

IN THE SENIOR COURTS OF BELIZE
CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL JURISDICTION)

INDICTMENT NO: C1/2020

THE KING

and

MARLON EVERETT

Accused

Before: The Honourable Madame Justice Candace Nanton

Appearances: Ms. Sheiniza Smith, Senior Crown Counsel for the Crown.
Mr. Bryan Neal for the Accused.

Date of Delivery: 23rd October, 2023

MURDER-

Oral Ruling on the Admissibility of Previous Inconsistent Statements

HISTORY OF THE MATTER

1. NANTON J.: Marlon Everett (hereinafter referred to as “the Accused”) was indicted for the offence of murder, contrary to section 117 read along with section 106(1) of the **Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020**, (hereinafter “the Code”) arising out of a shooting involving the death of Albert Johnson (hereinafter “the deceased”) on 20th April 2018. The trial by judge alone began with the arraignment of the Accused on 11th October 2023 before this Court pursuant to section 65 A (2)(a) of the **Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020**.
2. Crown witness Jaden August was deemed hostile by the Court, without objections, and the Crown was allowed to cross examine him pursuant to section 71(2) of the **Evidence Act Cap 95**.

3. Jaden August allegedly gave an account in which he implicated the Accused on a previous occasion but effectively retracted that account whilst giving evidence on oath at trial. His previous accounts contained in written statements **KRA** and **AA1** were tendered for admission pursuant to **section 73 A of the Evidence Act Cap 95.**

4. The provision states:

73A. Where in a criminal proceeding, a person is called as a witness for the Prosecution and—

(a) he admits to making a previous inconsistent statement; or

(b) 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.

5. Jaden had testified that he recalled giving a statement to the police in April 2018 but could not recall giving a statement in July 2019. The witness was shown two statements dated 25th April 2018 and July 11th 2019 and accepted that he wrote his signature on each document but effectively denied that he told the police the information contained therein.

6. The statements were proven pursuant to **section 71 (1) of the Evidence Act** through the testimony of WCpl Kacy Ann Requena and Justice of the Peace Jermaine Hyde with regard to the first statement **KRA** and through Assistant Superintendent Alfonso Aban and Justice of the Peace Andrew Godfrey with respect to the second statement dated 11th July 2019 **AA 1**. A video recording of the recording of the first statement was also admitted into evidence and marked **KRB**.

7. This is the Court's ruling on whether to admit hearsay statements-

i. **KRA**-written statement of Jaden August dated 25th April 2018

ii. **AA 1**-written statement of Jaden August dated 11th July 2019

ANALYSIS

8. Section 73A of the **Evidence Act Cap 95** allows for the admission of hearsay statements in the form of previous inconsistent statements. The rule allows proven hearsay statements to be admitted not merely for the fact that it was made or to challenge a witness' credibility but also for the truth of its contents and may be relied upon by the Prosecution to prove its case.

9. The Court holds that the Crown has satisfied the statutory precondition for admissibility i.e. that the witness did in fact give the two previous statements which are inconsistent with his present testimony at trial.

10. Having been satisfied that the statements were proven to have been made in accordance with the legislation the Court next has to determine whether they should be admitted.
11. It should be noted that 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 to exclude admissible evidence was correctly recognized by the Court of Appeal in **Dean Tillett v R** Privy Council Appeal No. 56 of 1998, a case which dealt similarly with a hearsay statement admissible under s 73A, where the court stated, referring to its earlier decision in **Williams v R** (Criminal Appeal No 16 of 2006) (22 June 2007), 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.’*
12. The CCJ case of **Japhet Bennett** (2018) 94 WIR 126 is binding authority on this point. In that case it was stated that during a trial, the judge basically had two opportunities to evaluate and assess the necessity and reliability of the hearsay evidence, and to decide whether it should be left to the jury. The first occasion occurred when the hearsay evidence was introduced, and the judge had to decide whether, at that stage, to admit it. The evidence having been admitted, the second occasion occurred when at the close of the prosecution case a no case submission was made, and the judge had to decide whether to uphold that submission.
13. If, on the first occasion, the judge, *exceptionally*, was clear in his mind that the hearsay evidence could not in reason safely ever be held to be reliable, he had to exclude it and, where the prosecution’s case wholly or substantially rested on that evidence, he should stop the trial and direct the jury to acquit the accused. If, however, there was a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge given which the hearsay evidence could in the end safely be held to be reliable, the judge should in principle admit the evidence. That was the more so if at that stage it was already clear that that test was or would be met.

