter on 29th July, 2017.

So, the court here will continue to bear in mind the potential risk of relying on a statement by a person whom the jury has not been able to assess and who has not been tested by cross-examination.

Finally, the court looks at the strength of the deponent's evidence –

(1) That it provides strong identification evidence against the accused.

(2) It provides evidence implicating the accused in the murder of the deceased (Daniel Sosa)

(3) Looking carefully, it also negatives the defence of (a) accident, and self-defence

Therefore, noting the above check list – and the evidence presently before the court, it is noted – at trial the Defence did not object to the admission of the statement of the deceased being admitted into evidence.

However, the absence of an objection by the Defence does not relieve the Prosecution of its responsibility to prove that the circumstances surrounding the giving/taking of the statement were such that it was freely and voluntarily given and made.

Further, it is noted it has always been the law that the Prosecution must adduce evidence of the circumstance surrounding the making of the statement to show affirmatively that the statement was freely and voluntarily given/made. It is noted unfortunately the evidence of the Prosecution's witnesses did not do so in the present case, and no evidence was adduced as to the circumstance of how the second statement came about at 9:00 p.m. that night while Hernandez was in custody still.

Therefore, the reliability of the maker of the statement leaves many questions unanswered. The statement was not spontaneously made. It was made some twelve (12) hours later. So, the make could have also concocted the evidence.

Therefore, I here note that the statement did not in the circumstances surrounding the taking of the statement itself provide circumstantial guarantees of trustworthiness or that there was sufficient reliable evidence at the close of the case for the Prosecution linking the accused/defendant to the crime.

So, I here note that the hearsay statement of the deceased Gustavo Hernandez did not pass the threshold reliability test from the evidence now before the court.

It is noted that the Crown has not addressed the matter of the conflicting evidence of Inspector Rodriguez and that Inspector Desmond Francisco as to how Inspector Rodriguez stated he was told by Inspector Francisco that Gustavo Hernandez was not in custody at the time he was asked to take an open statement from him in the presence of a JP and at the time he took such statement.

The matter at the end of the Prosecution's case still remains unresolved.

The Crown Counsel further submitted that both Gustavo Hernandez and Luis Briceno provided a statement under caution around 9:00 a.m. on 29th July, 2017 a few hours after the murder.

The court notes that this was indeed brought out in evidence, but the content of the statements was never brought to the attention or made available in evidence before this court. The court knows that caution statements were indeed obtained from both witnesses. The court has no evidence adduced into the record at trial as to what was stated in the caution statements by either the deceased Gustavo Hernandez or Luis Briceno regarding what occurred if anything as regards the death of Daniel Sosa.

Again, the court states the contents of the caution statements were never admitted for perusal before the court; also, there has never been any explanation to the court

as to why it was necessary to take two (2) statements hours apart from both persons who were detained pending charges of murder in the death of Daniel Sosa.

The Crown further submitted that unlike the hostile witness in Japhet Bennett, both Gustavo Hernandez and Luis Briceno gave an account almost immediately after the incident.

The court notes this account was never before the court and that both statements were taken while the two (2) men were still in custody.

Reference the case of Japhet Bennett v The Queen [2018] CCJ (AJ) paragraph 18 (22-24) the proper approach having been taken that requires the judge to make a finding on the reliability of the hearsay evidence – as to whether the hearsay evidence could safely be held to be reliable.

I, therefore, note that in the present circumstances, the evidence on the hearsay evidence carries a great risk of unreliability and there is little evidence by which the reliability of the evidence can be safely be tested and assessed by the jury here as noted above the circumstances of the statement being given by the deceased and taken by the police after previously he has given a caution statement, the witness being held as a suspect in a murder in and after twelve (12) or more hours changing and now giving a witness/open statement which he did not do before. The court

must or is forced to accept the submission of the Defence Counsel. The statement is unreliable at this juncture and its trustworthiness has become suspect.

