

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.
Dates of Hearing: 11th, 12th, 13th, 16th, 18th, 19th, 23rd, 25th October 2023.
Date of Delivery: 6th November 2023

MURDER- JUDGE ALONE TRIAL-DECISION

JUDGMENT

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**.

THE EVIDENCE

2. The Crown's case is that on 20th April, 2018 around 11 pm the Accused Marlon Everett shot and killed the Deceased Albert Johnson at Rectory Lane Belize City in the presence of witness Jaden August and another unidentified male. The shooting of the deceased was captured on video footage extracted by Cpl Brian Flowers from a DVR belonging to Stephen Sheran. On 21st April 2018 Police Corporal Rollington Fuller #1749 viewed the video footage and identified the Accused Marlon Everett as the shooter. On 25th April 2018 Jaden August named the shooter as someone he knew by the alias Yankee. On 11th July, 2019 Inspector Alfonso Aban conducted a group identification procedure where Jaden August identified the Accused Marlon Everett as the shooter whom he had referred to as Yankee.
3. The Crown read the statements of 3 witnesses whose evidence was agreed in accordance with Rule 10 of the **Criminal Procedure Rules 2016**, (hereinafter "the CPR") along with section 106 of the **Evidence Act, Cap. 95 of the Substantive Laws of Belize R.E. 2020**, (hereinafter "the EA"). The Court wishes to record its thanks to both parties for acting in the spirit of the *CPR* and saving precious judicial time.
4. The statements of the following witnesses were read into evidence:
 - i. Orin Clayton Michael - identified the body of the deceased as that of his brother Albert Ervin Johnson;
 - ii. Brian Lopez Sr –Crime Scene Technician took photographs of the post mortem examination. These photos were admitted into evidence as **BL 1-4 (A-E)**
 - iii. Angela Wiltshire- Crime Scene Technician - visited the scene on the 20th April, 2018. She took photographs of the scene which were admitted into evidence as **AW 1-7 (A-C)**
5. The Crown called the following live witnesses in the order shown below:
 - i. Jaden August
 - ii. #Woman Police Constable Kacy Ann Requena
 - iii. Justice of the Peace Jermaine Hyde
 - iv. #164 Police Corporal Brian Flowers
 - v. Justice of the Peace Andrew Godfrey
 - vi. Assistant Superintendent Alfonso Aban
 - vii. #1749 Police Corporal Rollington Fuller
 - viii. Dr Mario Estradaban
 - ix. Police Inspector Gladimir Cu
6. The following items of documentary/real evidence were admitted:
 - i. **KRA**- first statement of Jaden August dated 25th April 2018
 - ii. **KRB**- video recording of first statement of Jaden August
 - iii. **AA1**- second statement of Jaden August dated 11th July 2019
 - iv. **BF1**- video footage of incident extracted from DVR
 - v. **AW 1-7 (A-C)**- Photographs of the scene
 - vi. **BL 1 -4 (A-E)**- Photographs of the Post Mortem

WPC Kacy Ann Requena #1647

7. On 20th April, 2018 WPC Requena received a radio transmission and proceeded to Rectory Lane where upon arrival she observed a motionless body on the roadway. She conducted a walkthrough of the scene and witnessed scenes of crime technician Angela Wiltshire process the scene. WPC Requena viewed surveillance footage from a nearby house which captured footage of the shooting. On 21st April she handed over the investigation to Inspector Gladimir Cu.
8. On 25th April 2018 she recorded a written statement from Jaden August in the presence of his sister Monique Dennison and JP Jermaine Hyde. This was video recorded. The witness asked Jaden August questions pertaining to an incident that occurred on 20th April, 2018 and recorded the information that he gave. At the conclusion of the statement WPC Requena read the statement back to Jaden August and invited him to correct or change anything and he did not make any changes. Jaden, his guardian Monique Dennison, JP Hyde and WPC Requena signed the statement. The statement was admitted into evidence as **KRA**. The video recording was admitted through this witness as **KRB**. (the Court's previous ruling on the admissibility of the previous inconsistent statements of Jaden August is annexed to these written reasons)
9. Under cross examination the witness stated that she was not involved in bringing Jaden August to the station. She denied that he was detained. She said that this was her first time video recording a witness statement. She agreed that when she interviewed Jaden August she had already seen the video recording of the incident. She agreed that Jaden spoke a lot of creole and that the statement was written in grammatical English. She explained that she wrote the English version of what Jaden said. She said that when she viewed the footage she was not familiar with any of the male persons in the video. She agreed that the shooter's face only appeared for a fleeting glance and that she could not identify Jaden August's face in the video. She denied that the video was dark and stated that it was bright enough to see his face. She stated that when Jaden asked her to stop she told him that it would be better for him to continue so that he would not have to return to the police station but maintained that she gave him the choice to stop or continue. She denied the suggestion that she wanted a complete statement so that she could charge someone. She agreed that the video recording did not show that she read back the statement to Jaden August.
10. In re-examination she explained that the video recording equipment had stopped recording before she was able to complete the statement of Jaden August due to the time limit.

Justice of the Peace Jermaine Hyde

11. On 25th April, 2018 JP Hyde proceeded to the Criminal Investigation Branch where he met WPC Kacy Ann Requena, Jaden August, a minor and his guardian Monique Dennison. He spoke with Jaden August and his guardian and informed them that his role was to ensure that their rights were not violated. He asked Jaden August and his sister if they had been threatened to give the statement and they both said no. He testified that he asked to see the witness' hands and feet and under his shirt and did not observe any signs of injury. Jaden August told him that he was willing to give the statement. JP Hyde was present during the written and video recording of the statement of Jaden August. He identified **KRA** and **KRB** respectively. He testified that Jaden seemed helpful and willing to cooperate.

12. Under cross examination JP Hyde stated that the video recording captured everything that happened. He stated that he was unaware that Jaden was taken from his house to the police station in a police vehicle and that he did not ask Jaden or his sister how they got to the station or how long they had been there. He said he had asked if they were detained and they said no. He agreed that Jaden spoke creole in the interview. He said that WPC Requena wrote exactly what Jaden said but she asked him to explain the terms that were not understood. He said that he heard Jaden August say that he wanted to stop at one point and that WPC Requena had stopped. He did not ask Jaden if he could read or if he had anything to eat.

Corporal Brian Flowers #164

13. The Court deemed this witness an expert in DVR extraction. He testified that on 23rd April 2018 he was at his office when Stephan Sheran and CIB personnel presented a Sony Brand DVR surveillance system. From that system he retrieved a file which he copied onto a DVDR disc that could not be added edited or deleted. That DVDR disc was admitted without objection as **BF1**. He was not cross examined.

