

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

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C5/2021

THE KING

v.

OSCAR SELGADO

BEFORE: The Hon. Mr. Justice Nigel Pilgrim

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

Mr. Adolph D. Lucas Sr. for the Defence

DATE OF DELIVERY: 6th July 2023

RULING ON EVIDENTIAL OBJECTIONS

1. Oscar Selgado (hereinafter “the Accused”) was indicted on 14th January 2021 for the offence of abetment to murder, contrary to section 20(1)(a) read along with section 117 of the *Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020* (hereinafter “the Code”). The particulars of charge are that on 7th February 2019 the Accused solicited Giovanni Ramirez to kill Marilyn Barnes.
2. Pursuant to the Court’s duties to actively manage cases under the *Criminal Procedure Rules 2016* (hereinafter “the Rules”) and ensure that the evidence at trial is presented without avoidable delay, the Court at case management, and under its power at Rule 4.2(ii)(i) of the *Rules*, invited the parties to make, and respond to, evidential objections, in writing, which the Court would rule on in advance of trial. Mr. Lucas Sr. learned Counsel for the Accused filed his particularized objections on 15th February 2023, the learned DPP filed her response on 19th June 2023, and a rejoinder was filed on behalf of the Accused on 21st June 2023.

3. The Court will address the objections in turn.

MARILYN BARNES

4. The Crown has conceded all five objections. The Court views those concessions as being well made.

SHANIDI CHELL

5. It appears to the Court that Ms. Chell's evidence is being led by the Crown to support the evidence of Mr. Ramirez in that he had accurate and specialized information which may not have been public knowledge with regard to the progress of a disciplinary complaint against the Accused, which would make it more probable that Mr. Ramirez in fact had conversations with the Accused, as the former alleged in his deposition.
6. The Accused objects to the evidence of this witness as inadmissible hearsay. They further contend that her repetition of the complaint of Ms. Barnes is hearsay and prejudicial.
7. The Crown submits that the evidence of Ms. Chell is not hearsay as much of her evidence comes from matters within her personal knowledge, and the other portions are not being relied upon for their truth.

The Law

8. The Court adopts the following definitions of hearsay:

*“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible **when the object of the evidence is to establish the truth of what is contained in the statement.** It is not hearsay and is admissible when it is proposed to establish by the evidence, **not the truth of the statement, but the fact that it was made.**” (Subramaniam v. Public Prosecutor [1956] 1 WLR 965 (PC) at p. 970)*

*“A question of hearsay only arises when the **words spoken are relied on testimonially...establishing some fact narrated by the words.**” (Ratten v. R [1971] 3 WLR 930 (PC) at pp. 933-4) (emphasis added)*

9. The Court also finds the opinion of the editors of **Murphy on Evidence, 13th Edition** on the issue of the identification of hearsay helpful:

“2.3.2 Direct or percipient versus hearsay evidence

*The term ‘direct evidence’ is sometimes also used to mean the opposite of hearsay evidence. The alternative term ‘percipient evidence’ not only avoids any possibility of confusion, but is also more appropriate to describe the opposite of hearsay evidence...**Percipient evidence is evidence of facts which a witness personally perceives using any of his senses. Hearsay evidence is given when a witness recounts a statement made by another person, and where the proponent of the evidence asserts that what the person who made the statement said was true.** Thus, the evidence of W that he saw D rob the bank is percipient evidence, whereas the evidence of H (who was not present at the scene of the robbery) that W told H that D robbed the bank is hearsay, if tendered to prove that D robbed the bank.” (emphasis added)*

Analysis

10. Ms. Chell’s deposition consists of two statements, the second being made to exhibit documents referred to in the first. In the Court’s view lines 1-16 of the first page of the first statement are admissible as percipient evidence, namely, facts and procedures within her personal knowledge which she can speak to as the general secretary to the General Legal Council (hereinafter “GLC”)
11. Lines 16-18 of the first page of the first statement speak to the receipt of a complaint from Ms. Barnes. In the Court’s view that is also percipient evidence and admissible. The witness stated that as secretary she would receive and forward complaints to the GLC. The witness, in the Court’s view, can say that on X date she received a complaint from Y person regardless of the truth or particulars of that complaint. The Crown has made clear that it is leading this evidence to establish the fact that a complaint was made on a particular date from a particular person and is not leading evidence of the particulars of the complaint. Indeed to do so would, in the Court’s view, offend the rule against previous consistent statements as outlined in the English Court of Appeal decision of **R v Roberts [1942] 1 All ER 187¹**, and would allow for the improper bolstering of the evidence of Ms. Barnes. The Court would not admit the evidence of particulars of the complaint of Ms. Barnes on that ground.
12. The evidence at lines 18- 21 of the first page with regard to the hearing of the 14th day of February, 2019 is also, in the Court’s view, percipient evidence, as though Ms. Chell’s evidence is given almost in the passive voice, the learned

