

IN THE SENIOR COURTS OF BELIZE

NORTHERN DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO.: N12/2021

BETWEEN

THE KING

and

NISANI GARCIA

Accused

Before:

The Honourable Mr. Justice Raphael Morgan

Appearances:

Mrs. Shanidi Urbina and Dovini Chell for the Crown

Mr. Leslie Hamilton for the Accused

2024: May 7th, 8th, 16th, 17th and 30th

**RULING ON ADMISSIBILITY OF EVIDENCE OF A DECEASED WITNESS PURSUANT TO SECTION
123 OF THE INDICTABLE PROCEDURE ACT**

[1] **MORGAN, J.:** Nisani Garcia (“the Accused”) was indicted for the murder of Albert Vargas Jr contrary to section 106, read along with section 117 of the Criminal Code, Cap 101 of the Substantive Laws of Belize (Revised Edition) 2020 (“the Code”). The incident is alleged to have occurred on the 10th July 2018.

[2] The trial by Judge Alone began with the arraignment of the Accused on 7th May, 2024 before this Court pursuant to section 65 A (2)(a) of **the Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020** (the IPA).

[3] The trial began with an application by the Crown to adduce at trial the following depositions of two deceased witnesses Jose Adolfo Medina (Jose Medina) and Alvaro Grajalez Justice of the Peace:

- a) Statement of Jose Medina dated the 11th July, 2018 (the first Statement of Jose Medina) – where he purports to identify the Accused as the shooter of Albert Vargas
- b) Statement of Jose Medina dated the 12th July, 2018 – where he recounts attending a group identification at the Orange Walk Police Station during which he identified the Accused as the person he named in his initial deposition as the shooter.
- c) Statement of Alvaro Grajalez dated the 16th July, 2018 – where he recounts having witnessed the group identification involving Jose Medina on the 12th July, 2018.
- d) Statement of Alvaro Grajalez dated the 16th October, 2018 – where he recounts having witnessed Jose Medina giving his statement on the 16th July, 2018.

[4] The Crown made its application pursuant to **s 123 of the IPA** which provides as follows:

(1) **Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in sub-section (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.**

(2) The conditions hereinbefore referred to are **that the deposition must be the deposition** either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55 or **of a witness who is proved at the trial by the oath of a credible witness to be dead** or insane, or so ill as not to be able to travel or is absent from Belize. [emphasis mine].

[5] The Court now proceeds to rule on the Crown's application.

Evidence on the application

[6] The Crown called the following *viva voce* witnesses on the application:

- a) **Sergeant Abner Pascual regulation number 1191** – Sergeant Pascual testified that in July 2018 he was stationed at the Orange Walk Police Station as a Corporal of Police attached to the Quick Response Team. On the 10th July 2018 at around 8:30 pm, he and a party of officers were on mobile patrol within Orange Walk Town when he received a radio transmission. The party of officers, including himself, then went to Belize Corozal Road, Orange Walk. Upon arrival at that location, they received information that a male person was shot in an SUV and rushed to the Orange Walk Hospital. They then proceeded to the hospital and received certain information. Sergeant Pascual and the party of officers then proceeded to the CIT Apartments Complex at around 9:20 pm where he saw a green Ford Escape with an Orange Walk License Plate C09315 which he found was owned by Jose Adolfo Medina (Jose Medina). He then located Jose Medina who was a tenant in CIT Apartments Complex. Jose Medina then indicated that he was the one who took the person who was shot to the Hospital. The green Ford Escape was then inspected by Sergeant Pascual with the permission of Jose Adolfo Medina. During the inspection Sergeant Pascual noted that the front passenger seat was bathed in blood and he also saw some expended shells inside the vehicle. He then informed Jose Medina that the green Ford Escape would be conveyed to the Orange Walk Police Station for processing by the Crime Scene Technician. The green Ford Escape was driven back to the station by a member of the party of police officers while Jose Medina was also escorted to the police station inside the police mobile. He further testified that when he initially spoke to Jose Medina on that day, he appeared nervous and frightened. Under cross examination Sergeant Pascual testified that he did not consider Jose Medina to be the prime suspect in the shooting. However, he did not give Jose Medina a choice to decline to accompany the party of police officers to the Orange Walk Police Station.

