IN THE SENIOUR COURTS OF BELIZE

CENTRAL SESSION – CITY OF BELMOPAN, CAYO DISTRICT

IN THE HIGH COURTS OF JUSTICE

INDICTMENT No. C56 of 2020

BETWEEN:

THE QUEEN

and

[1] THELMA WARRIOR

Defendant

Appearances:

Mr. Cecil Ramirez S.C.C., for the Crown

Mr. Oscar Selgado, for the Defendant

Dates:

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Hearing dates: 2022: July 19; 22: September 14; 23

October 17

November 15

December 8

2023 January 24; 26

February 1; 9: March 21: April 26: June 13

Judgment date: 2023: July 17

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RULING ON SUBMISSIONS

[1] **CUMBERBATCH. HON. MR. FRANCIS M.; J**: On 17 July 2023, ruled that the evidence be admitted as elaborated below to correspond with the requirements of

the ***Evidence Act*** in the matter of Ms. Thelma Warrior who was indicted by the Director of Public Prosecutions for the offence of murder for that she on the 23 June 2019, at Bullet Tree Falls Village in the Cayo District murdered Yolanda Requeña ('the Deceased'). At her arraignment, the Accused entered a plea of not guilty, hence, a judge alone trial was held pursuant to the provisions of section 65(A) of the ***Indictable Procedure Act***[1].

[2] At the commencement of the trial Defence Counsel raised the following point *in limine* to *wit*:

[3] That the witness Kalim Warrior who is to be called by the Crown is the husband of the Accused, hence, pursuant to the provisions of the ***Evidence Act***[2] he is competent but not compellable to testify against the Accused having regard to the circumstances of this case.

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[1] ***Indictable Procedure Act*** CAP 96 of the Revised Edition of the Laws of Belize 2020

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.

[2] **Evidence Act** Chapter 95(57) of CAP 101 Criminal Code of the Substantive Laws of Belize Revised Edition 2020

57.– **(1)** A husband or a wife shall be a– (b) competent, but not a compellable, witness to give evidence on behalf of either or any of the parties in any of the criminal proceedings against a wife or a husband mentioned in Part II of Schedule II. **(2)** Either of the parties to a common law union shall be a– (b) competent, but not a compellable, witness to give evidence on behalf of the other party in any of the criminal proceedings against the other mentioned in Part II of Schedule II.

[4] Crown Counsel made an application that the contents of statements given by WPC Astrid Trapp, Tyron, and Jasmin Warrior, the son and daughter of the Deceased be admitted into evidence as part of the *res gestae*.

[5] The Court held a *voir dire* to determine whether Kalim Warrior is compellable to testify against the Accused at her trial and whether the evidence in the statements of, WPC Trapp, Tyron, and Jasmin Warrior, are admissible as being part of the *res gestae*.

The Crown's Case

[6] The Crown called the following witnesses: -

[7] WPC Trapp testified that in June 2019 she was attached to the San Ignacio Police Formation. On Sunday 23 June 2019, she reported for duty and part of her duties that day included answering 911 emergency phone calls which she was doing from 7:00 p.m.

[8] This witness testified that sometime after 7:00 p.m., she answered the emergency line. She said, she identified herself informed the person of the station they were calling and inquired how she could be of assistance. A male person answered and told her he was, Mr. Warrior, a bus driver. He stated that his ex-wife had just stabbed a friend he was with, and she has died. He stated that the name of his ex-wife was, Thelma Warrior, and that she had gone running.

[9] The witness asked him about the person who received injuries, and he said it was one, Elvira, who works at the Magistrate's Court and that she's lying on the ground dead. She went on to say that Mr. Warrior called back about four or five times and sounded extremely frightened during those calls. She said she stayed with him on the line until assistance was nearby.

[10] At around 9:41 p.m., PC Sutherland entered the station with Mr. Warrior whom she knew from before as a bus driver on whose bus she travelled whilst a schoolgirl. She said she documented the call received in the 911 diary.