¹ P. 192

DPP's submission contends, and it is reasonable to infer, from her evidence that she would have been present at that GLC meeting and is recounting what she saw and heard. The finding of the GLC at that meeting is not relevant for the truth of the complaint but for its fact in demonstrating that the complaint of Ms. Barnes, which is the seed from which the conduct charged in this indictment allegedly grew, was advancing. This is obviously relevant having regard to the evidence of the alleged conversations between Mr. Ramirez and the Accused and is admissible evidence of motive pursuant to section 43(a) of the *Evidence Act, Cap. 95 of the Substantive Laws of Belize, R.E. 2020* (hereinafter 'the EA') and the decision of the Privy Council in the Bermudan case of *Myers v R [2016] 2 LRC 383*².

13. The remaining portions of the statement relating to correspondence from the Accused or his agents are admissible as percipient evidence and as evidence of statements coming from the Accused, which may be used as admissions against interest. The evidence of the e-mail from the Chief Justice's office on 18th March 2019 and all things flowing from it appear to be hearsay in that Ms. Chell appears to be repeating what she was told in the e-mail rather than what she observed and the evidence is being led to establish the truth of the assertions in that e-mail and in that regard the Court finds that that evidence is inadmissible hearsay.
14. The Court notes, for completeness, that in the rejoinder of the Accused they appear to withdraw much of this objection, but inasmuch as that objection is at variance with the Court's ruling that evidential objection is overruled.

LIONEL ARZU

15. The evidence of this witness, as the Crown has indicated in their written submissions, and the Court accepts, is to support the evidence of Mr. Ramirez in that it speaks to specialized knowledge that that witness had about the disappearance of a file at the workplace of the Accused, which again makes it more probable that Mr. Ramirez was in fact in conversation with the Accused as the former alleges.
16. The Accused contends that this is evidence of his bad character and prejudicial as it seeks to involve him in theft and is not admissible.

² Para. 43

17. The Crown submits that the evidence is admissible as though it may be evidence that shows the Accused in a bad light it is relevant to the charge in the indictment.

The Law

18. Section 51 of the *EA*, where relevant, reads:

*“51.–(1) In criminal causes or matters, the fact that the defendant or the accused person, as the case may be, has a good character may be proved, but the fact that he has a bad character is inadmissible in evidence, **unless it is itself a fact in issue**, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.*

...

(3) In this section, the word “character” means reputation as distinguished from disposition, and evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown.” (emphasis added)

19. The Court finds helpful the Privy Council landmark judgment of *Makin v Attorney-General for New South Wales [1894] AC 57* at 68, per Lord Herschell:

*“It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, **for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried**. On the other hand, **the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury**, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.” (emphasis added)*

20. The Court also relies on similar statements of principle in the English House of Lords decision of *DPP v Boardman [1975] AC 421*³.

Analysis

21. The Court is of the view that the evidence of Mr. Ramirez that the Accused told him he stole a file from Mr. Arzu, a fact that may not have been widely known,

³ Ps. 449-462

and Mr. Arzu testifying that the file had in fact disappeared from his office, are related and relevant facts in support of the charge on the indictment. The fact that this evidence shows the Accused in a bad light, under the authority of *Makin* and *Boardman*, does not make the evidence of Mr. Arzu inadmissible because in the words of the Board in the former case, “it is relevant to an issue” before the Court.

22. The Crown is not leading evidence of bad character, which is evidence of reputation and not particular acts under section 51(3) of the *EA*, to undermine the credibility of the Accused or demonstrate propensity to offend, but to support a discrete bit of evidence in support of the indictment. The Court does not find this evidence to be more prejudicial than probative. The Court overrules the objection to the evidence of Mr. Arzu, and rules that it is admissible.

WILFREDO FERRUFINO

23. This witness was the investigator whose depositions outline the inquiries he made into the charge against the Accused.

24. The first objection is to the documents he received from Ms. Chell. Owing to the Court’s finding that her evidence was largely percipient evidence, and that the point of this evidence in Mr. Ferrufino’s deposition is for the fact of the inquiries that he made, not for the truth of the contents of Ms. Chell’s documents the Court overrules that objection.

25. In light of the agreement of the parties on the evidence of Ignacio Cho the objection to the evidence of Ferrufino with regard to his interaction with Cho is now moot.

26. The Crown has conceded the remaining objections, and again in the Court’s view, those concessions were well made.

Dated 6th July, 2023

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