(2) Defence Counsel Mr. Leeroy Banner further submitted in regard to the evidence of Luis Briceno that he is saying on oath what I told the police is a lie. He recanted his statement. He stated he was drinking; he did not see anyone kill Sosa.

That he and Gustavo were drinking, and he gave a declaration on 14th July 2017 saying that Dave Alamilla was not the gunman.

Alamilla is not the shooter.

Defence Counsel continued - when Dr. Loyden Ken testified, the Crown did not get from Dr. Ken if the injuries Sosa received were not self-inflicted. This was never explained to the court. The Crown did not negative this at all. Sosa's blood was not found on him, nothing.

Here it is noted by the court as follows – that Luis Briceno was called as a witness for the Prosecution. However, he suddenly retracted his previous statement of a witness given to the police dated 29th July, 2017. Here then the witness under oath at trial retracted his statement earlier given to the police which now became an inconsistent statement, as a result, he was eventually after proof, the statement was made and he maintained his original position then on the application by the Crown

Luis Briceno was treated as a hostile witness and cross-examined by the Crown in terms of his statement dated 29th July, 2017 which was proved by the Recording Officer, Inspector Desmond Francisco earlier when the statement was accepted as an Exhibit in the trial; and therefore admissible as evidence under (Section 73A) of the Evidence Act of Belize. However, as stated in the case of Japhet Bennett v The Queen at paragraph (3) –

> *"But the fact that the statement was admissible does not necessarily mean that the judge must always admit it. This flows from his duty to ensure the fairness at trial."*

Section (4) continued –

> *"Procedural fairness is therefore an overriding objective of the trial – It is therefore obvious that the judge's duty to ensure a fair trial must also include safeguards against reaching an inaccurate or wrong convictions."*

And as noted at paragraph 7 of the above case it states as indicated in the citation of Lords Steyn's statement in Crosdale v The Queen [1995] 2 All ER 500, on the law –

> *"The judge's supervisory role is supported by at least two procedural tools; the judge possesses the power to filter out (exclude) the evidence to be placed before the jury, and the power upon a no case submission by the defence at*

the close of the prosecution's case, to uphold that submission, stop the trial and direct the jury to acquit. Both of the legal foundations and the limitations of these powers are to be found in the common law although in several jurisdictions these have partly been supplemented, replaced or amended by statutory provision."

The Crown Counsel here replied to the above Defence submissions by submitting that the present case is distinguishable from Japhet Bennett.

Paragraph 26 –

The hostile witness, Luis Briceno was with the accused, Gustavo Hernandez and Daniel Sosa socializing and drinking at Gym Sports Bar, and they all go to the accused vehicle, and they entered together, and he sees the accused shooting, Daniel Sosa. He now recants part of his statement in which he gets in the vehicle and sees the accused shooting, Daniel Sosa. Luis Briceno's statement was admitted into evidence pursuant to 73A(b) of the Evidence Act. Pursuant to The Queen v Vincent Tillett Sr. Crim. App. No. 21 of 2013, the statement was read into evidence without any objections from Defence.

Japhet Bennett guides us at paragraphs 27 and 28.

The court, therefore, noted the above-quoted paragraphs.

Paragraph 27 states –

"During the trial, particularly a jury trial a judge in Belize has basically two (2) opportunities to evaluate and assess the necessity and reliability of the hearsay evidence and to decide whether it should be left to the jury. The first occasion occurs when the hearsay evidence is introduced and the judge must decide, at that stage to admit it. The evidence having been admitted, the second occasion occurs when at the close of the prosecution case a no-case submission is made, and the judge must decide whether to uphold that submission.

- *And where the prosecution's case, like here wholly or substantially rests on that evidence, the judge should stop the trial and direct the jury to acquit the accused."*

Paragraph 28

"Where at the close of the prosecution's case a no case submission is made, which, one can assume will be standard in cases like these the final test is whether the evidence thus far produced could safely be held to be reliable as it is for the jury to decide whether in fact the evidence is reliable or not. If the test is met the judge will leave the evidence for the jury, after having given them the necessary directions, to consider its ultimate reliability.