- b) **Inspector Luis Rodriguez regulation number 1426** – He testified that in July 2018 he was stationed at the Orange Walk Police Formation attached to the National Criminal Investigation Branch (CIB). On the 10th July, 2018 he responded to the scene of a shooting incident on the Belize – Corozal Road in the vicinity of Landy's Hardware store, Orange Walk Town. On arrival

at the scene, he met Corporal Alfonso Chuc who gave him certain information and he took command of the scene. He requested and received the assistance of CST Arian Reneau who processed the scene. He surveyed the scene along with CST Reneau and found two expended 9mm shells and a pair of black and blue slippers. At around 8:56 pm that night while canvassing the scene, he received certain information and disseminated the information to all police patrols to be on the lookout for a dark in colour Ford Escape with suspected gunshots on the right side. At around 9:40 pm he was still on the scene when he received a call from the Orange Walk Police Station and given certain information. He immediately made his way back to the Orange Walk Police Station where Jose Medina and a green in colour Ford Escape were handed over into his custody by Sergeant Pascual. Inspector Rodriguez then informed Jose Medina that he was detaining him in connection with the shooting incident. CST Arian Reneau also returned and processed the Ford Escape in the presence of Jose Medina where three expended 9mm shells were found on the back seat and one on the floor behind the front passenger seat. At about 10:39 pm that night he escorted Jose Medina to the CIB office which is located on the 2nd floor of the Orange Walk Police Station. There he again informed Jose Medina of the reasons for his detention pending investigation of the shooting death of Albert Vargas Jr. He informed Jose Medina of his constitutional rights and cautioned him by telling him that he was not obliged to say anything unless he wishes to do so but what whatever he says will be taken down in writing and given in evidence. Jose Medina remained silent at that point. Inspector Rodriguez printed two copies of the Suspect's Rights in Custody Acknowledgement Form, explained it to Jose Medina and again informed him of his constitutional right to communicate privately with an Attorney of his choice without delay. Jose Medina declined to exercise his constitutional rights and then signed both copies of the Acknowledgement Form. Inspector Rodriguez then served Jose Medina with the copy. He then escorted Jose Medina to the downstairs portion of the Orange Walk Police Station.

On the 11th July, 2018 at around 8:40 am Inspector Rodriguez was at the CIB Office at the Orange Walk Police Station along with Jose Medina who he was attempting to interview in connection with the incident. Jose Medina was not co-operating. During the process, Northern Regional Commander Senior Superintendent Luis Castellanos stopped by the office. Inspector Rodriguez briefed Mr. Castellanos about the progress of the investigation and he requested to

speak with Jose Medina. Inspector Rodriguez exited the office and allowed Senior Superintendent Castellanos to speak with Jose Medina alone. About 10 minutes later Inspector Rodriguez returned to the office where he was given certain information by Senior Superintendent Luis Castellanos. As a result of that conversation Inspector Rodriguez asked Constable Gaspar Camara to record a statement from Jose Medina and to do so in the presence of a Justice of the Peace. At about after 9 the statement was recorded by Constable Camara in the presence of a Justice of the Peace. At no time prior to the recording of the statement did Jose Medina make any complaints to him (Inspector Rodriguez). Jose Medina appeared calm and relaxed.

Inspector Rodriguez also testified that on the 11th October, 2018 he responded to a shooting at around 11:00 am Orange Walk Town. When he arrived at the scene the scene was being processed by Sergeant Desmond Francisco and his team. The deceased was identified as Jose Medina.

Inspector Rodriguez further testified that on the 16th October, 2018 he was requested by Sergeant Desmond Francisco to record a statement from Justice of the Peace Alvaro Grajalez pertaining to him witnessing the recording of a statement from Jose Medina on the 12th July, 2018. He was introduced to Alvaro Grajalez by Sergeant Francisco. He inquired from Alvaro Grajalez whether he wanted to give the statement and he said yes. He then recorded the statement from Alvaro Grajalez on a computer at the CIB office. At the end of the recording he read over the statement to Alvaro Grajalez who indicated that he agreed with the contents. He then printed the statement and had Alvaro Grajalez read it over and said he agreed with the content. Inspector Rodriguez then invited Alvaro Grajalez to sign the statement which he did and placed his stamp as a Justice of the Peace.

Under cross examination, he admitted that in his deposition he never mentioned speaking to Luis Castellanos on the morning of the 11th July 2018. He confirmed that at the time Jose Medina was in his custody as a suspect. At the time of the giving of Jose Medina's first statement, he did not enquire from him whether he had been coerced into giving the statement. He further

admitted that after Jose Medina gave his statement he was released from custody but he could not give an exact time.

- c) **Luis Castellanos** – He testified that he is a retired senior Police Officer. In July 2018 he was the Northern Regional Commander in charge of both the Orange Walk Police Formation and the Corozal Police Formation. At that time he was a Senior Superintendent. His duties extended inter alia to ensure that the police policies and guidelines were adhered to. On 10th July, 2018 he was briefed that a murder had occurred on the Belize – Corozal Road in the vicinity of Landy's and Son Hardware in Orange Walk Town.

