IN THE SENIOUR COURTS OF BELIZE

CENTRAL SESSION – CITY OF BELMOPAN, CAYO DISTRICT

IN THE HIGH COURTS OF JUSTICE

INDICTMENT No. C113 of 2015

BETWEEN:

The Queen

and

[1] **Alton Bailey**

[2] **Roque Middleton**

[3] **Roger Hernandez**

Defendants

Appearances:

Ms. Natasha Mohammed, for the Queen

Mr. Anthony Sylvester, for the First Defendant

Mr. Simeon Sampson SC, for the Second Defendant

Ms. Paulette Elrington, for the Third Defendant

Dates:

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Hearing Dates: 2023: May 8, 9, 11, 12, 15, 24, 26.

June 6, 19, 29

July 7, 27

Judgment Date: 2023: September 15

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RULING ON *VOIR DIRE*

[1] **CUMBERBATCH, HON. FRANCIS M.; J**: On (insert date delivered) ruled that the Crown's application regarding the admissibility of evidence in respect to the Defendants Alton Bailey, Roque Middleton, and Roger Hernandez whom were indicted by the Director of Public Prosecutions for the offence of murder contrary to the provisions of sections 106(1)[1] and 117[2] of the ***Criminal Code*** CAP 101 of the Substantive Laws of Belize Revised Edition 2011 for that they on the 25 October 2013, at Sandhill Village in the Belize District murdered, Jorge Blanco, have been denied.

[2] At their arraignment they all entered pleas of not guilty, hence, a judge alone trial was held pursuant to the provisions of section 65A of the ***Indictable Procedure Act***[3] Chapter 96 of the Revised Edition of the Laws of Belize 2020.

[3] Counsel for the three Accused at the case management hearing gave notice of their intention of challenging the admissibility of evidence respectively,

First defendant: allegedly provided Notes of Interview **"(NOI)".**

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[1] CAP 101 of the Substantive Laws of Belize Revised Edition 2020 section
106.- **(1)** Subject to sub-section **(2),** a person who commits murder shall be liable, having regard to the circumstances of the case, to– (a) suffer death; or (b) imprisonment for life.

[2] CAP 101 of the Substantive Laws of Belize Revised Edition 2020 section
117. Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned.

[3] Indictable Procedure Act CAP 96 of the Revised Edition 2020 of the Substantive Laws of Belize section
65A.- **(1)** Notwithstanding anything contained in this Act, the Criminal Code, the Juries Act or any other law or rule of practice to the contrary, every person who is committed for trial or indicted, either alone or jointly with others, for any one or more of the offences set out in sub-section (2) shall be tried before a judge of the court sitting alone without a jury, including the preliminary issue (if raised) of fitness to plead or to stand trial for such offences. **(2)** The offences referred to in sub-section (1) are– (a) Murder, (b) Attempt to murder, (c) Abetment of Murder, and (d) Conspiracy to commit murder. **(3)** In an indictment charging an accused person with any of the offences specified in sub-section (2), no other count for an offence not referred to in the said sub-section shall be added.

Second Defendant: the involvement in a covert group identification parade.

Third Defendant: allegedly made a statement under caution whilst in police custody following his detention and arrest.

[4] The Court ruled that the objections aforesaid will be heard and determined as preliminary matters and as such a *voir dire* would be held in respect of the challenges raised by each Accused. It should be stated, however, that during the conduct of the *voir dire* in respect of the Second Accused the Crown entered a *nolle prosequi* thereby discontinuing the indictment against him. The Court discharged this Accused person, and I will say no more of him in this decision.

RE: **ROGER HERNANDEZ** – Third Accused

[5] Defence Counsel challenged the admissibility of the Caution Statement given by her client on the ground that her client received a promise and/or was induced by now ASP Romero to the effect that he would help him in any way he could and release his wife who was in custody if he gave a statement to the police about the murder under investigation.

[6] The Crown called INSP Mc Culloch and ACP Romero. Both witnesses denied the allegations that a promise was made to the Accused by ACP Romero to help him in any way he could and to release his wife from custody if he gave a statement to the police about the murder under investigation.

[7] Under cross-examination ACP Romero repeatedly denied making any promises to the Accused. He stated that he did not interview the Accused that day and that it was Mr. Tillett who interviewed him. There was an inconsistency in the evidence of INSP Mc Culloch and Romero as to exactly when Tillett was at the Queen Street

police station. However, both INSP Mc Culloch and ACP Romero states that Tillett was present at the station sometime during the afternoon.