If it is not met, the judge should conclude that the evidence is inherently so weak that the jury, even if properly directed could not properly or reasonably convict on it, in which case the judge will uphold the submission and direct the jury to acquit the accused."

Therefore, here the court will now look and consider if the final test is met following the above guidance issued in this case which was decided in a similar circumstance.

Therefore, the court now looks at Section (114) noted at paragraph (115) of the case of Japhet Bennett v The Queen.

The court here, therefore, noted the case of The Queen v Japhet Bennett which is noted to be the Locus Classicus dealing with the admissibility of a hearsay statement especially one which the witness has as he recanted on, (e.g.) stating he never made the statement, or he cannot recall making, stating or signing his name or signature to it.

The court therefore here noted Section (4) of Bennet where Justice Wit stated –

"We note that fairness in this context is not limited to the defendant, the trial should be fair to all, defendant, victims, witnesses, and society as a whole. As Section 6 (2) of the Belize Constitution puts it – If any person is charged with a criminal offence, then – the case shall be afforded a fair hearing.

Procedural fairness is therefore an overriding objective of the trial. Verdict accuracy, however, is equally important and must also be considered. Although it is possible (but surely not proper) to reach an accurate verdict through an unfair process, a procedurally fair process leading to an obviously inaccurate result can hardly be called fair. Especially if the verdict is a conviction of a possible innocent person. It is therefore obvious that the judge's duty to ensure a fair trial must also include safeguards against reaching an inaccurate or wrong conviction."

Justice Wit further noted at paragraph 14 where he stated –

We note in passing that these common law powers and discretions of the judge have an even stronger foundation in Belize because they directly flow from and give further content to the judge's constitutional duty to ensure a fair trial. We also note that the very fact that the right to a fair trial (including the judge's corresponding duty to ensure it) is a fundamental constitutional right in Belize, not only means that the judge needs to conduct himself fairly in accordance with his common law duties; but also that if the common law would not sufficiently allow the judge to do what basically needs to be done from a perspective of fairness in the broader sense as set out in (4), the common law could, and depending on the circumstances should be recalibrated or incrementally adopted in order to enable the judge to comply

with his constitutional mandate. We hasten to say, however, that we do not see a need to embark on that exercise in the case before us. The existing legal instrumentarium is in our view adequate to properly deal with this case."

The court further noted (paragraph 17) of Japhet Bennett where Justice Wit stated –

"The job of the judge was, either at the admission stage or after the close of the prosecution's case, to ensure that the hearsay can safely be held to be reliable."

Justice Wit further continued on a further examination of the dictum of Hughes LJ in (Riatt) –

"We are therefore of the view that the proper approach for Belize would not be to require the judge to make a finding on the reliability of the hearsay evidence (prohibited by Galbraight) but to limit himself to the question whether the hearsay evidence could safely be held to be reliable. That test does not go to the reliability of the evidence as such, which would be for the jury to assess, but to the pre-condition of the quality of the evidence, more or less in the same way as in Turnbull where the judge must exclude inherently weak identification evidence."

So now as stated above this admitted the impugned statement into evidence pending a final determination on its weight after the Crown had adduced all its evidence here

in. So then on the question of the approach of the court at the no case submission stage Justice Wit stated –

> *"We do not however, agree that the test should altogether be the same for both the admission stage and the no case submission stage.*
>
> *Although it might be true, as Hughes LJ stated in Riatt, that <u>if it is the Crown which is seeking to adduce the evidence, and if the evidence is important to the case, the judge is entitled to expect that very full inquiries have been made as to the witness's credibility and all relevant material disclosed."</u>*

It would seem to us more aspirational that real to expect that at that early stage of the proceedings all the relevant evidential material would be available to make the decision to exclude the evidence. As is stated in Phipson –