On the 11th July 2018 at around 8:30 am he was again briefed that there was a person detained at the Orange Walk Police Station by the name of Jose Medina. As it was customary for him to check on all persons detained at the station to see how they were being treated, he walked up to the CIB office. Upon entering the CIB office around 8:30 – 8:35 am he noted that Detective Corporal Rodriguez was questioning Jose Medina and he noticed that Jose Medina was not co-operating with the investigator. He then decided to speak with him and told him if he and Albert Vargas Jr were not friends. Jose Medina responded that yes they were close friends. Mr. Castellanos then told Jose Medina that if he considered Albert Vargas Jr to be his friend then he has an obligation to say what actually happened. He further told him that if Jose Medina considered Albert Vargas Jr to be his friend, then it would be wise for him to co-operate with Police Officers or the investigators. He also reminded Jose Medina that since he was the only one in the vehicle that the police would focus on him as being a possible main suspect in the case. Jose Medina then responded to him that he understood what he was telling him and that he was going to tell the police what happened. During the conversation with Mr. Castellanos, Jose Medina also began telling him about his background, including the names of his mother and grandmother. They turned out to be neighbours of Luis Castellanos and he made Jose Medina aware of the fact that he knew both his mother and grandmother. It was at that point that Jose Medina insisted he was more willing to give the statement as he knew the background where Luis Castellanos came from. Luis Castellanos further testified that he didn't use any favour, promise, threat or his position as a senior member of the Police Department. He also indicated that it was not until he spoke to Jose Medina and explained the situation that he saw

him become calmer and engage in conversation. After Jose Medina said he would give the statement, he noted that Constable Camara started the necessary preparations for the statement. The conversation lasted about 8-10 minutes.

Under cross examination, Luis Castellanos testified that he was dressed in his full khaki uniform that morning. He further acknowledged that he had not given a statement to the office of the DPP at the Preliminary Inquiry documenting his role in the investigation. He also acknowledged that he never said in his statement that he knew the relatives of Jose Medina and only indicated that in his evidence in chief. He indicated that it was not unusual for him to check on Prisoners at the station. He didn't ask Jose Medina whether he received a meal or was able to sleep the night before. He didn't enquire from Jose Medina whether his rights were read to him. He again indicated that he told Jose Medina that he could be the main possible suspect but he indicated that his tone of voice was not in any way authoritative, it was a person to person conversation. He was letting him know the situation that he should co-operate. He didn't say to Jose Medina that he was his friend nor that he was talking to him as a friend.

- d) **PC Enrique Bacab regulation number 769** – PC Bacab testified that he recorded the statement of Alvaro Grajalez Justice of the Peace on the 16th July, 2018 pertaining to him witnessing a group ID parade that was conducted at the Orange Walk Police Station by Sergeant Daniel Teck.

- e) **Corporal Gaspar Camara regulation number 1705** - Corporal Camara testified that in July 2018 he was a Detective Constable attached to the CIB, Orange Walk Formation. On 11th July 2018 around 9:30 am he was on duty at the Orange Walk Police Station when Corporal Rodriguez (now Inspector Rodriguez) asked him to record a statement from Jose Medina in relation to an incident that occurred on the 10th July 2018. After the request to record the statement, he met Jose Medina. He introduced himself to Jose Medina and asked him if he wanted to give a statement in relation to an incident that occurred on 10th July 2018 when his friend Albert Vargas was killed. Jose Medina answered yes he wanted to give a statement. Corporal Camara informed Jose Medina that he would get the services of a Justice of the Peace to witness the recording of the statement. He contacted JP Ruben Vargas who arrived around 10:00 am while Corporal Camara was in the office with Jose Medina. Corporal Camara then

introduced JP Ruben Vargas to Jose Medina and informed Jose Medina that the JP would be present during the recording of the statement. Corporal Camara then asked Jose Medina if he wanted to give a statement in the presence of the JP Ruben Vargas and he said yes. Thereafter Jose Medina started narrating his statement in the English language. When he was finished Corporal Camara printed the statement which amounted to three typing sheets. Corporal Camara asked Jose Medina if he wanted to read his statement or if he wanted it to be read to him. Jose Medina told him to read it to him. He read the entire statement to him, which included the top captions which he explained to Jose Medina was saying that the statement he was giving was true to the best of his ability and belief and that if it is tendered in evidence he would be liable to prosecution if he stated in it anything he knew to be false or does not believe to be true. After the statement was read over to Jose Medina, Corporal Camara invited him to sign the caption and at the bottom of each page, which Jose Medina did. This was followed by JP Ruben Vargas placing his stamp and signature on each page. Corporal Camara then signed the caption on the last page which corresponded to him as the recording officer. He also told Jose Medina before he signed his statement that he can add, alter or change anything on the statement but he said that it was ok. Corporal Camara further stated that he did not threaten, force or promise anything to Jose Medina for his statement. During the recording of the statement Corporal Camara further stated that Jose Medina didn't complain of anything. JP Ruben Vargas was present during the recording of the entire statement. During the hour and half that the statement was recorded, Jose Medina was calm but lamenting that his friend was killed. He was saying that he knew who killed him.

