IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C 0005/2021

BETWEEN

THE KING

and

OSCAR SELGADO

Defendant

Before:

The Honourable Mr. Justice Nigel Pilgrim

Appearances:

Ms. Cheryl-Lynn Vidal, SC, Director of Public Prosecutions, with her
Mr. Dervin Sambula for the Crown

Mr. Adolph Lucas Sr. for the Defendant

2023: October 3; 4; 11; November 6; 8; 23;

December 6

JUDGMENT

Application by the Crown to admit a hearsay statement.

[1] PILGRIM, J: Oscar Selgado ("the defendant") was indicted for the offence of abetment of murder, contrary to section 20(1)(a) read along with section 117 of the **Criminal Code[1],** ("the Code"). The trial by judge alone began with the arraignment of the accused on 3rd October 2023 before this Court pursuant to section 65A(2)(c) of the **Indictable Procedure Act[2].** The indictment alleges that the defendant, on 7th February 2019, solicited the commission of the crime of murder by asking Giovanni Ramirez ("Mr. Ramirez") to kill Marilyn Barnes ("Ms. Barnes").

[2] The Crown has made an application to admit the statement of Mr. Ramirez in evidence for its truth pursuant to a statutory exception to the hearsay rule, namely section 105(2)(d) of the **Evidence Act[3]** ("the EA") that he is a witness who through fear of death is unwilling to give oral evidence. The Court conducted a voir dire to determine the admissibility of Mr. Ramirez's statement and has received very helpful submissions on both sides, in writing and orally to address its admissibility.

The legal framework

[3] Section 105 of the EA reads, where relevant:

> *"105.–(1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to sub-sections (4) and (5) of this section, a statement made by a person in a document shall be admissible in criminal proceedings…as evidence of any fact of which direct or oral evidence by him would be admissible if–*
> *(a) the requirements of one of the paragraphs of sub-section (2) are satisfied; and*
> *(b) the requirements of sub-section (3) are satisfied.*
> *(2) The requirements mentioned in sub-section (1) (a) are–*
> *…*
> *(d) that through fear of death or bodily injury, to him or her or to a member or members of his or her family, the person is unwilling to give or to continue to give oral evidence.*
> *(3) The requirements mentioned in sub-section (1)(b) are that the statement to be tendered in evidence contains a declaration by the maker and signed before a magistrate or a justice of the peace to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true."*

[1] Chapter 101 of the Substantive Laws of Belize, Revised Edition 2020.
[2] Chapter 96 of the Substantive Laws of Belize, Revised Edition 2020.
[3] Chapter 95 of the Substantive Laws of Belize, Revised Edition 2020.

[4] The Court of Appeal has held in the case of **Micah Lee Williams v R** [4] that section 105(1) of the EA gives this Court a discretion to admit Mr. Ramirez's statement if the condition of fear of death, in this case, at sub-section (2)(d) is made out.

[5] Separate and apart from the proof of the formalities required by sub-section 3, the application of the foregoing section in this case requires the consideration of two legal sub-questions: (i) how is fear judged; and (ii) how is the discretion to admit the statement exercised.

[6] The issue of the proof of fear has not been considered by higher local authority so the Court has considered English cases, as that jurisdiction has legislation, which is similar, though not the same, as section 105.

[7] The standard of proof for this application, in the Court's view, relying on the English Court of Criminal Appeal ("ECCA") authority of **R v Acton Justices, ex parte McMullen** [5] is proof beyond reasonable doubt. This Court will only grant the Crown's application if it is satisfied so that it is sure that the fear of death condition is established.

[8] JR Spencer, the author of the leading English text, **"Hearsay in Criminal Proceedings"**[6] , opined, after considering several authorities, including the case of **Doherty**[7]:

> *"…for the purpose of deciding whether a witness was put in fear, the test is a subjective one."*

[9] In the Court's view, this opinion receives support from a decision of the ECCA in **R v Adeojo et al**[8], per Pitchford LJ:

> *"The witness's fear need not be induced by specific threats uttered by or on behalf of the Defendant, **provided it is genuine**." (emphasis added)*

[10] The ECCA further stated in the seminal case of **R v Horncastle et al**[9], per Thomas LJ, that the fear provisions in the statute:

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[4] Criminal Appeal No. 16 of 2006, paras 22-23.
[5] (1990) 92 Cr App Rep 98 at 104.
[6] Oxford And Portland, Oregon (2008), para 6.28.
[7] [2006] EWCA Crim 2716.
[8] [2013] EWCA Crim 41, para 93.
[9] [2010] 2 AC 373, para 86.