First Test – Admission Stage

14. This Court is of the view that at this first stage of admission, the test for exclusion is whether the Court is clear in my mind that the hearsay evidence could not in reason safely ever held to be reliable. If, however, there is a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge given which the hearsay evidence could in the end safely be held to be reliable, the Court can in principle admit the evidence. That was the more so if at that stage it was already clear that that test was or would be met.
15. In accordance with the dicta in **Japhet Bennet** the Court is not required at this stage to make a finding on the reliability of the hearsay evidence but to limit myself to the question of whether the hearsay can be safely be held to be reliable.

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

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

17. With those considerations in mind I turn now to the two statements in question of whether the statements of Jaden August can be safely held to be reliable for the purposes of satisfying this first stage –threshold test:

KRA – dated 25th April 2018

Strength and weakness of the evidence contained

18. From the first statement the evidence which emerges is that this is a case of alleged recognition case. The Turnbull guidelines contained therein on its face seem relatively strong, with the witness detailing the length of time he had the shooter under his observation – from his yard to the scene of the shooting and thereafter, he described the lighting as being good on the scene indicating the sources of light, he indicates there was nothing obstructing his view. He describes the distance between himself and the shooter. He also provides a description of that person.

Importance of the case as a whole

19. At this stage it is to be noted that the statement of Jaden August is not the only evidence that the Crown will rely on against the Accused. There is potentially corroborative evidence in the form of video evidence of the shooting and also the Crown intends to rely on an independent identification of the accused by another witness- Officer Fuller. While the evidence is quite important and as the Crown has suggested it is the main crux of the Crown's case it is not the sole evidence upon which the Crown's case relies and has the potential to be supported or corroborated.

The alleged circumstances surrounding the giving of the statement

20. The evidence is that the maker is alleged to have come to the police station 5 days after the incident occurred. There was some cross examination by defence in relation to how 12 year old Jaden August found himself at the police station. The fact finder therefore has before it for its assessment the circumstances surrounding the giving of the statement and can draw conclusions from the evidence that it accepts at the relevant time and make decisions as to whether those circumstances affect the weight to be attached to the statement.

Can the reliability of the evidence be safely tested and assessed-

21. There was cross examination of the witness by Learned defence counsel for the Accused who was able to elicit the witness' version of the circumstances surrounding the giving of the statement. It is noted however that defence would have been limited in the manner of his cross examination by the fact that the witness denied ever giving the police the information that the statement contains.

The DVDR video tape of the incident itself

22. This may allow the fact finder to evaluate and assess the accuracy of what Jaden August states in his statements to the police. The dvr video is an independent recording of the incident itself which can be measured against the account alleged to have been given by Jaden August which was tendered into evidence and provides another way in which the reliability of the witness' alleged account can be tested. Its factual accuracy/inaccuracy at least in so far as the witness' account of the actual shooting goes and the reliability of the statement can be measured against this real evidence of the actual shooting. It should be noted that there would be no way of assessing what the witness said occurred at his yard however that evidence is merely background and not as crucial to the Crown's case as what occurred on Rectory Lane.

KRB- Video Tape of the recording of the statement

23. The video tape of the recording of the statement was tendered into evidence as **KRB**. It is an item of real evidence which is inextricably tied to the giving of the statement and itself can provide a reliable account of an assessment of what Jaden August said or did not say to the police. The video tape of the recording of the statement allows the fact finder the opportunity to make an assessment of the circumstances surrounding the giving of the statement and to determine whether to accept or reject all or parts of that written statement. It therefore has the potential to cast doubt or strengthen the assessment of the written statement giving the fact finder a fuller and more comprehensive picture. At the evaluative stage it will be open to the fact finder to rely on both the written statement and the video recording to assess the weight if any that can be placed.
24. The cooperativeness or lack thereof can be assessed along with other circumstances such as the length of time between the incident and the statement; the length of interview; the age of the witness; his intelligence level and his demeanour while giving the statement.