> *"The more important the hearsay is to the prosecution's case; the more is required by way of counterbalancing factors to ensure the trial was fair. During trial at first instance, the extent to which a statement is supported by other evidence or is decisive may depend upon how the trial unfolds, hence the need for English trial judges to be able to stop trial proceedings after hearsay has been admitted."*

What is true for English trial judges is also, if not more true for Belizean trial judges. In this respect we would also refer to what was said in the recent case of H M Advocate v Alongi -

> *"If there is no strong corroborative evidence to enable the fact finder to conduct a fair and proper assessment of the reliability of the statement allegedly made by deceased then unfairness may be seen to occur."*

The court here notes that the evidence adduced by the Crown during trial as to the circumstances under which the impugned statement was created was given by Inspector Desmond Francisco (then in 2017 a Sergeant of Police) who testified that on 29th July, 2017 at 8:00 p.m. I recorded a witness statement from one Luis Briceno, aged 22 years, Date of Birth 3rd July, 1995, Belizean Labourer of Guadeloupe Street, Orange Walk Town. The statement was recorded in the presence of JP Noemi Lizama at the CIB office. The statement was typewritten by myself. At the conclusion, it was read over to the witness Luis Briceno in the presence of the JP, after which he signed at the caption of the statement and end of the said statement. The JP signed as a witness.

The statement was certified by me and signed. The statement is two (2) pages. The name of witness Luis Briceno, Time 8:00 p.m., it has the JP's stamp, my name

Desmond Francisco on it (Sgt. #383) it has my signature at end of certification. He identified it as the statement he recorded from the witness.

It is noted the witness stated the time the statement began, the time being 8:00 p.m., but failed to state how long the statement took to be completed as the time of completion was never stated or revealed to the court in his evidence.

In the statement of JP Noemi Lizama which was read into evidence as agreed evidence by both Crown and Defence. The JP stated she witnessed a statement taken or recorded from Luis Briceno, aged 22 years, Labourer of Guadeloupe Street, Orange Walk Town, on request of Sgt. Francisco, the statement was taken in the English language, after which it was read over to him by Sgt. Francisco who asked Luis Briceno if the statement was correct and he said yes, Luis Briceno then signed the said statement, Sgt. Francisco then ask me to sign which I did. No force or threat was used to get the statement, it was given by him on his own free will. I also signed as a witness on the statement and stamp it.

It is noted Luis Briceno when called to give evidence in court was not present at first and a request for a Voir Dire for a witness who was afraid/fearful for his life was made on the application of the Crown to adduce the written statement of Luis Briceno pursuant to Section 123(2) of the Indictable Procedure Act and Section 105(2) (c) and (d) of the Evidence Act.

During the Voir Dire the witness Luis Briceno appeared in court and the request made by the Crown for a Voir Dire was subsequently withdrawn and Luis Briceno was then called as a witness for the Crown in trial.

Thereafter, the Crown's witness (Luis Briceno) stated under oath when he was finally found and brought as a witness for the Crown –

> *"I recall 28th July, 2017 at 11:00 p.m.; honestly at the moment, I am not too certain because at that time I was under the influence of alcohol for several days. As I stated (29th July, 2017) at that time I believe I gave a statement, but right now honestly I can't remember anything about that statement.*
>
> *Honestly, I don't recall/remember signing the statement because it is a couple of years now."*

The witness was shown a statement and stated –

> *"<u>It looks a little bit like mine, but I can't say it is mine."</u>*

Eventually, the witness (Briceno) refused to accept the statement and stated in evidence - We were drinking a couple of beers and making a circle through the town. Like I said I was drinking for three (3) days straight, so I was not in the right mind.

The Crown eventually after having brought Insp. Francisco to give evidence of the recording of the statement which he recorded the statement with the JP witnessing

its making/recording, the statement was eventually accepted as Exhibit (DF1) with no objection from the Defence and its Counsels/the witness was eventually treated as a hostile witness on request of Crown Counsel. He was subsequently cross-examined by the Prosecution and amongst other replies, he stated he never see no gun and he never heard a loud shot in the vehicle, and he also stated I never did see a hand waving in the back and a gun was in Alamilla's hand in response to questions asked by the Crown. Emerging from the witness after being cross-examined as a hostile witness is the fact –

(1) The evidence speaks of him being in custody pending charges of murder in the death of Daniel Sosa, and then.