Cpl Rollington Fuller

14. Cpl Fuller testified that in 2018 he was a Police Constable then attached to the Anti-Gang Unit stationed at the Queen Street Police Station. On 21st April 2018 he received a call from Sgt Gladimir Cu. He proceeded to the Crime Investigations Branch (CIB) where he viewed **BF1**- video footage of an incident. He recognised the area shown in the footage as Rectory Lane and identified the Accused Marlon Everett as the male person he saw in the video retrieving an object from another male person and pointing the object to the head of the deceased. He recognised the Accused by his body structure, gait and his face. He stated that he had known the Accused for 10 years and would see the Accused nearly every day as the Accused lived in the area. He would see the Accused whilst doing his regular police duties. He said that he had last seen the Accused on April 18th 2018 when he was doing a special escort duty on Albert Street West, Belize City. He recognised the Accused as he was passing along the street. The Accused called out to him by his nickname 'Punisher' and briefly spoke to him. He had the Accused under his observation for 20-25 seconds.
15. In cross examination the witness accepted that he had previously stated that that he had observed the Accused for 10 seconds and not 20-25 seconds as he stated in examination in chief. He explained that the 10 seconds only referred to the time the Accused took to approach him. He stated that he did not know that the Accused was in prison from 2013-2016; for 6 months in 2010 and 2011 and for 90 days in 2017. When it was suggested that he could not have known the Accused for 10 years the witness stated that he would see him most of that time but he did not know when he went to prison. He said he could not recall if the Accused had a goatee. He stated that he saw the side of the Accused's face in the video for 3 seconds and that his face was showing clear when he saw the spark from the object. He denied that he got a fleeting glance but testified that he had a clear view and that he was positioned closer to the screen. He denied the suggestion that he identified the wrong man.

Justice of the Peace Andrew Godfrey

16. JP Godfrey testified that on 3rd July 2019 he received a call from Inspector Alfonso Aban. He arrived at the Magistrate's Court and Inspector Aban introduced him to the Accused Marlon Everett at the cell block. In his presence Inspector Aban asked the Accused if he was willing to participate in a formal identification parade and the Accused refused. Inspector Aban told the Accused of the different types of identification parades but the Accused refused all. He stated that Inspector Aban filled out a form which he and the Accused signed.
17. On 11th July 2019 he stated that he received another call from Inspector Aban. That day he accompanied Inspector Aban, Jaden August and his sister in law in a heavily tinted mobile. They parked on Treasury Lane and Inspector Aban told Jaden August to look around to see if he recognized anyone and that the person Jaden described in his statement may or may not be there. Shortly after JP Godfrey said he saw police officers escorting 5 persons toward the Magistrate's Court. Jaden August looked and said there he is right there. Jaden described the person he identified as a slim built dark complexion male person about 5 ft 6 inches to 8 inches in height with a goatee under his chin wearing a long jeans pants a plaid shirt and a black tennis shoe. He said that Jaden August said that he was sure that that was the person he knew as Yankee.
18. In his presence Inspector Aban showed Jaden August **BF 1** and Jaden pointed out the person that he gave something to in the video and said that was Yankee. JP Godfrey identified **AA 1** as the statement that was recorded from Jaden August on 11th July 2019.
19. Under cross examination the witness stated that he was never given an opportunity to speak with Jaden August and his guardian alone. He said that he was never able to verify if Jaden August was pressured to give the statement or if he gave it voluntarily. He said that he had asked Jaden August in the presence of his guardian if he had been threatened. He disagreed with the suggestion that the statements of minors must be video recorded but said that the requirement is that a guardian must be present. He accepted that Jaden did not speak in perfect English but used a few creole words. He said that the statement was not written in creole and that English is the language of Belize. He agreed that Inspector Aban changed the patois words to English. He said he did not know how Jaden August came to be in the presence of the police and that he did not ask him. He also did not ask him how many police officers had interacted with him. He denied the suggestion that there were only 2 individuals on the group identification parade. He accepted the suggestion that the 5 persons looked different.
20. In re-examination he clarified that when he said they looked different he meant that they did not all look like the Accused.

Asst Superintendent Alfonso Aban

21. ASP Aban testified that on 3rd July 2019 Sgt Gladimir Cu requested that he conduct an identification parade with the Accused. He contacted JP Andrew Godfrey and they both proceeded to the Magistrate's Court on Treasury Lane. They proceeded to the cell block area where he introduced

himself and the Justice of the Peace to the Accused. He informed the Accused of his intention to conduct an identification parade and explained the procedure to him. He told him that it was his right to agree or refuse to participate in the parade. The Accused refused to participate. The Accused also refused to give a statement to that effect.

22. He said that on 11th July 2019 he again contacted JP Godfrey. He said that Jaden August and his guardian were escorted to the Queen Street Police Station CIB office where he asked Jaden August if he was willing to do an identification and Jaden agreed. He brought them to the Magistrates Court in a fully tinted police vehicle. He explained the group identification procedure to Jaden. They waited about 10 minutes and then saw two police officers escorting 5 persons walking in the direction of the Magistrate's Court building. Jaden August identified the Accused as the person he knew as Yankee and described his clothing. ASP Aban said the 5 male persons were almost the same height and general appearance as the Accused.
23. They then proceeded to the Queen Street Police Station where Jaden August was shown **BF 1**. Jaden August pointed and said that the person in the video that shot and killed Albert Johnson is the person he knows as Yankee.
24. Asp Aban said he then recorded a statement-**AA 1** from Jaden August who signed same after it was read over to him. He said that Jaden August was cooperative and willing to give the statement and no one threatened or promised him to give the statement.
25. In cross examination the witness agreed that the identification procedure was conducted 14 months after the incident. He denied that there is a form that must be filled out where the Accused refuses to do an id parade. He said that he did not write down the reason that the Accused gave for refusing as the Accused gave none. He denied the suggestion that the Accused said he refused because it was 14 months after the incident and that his face had been aired on television and on the internet. He stated that the procedure he adopted was pursuant to the police standing orders. He said that the Accused never asked to consult a lawyer. He said that he did not take a statement from Jaden's guardian. He also did not videotape the procedure. He denied that there were 5 persons in total including the police officers and accepted that he did not have photos to prove that was so.

Dr Estradaban

26. Dr Mario Estradaban was deemed an expert in Forensic Medicine by the Court. This witness testified that he performed a post mortem examination on the deceased. His findings were that there were two entry wounds and one exit wound on the head of the deceased. He opined that direct cause of death was traumatic shot due to head injuries by gunshot wounds. Dr Estradaban was not cross examined.

Police Inspector Gladimir Cu

27. Inspector Cu testified that on 21st April 2018 WPC Kacy Ann Requena handed over the investigation to him. He stated that later that day he viewed **BF 1** – video footage of the incident and requested the assistance of PC Rollington Fuller, who was then attached to the Anti-Gang Task Force, to view

the footage for the purpose of identification. In his presence Officer Fuller viewed the footage and identified the shooter as Marlon Everett of West Canal Belize City.

28. Inspector Cu said that later that day Sgt Gino Peck, now deceased, detained the Accused and handed him over to William Cobb. Inspector Cu later informed the Accused of the report of murder made against him cautioned him and informed him of his constitutional rights. The Accused remained silent and requested a phone call which was granted. Inspector Cu continued investigations and later charged the Accused for the offence of murder.
29. On 3rd July 2019 Inspector Cu requested Inspector Alfonso Aban to conduct an identification parade on the Accused. On 11th July 2019 Inspector Aban had informed him that the Accused had been positively identified on the parade. He stated that the murder investigation had led the police to Jaden August but that to his knowledge Jaden August was not detained.
30. Under cross examination Inspector Cu stated that when the Accused was charged he had not yet received a statement from Jaden August. He stated that no suspect books were used to identify the Accused and that only Rollington Fuller had identified the Accused based only on the video footage. He stated that other officers had viewed the footage but accepted that he had only mentioned Officer Fuller in his report. He could not recall if the Accused had a goatee when he met him.
31. When shown **BF1** he accepted that one of the persons was Jaden August but denied that Jaden August handed the gun to the shooter. He agreed that if Jaden August had handed the gun to the shooter he could be charged as a secondary party. He stated that Jaden August was not charged. He stated that it is not his belief that Jaden August intended to kill the deceased and that he did not think that Jaden August was covering up or concealing the identity of the accused to save himself.
32. He accepted that Israel Usher was charged for the murder and that Israel Usher in his statement did not name the Accused as the shooter. When asked if anything prevented him from conducting an identification procedure with the Accused between 2018 and 2019 he stated that the police had problems locating Jaden August. He stated that in November 2018 he had requested that an order be put out to detain Jaden August but that it was Officer Cowo who had put out the order as he had been transferred to Corozal at that time.