"…do not impose the requirement that the fear must be attributable to the defendant. ***It is sufficient that the witness is in fear****.* ***No doubt Parliament took into account the well known difficulties of ascertaining the source of a witness's fear… it is our view that in determining whether the requirements…have been met, two of the essential questions are whether there is a justifiable reason for the absence of the witness supported by evidence****…****and whether the evidence is demonstrably reliable or its reliability can properly be tested and assessed. On this analysis, if the witness can give evidence which should be heard by the court in the interests of justice, but is clearly too frightened to come, then it matters not whether that fear was brought about by or on behalf of the defendant— there is a justifiable reason for the absence. The task of the court is to be sure that there are sufficient counterbalancing measures in place (including measures that permit a proper assessment of the reliability of that evidence fairly to take place) and to permit a conviction to be based on it only if it is sufficiently reliable given its importance in the case****." (emphasis added)***

[11] With regard to the second question our apex court, the Caribbean Court of Justice ("CCJ"), in the case of **Dioncicio Salazar v R**[10] has clearly set out the test for the exercise of the discretion in this jurisdiction, per Wit JCCJ:

"[39] A second remark to be made is that although it is clear that section 105 Evidence Act does not have the proviso ***"that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence" it is clear that that proviso also exist with respect to that provision. Albeit, under the aegis of the common law****.* ***After our decision in Bennett v the Queen it must also be clear that this proviso, in whichever emanation, is no longer limited to the longstanding rule that a judge in a criminal trial has an overriding discretion to exclude evidence if the prejudicial effect outweighs the probative value and the exclusion of evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. The proviso also extends to the situation wherein it is clear that the statement cannot in reason safely ever be held to be reliable****.*

[41] A last remark: the law of evidence has gone through many changes especially in the last two decades. ***The rule against hearsay is certainly no longer what it used to be and surely not in Belize. The crime situation in the country as in so many other countries, has made it imperative to make more and more inroads into that rule. Many rules of evidence can only be understood against the background of the concept of a trial by lay jurors who needed to be guarded from evidence that they would not be able to properly assess.*** *In the course of time, many rules of evidence were developed with an eye on the reliability of the evidence and the fairness of the trial.*

[42] On the other hand, societal developments required stronger measures to fight ever more violent crimes. ***The legislature created opportunities for the prosecution to get a better grip on crime. At the same time, it also needed to keep their eyes on the Constitution and the safeguards it seeks to ensure****." (emphasis added)*

[10] [2019] CCJ 15 (AJ)

[13] The Court notes the CCJ in *Salazar* fastening on to considerations of the admissibility of hearsay statements the 'safely reliable' test in **Japhet Bennett v R**[11]. The Court reminds itself of those principles, per Wit JCCJ:

> *"[18]…**We are therefore of the view that the proper approach for Belize would not be to require the judge to make a finding on the reliability of the hearsay evidence (prohibited by Galbraith) but to limit himself to the question whether the hearsay evidence could safely be held to be reliable**. **That test does not go to the reliability of the evidence as such, which would be for the jury to assess, but to the pre-condition of the quality of the evidence, more or less in the same way as in R v Turnbull where the judge must exclude inherently weak identification evidence**.*
> *[19] We do not, however, agree that the test should altogether be the same for both the admission stage and the no case submission stage. Although it might be true, as Hughes LJ stated in Riat, that '[i]f it is the Crown which is seeking to adduce the evidence, and if the evidence is important to the case, the judge is entitled to expect that very full inquiries have been made as to the witness's credibility and all relevant material disclosed', **it would seem to us more aspirational than real to expect that at that early stage of the proceedings all the relevant evidential material would be available to make the decision to exclude the evidence**. As is stated in Phipson: 'The more important the hearsay is to the prosecution's case, the more is required by way of counterbalancing factors to ensure the trial was fair. **During a trial at first instance, the extent to which a statement is supported by other evidence or is decisive may depend upon how the trial unfolds**, hence the need for English trial judges to be able to stop trial proceedings after hearsay has been admitted.' What is true for English trial judges is also, if not more, true for Belizean trial judges. In this respect we would also refer to what was said in the recent case of HM Advocate v Alongi:*
> ***'[I]f there is no strong corroborative evidence to enable the fact-finder to conduct a fair and proper assessment of the reliability of the statement allegedly made by the deceased, then unfairness may be seen to occur** … In this case the degree to which RS's statement will be decisive remains uncertain, notwithstanding the concessions made by the Crown.'*
> ***The court concluded that in all the circumstances of that case, it could not be determined 'on the predicted testimony' that the defendant's trial would 'inevitably be unfair**.'*
> *[20] **In short, the reality is that in the course of the trial evidence may be adduced which will strengthen (or weaken) the hearsay, this being good reason why it would be prudent and in the interest of justice to allow the adducing of further evidence. This is, we think, also in keeping with the intention of the legislature to facilitate the prosecution of serious crimes and to strengthen the administration of criminal justice. In our view, the judge should therefore in principle admit (admissible) hearsay evidence when it is introduced if there is at least a reasonable possibility that***