The Law

[11] The *locus classicus* on the *res gestae* exception to the hearsay rule is to be found in the *dictum* of the Court in the decision of ***R v Andrews*** [1987] 1 AC 281.

[12] Lord Ackner with whom the remainder of the house agreed opined thus:

> "*1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?*
>
> *2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.*
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> *3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus, the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider*

under this heading.

4. *Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the Defence relied upon evidence to support the contention that the Deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, as he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the Accused.*
5. *As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case, there was evidence that the Deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances, the trial judge must consider whether he can exclude the possibility of error.* (page 300 H – 301G)".[3]

[3] Andrews v. The Queen (1987) 1 AC 281 p. 300 H and 301 G

[13] Lord Ackner, however, strongly cautioned against attempting to use this doctrine as a device to avoid calling the maker of the statement when he is available (see page 302):

> *"… … Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus, to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done … …".*[4]

[14] Therefore, in keeping with the mandate of the Court in ***Andrews*** the Court will first consider whether the purported maker of the impugned statements is available to attend the Court and be cross-examined by Counsel for the Accused to test his credibility. Indeed, as Lord Ackner opined aforesaid to deprive the Defence the opportunity to cross-examine him would not be consistent with the fundamental duty of full disclosure by the Crown to place all relevant material facts before the Court to ensure that justice is done.

[15] As stated aforesaid Defence Counsel is submitting that the witness Kalim Warrior is not compellable him being the spouse of the Accused.

[16] Accordingly, the Court will consider the issue of compellability in respect of Kalim Warrior. Mr. Selgado for the Defence, has contended that the witness and the

[4] Andrews v. The Queen [1987] 1 AC 281 p. 302

Accused are presently husband and wife and as such by virtue of the provisions of section 57 of the ***Evidence Act***:

> "57. – (1) A husband or a wife shall be a– (**a**) competent and compellable witness to give evidence on behalf of either or any of the parties in any criminal proceedings against a wife or a husband mentioned in Part I of Schedule II[5]; (**b**) competent, but not a compellable, witness to give evidence on behalf of either or any of the parties in any of the criminal proceedings against a wife or a husband mentioned in Part II of Schedule II[6].

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[5] Evidence Act CAP 95 of the Substantive Laws of Belize Revised Edition 2020 CAP 101 Schedule II Part I

> 1. Proceedings, whether on summary conviction or on indictment, for personal injury or violence committed by the husband or wife upon or against the wife or husband. 1A. Proceedings, whether on summary conviction or on indictment, for personal injury or violence committed by either party to a common law union against the other. 2. Any indictment or summary proceedings for the purpose of enforcing a civil right only. 3. Proceedings, whether on summary conviction or on indictment, for the protection and security of the property of a husband or a wife or of either party to a common law union or the person prosecuted under any provisions relating to married person's property, except that no husband or wife or, in the case of common law union, the other party who is a defendant or an accused person shall be compellable to give evidence.

[6] Evidence Act CAP 95 of the Substantive Laws of Belize Revised Edition 2020 CAP 101 Schedule II Part II

> 1.Proceedings for neglecting to maintain or for deserting his wife or family, either on summary conviction or on indictment, or for running away and leaving his wife or his or her child or children under section 3 (1) (xv) of the Summary Jurisdiction (Offences) Act, Cap. 98. 2. Proceedings for– (a) rape and other unlawful carnal knowledge of girls and women; (b) attempt to commit rape; (c) rape by personation of husband or male party to the common law union; (d) procuration under section 49 of the Criminal Code, or any other law; (e) procuring defilement of women by threats or fraud or administration of drugs under section 50 of the Criminal Code or any other law; (f) permitting defilement of girl on premises; (g) abduction of women and girls for any unlawful purpose; (h) detention of female with intent to have carnal knowledge; (i) child stealing; (j) committing or attempting to commit an unnatural offence; (k) indecent assault; and (l) aggravated assault on females or a male child, whether on summary conviction or on indictment. 3. Proceedings for incest or bigamy. 4. Proceedings for the following offences committed against a child or young person– (a) manslaughter; (b) common assault or battery; and (c) all other offences involving ill-treatment and neglect of, or bodily injury to, a child or young person. 5. Proceedings for any crime mentioned in section 111 of the Criminal Code, Cap.101. 6. Proceedings for the punishment of vagrancy, the suppression of brothels or against persons for keeping disorderly houses under any law. This Schedule was amended by Act No. 33 of 2010.