Jaden August

33. Jaden August testified on oath that he did not know anyone by the name of Yankee or Izzy. He said that he did not recall anything happening on 20th April, 2018. He said that he recalled giving a statement to the police on 25th April 2018 but that he did not recall what he said to the police. He said that the police had threatened him. He did not know that the statement was video recorded. He said that he was afraid and that the police forced him to say those things. He said that he did not recall giving a statement to the police in July 2019. He did not recall pointing out certain persons on the video to the police. The witness recognised his signature on **KRA** and **AA 1** and said that he had placed his signature on both documents. When invited to refresh his memory from those statements the witness refused.

34. 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**. The witness denied telling the police the things contained in the statements and denied that the contents were true. He said that the police forced him to give the statement and told him they will send him home. He insisted that he did not know where the police got the information and that he did not tell them anything.
35. Under cross examination by defence counsel the witness stated that he did not know anything about what happened on 20th April, 2018 and that he did not see anyone get shot. He agreed that the police picked him alone up from his home and carried him to the police station. He agreed that he was frightened that he would go to jail. He said that the police put him in a room with two police and that he never know about any JP. He disagreed that he told the police anything they wanted to hear to go home but that they forced him to say what he said. He said that everything he told the police was never true and that he only told them because he was frightened.

KRA – statement of Jaden August dated 25th April 2018

36. The account given in **KRA** is that Jaden August was at his home at Rocky Road when he was approached by an unnamed male person who asked him if he “*wa one body*”- which Jaden understood to mean if he wanted to kill someone. Jaden said yes because he was afraid the person would knock him. The man told him to change his clothing and gave him a rusty gun to hold. The man then left through the back door. When Jaden went outside he saw Yankee, a person who normally hangs out in his yard, and Izzy. He had last seen Yankee the previous Saturday for about two hours. Yankee told him let’s go. Jaden, Izzy, Yankee and the deceased left the yard together and walked to the foreshore. When they reached at the front of a building Jaden said he took out the firearm and Izzy told him to shoot the man. Jaden said that he said “*no no no*” and Yankee took the gun from him and pointed the gun at a very close range to the man. The man tried to fight Yankee and that was when Jaden heard a sound that was not as loud as a gunshot. He saw the man drop on the ground and Jaden said he ran in the direction he came from. He and Yankee continued towards Birds Isle.

AA1- statement of Jaden August dated 11th July 2019

37. On 11th July 2019 Jaden August stated that he met Inspector Aban who asked him if he was willing to do an identification parade relative to the murder investigation. He said that Inspector Aban explained the procedure to him. He was also introduced to Justice of the Peace Andrew Godfrey. He was taken to the Magistrate’s Court on Regent Street. He sat in a tinted vehicle with the JP, Inspector Aban and his sister in law Lisbertha Samuels. He said he waited about 10 minutes and then saw police officers escorting about 5 male persons. He identified one of those male persons as Yankee, the person who shot and killed the deceased on the 20th April, 2018. He said he then went to the CIB office where Inspector Aban showed him a video recording where he pointed out the person on that video that he knew as Yankee.

Defence case

38. At the close of the Crown's case the Court told the Accused of the three options available to him i.e. to remain silent; to give a statement from the dock; to give evidence under oath. The Accused made a statement from the dock but called no witnesses.
39. The Accused stated that on the night of the incident he was at home with his common law partner watching tv when he had heard the sound of shots. He went outside, looked around and saw persons in the neighbourhood coming out of their houses. The next morning the police came for him at his house and told him that he was wanted in connection with a murder. He said he asked the police to watch the video and for them to put him on an identification parade. He told the police that he did not know anything about a murder and that he did not know Izzy and Jaden. It was the following year that the police asked him about an id parade and he told them that the only way he would attend the id parade is if he had someone there to attend. The police eventually conducted a group identification without his permission. He said that his face had already been shown on the news and that it was only him and one other person on the group parade and not 5-6 persons as the police said.

Closing addresses

40. The parties gave closing addresses which were carefully considered by the Court.

ANALYSIS

41. The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy the Court so that it is sure of the guilt of the Accused and if there is any reasonable doubt the Court is duty bound to acquit him.
42. The Court has considered all the evidence with the intention of reaching a fair and dispassionate assessment of that evidence. The Court notes that in assessing credit and reliability it must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that particular bit.
43. The Court begins firstly with analyzing the evidence on the Crown's case and **if** the evidence is strong enough to consider a conviction it would consider the case for the Accused, as is the required reasoning process noted by our apex court, the Caribbean Court of Justice (hereinafter "the CCJ"), in **Dioncicio Salazar v R** [2019] CCJ 15 (AJ)¹.

¹ Para. 35

The offence: Murder

44. The Court has derived great assistance from a decision of our Court of Appeal in Peter Augustine v R Crim. App. 8/01 in defining the crime of murder, per Carey JA:

“Murder is defined in the Criminal Code as intentionally causing the death of another without justification or provocation (section 117 Cap. 101). It was essential to emphasize to the jury that the specific intent which the prosecution must establish on the charge against him was an intent to kill.”

45. The Court understands that the Crown must prove to the satisfaction of the Court so that it is sure that:
- i. Albert Johnson is dead.
 - ii. His death was caused by the act of the Accused.
 - iii. The Accused specifically intended to kill the deceased.
 - iv. There was no legal justification for the killing of the deceased.
 - v. The Accused was not legally provoked into killing the deceased

Whether Albert Johnson is dead

46. The Crown has established that Albert Johnson is dead on the agreed evidence of Orin Clayton who identified the body of the deceased as that of his brother Albert Johnson and the evidence of Dr. Estradaban that the deceased died from traumatic shock due to head injuries by gunshot wounds.

Intention to kill

47. The Court finds that the principal, the man seen in **BF 1** holding the object against the head of the Deceased specifically intended to kill.
48. The Court has derived great assistance from a judgment of our Court of Appeal in Gareth Hemmans v R, Crim. App. 12/16 on the question of intent, per Hafiz-Bertram JA, as she then was:

*“[51] Section 6 of the Criminal Code provides for the standard test of intention, that is, **whether the person, (the appellant in this case) intended to produce the result, that is, to kill Mr. Zaiden when he chopped him with the machete.***

[52] Section 9 of the Criminal Code sets out the approach to be adopted in relation to proof of intention to kill. Section 9 of the Criminal Code provides that:

“9. A court or jury, in determining whether a person has committed an offence-

(a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but

(b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

[53] *The relevant question and factor in this case as shown in the table being whether the person charged with the offence intended to produce a particular result by his conduct (question) by the “fact that the result was a natural and probable result of such conduct.” (appropriate factor).*

[54] *Mr. Sylvester contended that there is nothing on the record to show that the trial judge considered sections 6 and 9 of the Criminal Code, which sets out the statutory matters which should be taken into account in relation to proof of intention to kill. In the view of the Court, **the judge was not required to set out sections 6 and 9 in his judgment or use the formula as set out therein, provided that he makes it clear that the appellant intended to kill Mr. Zaiden. The question to be asked is whether the trial judge arrived at the conclusion of intent to kill by looking at all the facts and circumstances which were disclosed in the evidence.**” (emphasis added)*

49. The Court has looked at all the evidence and divines the specific intention of the principal to kill from **BF1**: the shooter takes the object from one of his associates and aims that object at the head of the deceased and fires shots. The shooter then runs off after the deceased falls to the ground. The Court finds this is conclusive evidence of intention to kill.