[11] 94 WIR 126.

eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence could in the end safely be held to be reliable*.*

…

[22] .. to ensure that the hearsay evidence can safely be held to be reliable, ***the judge must look (1) at its strengths and weaknesses, (2) at the tools available to the jury for testing it, and (3) at its importance to the case as a whole.*** *In R v Friel the Court of Appeal indicated that judges should focus on the reliability of the hearsay evidence, grounded in a careful assessment of* ***(1) the importance of the evidence, (2) the risks of unreliability and (3) the extent to which the reliability of the evidence can safely be tested and assessed by the jury****.*

[23] The requirement that the jury must have sufficient tools to test and assess the hearsay evidence also figures prominently in the Canadian case-law: 'threshold reliability' can in the first place (and should preferably) be established 'by showing that ***there are adequate substitutes for testing the evidence which provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement'*** *('procedural reliability').* ***As a substitute for the traditional safeguards is mentioned a video (or audio) recording of the entire statement****.*

[24] Threshold reliability can also, although it would seem to a lesser extent, be established when there are ***sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy ('substantive reliability')****. Whether this is the case may depend on the circumstances in which the statement was made and on* ***evidence (if any) that corroborates or conflicts with the statement****. Another factor may be whether or not the maker of the* ***statement had any reason to misrepresent the matter stated or whether the statement was made spontaneously, or against his or her own interest*** *(factors that can be found on the 'checklist' of s 114(2) CJA)." (emphasis added)*

[12] The Court will analyse this issue in two stages, firstly assessing whether it is satisfied so that it is sure that Mr. Ramirez is through fear of death is unwilling to give oral evidence. Under this heading the Court will consider whether the section 105(3) of the EA formalities have been complied with.

[13] If the application passes the first stage, the Court will go on to consider the exercise of discretion as to whether to admit the statement. The Court will consider, namely, if it is satisfied that the defendant would not be materially prejudiced by the reception of Mr. Ramirez's statement, that it would not be more prejudicial than probative to admit it, and that it can be safely be held to be reliable.

Issue 1: Is the Court satisfied so that it is sure that Mr. Ramirez is through fear of death unwilling to give oral evidence?

The evidence

[14] The evidence of fear comes largely from audio recorded conversations with Mr. Ramirez which were tendered into evidence without objection as CW1. Those recordings were admitted through the witness, Mr. Chester Williams, the Commissioner of Police ("Commissioner Williams"). The Court admitted them under the common law exception to the hearsay rule that evidence of Mr. Ramrez's declarations as to his contemporaneous state of mind where that state of mind is relevant, in this case it is because one of the central findings that must be made in this case is whether he is fearful of death, is admissible[12]. The evidence of fear is also supplemented by the viva voce evidence of Commissioner Williams of his conversations with Mr. Ramirez.

[15] Commissioner Williams testified that on 15th March 2019 Mr. Ramirez indicated that he was in fear that the defendant would have him killed. Mr. Ramirez grounded that fear on the fact that the defendant had allegedly contracted him to kill Ms. Barnes, and that Mr. Ramirez had not only defaulted on the contract but had secretly recorded the defendant on a cell phone and was blackmailing him.

[16] Mr. Keron Cunningham testified that on 18th March 2019, three days after Commissioner Williams's interaction with Mr. Ramirez, he had retrieved recordings from a cell phone obtained from then Insp. Wilfredo Ferrufino ("Mr. Ferrufino") and had generated DVD's. Commissioner Williams had testified that he had directed Mr. Ferrufino to be the investigator of Mr. Ramirez's allegations.

[17] Commissioner Williams testified that on June 21st, 2023, he spoke with Mr. Ramirez who indicated that he was willing to testify and that he would meet with the Director of Public Prosecutions ("DPP") closer to trial. He also undertook to provide a copy of the recordings he had made to the DPP.

[18] Commissioner Williams testified that he subsequently had tried numerous times to contact Mr. Ramirez but it proved futile. He tried contacting Mr. Ramirez from an unknown number and was finally successful on 19th August 2023. Mr. Ramirez confirmed that he was avoiding Commissioner Williams. He said he was doing so because after their meeting in June the defendant had called and threatened him with death. Commissioner Williams testified in viva voce evidence that Ramirez told him, "if he were to testify in the matter against him that he would be a dead man. He said Mr. Selgado also told him… even if he

[12] **Neill v North Antrim Magistrate's Court** [1992] 1 WLR 1220 at 1228-1229.

were to go to prison, he would have him killed." Mr. Ramirez expressed similar sentiments in the recording of that date.