(2) Later giving a caution statement in the morning of 29th July, 2017 and

(3) Later of witness (Briceno) at about 8:00 p.m. now giving an open/witness statement in the case under the situation in which the evidence revealed he could have been considered as a person with an interest to serve.

(4) The real likelihood that in the circumstances aforesaid the witness could have been coerced or felt compelled to give a statement that may well be untrue implicating the accused who at that time was also held in custody for this offence.

The evidence of this witness from his answers under cross-examination was yes, I felt pressured as we got detained for the murder itself, so to not be charged I gave that statement.

It is further noted under cross-examination, the witness was asked –

Q. You were told if you give the statement against Alamilla they will not charge you?

A. Yes sir.

Q. After you gave the statement, you were released on 20th July, 2017.

A. Yes.

(1) It is noted about the statement he stated he gave because he felt pressured by the police.

(2) Of the witness being released the next day after giving a second statement, this now being a witness statement

(3) Of the witness (Briceno) being released the next day, no charges were being pressed against him and he no longer facing the fact of being charged for the death of Daniel Sosa with murder.

Here now the court asks –

(1) Was this witness charged or held in custody at any time in connection with this matter?

The answer from the above evidence is yes, the witness was held in custody facing a charge of murder for many hours and as accepted by the investigating officer this being in custody was for one (1) the whole day.

(2) Could he too be considered an accomplice or a person with an interest to serve?

Here again, the answer is yes. He could have been considered an accomplice and yes, in that situation yes, as a person with an interest to serve. Further cross-examination of Luis Briceno he stated in answer to questions passed.

Q. Recently on 24th January, 2023 at (TFC) restaurant you gave a statement to the police.

A. Yes sir.

Q. The Police detained you for this matter.

A. Yes sir.

Here the court notes that another statement was accepted by the witness Briceno as being made 24th January, 2023 in which a statement was recorded from him (Luis Briceno). This evidence emerged from the evidence PC#1949 Florentino Salam who

stated he met with Luis Briceno on 24th January, 2023 at (TFC) Restaurant and under cross-examination where this witness was asked as follows by Defence Counsel.

Q. Do you have any notes of this meeting you and Luis Briceno had on 24th January, 2023.

A. No sir.

Q. You did not write down anything the man told you.

A. There was a statement I recorded from him.

Q. Where is that statement?

A. I handed it over to the Crown Counsel.

Q. Why wasn't that statement attached to your witness statement?

A. I cannot say.

Q. Which Crown Counsel did you give the statement?

A. Mr. Chan.

This statement taken from Luis Briceno on 24th January, 2023 was never made part of the Crown's evidence before the court in the present trial.

So, the matters arising out of the contents of this witness statement of 24th January, 2023 remain unknown and unaddressed by the Crown also.

The court also looked at Section 115 of Japhet Bennett case where it is stated –

"Most relevant to the present Appeal as examples of the English counterbalancing measures to ensure fairness are Sections 114 and 125 of CJA – Section 114 is a governing provision which states – (Section 114) Admissibility of hearsay evidence.

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if.

(a) Any provision of this Chapter or any other statutory provision makes it admissible.

(b) Any rule of law preserved by Section (118) makes it admissible.

(c) All parties to the proceedings agree it is in the interest of Justice for it to be admissible or

(d) The court is satisfied that it is in the interest of Justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under Subsection (1)(d) the court must have regard to the following factors and any others it considers relevant.

(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 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 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 the difficulty would be likely to prejudice the party facing it.

At this juncture, the court now looks at 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 own interest.