Is the Accused the shooter?

50. The main issue for the Court’s determination is whether the Court is satisfied beyond reasonable doubt that the Accused Marlon Everett is the shooter.
51. The evidence to be examined in relation to this issue comes from three sources which will be analysed below:
- i. **BF 1** -Video recording of incident
 - ii. Evidence of Rollington Fuller who identifies the Accused as the shooter in **BF 1**.
 - iii. Evidence of Jaden August contained in hearsay statements dated 25th April 2018 and 11th July 2019. These statements were admitted into evidence pursuant to section **73 A of the Evidence Act Cap 95** (see Annex A for the Court’s previous ruling on the admissibility of this evidence).

BF 1- Video Recording of the incident

52. The Court would firstly wish to clarify the basis upon which it admitted **BF 1**. This was done on the conjoint effect of the common law and the provisions of the **Electronic Evidence Act 2021** (hereinafter “the EEA”). The Court accepts the common law test for the admissibility of video

evidence as set out in the decision of the Supreme Court of Canada in R v Alexander Nikolovski [1996] 3 SCR 1197, per Cory J for the majority:

*“28. Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. **It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.**”*
(emphasis mine)

53. This jurisprudence has been adopted in the Caribbean in the Jamaican Court of Appeal decision of Randeano Allen v R [2021] JMCA Crim 8.²

54. The EEA reads, where relevant:

“2... “electronic record” means a record ... stored by electronic means in an information system ...

“information” includes data, text, images, sound, codes, telephone communications, computer programs, software and databases; and

“information system” means a system for generating, sending, receiving, storing or otherwise processing electronic records.

4. Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.”
(emphasis mine)

55. The Court in interpreting this section presumes that the National Assembly knows the common law when it is legislating.³ In the Court’s view the intention of the National Assembly when passing section 4 of the EEA was to make electronic evidence more easily admissible and provide assistance by way of a presumption to overcome the accuracy requirement, the first step in Nikolovski, with regard to the adducing of electronic evidence.

² Paras. 38-40

³ Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at 649

56. It is the Court's view that by virtue of the definition section video footage on a DVR would be an electronic record stored in an information system, namely the DVR. Section 4 provides that a device that "is of a kind" that ordinarily produces an accurate record the Court shall presume it produced an accurate record on the occasion in question unless there is sufficient evidence to cast doubt on that presumption.
57. In the Court's view, it is a notorious fact of which it takes judicial notice, as defined in **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service** [1923] AC 191⁴ that DVRs, which are a commonplace technological advancement, are devices which ordinarily produce an accurate record.
58. The evidence of Cpl Brian Flowers is that the file was not tampered with, that it was the same file as created on the DVR and that the system does not give the user nor the owner the ability to edit that file. There was evidence that the computer Cpl Flowers used was password protected and that he carefully retrieved the footage and reproduced it onto a copy, the best evidence rule having no applicability to film recordings on the authority of the English Divisional Court decision of **Kajala v Noble** (1982) 75 Cr App R 149.
59. This evidence supports the presumption that **BF 1** is an accurate record of what the DVR recorded on 20th July 2018 at Rectory Lane. The Court having considered the above, as well as its obvious relevance, admitted **BF 1** into evidence, without objection by the Accused.
60. The Court has derived considerable assistance from the English Court of Appeal decision of **AG's Reference** (No. 2/02) [2003] 1 Cr.App.R. 21. Though the decision spoke to photographs, the Court believes that it is equally appropriate to videos, per Rose LJ:

"19. In our judgment, on the authorities, there are, as it seems to us at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up, a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

*(i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (**Dodson and Williams**);*

*(ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (**Fowden and White, Kajala v Noble, Grimer, Caldwell and Dixon and Blenkinsop**); and this may be so even if the photographic image is no longer available for the jury (**Taylor v Chief Constable of Chester**);*

(iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images

⁴ At p. 212

*and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (**Clare and Peach**); (iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury...”*

Cpl Rollington Fuller’s identification from BF 1

61. Corporal Fuller’s testimony is that on 21st April 2018 he viewed **BF 1** and was able to identify Marlon Everett as the shooter in that video.
62. The Court approaches the evidence of Cpl Rollington Fuller’s in the following manner based on the guidance of the Jamaican Privy Council decision of **Beckford and Anor. v R** (1993) 42 WIR 291⁵, per Lord Lowry:

“The first question for the jury is whether the witness is honest. If the answer to that question is ‘Yes’, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely is he right or could be mistaken?”

Whether Cpl Fuller is honest

63. The first step of this analysis requires the Court to determine whether Cpl Fuller is an honest witness.
64. The Court, in assessing credit and reliability, must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes however, on the authority of the Belizean CCJ decision of **August and Anor. V R** [2018] 3 LRC 552 ⁶ that it need not comb the record for inconsistencies or contradictions.
65. In its determination of the credibility of Cpl Fuller the Court examines the following inconsistencies which arose during his testimony.
66. The witness had stated in examination that he had known the Accused for “*more or less*” 10 years at the time that he made his identification. This was challenged in cross examination when defence counsel asked whether the witness knew that during that 10 year period the Accused had been in custody on 4 occasions: in 2010 for 6 months, in 2011 for 6 months, for 3 years from 2013-2016 and in 2017 for 90 days. The witness stated in response that he did not know whether the accused had been incarcerated but that he would see him during that 10 years. The Court observes that there is no evidence as to whether the Accused was in fact incarcerated during those periods. The Court notes that what is put is not evidence and the specific question asked by counsel was limited to whether the witness knew of such a fact and it was never put to the witness that the Accused was *in*

⁵ P. 298

⁶ Para. 60

fact incarcerated. The Court also observes that the Accused himself did not mention this in his unsworn statement from the dock. In any event, the witness neither accepted nor refuted the claims.