[19] Mr. Ramirez said he was in fear of death on those recordings in CW1. In the second recording on 22nd August 2023 Mr. Ramirez said in conversations with Commissioner Williams and the DPP:

> ***"I feel like ih get outta hand and then people the threaten me and my life and I just waahn, I noh waahn be part ah it ma'am****….*
>
> *…*
>
> *Yes, ma'am. I andastan that perfectly, Ms. Vidal.* ***And also I want you guys to andastan that, you know, the consequence of things dat could happen to me if I do such thing, ma'am****.*
>
> ***…***
>
> *I tell yu ma'am the conversation mi get to wa heated, wa confrontation bikaa at the end ah the day I can't really show he (inaudible)* ***oh he cu have me killed and this and that. Right away I mek he know well I cu mek yoo peoples dehn dead. I done set the order to. Yoo peoples dehn was dead da PG****.*
>
> *…*
>
> *Mr. Williams: Do you really believe that Oscar Selgado would have killed you or have you killed?*
>
> *G. Ramirez:* ***I believe so Mr. Williams****.*
>
> *Mr. Williams: Whe mek you think soh?*
>
> *G. Ramirez: If he cu do that - - all right then because* ***one, ih have the money pa disposable. Man the kill people fi wa $1000.00, $1500.00 right now eena simple lee Belize, right now****.* ***Lotta lee duncey weh (inaudible) the street. Mek no sense, right, Mr. Williams****.* ***Two, if he cu do that to wa old lady, whe da like the age ah your man or cu be my granny, weh yu wa do to wa young, healthy, strong person****. Come on yu waahn see dat happen to wa old lady. You think he was think twice when I know weh he was do to wa old ageable lady whe cant help ih self. He naw think twice fi do me that.*
>
> *Mr. Williams: You just seh earlier how you respect and love your elders them and if it is that yu respect and love your elders them then yu naw mek the man get weh with weh ih the try do to wa old lady. What if da lady da mi your granny (inaudible) set up somebody fi kill your granny and just get away with it.*
>
> *G. Ramirez****: I wish I kuda help unno pa. If that happen, we both know weh ah happen. Whe he wa do. I know exactly whe wa happen and then da people dehn eena the street whe I least expect and dat ah be bad fi me."***
>
> *…*
>
> *G. Ramirez: Noh I wa ansa the call, ma'am, and also I mi waahn know if all right, I neva did waahn let goh the phone any at all but I seh* ***at least I cu try help by letting go of the phone fi helping you guys case without I have to be on the stand bikaaz the only thing weh wa put in in a predicament which was clear to me that if I ever take the stand and seh XYZ that, yu noh, and dat da the line weh I noh waahn cross****."*

…

The DPP: You think there's any possibility that at any time you would change your mind?

*G. Ramirez: **Honest ma'am. I noh think soh. I can't kaaz this brethren** - - …. The man have power either if he would a deh da jail or not people right - - people I would a call my peers you all know and I just kyant change people place and thing kaaz I neven have resource mami and at the end of the day I really waahn help the case and thing but I jus the try be smart. I have two pickni fi live fa, yu know, I grow up without wa father. Yu know and I jus waahn change certain thing mein like please." (emphasis added)*

[20] In the final recording on 31st August 2023 Mr. Ramirez further indicated as follows in conversations with the DPP and Commissioner Williams:

"The DPP: Please don't think that I don't care about your life but it's my duty to make every attempt to put forward the best possible case that I can, right. You understand that?

G. Ramirez: Yes, ma'am. I understand, ma'am.

The DPP: So, I need to ask again what your position is in relation to testifying in the case.

*G. Ramirez**: I don't want to testify, ma'am.***

The DPP: Has anyone reached out to you again since last we spoke?

*G. Ramirez: **No, ma'am. I wa be honest. I naw tell lie nobody did reach out to mi afta**.*

…

The DPP: And you still think your life is in danger?

*G. Ramirez: **Yes, ma'am. I very much think so and that's why I just seh yu know I jus noh wa be part ah it and tek the stand which, yu noh, and already being warned about (inaudible) yu noh wa final straw. I noh waahn tek da risk, ma'am. Honest**.*

*The DPP: **And its still your position that you wont even go to court to say that you don't want to testify***

*G. Ramirez: **No, ma'am. I noh waahn involve eena it ma'am like honest like I noh waahn yu know. Dats why I the tell yuh fram mi heart mammy I noh waahn be part ah it, Ms. Vidal. Yu check, I noh waahn put myself eena da firing line. I noh waahn try mek nobody have no reason fi try think bout jus play with me. I already feel like I the hide fi years and I tiad ah it. I jus waahn - - I jus waahn live in peace mammy like real, like***

- -

The DPP: And you won't even give us a statement saying why it is you don't want to testify?