Looking at the above discussion the court notes that indeed the maker of the statement had reasons to misrepresent the matter stated as he stated in court, he felt pressured, and it is also noted he was in custody for approximately twelve (12) or more hours facing the prospect of being charged with the murder of Daniel Sosa.

So, looking at his statement, being felt pressured and in custody under investigation and had given a caution statement approximately twelve (12) hours before the maker of the statement did have ample time to reflect and perhaps concoct the evidence in the statement, he made later in the night of 29th July, 2017.

It is also noted this statement was not made spontaneously, but long hours later when facing a charge of murder despite having given a caution statement much earlier before to the police. So, it could be in his own interest to say what he stated.

What are the strength and weaknesses of the hearsay evidence?

It is noted one weakness of this hearsay evidence was the appellant inability to full cross-examine the witness on the contents of the statement since the witness testified that the statement was not given by him (e.g.) he can't remember giving it and he denied a significant if not all the statement he is purported to have given.

The strength of the statement is that it provides strong identification evidence against the appellant in the killing of the deceased.

The risk of the unreliability of the statement from the evidence before the court bearing in mind the conditions under which it was given remains very high indeed. The extent to which the reliability of the evidence can safely be tested by the jury is very low from the evidence before the court on circumstance under which the statement and its contents were made and given.

Conclusion

At the end of the day the court finds after having considered all of the evidence adduced by the Crown in this matter it is clear that this statement is the only evidence now capable of connecting the accused to this offence and this lies in the contents of the statement dated 29th July, 2017.

So, here now the court will apply the relevant principles stated in the Bennett case which are all well worth repeating in determining whether or not the application by the Defence Counsel should succeed –

> *We do not, however, agree that the test should altogether be the same for both the admission stage and the no-case submission stage.*
>
> *Although it might be true Hughes (LJ) stated in Riatt that, if it is the Crown which is seeking to adduce the evidence and if the evidence is important to the case, the judge is entitled to expect that very full inquiries have been made as to the witness's credibility and all relevant material disclosed (it would seem to us more aspirational than real to expect that at that early stage the proceeding all the relevant evidential material would be available to make the decision to exclude the evidence) as is stated in Phipson "the more important the hearsay is to the Prosecution's case, the more is required by way of counterbalancing factors to ensure the trial was fair. During a trial at first*

instance, the extent to which a statement is supported by other evidence or is decisive may depend upon how the trial unfolds, hence the need for English trial judges to be able to stop trial proceedings after hearsay has been admitted; what is true for English trial judges is also, if not more true for Belizean trial judges."

The court has taken into account the inconsistencies in the evidence before the court and those surrounding the actual recording of the statement dated 29th July, 2017. I find that the nondisclosure of the statement of 24th January, 2023 allegedly made by the witness as stated by PC Florentino Salam in evidence has deprived the Defence of taking advantage of the content/provisions of said statement. Here I note the requirement of full disclosure is now deeply entrenched in our jurisprudence (e.g.) Section 6(3) of the Constitution states –

"A person shall be afforded facilities to examine in person, or by his legal representative the witnesses called by the Prosecution before the court."

So, after careful study of all the evidence before the court, I find that there is overwhelming evidence adversely affecting the reliability of this statement.

So, I now note that the Crown has been unable to satisfy this court that the statement could be found by (a jury) a tribunal of fact to be reliable to the extent that, that

tribunal could render a conviction that would not be unsafe/or unsatisfactory and which would not result in a miscarriage of justice.

So, here I rule that pursuant to Rule 2(a) of Galbraight I find that the Crown's case is at its highest when the total evidence has been considered and in the circumstances of this case, a tribunal of fact properly directed cannot convict.

Here then the submissions are upheld, and the court finds that the Crown has not made out a case against the accused to merit him being called upon to lead a defence under the present circumstances.

Here then I note in the circumstances of this being a judge alone trial, I render here a verdict of not Guilty as against the defendant/accused.

Dated this **28th** day of **March, 2023.**

(H. R. LORD)
Justice of the High Court
of Belize