67. The Court considers that even if the Accused was incarcerated during those periods that does not detract from the witness' honesty or credibility on the issue of whether he knew the Accused for a significant time period prior to his identification. The witness did not seek to deny this fact he merely stated that he was unaware. The Court observes that the alleged incarcerated periods save for the 3 year stint were not significant in the context of a 10 year acquaintance. The Court is of the view that this inconsistency arose not out of any nefarious intent by the witness to mislead but the oftentimes inexact way we in the Caribbean speak.
68. The Court notes that loose estimates of time, or even age, by honest witnesses are not unusual in the criminal courts as was noted, quite colourfully, in a decision of our Court of Appeal in **Chadrick Debride v R** Crim. App. 13/07, per Sosa P:

"[69]...This Court cannot, however, sit in an ivory tower and ignore the often-very-loose habits of speech of Belizeans in the streets of our cities and towns..."⁷

69. The Court also notes that although the 10 year period was challenged, the familiarity between the accused and the witness was never challenged. The witness not only said that he knew the Accused but that the Accused also knew him and knew him well enough to speak with him. The interaction on 18th April when the witness said that the Accused called out to him by his alias Punisher- an alias he was known by before joining the police- remained unchallenged. The witness described where he lived in proximity to where the Accused would frequent and described the instances in which he would often see or interact with him. He said that he would sometimes stop and search him and described a person named Foam with whom the Accused would usually be seen. This was also unchallenged by the defence.
70. The second apparent inconsistency was in relation to the length of time that the witness observed the Accused during the prior interaction of the 18th April, 2018. In his evidence in chief the witness stated that he had the Accused under his observation for 20-25 seconds however in cross examination it was suggested to him that in a previous statement he had said 10 seconds. The witness sought to clarify the alleged inconsistency by stating that the 10 seconds referred to when the Accused was coming towards him and that there was another 10 seconds where the Accused passed by. He denied the suggestion that he was adding seconds to make his evidence look better.
71. The Court considers that to be a plausible explanation when one examines the alleged prior inconsistent statement itself. In examination in chief the witness was asked the general question of how long he had the Accused under observation to which he responded 20-25 seconds. In his prior statement the witness was specifically describing the initial timeframe when the Accused was walking towards him.

⁷ See also para. 71

72. The Court also considers the nature of the alleged interaction as described by the witness which suggests a length of time beyond 10 seconds. The witness described that he saw the Accused exiting the alley and walking towards him, the Accused then spoke to the witness and asked him what he was driving. He responded by nodding and then the accused continued walking. It is therefore believable when the witness said that that entire interaction lasted 20-25 seconds.
73. Defence counsel cross examined the witness on whether the Accused had a goatee or moustache when he saw him on the 18th in person and on the 21st via **BF1**. The witness said that he could not remember if the Accused had either. Counsel suggested that he could not have had a clear view of the Accused if he did not notice his goatee/moustache. The witness' response was that he had never mentioned a goatee/moustache because he did not see a goatee/moustache. This evidence may be contrasted with that of Jaden August who said (in **KRA**) that he observed a goatee on the Accused. In considering the discrepancies between these two witnesses the Court is assisted by the dicta of the ECCA in **Maynard v R** (2022) 101 WIR 243, per Pereira CJ:

"[60] ... It is not at all unusual for different witnesses seeing and recalling a scene to which their attention is drawn differently."

74. These witnesses would have had different vantage points, under differing pressures and with different powers of observation and recall. Different witnesses may observe and take note of different characteristics on an individual and that does not mean that the witness is being untruthful in his account of what he saw.
75. The suggestion made by defence counsel was that because Cpl Fuller admitted that he was unable to read the license plate on a vehicle in **BF 1** meant that he was unable to make an identification of the Accused and as such the Defence invites the Court to consider that Fuller was either lying or mistaken when he identified the Accused. The witness responded that he could not read the license plate because it was too small and that at the time he made the identification of the Accused he was positioned much closer to the screen. The Court accepts the witness' explanation as both reasonable and credible.
76. The Court finds Officer Fuller to be a reliable witness whose credibility remained intact throughout his testimony. The inconsistencies that arose on his evidence could be explained and the Court finds that the witness gave his evidence clearly and did not display any deceptive intent in the way he responded to questions posed in cross examination.

Circumstances of the identification

77. The next step of the analysis requires the Court to examine closely the circumstances in which Cpl Fuller's identification was made and to consider its specific weaknesses to determine whether he is mistaken.
78. At this stage the Court reminds itself of the need for caution in accepting identification evidence because of its inherent challenges and that mistaken identification has led to miscarriages of justice in the past. Indeed, the Court specifically reminds itself of the fact that the CCJ has opined recently in the Barbadian decision of **R v Hall** (2020) 95 WIR 201 per Jamadar JCCJ, that, "*this special need*

for caution is corroborated by current cognitive scientific research on the subject, which compellingly demonstrates the potentially perilous unreliability of such singular reliance on visual identification as the basis for conviction.”⁸

79. Miscarriages of justice often have their root in mistaken identification by seemingly sure witnesses. The Court notes that an honest witness may be mistaken, and that Cpl Fuller may have conscientiously convinced himself that the person he saw with the shooter was the Accused without intending to make a mistaken identification but is in fact in error. The Court also notes that mistaken witnesses may nonetheless be convincing.
80. The Court also notes that although a case of recognition evidence may be more reliable than identification by persons unknown to the suspect, errors can be made *even* in the recognition of close friends or relatives. Therefore the fact that Cpl Fuller claimed to have known the shooter does not mean that he cannot be mistaken.
81. In this particular case where there are identifications made by two witnesses, the Court warns itself that several identifying witnesses may be all mistaken.
82. The Court therefore considered carefully the circumstances of the identification, and the Court’s view thereon, are as follows:
 - i. **Recognition:** Cpl Fuller testified that he knew Accused for about 10 years. Although it was suggested to him that he could not know him for a full 10 years it was never put to him that he did not know him. He stated that he saw him as the Accused traversed in the area that he lived and that he would see him in the morning or evening time coming as he was coming on and off work. He said that he would see him nearly every day because of where the Accused resided. He said he would also see him during his regular police duties as he would often stop and search him. This was not challenged. He said that he last saw him and spoke to him two days before the shooting. The Court explained above how it resolved the issue concerning the length of time that Cpl Fuller knew the Accused. The Court finds that this a case of strong recognition evidence against the Accused.
 - ii. **Lighting:** The Court is helped considerably on this issue by the evidence of **BF 1**, the video demonstrates clear bright artificial lighting from the street lamppost which illuminated the area where the shooting takes place.
 - iii. **The period of observation:** The witness observed the Accused for the period that the 4 men came walking into the street however the only opportunity to view the Accused’s face was the time period that his face came into frame on the video. The witness specifically mentioned in his evidence that at the time of viewing he made a record of the time stamp when he was able to make out the face of the Accused and he indicated that time on the video as 10:52:20. When **BF 1** was played the witness demonstrated the moment that he referred to and the video was stopped to demonstrate that view. The Court notes that the face of the shooter was shown on screen for one second at that time stamp. The Court takes note of the nature of video footage evidence which allows the viewer to stop and pause moments as contrasted to a real life continuously moving incident. The Court also notes that the witness would’ve had an opportunity for observation uninterrupted by fear or the usual traumatic circumstances attached to a live observation.

⁸ Para. 149

- iv. **Distance and obstruction:** Mr Fuller stated that he was positioned closer to the screen when he viewed the footage than where he was positioned while giving evidence in Court. He did not estimate a distance but the Court would have been able to observe the distance of his vantage point at Court which was approximately 15-20 feet so according to the witness he would have been closer than that. He also described the size of the screen- on which he viewed the footage 40 inches. In the Court's own view of **BF 1** this is a distance where a proper observation could be made. The witness stated that nothing obstructed his view. The Court notes for itself from its own viewing of **BF 1** that a clear observation of the shooter's face could be made at the time stamp mentioned above. The witness stated that he first saw the side profile then a frontal view of the shooter's face. This is consistent with what is depicted in **BF 1**. The witness also said he could identify the Accused not only by his face but also by his body and walk. From **BF1** the shooter's body is seen clearly as he walked up the street. Cpl Fuller testified that he also recognised the Accused by his body structure – he said the Accused had wide shoulders and his own distinguished walk. The Court found that the video footage allowed ample opportunity for those features of the shooter to be observed and the Court also specifically observed consistency with that description given by Cpl Fuller and that of the shooter on **BF 1** and that of the Accused himself at Court as the Court itself had several opportunities to observe the Accused as he walked in and out of the dock.