G. Ramirez: no mammy kaaz automatically he will know that I the try something fi like yu know which in all right he mi done tell me that bikaaz dehn seh if I do such thing dehn wa mek - - dehn wa use dat as to why dehn noh waahn throw out di case and XYZ and like weh I seh yu know like ah noh relally fraid or sometime I feel like, sometime like I neem know weh fi feel mami. Honest. I noh know weh fi feel. I noh know weh fi think sometime kaaz da like nobody know. Only dehn know yu check and I know how people think Ms. Vidal like honest men and I just waahn live my life (inaudible).

…

G. Ramirez:…Tell me certain ting if I try this or if I try that or if I ever this or if I ever. I just noh waahn eena da bracket deh ma'am like yu know." (emphasis added)

[21] Commissioner Williams was cross-examined. He testified in cross-examination that Mr. Ramirez was a known affiliate of one of the gangs in Belize. He also testified that he had ordered that the defendant not be charged for ammunition found in his vehicle on a previous occasion. Commissioner Williams denied that he instigated these charges through Mr. Ramirez. Commissioner Williams accepted that Mr. Ramirez had a criminal conviction.

[22] The defendant gave sworn evidence in the voir dire that he did not know Mr. Ramirez and never threatened him. He testified that he had no previous convictions and was a man of good character. He testified that he was an attorney in a claim which the Crown settled for the unlawful seizure of a truck.

[23] In cross examination the defendant testified that this matter was the fruit of a malicious prosecution by Commissioner Williams because of a matter that went to mediation and other unknown matters. He also testified that he did not read his disclosure in the preliminary enquiry. He did not know if any recordings were tendered against him in the preliminary enquiry. He testified that he only read the disclosure in this matter when the case started at the High Court.

Analysis

[24] The Court on this issue follows the CCJ direction in *Salazar*[13] that it should consider the Crown's case on the issue of fear and if there is evidence strong enough to support such a finding, consider the defendant's case on the issue. If the Court rejects the case for the defendant, it will then return to the Crown's case to determine whether it is satisfied on all the evidence so that it is sure that the witness was in fear.

[25] In terms of considering the evidence the Court directs itself 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. The Court must consider whether inconsistencies or discrepancies arose for innocent reasons, for example through faulty memory or lack of interest in what is transpiring, or if it is because the witness is lying and trying to deceive the Court. 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 bit. The Court notes following *Salazar*[14] and the Court of Appeal decision of **Andy Forbes et al v R**[15], that it does not have to address every point made in argument and decide every issue once the essential issues of the case have been correctly addressed as to how the Court arrived at its decision.

[26] The Court accepted the evidence of Commissioner Williams as credible, truthful and reliable. There were no material or any inconsistencies in his evidence, nor any discrepancies with other evidence. It was not challenged that the witness ordered the release of the defendant on an ammunition charge where it would have been within his discretion to do so if he indeed would have wanted to maliciously prosecute the defendant. The fact that the witness was involved in a civil matter in which the Crown settled appears to the Court to be a weak premise for disbelieving the witness especially considering the uncontested evidence of release on the ammunition charge. The Court was also impressed by the forthright manner and demeanour of Commissioner Williams as he testified.

[13] Para 35.
[14] Para 27.
[15] Criminal appeals 20 and 21 of 2018 at para 40.

[27] The Court considered the evidence of the good character of the defendant in that it made him more likely to be speaking the truth. The Court has also considered that his good character makes it less likely that he may have threatened Mr. Ramirez.

[28] The Court rejected the entirety of the evidence of the defendant in the voir dire as there were several implausible features of his testimony. The Court finds it implausible that the defendant did not read his disclosure until just before this trial started given the fact that the defendant was facing a serious charge with a potentially grave sentence. The Court finds it implausible that he never read his disclosure at the preliminary enquiry and was not aware of the evidence that was tendered there. The Court finds that it is implausible that the defendant would have unknown reasons for asserting that Commissioner Williams was maliciously prosecuting him and not put it to him in cross-examination relying on the duty to put material matters to witnesses in cross-examination as noted in the Trinidadian Privy Council decision of **Warren Jackson v The State**[16], in light of the very serious nature of this charge.

[29] There was also an inconsistency in the evidence of the defendant with regard to him having been a defendant in a civil matter. It was the defendant who volunteered that he had never been a defendant in civil proceedings in an attempt to boost his credibility. The evidence emerged that he was a defendant in a civil matter with an Edward Broaster. When probed on the inconsistency he attempted to explain it by saying that he thought he qualified it by saying it was up to 2019. That explanation was unsatisfactory to the Court, because again he volunteered the information without qualification and it is unlikely that the defendant, an attorney, would speak so loosely.