(2) Either of the parties to a common-law union shall be a–

(**a**) competent and compellable witness to give evidence on behalf of the other party in any criminal proceedings against the other mentioned in Part I of Schedule II; Competency and compellability of husband and wife and of parties in common law union in criminal cases.

(**b**) competent, but not a compellable, witness to give evidence on behalf of the other party in any of the criminal proceedings against the other mentioned in Part II of Schedule II."

[17] Mr. Ramirez for the Crown, is contending that the Accused and the witness Kalim Warrior are not married. The Crown adduced testimony from Gladys Sosa, Asst. Registrar of the Vital Statistics Office. This witness tendered into evidence a marriage certificate bearing the names Carlos Warrior Jr. and Thelma Martinez being parties to a marriage. The birth certificate bears the name, Kalim Simeon Warrior.

[18] The Accused Thelma Warrior testified at the close of the case for the Crown in the *voir dire*. She testified that she was married to Kalim Warrior who she also knows as Carlos Warrior and has been living with him since 1985. She further states that there are six children issue of that marriage, and that Kalim and Carlos warrior are the same person.

[19] Under cross-examination the Accused said that she does not see the name Kalim Warrior on the marriage certificate. It has Carlos Warrior and Thelma Martinez, the latter of the two being her name.

[20] The thrust of the Crown's case on this issue is that the marriage certificate refers to two different persons instead of the Accused and the witness Kalim Warrior. Hence,

they are not married as the records show that they are not married. Crown Counsel further contends that, no record has been adduced in court by the Defence that Kalim Warrior and Carlos Warrior are one and the same person. He submits that the Defence must prove on a balance of probabilities that Kalim Warrior and the Accused are husband and wife and that has not been done by the Defence.

[21] The Court has also considered the evidence of Tyron Warrior aforesaid. He testified *inter alia* that his father's name is Kalim Carlos Warrior. He went on to state under cross-examination that he knows Thelma Warrior and she is his mother. He also knows Carlos Warrior; he is his father, and he knows him as both Kalim and Carlos Warrior. Carlos Warrior and Thelma Warrior are husband and wife, and he has known them for some 23 years.

[22] It is not an unusual feature in the CARICOM region for persons to be known as and referred to by names other than those on the birth register. Tyron Warrior in his evidence-in-chief referred to the witness as Kalim Carlos Warrior and that person is his father whom he has known for some 23 years as both Kalim and Carlos Warrior. That evidence has not been challenged by the Crown who called him as a witness in the *voir dire*.

[23] Assuming that the parties were not lawfully married there is evidence from Tyron Warrior that they are his mother and father and that they have been married for some 23 years. Thelma Warrior testified that; she has been living with Kalim Warrior from the year 1985 to when this incident occurred. There is therefore the distinct possibility that they are living and cohabiting in a common-law union. However, it must first be established that if the parties were in a common-law union for the Court

to grant recognition thereto it must be proved that neither party is married to someone else and that they have lived together for at least five years.

[24] I accept the assertion by, Mr. Ramirez, that the burden lies with the Defence to satisfy the Court on a balance of probabilities that the Accused and Kalim Warrior were indeed lawfully married or lived and cohabited in a common-law union for a period of more than five years and that at the time when Kalim Warrior is summoned to testify against the Accused that marriage subsists.

[25] Section 57(2) of the ***Evidence Act*** aforesaid, provides similar provisions for the non –compellability of parties in a common-law union as those who have been lawfully married. There is no doubt that the parties have been living together for in excess of five years.