83. The Court found the specific weaknesses in Cpl Fuller's evidence to be as follows:

- i. The fact that Cpl Fuller's view would have been an on screen viewing as opposed to a real life face to face meant that certain features may not have been observed.
- ii. The incident happened at night and lighting was provided artificially as opposed to daylight.
- iii. The incident occurred very quickly in a matter of seconds.
- iv. The shooter's face remained on screen for a brief moment although there was the ability by the observer to pause the video.

84. The Court also considers the contention seemingly made by defence counsel through his cross examination of the investigator Inspector Cu that the police ought to have held an identification parade with the Accused in respect of Cpl Fuller. The Court notes that an identification parade enables a suspect to put the reliability of an eye witness' identification to the test- and that the failure to hold an identification parade notwithstanding that this is a case of recognition- means that the Accused has lost the benefit of that safeguard. In this regard the Court reminds itself of the dicta in **Pipersburgh** [2008] UKPC 11 (Belize) which states that where identification of the perpetrators is plainly going to be a critical issue in the trial, the balance of advantage will almost always lie with holding an identification parade.

85. In those circumstances the Court considers that an identification parade may have served a useful purpose in the context that Cpl Fuller's identification was being challenged by the Accused. This is a fact which I have taken into account in my assessment of the strength and correctness of the identification made by Cpl Fuller. My assessment of the correctness of Cpl Fuller's identification therefore rests solely on his observations made from viewing the footage (and any independent support for same) since his ability to recognise the Accused had not been tested through an identification parade.

86. The Court is of the view that the strengths of the identification evidence far outweigh its weaknesses even cumulatively considered. The Court finds that Cpl Fuller had the opportunity to make a correct identification of the person when he pointed out the Accused as the shooter. The Court is satisfied, subject to its assessment of the case for the Accused, that Cpl Fuller has correctly identified the Accused as the shooter.

Can the Court make its own identification from BF1

87. The Court is satisfied that where the photographic or in this case video image is sufficiently clear the fact finder can compare it with the defendant sitting in the dock (**Dodson and Williams**)

88. The Court can therefore use **BF 1** to determine whether the person shown with an object firing at the head of the deceased is the Accused. **Nikolovski** has held that the Court is permitted to look at **BF 1** and compare it with the Accused whom it has seen over days of trial and determine after appropriate warning, and reminding itself that certainty to the standard of beyond reasonable doubt is required, whether they are one and the same person.

89. The Court notes that it is not being asked if it recognises someone it knows. The Court is being asked to make a comparison between images and the physical features of someone who was, until this trial, a stranger.

90. The first question the Court needs to consider, is whether these images are of sufficient quality to make any comparison with the Accused. The Court is of the view that the video image is of sufficient clarity to make a comparison. The footage has sufficient artificial lighting and the shooter's face comes close enough to the camera that his facial features can be made out. In the one moment that his face is shown on the screen there is nothing obstructing a view of his face at that point of the video. The Court is also permitted to stop this video and examine it in the same way that any witness is permitted to do.

91. However, unlike the other witnesses in this matter, the Court reminds itself that the Accused is a stranger to this Court and not someone the Court has known personally. The Court also notes the passage of 4.5 years since the incident and the time at which the Court has viewed the footage which also weakens the Court's ability to make an accurate identification. In this regard I caution myself against making assumptions as to what the Accused may have looked like 4.5 years ago. The Court is not aware of the appearance of the Accused in 2018 and whether some of his features have changed with time.

92. The Court observes that while there is a striking degree of similarity in the appearance of the Accused now and the shooter in the video such as his height, complexion, size, the shooter and the Accused both have broad shoulders and generally similar physical features, the Court declines to make its own identification bearing in mind the standard to which it must be satisfied i.e so that it feels sure that the person in **BF 1** is the Accused.

Evidence of Jaden August

93. The Court observes that Jaden August was deemed a hostile witness who 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 account (**KRA** and **AA1**) was admitted pursuant to **section 73 A of the Evidence Act Cap 95.**

94. 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.

95. 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.

96. 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 Asst Superintendent Alfonso Aban and Justice of the Peace Andrew Godfrey with respect to the second statement dated July 2019 (**AA 1**) (see above for summaries of these witness' account). A video recording of the recording of the first statement was also admitted into evidence and marked **KRB**.

97. These witnesses all testified to being present when Jaden August narrated the events to which he deposed in his statement and to being present when the statements were read over to Jaden August and when he placed his signature on each page of the documents.

KRA

98. The Court placed reliance on the video recording **KRB** which the Court finds provides an accurate and reliable depiction of the taking of the statement. The Court has carefully reviewed **KRA** (the written statement) in the context of **KRB** in order to determine whether the content of the written statement was in fact given by Jaden August.

99. The Court considered carefully the fact that the written statement is recorded in formal English and that Jaden August spoke in broken English on the 25th April, 2018 and even whilst giving evidence at the trial. The submission of the defence was that the words as contained in the written statement were not in fact the words of Jaden August but the words of WPC Requena. The question was put

to Ms Requena and to JP Hyde in cross examination that WPC Requena changed the words of Jaden August.

100. The Court wishes to state at this point that police officers, when recording statements, ought to use the words narrated by the witnesses in the manner that they speak as far as is reasonably practicable. On the other hand, the Court recognises that the statements themselves should be intelligible and capable of being read and understood. In this case it is clear that the police officer wrote the written statement in formal English whereas the witness himself spoke in creole. The Court considers that this is not a laudable practice. Notwithstanding, from the Court's careful examination of both **KRA** and **KRB** the Court is satisfied so that it feels sure that the information came from Jaden August himself and was not a manipulation or fabrication by WPC Requena. WPC Requena clearly wrote the information received from the witness and transcribed it in a manner to make a narrative that was cohesive. The Court derives this satisfaction from multiple viewings of **KRB** which demonstrate that the material facts deposed to in **KRA** came from the mouth of Jaden August.

101. The Court also accepts that after the statement was recorded it was read over to Jaden August and he signed same on each page as accepting the contents of the statement as being true. His signature appears on each page of **KRA**. The Court accepts the testimony of WPC Requena that the video recording did not capture the reading over of the statement as it had already cut off. The Court is able to accept this view as it is apparent that the video recording does not capture the entire process. For example the signing process is not recorded on the video but the witness Jaden himself admitted to signing the document. The JP also attested to seeing Jaden sign the statement along with Jaden's guardian after it was recorded. None of this was captured on the video. The Court feels satisfied so that it feels sure that these formalities, although not captured on video, were conducted.

102. The Court therefore accepts as a fact that **KRA** is the written statement of Jaden August and pursuant to **section 73 A of the Evidence Act** the Court can consider the account contained therein as probative of the guilt of the Accused.

AA1

103. This statement dated 11 July 2019 contains evidence of a group identification process where witness Jaden August identifies 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 DVDR and identified on that video the person who he knew as Yankee.

104. 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. Jaden August stated at trial that he could not recall giving this statement to the police. He accepted that he was the one who signed his name on the statement but denied the contents of the document.