[30] The Court also finds a discrepancy between the evidence of the defendant and his witness Marco Marin. The defendant testified that he had requested a search for calls between his number and the number used by Mr. Ramirez in the three-way phone call with Commissioner Williams and the DPP and that he had received a response from the telephone company. Marco Marin from that company testified that the only request he received were from a court order, and that if any other requests had been made for a search against that number he would have received it. This was an unexplained discrepancy which in the Court's view undermined the defendant's credibility.

[16] (1998) 53 WIR 431 at p 442.

[31] The evidence of Marco Marin added little by way of proof of fear but to test the credibility of Mr. Ramirez vis a vis the phone calls in 2019. That evidence in the Court's view did not necessarily generate an inconsistency as those calls may have been made by WhatsApp, which would not have been recorded by the telephone company. The Court notes that WhatsApp is not an uncommon mode of communication in Belize.

[32] The Court having rejected the defendant's evidence with regard to fear returned to the Crown's case.

[33] In reliance on the Court's findings as to the credit, honesty and reliability of Commissioner Williams the Court does not accept that he manipulated the recordings in any way and accepts his evidence that he only recorded the latter parts of the first two recorded conversations because he had not thought of it.

[34] The Court also finds that Mr. Ramirez is a witness who through fear is unwilling to give oral evidence. The Court firstly notes two things. The limited remit of this voir dire does not involve the Court considering whether the witness statement of Mr. Ramirez is true on the authority of the Privy Council decision of **Wong Kam Ming v R**[17]. The Court's only task is to determine admissibility of the statement, it would be a trespass on the Court's fact-finding function to consider the truth of the statement at this stage. Secondly the Court's accepts the learning in the text from JR Spencer that the question of fear is to be considered subjectively, that the question is not whether a reasonable man in Mr. Ramirez's position would be in fear but whether Mr. Ramirez is in fact in fear. Indeed, as *Horncastle* underlined no threat need come from the defendant at all and it can also operate when no approaches have been made to the witness by anyone at all, as in one case where a 13-year-old defence witness in a wounding case saw the alleged victim's friends sitting in the public gallery, and their presence scared him into silence[18].

[35] The Court accepted the evidence of Commissioner Williams that Mr. Ramirez had expressed fear since 2019. Though the test is subjective, it is obvious to see why Mr. Ramirez would be in fear if his witness statement was true. He had engaged with a person who contracted a killing, who was able to finance it and Mr. Ramirez had the temerity to blackmail him with recordings after not executing the contract. Mr. Ramirez had consistently through the three recordings clearly expressed that he feared death from the defendant, so much so that he openly spoke of considering violent retaliation if he was harmed in a

[17] [1980] AC 247.
[18] **B** [2006] EWCA Crim 1978, see JR Spencer's text at para 6.29.

conversation with the country's highest law enforcement officer. The Court found that this was compelling evidence that the witness was in fact in fear. The Court finds that the sequence of events is also telling. Mr. Ramirez did not call Commissioner Williams to request a quid pro quo for giving evidence even though he has a matter which is still pending on the uncontested evidence of Gregory Cayetano, he avoided the Commissioner's calls initially after he stated the threat was received. This contributes to the Court making the finding that the refusal by Mr. Ramirez to testify is through fear of death. The Court has had the opportunity to hear the recording, the voice and tone of Mr. Ramirez. The Court finds that indeed he sounded desperate and afraid.

[36] The Court has taken into consideration that Mr. Ramirez's evidence has not been tested by cross-examination. The Court does not accept that there should be a default position that a witness who claims to be in fear must be brought to court to test that fear. The Court accepts the reasoning of the ECCA in **R v Davies**[19]. In that case the submission was made that the witness claiming fear must be brought to court to test it. The Court rejected that general proposition, per Moses LJ:

> *"[12] The first point taken by Mr Rowland …is that at the outset of the case, as this ruling was, there was insufficient evidence on which the judge could be satisfied of the matters set out in s 116(2)(e). There was, in short, insufficient evidence of fear. He rightly points out that when the ruling was made at the beginning of the case, the judge can have had no particular feel for the case. The matter was strenuously contested. It was all too easy for witnesses reluctant to go to the bother of coming to court to say that they were frightened. In those circumstances, it was incumbent upon the judge properly to scrutinise that which they asserted.*
> *[13] In seeking to make good that submission, he drew attention to s 116(4)(c) relating to special measures. No attempts were made to see whether the fears of these witnesses could be allayed by giving evidence through video link. Indeed, he said it was incumbent upon the judge at least to assess their assertions of fear by having those examined by means of video link. In support of that proposition he relied upon R v H [2001] Crim LR 815, particularly in the note of the judgment at 816 which advised that a court should test the oral testimony of fear through video link or tape recording particularly as to the reasons for the fear. In the instant case he pointed out there was no evidence of any past history to justify the fears which the witnesses expressed.*
> *[14]* ***We reject these submissions. In our judgment, the judge was perfectly entitled to reach a conclusion as to the genuineness of the witnesses' fears on the basis of the evidence to which we have referred. It must always be recalled that fear is to be widely construed (see s 116(3)) and that it was the purpose of this part of the 2003 Act to***