[8] The thrust of Defence Counsel's allegations against ACP Romero are clearly stated in the following excerpt from the evidence:

> Q. Mr. Romero, I am putting it to you at this point that it is only after you had spoken with Mr. Hernandez alone in the room and you gave him assurances that you would help him that he agreed to give the confession and that is when Mr. Mc Culloch subsequently made arrangements for the statement to be taken and that was when you gave the instruction for Ms. Heron to be released.
>
> A. She was released because there was no connection to her and the exhibits found at the house, so I made a decision for her to be released. That she was not a part of the investigation.

[9] As stated aforesaid ASP Romero had denied making any promises to the Accused to help him if he gave a statement to the police. In his unsworn statement from the dock the Accused alleged *inter alia* that:

- ACP Mr. Romero came into the conference room with documents and photographs of the two co-Accused and told him "I am not worried about you I want these two assholes that killed the man and pointed at the picture ….."
- As time continued passing, he kept coming different occasions to try to get me to say what had happened or what I knew of the situation.

- That ACP Romero kept returning to the room and taunted him about his wife.
- After INSP Mr. Mc Culloch left, ACP Mr. Romero returned once more and told me, “Mek we get this over with”. I already told you that if you cooperate with me, you and your wife, will be going home. He further said, “if you cooperate with me your wife will go home, and I will do anything to help you in not charging you….” I remained seated and silent and after hours of ACP Mr. Romero tantalizing me, making remarks and offering me a deal for me to give him a confession based on what he said that he would let go my wife and not charge me”.

Analysis

[10] A consideration of the cross-examination by Defence Counsel reveals that what was said by the Accused in his unsworn statement aforesaid and Caution Statement was not put to ACP Romero save and except for a vague accusation that ACP Romero would help the Accused and release his wife. In his statement the Accused said thus, on this subject:

> ***“I would be willing to be the main key witness against those three individuals and assist the police in solving this murder. Furthermore, ASP Mr. Hilberto Romero assured me that he will try to assist me in every way possible if I co-operated back with the police department of which I am willing to assist and co-operate so that he can solve and close this murder case.”***

[11] The totality of the Accused's utterances in the Caution Statement and unsworn statement and the specific accusations made against ACP Romero therein were not put to ACP Romero at any time when he testified. This is so notwithstanding the fact that ACP Romero stated that he never interviewed the Accused.

[12] ACP Romero admitted that he gave instructions to have the wife of this Accused released and that was because there was no evidence connecting her to this offence. INSP Mc Culloch stated that she was released sometime around 5:20 p.m., which was before the commencement of the Caution Statement given by the Accused which is recorded as commencing at 5:50 p.m. and concluded some two hours later. Therefore, the wife of the Accused was released before ACP Romero could have perused the contents of the statement and its contents to ascertain whether it was helpful to the police as alleged.

[13] The Defence should provide some evidence in support of its allegation that the provisions of section 90(2) of the ***Evidence Act***, the Judges rules or the constitutional rights of the subject have been breached during the process leading up to the taking of the impugned document.

[14] However, the Crown must prove affirmatively beyond reasonable doubt that the impugned document was freely and voluntarily made. Section 90 (2) of the ***Evidence Act***[4] provides thus:

> *"(2) Before such admission is received in evidence the prosecution must prove affirmatively to the satisfaction of the judge that it was not*

[4] Chapter 95 Evidence Act of the Substantive Laws of Belize CAP101 Revised Edition 2020

induced by any promise of favour or advantage or by use of fear, threat, or pressure by, or on behalf of a person in authority".

[15] I have carefully considered the evidence adduced by the Accused in support of their allegations against ACP Romero aforesaid. I believe and accept the evidence of ACP Romero that he did not know the Accused prior to that day, and he held no interview with him and as such made no promises or inducements to the Third Accused to help him if he gave a Caution Statement and to release his wife from custody.

[16] I do not, however, believe and accept the unsworn testimony of the Third Accused that ACP Romero promised him a deal that if he provided a Caution Statement to the police he would not be charged. The Accused went on to say in his Caution Statement that he expected to be the main witness for the Crown to give evidence against his co-Accused. Again, I do not believe and accept that ACP Romero assured him thereof. However, I will not speculate on his reasons for ventilating what I consider to be ridiculous assertions.

[17] There is however, one discrete point that arose during the *voir dire* that was not specifically addressed by the Crown. That is the issue of refreshment to and for the Third Accused during the time he was in custody. During his unsworn statement the Third Accused stated that he had left home at around 8:30 a.m., to take his son to school. He was taken into police custody; his house was searched, and his wife was also held in custody. In his unsworn statement, the Third Accused stated that after he completed giving the statement to SGT Aban, he was given two burritos and two orange Fanta. He was told his wife brought them for him.

[18] It is a well-established principle of English Common Law that a statement which is obtained by oppression is not admissible (see ***Callis and Gunn v. The Queen*** ([1964] 48 Cr App Rep 36)[5], ***Priestly v. The Queen*** ([1965] 51 Cr. App. Rep. 1), and ***Prager v. The Queen*** ([1972] 1 All ER 1114)[6].