105. Evidence capable of proving that Jaden gave this statement comes from witnesses to the group identification procedure- ASP Aban and Justice of the Peace Godfrey. The Accused also

seemingly acknowledges in his dock statement that he was in fact placed on a group identification procedure but denied that there were 5 persons on that procedure.

106. The Court accepts ASP Aban's and Godfrey's evidence that Jaden did in fact provide the account contained in AA1. The Court considers that the witness were truthful and believe their testimony on this point.
107. Having accepted that the statements **KRA** and **AA 1** were proven by the Crown, the Court can therefore decide whether to accept or reject all or part of Jaden's testimony at trial and/or whether to accept or rely on all or part of his previous accounts contained therein.
108. The Court directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of all believability. The Court in this regard relies upon the decision of the English Court of Appeal of **R v Fanning and Ors** [2016] 2 Cr. App. R. 19.⁹ The Court notes that if a witness has lied about some bit of evidence, the evidence must be properly evaluated, taking into account the fact that the witness told the untruth and the reason for the lie, and may still convict if the Court is sure that the material parts of that evidence to be true. The Court in this regard relies upon the Trinidadian Court of Appeal decision of **Minott and Ors. v The State** (2001) 62 WIR 347 at p. p. 362 n. 4.

Jaden August's evidence at trial:

109. I have rejected Jaden August's testimony at trial as a lie. For the reasons stated above I have found as a fact that Jaden August did in fact provide an account to the police of the events on 25th April, 2018 and is lying when he says that he did not say anything to the police and that they forced him to say what he did say. I rely on **KRB** which contradicts Jaden's oral testimony. From **KRB** I observed not only the words spoken by the witness but also his demeanour which seemed for the most part cooperative. I do not believe Jaden August when he said that he was forced and that the police fabricated his account.
110. I have similarly formed the view that Jaden did in fact point out the Accused on 11th July 2019 at the group identification and later on the video as the shooter. The Court accepts the testimony of Andrew Godfrey and Aban as true that Jaden August pointed out the Accused both at the group identification procedure and when **BF 1** was shown to him. Jaden August in evidence at trial accepted that the police did show him a video which was the same video showed to him by the prosecutor. The Court accepts this evidence as true.
111. The Court, in its deliberation on this point, is entitled to consider the reason (if available) for Jaden's departure before rejecting his oral evidence entirely or partially. After giving his first statement it is apparent from the evidence of Inspector Cu that as investigator he had difficulty locating Jaden and could not find him at his stated address. A directive was given for police officers to look out for him. The witness was not located until 2019. The Court notes that the witness was not present on the first day of trial notwithstanding evidence of the personal service of a summons and

⁹ At para. 27

he was only present by way of warrant. The procedural history makes it pellucidly clear that this witness simply did not want to give evidence on oath.

112. Although neither the Crown nor the defence explored the reason for the witness testifying the way he did during the course of this trial, the Court notes that the witness repeatedly said in oral evidence that he doesn't know why he is here and that he doesn't want to be here. The Court draws the irresistible inference that the witness was simply no longer willing to participate and was deliberately frustrating the process by refusing to give evidence in accordance with his prior statements.

113. I therefore reject his oral testimony. Having come to the conclusion that Jaden August has told lies whilst under oath the Court must bear this in mind when considering the reliability of his previous account. I note that I am not bound to accept either account. I now turn to consider his earlier account as given in **KRA** and **AA 1**.

Whether Jaden August is honest

114. Before relying on the previous inconsistent statements I must consider whether Jaden August was honest and credible when he gave that account to the police. I have already observed that it is apparent that Jaden has told lies whilst giving evidence under oath in this matter. He said that he had not dictated the contents of his statement to the police yet **KRB** proved that that was untrue. The witness had told several lies under oath which caused him to be deemed hostile in the first place. That necessarily throws into issue his credibility as a witness and whether he is someone whose previous account can be believed by the Court.

115. I have additionally considered that Jaden August may well be considered an accomplice to the murder of Albert Johnson or at the very least a witness with an interest to serve. In **BF 1** he is seen in possession of a gun which he hands over to the shooter who then proceeds to fire shots at the head of the deceased. The three men then run off in the same direction.

116. The circumstances of how Jaden August came to the police station suggests that he was picked up by the police and transported to the station. The Court accepts the evidence of the police officers that he was never charged or detained however it is obvious that he could well have been charged for the murder on the basis of joint enterprise or at the very least charged for possession of an unlicensed firearm. He was the individual who had handed over the murder weapon to the actual shooter with whom he ran off. He would have been aware by the time he was picked up that someone had already been arrested and charged for that murder on the basis of video footage. In those circumstances Jaden August may well have felt pressure to give a statement and would have had his own interest to serve i.e. to avoid being charged himself. He may have felt some pressure to implicate someone else and exculpate himself from the commission of the offence.

117. It would also mean that Jaden himself is a person of dubious character which can affect his creditworthiness. For all of these reasons I strongly direct myself to be careful before accepting the evidence of Jaden August who would have a heightened likelihood of tailoring or fabricating his evidence in hopes of an advantage.

118. The Court also considers that a child of 12 years old may be easily coached or may say what they think an adult wants to hear or merely repeat by rote something said to them. For this reason I have also cautioned myself against relying solely on his written statement bearing in mind his age when he gave it.
119. His written statements are also hearsay statements and as such the evidence was not given under oath nor was the defence able to fully cross examine the witness on its contents due to the witness' hostility and him in essence denying the account completely. This factor is considered when assessing the strength of the evidence.
120. The Court notes that the risk of danger, although still present, was to some limited extent mitigated by the fact that the statement of 25th April 2018 was video recorded. The Court therefore has the opportunity to view the demeanour and manner in which Jaden recounted the incident of the 20th April, 2018.
121. The Court has given particular consideration to the video recorded version of Jaden August's statement of 25th April before deciding whether I can safely rely upon his written statement. The video recording of Jaden August's statement helps to provide a real life visual depiction of the manner in which the statement of 25th April was taken. A careful examination of this video helped to put the words of his written statement in their proper context- the video showing the true manner in which the words came out the mouth of the witness himself.
122. The Court finds that although WPC Requena attempted to structure the way in which the witness narrated the events the material parts of his account came from Jaden himself. *He* described the incident at his house on Rocky Road, *he* made clarifications when WPC Requena misunderstood what he meant when he described the role each person played such as clarifying the entrance and exit of the first man he spoke with. *He* explained how he came to be in possession of the gun and described same without prompting. *He* explained how he came to know the Accused and when was the last time he had seen him. He implicated himself by saying that he told the man that he "*wanted a body*" and he was the one who explained what he understood that term to mean. He then dictated how he was told to shoot the deceased but said that he told them no and then handed over the gun to the Accused who he said shot at the deceased. He explained that the gunshot was not loud even though one might have expected him to say it was loud had he been fabricating the incident. He then details the path he and the Accused took to make good his escape.
123. The Court has considered that although I find Jaden's account to be truthful it would nevertheless be dangerous to act on his evidence in the absence of corroboration. It is with this in mind that I consider it necessary to ascertain whether there is independent evidence capable of supporting the evidence of Jaden August. Such supporting evidence can be found in:
- i. **BF 1** -there is no evidence that Jaden August was shown BF 1 at any time prior to giving his statement. BF 1 is an untampered and unedited account of what transpired on Rectory Lane. The Court finds that the account of Jaden August is consistent with what was shown on the video footage.