[19] [2007] 2 All ER 1070.

alter that which had previously been the law under s 23 of the Criminal Justice Act 1988. The law previously referred to, particularly in R v H, is no longer that which should guide the courts under the new regime. Indeed, courts are ill-advised to seek to test the basis of fear by calling witnesses before them, since that may create the very situation which s 116 was designed to avoid.

[15] ***Of course, judges must be astute not to skew a fair trial by a too-ready acceptance of assertions of fear since it is all too easy for witnesses to avoid the inconvenience and anxiety of a trial by saying they do not want to come. But having said that, in the instant case there was ample evidence to justify the course that the judge took. In those circumstances, there is no basis for the suggestion that he was wrong to do so. Normally a judge will have a much better feel of the truth or otherwise of the assertions of fear than this court could ever do, but we accept that the judge made his ruling at the outset and in those circumstances based it purely upon the written assertions of the witnesses. Had we thought he was plainly wrong, then there would have been merit in this appeal, but, on the contrary, we take the view that he was right****." (emphasis added)*

[37] The Court similarly finds that the intention of the National Assembly in creating the fear provision in section 105 of the EA was to have evidence available to the tribunal of fact when witnesses were in fact in fear, subject to the Court's exercise of discretion. It would defeat that intention if witnesses were sure in their mind, that if they take one step into the proceedings there would be fatal repercussions to put them before that very said court to test the fear. This is the case here as Mr. Ramirez has clearly and consistently indicated what he believes would happen to him if he even gives a statement as to that fear.

[38] The Court is of the view that the case of **R v Shabir**[20] states the point too rigidly that "every effort must be made to get the witness to court to test the issue of his 'fear'." This is inconsistent with the ECCA's own ruling in *Davies*, which was still considered applicable in a decision by a later court in **R v Harvey**[21]. The Court notes that a *Davies* interpretation of our fear provision is more consistent with that of the CCJ in *Salazar's* reading of the intent of section 105 of the EA to not have viable prosecutions rendered nugatory due to unavailable witnesses, balanced of course by the consideration of the discretionary safeguards. In any event the Court in *Shabir* introduced their "default" testing requirement by saying, "How it is proved that a witness will not give evidence "through fear" depends upon the background together with the history and circumstances of the particular case.[22]"

[20] [2012] EWCA Crim 2564.
[21] [2014] EWCA Crim 54 at paras 51 and 55.
[22] Para 64.

[39] In this case the Court thinks that testing the witness's evidence through video link or special measures would have been of no likely assistance because the witness was clearly dug in and had convinced himself that if he gives any evidence against the defendant that he would be killed, if even to give evidence by way of a fear statement.

[40] The Court believes that every effort was made to convince the witness to come to testify. Two of the highest office holders in Belize had over three conversations been pleading with the witness to testify on three separate occasions. There is no evidence that the witness was told his statement would be read via section 105 of the EA, in fact it was told to the witness that the case would collapse if he did not testify, which the Court finds was an attempt at moral suasion to get the witness to come to testify in court.

[41] The Court finds that as a matter of human experience even though a person may be a gangster, as it appears Mr. Ramirez is, that does not mean that gangsters are not afraid to die. The Court also does not find that the evidence of fear is stale because having regard to the unwavering evidence of Mr. Ramirez that there is no possibility his mind would change. The Court again concluded on the evidence that over the three separate conversations on three separate occasions that the witness is subjectively in fear.

[42] The Court found the evidence of fear of Mr. Ramirez in the recordings and the viva voce evidence of Commissioner Williams credible and consistent. The Court makes this finding notwithstanding the fact that Mr. Ramirez is a man of bad character having regard to the aforementioned consistency and cogency of his evidence. The Court finds that Mr. Ramirez is a witness who is through fear of death unwilling to give oral evidence.

[43] The Court also finds that the formalities are also satisfied. The Court accepts the combined unshaken evidence of Justice of the Peace, Andrew Godfrey, Wilfred Ferrufino and the statement itself that Mr. Ramirez declared before a justice of the peace that his witness statement was true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true.