[26] The Crown's evidence from WPC Trapp is that Kalim Warrior referred to the Accused as his ex-wife.

[27] In ***Moss v. Moss*** [1963] 2 Q.B. 799 p. 800 the Court ruled thus: **Lord Parker C.J., Havers and Wiggery JJ.**

Crime - Evidence - Husband or wife, of - Decree of judicial separation - Information by husband against wife - Whether husband competent witness against wife.

> "A husband and wife were married on 7 May 1955, but ceased to cohabit at about Christmas, 1960 and did not resume cohabitation. On April 9, 1962, the wife was granted a decree of judicial separation on the grounds of the husband's adultery. On 21 November 1962, an information was preferred by the husband against the wife that, between 24 November 1961, and 20 November 1962, she persistently made telephone calls without reasonable cause and for the purpose of causing annoyance to the husband, contrary

to section 66 of the ***Post Office Act***, 1953. At the hearing before justices, the husband gave evidence in support of the information and one other witness gave evidence on his behalf. After the case for the husband was closed, counsel for the wife submitted that, since the parties were man and wife, the husband was not a competent witness against the wife. The justices ruled that as coverture had come to an end on the pronouncement of the decree of judicial separation the husband was a competent witness against the wife."

[28] On the wife's appeal: -

"Held, that, unlike a decree absolute for divorce, a decree of judicial separation did not terminate the marriage, but the spouses still remained husband and wife so that, notwithstanding the decree of judicial separation, the common-law rule applied and neither spouse was a competent witness against the other in criminal proceedings so long as the marriage subsisted; and that, accordingly, the justices' ruling that the husband was a competent witness against the wife in support of the information was wrong".[7]

[29] The Court granted leave to Defence Counsel to call Kalim Warrior to testify at the *voir dire* on the question of his marital status. The sum total of his testimony was that he denied that he is the person named, Carlos Warrior Jnr., stated on the marriage certificate. However, he admitted that he is married to the Accused for in excess of some 30 years and that they have six children, three boys and three girls. He further stated under oath, that he was never married to anyone else and as far

[7] Moss v. Moss [1963] 2 Q.B.D. 799 p. 800

as he is aware the Accused was never married to anyone else. He stated that he is still married to the Accused. In the circumstances, I find that pursuant to the provisions of the ***Senior Courts Act*** [8] Kalim Warrior and the Accused were parties to a common-law marriage.

[30] I believe and accept the evidence of Kalim Warrior on his marital status. Accordingly, I find that Kalim Warrior and the Accused have lived and cohabited for in excess of thirty years in a common-law union and that marriage still subsists. Thus, pursuant to the provisions of section 57(2) of the ***Evidence Act*** aforesaid Kalim Warrior is not a compellable witness for the Crown to testify against the Accused Thelma Warrior.

Res Gestae

[31] I will now turn to consider the application of the *res gestae* principle herein.

[32] The evidence of WPC Trapp at the *voir dire* reveals that whilst she was on duty at the San Ignacio Police Formation, she received 911 calls from one, Kalim Warrior, about an incident involving his wife and the Deceased. Her statement dated 19 July 2022, was disclosed to the Court and the Defence prior to the holding of the *voir dire*.

[33] The statements of Tyron and Jasmin Warrior were also disclosed to the Court and the Defence. Both statements disclose *inter alia* that their father Kalim Warrior told them on the night of the 23 June 2019, that he was present when the Accused stabbed the Deceased at his farm, and she ran away. They waited with him until the police arrived.

[8] Senior Courts Act (Direct area quote)

[34] I will first of all consider the statement of WPC Trapp. As stated, aforesaid the statement of this witness is dated the 19 July 2022. Thus, I do not consider that statement to be one which was deliberately withheld by the Crown and submitted at the last minute. Its date and contents reveal otherwise. Hence, I do not accept the submission that the Crown has contravened the provisions of the ***CPR 2016***[9]. Defence Counsel further contended, that no record was made by this witness of the contents of the telephone conversations between WPC Trapp and Kalim Warrior and as such the Court should reject the Crown's application.