- ii. Identification by Cpl Fuller- I have above explained that I accept the evidence of Cpl Fuller, this independent identification of the Accused goes toward supporting the correctness of Jaden's identification of the Accused as the shooter.
124. Having given full heed and weight to my warnings I feel satisfied so that I am sure that Jaden August was honest and speaking the truth when he gave his account on the 25th April 2018 about the shooting death of Albert Johnson and on 11th July 2019 when he identified the Accused to the police as the shooter he knew as Yankee.
125. Having considered him honest and credible when he gave the statement the Court now turns to the question of whether the statements are reliable. The Court reminds itself that honest witnesses can be mistaken and that several witnesses can similarly be mistaken. The Court also warns itself that people can be mistaken even with person that they know well.

Circumstances of the identification

126. The circumstances of the identification, and the Court's view thereon, are as follows:
- i. **Recognition:** Jaden testified that he knew the Accused as Yankee, someone who normally hangs out in his yard on Rocky Road. The last time he had seen him was at his house the Saturday before the incident at about 10 am and he was about 10 feet from him. He saw him then for about two minutes and nothing obstructed his view of him. The Court rejects the Accused's statement from the dock that he did not know Jaden.
 - ii. **Lighting:** Jaden described that they were standing under a lit lamp post which made visibility clear. The Court is helped considerably on this issue by the evidence of **BF 1**, the video demonstrates clear bright artificial lighting from the street lamppost which illuminated the area where the shooting takes place. The Court notes that there is no description of lighting at the house on Rocky Road or during the path where the men ran off.
 - iii. **The period of observation:** No specific time was given save for the actual shooting which Jaden said took 10 seconds. The evidence of Jaden from **KRA** is that he first observed the shooter at his house. They were all in the yard when the men were drinking. He states that Yankee was the person who told him let's go. He described Yankee as wearing a white tshirt and grey long pants. The 4 male persons then all walked together to the Foreshore. They walk down the street and then Yankee took the gun from him and shot the deceased. He and Yankee made their escape together and he described the path they ran/walked. That evidence suggests a significant period of observation.
 - v. **Distance and obstruction:** Jaden said that at the time of the shooting Yankee was about 10 feet away from him. He did not give a distance of how far Yankee was either at the house or when they ran off together. At the house Yankee spoke to him and he said they walked together on the road alongside the basketball court. He said that Yankee's face was not covered throughout. He described Yankee's clothing and from BF1 it is clear that nothing obstructed his view of him.
127. The Court found the specific weaknesses in the circumstances of Jaden August's identification to be as follows:
- i. The incident happened at night and lighting was provided artificially.
 - ii. The shooting itself occurred very quickly in a matter of seconds

- iii. The subsequent identification procedure was conducted a year after the shooting incident took place.

The group identification

128. For ease of reference this Court's ruling on the admissibility of the evidence of the group identification is annexed to these written reasons.
129. The Court has previously concluded on the basis of ASP Aban and JP Godfrey's evidence that a group identification did in fact take place. This fact was unchallenged and rather supported by the evidence of the Accused himself through his unsworn dock statement. The Accused in that statement did not challenge the fact of the identification procedure but rather challenged its fairness.
130. The Court has been guided by the persuasive authority of **David Baptiste v the State** Cr App 23 of 2016 where the Court of Appeal of Trinidad and Tobago held that a confrontation exercise was an entirely justifiable and permissible mode of identification where the appellant refused to participate in an identification parade. In that case it was held that the confrontation exercise was properly conducted by the police officers and there was no resultant unfairness to the appellant.
131. The decision in **Boyce v R** BB 1985 CA 16 (Barbados). supports the proposition that, where a proper basis has been laid for an informal exercise such as a confrontation, for example, where the suspect has refused to participate in an identification parade, then evidence of what transpired at the informal exercise would be relevant and therefore admissible.
132. The Court finds as a fact that the procedure that occurred on 11th July 2019 was not unfair where the Accused was offered and rejected a formal identification parade. However, the Court still considers that the procedure adopted in lieu of an identification parade meant that the identification of the Accused by Jaden on 11th July 2019 was not a test of the correctness of his identification. There was no line-up of 8 or more persons of similar descriptions. There was also contradicting evidence from the Crown's witnesses as to whether the 5 persons looked alike. Officer Cu said that they had similar features while JP Godfrey said they had different faces. The Accused himself challenged that evidence stating that there were only two persons. The Court draws the inference most favourable to the Accused in this respect. The procedure therefore acted as no more than a verification that the person in custody was in fact the person Jaden August knew and had referred to as Yankee. The weight of the identification has therefore been considered in that context and cannot test the correctness of the identification in the same way that an identification parade.
133. The Court is of the view that the strengths of the identification evidence far outweigh its weaknesses even cumulatively considered. The Court finds that Jaden August gave a truthful account to the police which is independently supported by other evidence. The Court is satisfied so that it feels sure that Jaden August had the opportunity to make a correct identification of the shooter who he referred to as Yankee and who he subsequently confirmed was the Accused in the group identification procedure. The Court is satisfied, subject to its assessment of the case for the Accused, that Jaden August has correctly identified the Accused as the shooter.

Defence Case

134. The Court having found evidence that may result in a conviction then, following the guidance in *Salazar*, considers the case for the Accused as set out in the unsworn statement of the dock.
135. The Court observes that the Accused has nothing to prove as the burden remains on the Crown to prove the guilt of the Accused beyond a reasonable doubt throughout this trial.
136. The Accused chose to give an unsworn statement from the dock. In that statement he stated that he was with his common law partner at home at the time of the murder. He stated that he heard the sound of shots and that when he went outside he saw persons coming out of their homes. His case is thus that he could not have been the shooter since he was at home when the shooting took place on April 20th 2018.
137. The Court rejects the dock statement as untrue on the basis of the strength of the evidence on the Crown's case, on the authority of a decision of the Privy Council in the Dominican case of **Bally Sheng Balson v The State** [2005] 4 LRC 147¹⁰.
138. Mr Neal for Accused expressly indicated that he was not raising the issue of good character so the Court did not consider the issue.
139. The Court wishes to note that it placed no reliance on the suggestion that the Accused served prison terms at various occasions nor that the Accused had been stopped and searched by Cpl Fuller save and except for the limited reason that this evidence was adduced which was to probe the extent to which Officer Fuller allegedly knew the Accused. These facts could not in any way be probative of the guilt of the Accused in relation to this matter nor did the Court consider it as affecting the Accused's credibility with reference to his dock statement.

DISPOSITION

140. The Court now looks at the totality of the evidence to reach a final decision. The Court is satisfied so that it is sure, for the reasons given above, that the combined evidence of Cpl Rollington Fuller, Jaden August and **BF 1**, as an accurate depiction of the circumstances of the murder, has satisfied this Court so that it feels sure of the guilt of the Accused. The Court has rejected the case for the Accused, for the reasons given above.
141. The Court having considered all the evidence and the cases for the Crown and the Accused is satisfied so that it is sure of the guilt of the Accused.

¹⁰ Para. 38

The Accused is found guilty of murder and the matter is adjourned for a separate sentencing hearing as advised by the CCJ in Linton Pompey v DPP [2020] CCJ 7 (AJ) GY.¹¹

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

¹¹ Para. 32