Issue 2: Should the Court exercise its discretion to exclude the statement of Mr. Ramirez?

[44] This is a question of mixed law and fact and the Court is guided by the CCJ judgments in *Salazar* and *Bennett*.

[45] The Court finds that Mr. Ramirez's statement is not more prejudicial than probative as defined by the Privy Council in **Barnes et al v R**[23], per Lord Griffiths:

> *"The phrase "prejudicial effect" is a reference to the fact that, although evidence has been admitted to prove certain collateral matters, there is a danger that a jury may attach undue weight to such evidence and regard it as probative of the crime with which the accused is charged."*

[46] The Court finds that the statement of Mr. Ramirez is not collateral evidence, but directly probative of guilt. It is only "prejudicial" in the sense use by Lord Griffiths in that it is evidence which on the face of it, and if accepted as true, may result in conviction[24].

[47] The Court also does not find that Mr. Ramrez's statement puts the defendant at such an unfair disadvantage or deprives him of his ability to defend himself. The fact that Mr. Ramirez cannot be cross-examined does not by itself generate unfairness as was clearly outlined by the Privy Council in *Barnes*[25]. In this matter the Court finds that there are several tools available to the defendant to test the statement by Mr. Ramirez. There is the criminal record of Mr. Ramirez which has already been deployed in the voir dire which can be used to challenge his credibility. There is the concession by Commissioner Williams that Mr. Ramirez is a gangster, which can be used to challenge Mr. Ramirez's credibility. There is the phone book evidence by Mr. Ferrufino which may be used by the defendant to challenge the credibility of the account in Mr. Ramirez's statement. There is also the Marco Marin evidence about the absence of calls for the period mentioned in Mr. Ramirez's statement which can be used to challenge the latter's credibility.

[48] The Court is also of the view that the statement by Mr. Ramirez can safely be held to be reliable. The Court has already considered the issue of whether the hearsay can be tested and found that it

[23] (1989) 37 WIR 330 at p 337.
[24] P 338.
[25] P 340.

appropriately can. What the Court next considered were the strengths and weaknesses of the evidence and the importance of the evidence.

[49] In terms of weaknesses and strengths the Court warns itself following *Bennett* that the question of reliability is not for the Court at this stage. Again, it is not for the Court to determine if Mr. Ramirez's statement is true at this stage, or if the defendant is guilty or innocent of the charge. *Bennett* requires a consideration of "the pre-condition of the quality of the evidence, more or less in the same way as in R v Turnbull where the judge must exclude inherently weak identification evidence."[26] In that regard the Court notes that the test for a judge withdrawing a weak case, apart from cases of identification, generally is that in *Galbraith*, that if there is evidence which, taking the Crown's case at its highest no reasonable tribunal of fact **could** properly convict.

[50] There is evidence that potentially supports the correctness of the evidence in Mr. Ramirez's statement. He had the disciplinary hearing date of the defendant correctly stated in his statement when checked against the evidence of Ms. Marilyn Barnes, a fact that on one possible view Mr. Ramirez would only have known if he had interacted with the defendant. He knew about an incident involving the defendant and a missing file at the Ombudsman's office which was confirmed in the evidence of Mr. Lionel Arzu, again a fact that on one possible view he would have only known if he had interacted with the defendant. These are things, in the Court's view a reasonable tribunal **could** find trustworthy if the Crown's case is taken at its highest and could properly lead to a conviction by a reasonable tribunal of fact.

[51] The Court, using the prospective view that must be taken under *Bennett* in considering the importance of Mr. Ramirez's statement, is of the view that his statement is not the sole and decisive evidence. There is evidence that **may** be admitted from Commissioner Williams and Wilfredo Ferrufino in notices of additional evidence filed with the Court on 20th September 2023 in which they provide secondary evidence of audio recordings of who they allege to recognise as the defendant making threats to kill Ms. Barnes. This is evidence that has the potential to significantly strengthen the hearsay statement. This matter would have to be legally interrogated at a later stage and issues of their admissibility determined. However, the guidance of the CCJ in *Bennett* is clear in these circumstances, "the judge should therefore in principle admit (admissible) hearsay evidence when it is introduced if there is at least a reasonable

[26] Para 18.

possibility that eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence could in the end safely be held to be reliable."

DISPOSITION

[52] The Court finds that Mr. Giovanni Ramirez is a witness who through fear of death is unwilling to give oral evidence pursuant to sections 105(1)(a) and 105(2)(d) of the EA. The Court also finds that the formalities of subsection 105(3) have been complied with. The Court after considering the exercise of its discretion as outlined above admits into evidence in the main trial the statement of Mr. Giovanni Ramirez dated 17th March 2019.

Nigel Pilgrim
High Court Judge
Dated 6th December 2023