[19] Section 4 of the ***Evidence Act*** Chapter 95 of the Laws of Belize provides thus:

> "*Subject to the provisions of this Act and of any other statute for the time being in force, the rules and principles of the Common Law of England relating to evidence shall, so far as they are applicable to the circumstances of Belize, be in force therein.*"[7]

[20] A statement obtained by oppressive means ceases to possess that essential quality of voluntariness which is a *sine qua non* for its admissibility in evidence, and if it is obtained by unfair means, then notwithstanding its voluntary nature it is liable to rejection by the trial judge in the exercise of his discretion. (See ***Middleton v. The Queen*** ([1974] 2 All ER 1190, [1974] 3 WLR 335).[8]

[21] In ***Priestley v. The Queen*** ([1965] 51 Cr App Rep 1), Sachs J, although not venturing an exhaustive definition of the meaning of 'oppression' as used in the Introduction to the Rules had this to say [1965] 51 Cr App Rep 1 at 1: **202**

> *"… … **but, to my mind this word in the context of the principles under consideration imports something which tends to sap, and has sapped that free will which must exist before a confession is voluntary** ...* (Emphasis added) *whether or not there is oppression in an*

[5] Callis and Gunn v. The Queen ([1964] 48 Cr App Rep 36)
[6] Prager v. The Queen ([1972] 1 All ER 1114)
[7] Chapter 95 Evidence Act section 4 of the Substantive Laws of Belize Revised Edition 2021
[8] Middleton v. The Queen ([1974] 2 All ER 1190, [1974] 3 WLR 335)

individual case depends upon many elements ... They include such things as the length of time of any individual period of questioning, whether the Accused person has been given proper refreshment or not and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the Accused person is of a tough character and an experienced man of the world".[9]

[22] The above definition was adopted and applied by the English Court of Appeal in the case of ***Prager v. The Queen*** ([1972] 1 All ER 1114). The test is highly subjective and would appear to embrace almost any words and/or actions which are calculated or likely to weaken the mind of the Accused to whom it is addressed or undermine his will.

[23] In the present case, counsel for this Accused contends that oppression or oppressive conduct was disclosed from the fact that her client was not provided with refreshment *inter alia*.

[24] In considering the question of oppression or oppressive conduct though she did not describe it as such, counsel drew attention to and laid much stress on that part of the Accused's unsworn statement concerning the omission by the police to provide him with food and refreshment and other basic comforts. Such an omission is *prima facie* clearly a factor of substantial importance in determining

[9] Priestley v. The Queen, ([1965] 51 Cr App Rep 1)

whether the conduct of the police was oppressive and whether the statement was voluntarily given.

[25] The omission to provide for the comfort and refreshment of a person who is in custody and is being questioned is *prima facie* an act of oppression of sufficient gravity to warrant a statement given by that person being ruled inadmissible.

[26] I have noted that though the issue of comfort and refreshment was not initially raised in the grounds challenging the admissibility of the statement nor was it raised during cross-examination it arose during the unsworn statement of the Accused during which he spoke of not being given any food or drink. Obviously, it was of sufficient importance to him to the extent that he made mention thereof.

[27] This matter was not addressed by the Crown during its evidence-in-chief nor did the Crown seek to rebut this allegation by way of evidence of rebuttal after the Defence closed its case on the *voir dire*. Hence, it remains unchallenged.

[28] I find at the end of the day that the Accused was a victim of oppression as stated aforesaid. There is uncontradicted evidence that this Accused received no refreshment until after around 7:00 p.m., that night and it was at the instance of his wife who stated that she was sure that this Accused didn't have anything to eat or drink whilst in custody. I further find that the fact that he made mention thereof in his unsworn statement is evidence that this was a matter which affected him and caused some degree of discomfort.

[29] Thus, I find that this Accused was a victim of oppression with its resultant consequences as outlined by the authorities aforesaid.

[30] Accordingly, I find that the Crown has not proved beyond reasonable doubt that this statement was freely and voluntarily given, hence, the Court will not allow its admissibility.

Voir dire RE: **ALTON BAILEY –** First Accused

[31] The Crown tendered into evidence during the *voir dire* Notes of Interview allegedly taken by INSP Mc Culloch on the 29 October 2018, at the Queen Street Police Station. The defence challenged its admissibility on the following grounds:

- The First Accused was not informed of the reason for his detention, he was not informed of his right to consult an attorney nor was he cautioned.
- The First Accused also contends that he was not informed that he was being interviewed and that he was neither asked nor did he answer questions 4 and 5.
- The First Accused further contends that whatever responses he gave to SGT Dwayne Mc Culloch was not freely and voluntarily given but in consequence of the sapping of his will and the use of fear, threat, and pressure by now deceased INSP Henry Jemmott and other unknown officers who took him into custody on the morning of 29 October 2013.