Ruling on admissibility of KRA

25. In all these circumstances the Court considers that the potential probative effect of admitting the statement dated 25th April 2018 outweighs any prejudice against the accused. While it is true that the defence is limited to the extent that he may be denied the ability to test the version of the events given by Jaden August on 25th April 2018 he was able to elicit under cross examination salient points which may have the potential to undermine Jaden August's reliability and credibility. The counterbalancing measures outlined above may also have a similar effect so that the fact finder can appropriately test the evidence.

AA1- Statement dated 11th July 2019

26. This statement contains evidence of a group identification in which witness Jaden August identified the accused Marlon Everett as the person he saw shoot the deceased on 20th April 2018. This statement also contains evidence that the witness was shown a dvd recording and identified the Accused Marlon Everett as the person who he referred to as Yankee who shot the deceased.

27. In contrast to the first statement there is no video recording of the taking of this statement itself or of the incident to which the statement refers. Notwithstanding the Court considers that there are ways in which the accuracy of this statement can be tested

28. Evidence coming from this statement is supported by the other witnesses to that identification procedure. Inspector Aban and Justice of the Peace Andrew Godfrey have given evidence as to the circumstances and fairness of this identification procedure which was tested in cross examination by Learned Defence Counsel.

29. The witness Jaden August has also been cross examined on the circumstances of this identification and nothing prevented Defence Counsel from exploring the circumstances surrounding this purported identification evidence. The defence therefore is not constrained from exploring and discrediting the circumstances surrounding that identification through these other witnesses.

30. The importance of this statement concerning the identification of the accused is also assessed in relation to the following factors:

- a. The crown's case is one of alleged recognition
- b. The evidence comes from other sources- the later identification by this witness via the video evidence of incident/ the video evidence itself of the incident whereby the fact finder may be permitted to make its own finding
- c. The crown intends to rely on an independent recognition by Officer Fuller relative to the video recording.

31. In relation to both statements the crt notes that there are inherent weaknesses in the hearsay statements such as:
- a. The young age of the maker/seemingly low intelligence
 - b. The circumstances under which the child was taken from home have not been clearly demonstrated.
 - c. Whether the adult guardian added any level of protection
 - d. The manner in which the statement was taken varies from the video recorded version
 - e. The statement was not written in the language used by the child
 - f. The child may have felt like a suspect
 - g. Whether leading questions asked by police officer
 - h. No reason was ascertained for the witness' refusal to cooperate during the trial
 - i. Length of time that it took to record the statement

Ruling on admissibility of AA1

32. At this stage it is the Court's view that these apparent weaknesses are not such that requires their exclusion but can safely be left to the fact finder for its assessment at the evaluative stage when the full case for the Crown is disclosed.

DISPOSITION

33. I bear in mind that at this stage all the relevant evidential material has not yet been adduced by the Crown. The extent to which the statement of Jaden August is supported by other evidence or whether it will fall to be decisive on its own will depend on how the trial unfolds. There may very well be strong corroborative evidence which will enable the fact finder to conduct a fair and proper assessment of the reliability of the statements and the degree to which Jaden August's statements are decisive is therefore uncertain and a matter which cannot be decided at this stage.
34. It cannot be concluded at this stage that to admit the statement would be inherently unfair to the defendant. Evidence may very well be adduced to strengthen or perhaps weaken the hearsay evidence. For these reasons I hold that it is in the interest of justice to allow that further evidence to be adduced. The Court therefore exercises its discretion to admit the **KRA** and **AA1**.

**CANDACE NANTON
HIGH COURT JUDGE
BELIZE CENTRAL DISTRICT
SENIOR COURTS OF BELIZE**