[35] In ***Barnaby v DPP*** [2015] EWHC 232 (Admin) the prosecution sought to tender evidence of 911 calls made by the victim. In admitting the evidence of the 911 telephone call, the justices ruled as follows:

> ***"22. We do regard the telephone calls from Glenda Gibb to the police via the 911 system to form part of the res gestae and therefore admissible as hearsay under the previous evidential rules. We do not believe there was any possibility of concoction or distortion because she (Glenda Gibbs) was emotionally overpowered by the event and clearly scared of the consequences of reporting the matter to the police in this way. She was not tendered to the defence as she did not make a statement… …"***.[10] *(Emphasis added)*

[36] On appeal before the QBD it was argued *inter alia* that: -

> "26. *The prosecution failed to establish the provenance or the accuracy of the transcript. It is observed that these telephone conversations were*

[9] CPR 2016 (Need exact section quoted).
[10] Barnaby v DPP [2015] EWHC 232

introduced without supporting material that sufficiently demonstrated the source or the integrity of this evidence."[11]

[37] At para 31 the English C/A described the witness as being agitated and upset after making the first two 911 calls to the police. The Court went on to state thus:

> ***"To borrow the language of Lord Ackner, this would have been a startling and dramatic event that would have dominated the thoughts of Ms. Gibb, and her utterances would have been instinctive and spontaneous. In those circumstances, the Court would have been entitled to discount any suggestion that the allegation had been concocted for the advantage of Ms. Gibb or the disadvantage of the appellant. The possibility of error does not arise in this case: the choice was either that Ms. Gibb was telling the truth, or the entire incident had been made up and it is unsustainable to suppose that this was an event about which she could have made a mistake."[12]***

[38] The evidence of WPC Trapp reveals that Kalim Warrior called her on about four or five occasions during which he seemed frightened and as a result she stayed on the line with him until the police were close by. The evidence of Tyron Warrior at the *voir dire* was that Kalim Warrior after having told him what had happened said he was calling the police.

[39] Suffice it to say, however, the QBD did not set aside the decision of the Justices aforesaid.

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[11] Barnaby v. DPP [2015] EWHC 232 para. 26
[12] Barnaby v DPP [2015] EWHC 232 Para. 31

[40] The statements of, Tyron and Jasmin Warrior, discloses that they were present with Kalim Warrior at his ranch when the police arrived on the scene; and, Tyron had seen the body of the Deceased at that location. Prior to that they were told by Kalim Warrior that the Accused who is their mother had stabbed the Deceased and ran away.

[41] All of these events occurred on the evening of the 23 June 2019, and on that same evening Kalim Warrior made 911 telephone calls to the San Ignacio Police Station.

[42] I will return to and repeat and rely on the *dictum* of Lord Ackner in ***Andrews v. The Queen*** (D) [1987] AC 281 aforesaid:

> "***1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?***
>
> **2.** ***To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.***
>
> **3.** ***In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant***

was still dominated by the event. Thus, the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading".[13]

[43] I find that the facts and circumstances herein fall within the parameters of the *dictum* of Lord Ackner aforesaid. Being present at and observing a spouse allegedly acting in the manner the Accused did is not a common everyday occurrence. It is a horrific occurrence; hence, I find that the event would in the words of Lord Ackner be:

"***… … so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity … …".*** (Emphasis added)

[44] Accordingly, I have considered the facts and circumstances concerning the hearsay evidence which the Crown seeks to have admitted as being part of the *res gestae*. I have also considered the issue of fairness to the Defence if the application is granted. I find that whilst the witness, Kalim Warrior, is not compellable to testify against the Accused he is available to the Defence and could be called by them.

[13] Barnaby v DPP (2015) EWHC 232 Para. 29

Thus, applying the relevant principles of law to the facts and circumstances herein I find that the Crown's application succeeds.

Hon. Mr. F M Cumberbatch

Justice of the High Courts