[32] **INSP MC CULLOCH** testified that this Accused told him that he is willing to cooperate with the investigation and he conducted an interview with him. A *medico legal* form was issued to the Accused and McCulloch stated that after the interview he took the Accused to the Karl Huesner Memorial Hospital for medical treatment

and his injuries were diagnosed as wounding by the doctor. This witness had stated that when the Accused was taken into custody, he observed what he considered to be old scratches on his arms and body.

[33] It is common ground that the **NOI** ("**EXH. B**") does not bear the signature of the Accused on any part thereof. It is the testimony of INSP McCulloch that the Accused refused to sign the document. The Accused on the other hand stated under oath, that he never provided the answers written on "**EXH. B**" nor was it present during his interview with INSP McCulloch. The Accused further contends that he was not cautioned nor was he told of his rights or given an opportunity to contact his lawyer.

[34] During the conduct of the *voir dire* for the Third Accused Roger Hernandez, ACP Romero was cross-examined by Mr. Sylvester about the procedure to be adhered to during the taking of a written Caution Statement or an interview by a police officer. He said thus:

> Q. So now we are talking of 2013, what rules applied?
>
> A. The Judges' Rules.
>
> Q. Now you are in charge of CIB that is basically what you do investigate, right?
>
> A. Correct.
>
> Q. So, it would be expected that officers of CIB have a good knowledge of the Judges Rules, right?
>
> A. Correct.
>
> Q. So would you know if officers are given training for any updates or new developments as to the application of the judges Rules?

A. Yes, they are given training.

Q. In 2013, I am talking about.

A. Yes, they are given training.

Q. In 2013?

A. Yes, they were given training.

Q. Let me ask you so when you are doing an interview, you mentioned a couple of things a person is cautioned and told of his constitutional rights, and this is recorded, right?

A. Yes.

Q. So, when a person is being interviewed, and it starts and the officer administers the caution to the detainee that is written down, right?

A. That is correct.

Q. The detainee is invited to sign that right away?

A. That is correct.

Q. This would apply also when the person is told about his or her constitutional rights?

A. Correct.

[35] At no time during his testimony did INSP Mc Culloch state that he followed the practice as outlined by ACP Romero aforesaid. Moreover, it is against that background that the Accused testified that he was never cautioned or told of his rights and was not allowed to contact his lawyer.

[36] INSP McCulloch testified that the interview took place in the conference room at the Queen Street Police Station. He could not recall if anyone else was present

during the recording of that interview. The Accused testified that when he entered the room there were other police officers there and McCulloch asked them to leave the room. Thus, it is common ground that when the Accused and INSP Mc Culloch were in the conference room no one else was there.

[37] I find it astonishing that in a matter as serious as this which involves allegations against the Accused of committing the offences of murder and robbery that the Accused who was considered to be a suspect in the commission of these offences was interviewed without the presence of a Justice of the Peace or an officer senior to him. I accept that the Judges rules in force at that time do not expressly provide for the presence of a Justice of the Peace during the recording of a Caution Statement or interview.

[38] Notwithstanding this however, there is evidence in the *voir dire* of the Third Accused from whom a Caution Statement was recorded that it was done in the presence of a Justice of the Peace. There is also evidence before this Court in the aborted *voir dire* of the Second Accused on the legality of the holding of a covert group ID parade involving the Second Accused where a Justice of the Peace was present.

[39] I am of the view that the presence of a Justice of the Peace during the recording of a Caution Statement and the conduct of the covert ID parade was done by the police to ensure fairness to the suspect during these processes. Moreover, it is common ground that none of the three Accused was represented by counsel during the conduct of the procedures aforesaid at which a Justice of the Peace was present.

[40] Thus at the end of the day the Court is faced with two conflicting versions of sworn testimony on the recording of the NOI of the First Accused. I find that INSP Mc Culloch failed to comply with his training by his failure to comply with the practice and procedures for the recording of an interview as set out by ACP Romero aforesaid. Had he required the signature of the Accused after he read the caution before going onto read the Accused his constitutional rights, I cannot exclude the possibility that there might have been a different outcome in the interview.

[41] In any event, I am not satisfied that the rights of the Accused were not breached and were complied with by the police during his interview. Accordingly, I am not satisfied to the extent that I feel sure that the NOI as recorded on "**EXH. B**" were freely and voluntarily given by this Accused.

[42] Accordingly, the Crown's application is denied.

Hon. Mr. F M Cumberbatch

Justice of the High Courts