Corporal Camara further testified that on the 12th October, 2018 at around 1 pm Corporal Camara visited Karl Heusner Memorial Hospital morgue to witness a post mortem being done on the body of Jose Medina. The post mortem was done by Dr. Mario Estrada Bran, assisted by Dr. Roque Blanco. The body was identified by Jose Medina's sister Leira Smith to the police and the doctors. The post mortem concluded at 4 pm.

Under cross examination Corporal Camara accepted that he never indicated previously that during the recording of the statement Jose Medina was lamenting his friend. He did not tell Jose Medina that he was not compelled to give a statement. He did not ask Jose Medina if he was

pressured or coerced into giving the statement. He was also not aware how long he was in the station before he gave the statement. He also was not the person who released Jose Medina from the station.

- f) **Ruben Vargas, Justice of the Peace (JP)** – JP Vargas testified that he received a call from the Orange Walk Police Station asking for his services as a JP. He went to the CIB office where he was introduced to Jose Medina by Corporal Camara. Corporal Camara told Jose Medina that Ruben Vargas was there to witness the statement that was to be given by him. Jose Medina indicated to Corporal Camara that he was willing to give the statement. Corporal Camara then read a statement to Jose Medina being that if anything he said is not true, he is liable and can be prosecuted. Then Jose Medina stated what he said happened on the day before about the shooting of Albert Vargas. When he finished Corporal Camara printed the statement that Jose had just made. Corporal Camara then read over the statement to Jose Medina and invited Jose Medina to add, alter or change anything to which Jose Medina said no. Corporal Camara then invited Jose Medina to sign the three pages of the statement. JP Vargas then signed all 3 pages and stamped all 3 pages. After he signed, Corporal Camara told him that he could go.

Under cross examination JP Vargas indicated that he was not told that Jose Medina was detained pending investigation for a murder prior to witnessing the statement. He didn't ask Jose Medina whether anyone had spoken to him before concerning this matter. He didn't ask Jose Medina if anyone had promised him anything for him to give his statement. He also didn't ask Jose Medina if he was coerced into giving his statement. He also didn't inform Jose Medina that he could remain silent and that he doesn't have to give a statement.

In answer to the Court, he further indicated that he understood his role as a JP as being to see that the process that the police do is right and that the person's rights are protected and abided by. He further indicated that it's not usual for him to be called to the police station to witness a witness statement of an ordinary witness as opposed to a suspect but it does happen. He further indicated that had he known Jose Medina was detained pending investigation for murder he would have acted differently as he would have spoken to the officer first to get that situation and be fully apprised of that situation.

g) **Inspector Desmond Francisco regulation number 383** – Inspector Francisco testified that on the 12th July, 2018 at 11:41 am he recorded a witness statement from Jose Medina who was in the presence of Justice of the Peace Alvaro Grajalez pertaining to a group ID done by Sergeant Teck. The statement was a one page statement and took about 30 minutes to complete. The statement was read over to Jose Medina at his request in the presence of JP Alvaro Grajalez. Jose Medina signed the caption of the statement that the statement is true and correct. He then signed at the end of the statement and so did JP Grajalez. Inspector Francisco further stated that Jose Medina was calm and he gave the statement of his own free will in the presence of the JP. Jose Medina also didn't complain of any wrongdoing that was done to him.

[7] The parties also agreed to the following evidence being read into evidence on the *voir dire* pursuant to **rule 10 of the Criminal Procedure Rules** and **s106 (1) of the Evidence Act**¹:

- a) **Leira Smith** who testified that she identified the body of her brother Jose Adolfo Medina at the Karl Heusner Memorial Hospital morgue on the 12th October, 2018. She took the body of her brother Jose Adolfo Medina for funeral services on the 13th October 2018 and the body was transported to the Old Cemetery for burial.
- b) **Alvaro Gomez** who testified that he was the brother in law of Alvaro Grajalez. Alvaro Grajalez fell ill and was admitted to hospital on the 22nd October, 2022. On October 23rd 2022 he was present at the hospital when Alvaro Grajalez died at the northern hospital. He witness the post mortem of Alvaro Grajalez on the 24th October 2022. He also attended the funeral of Alvaro Grajalez which was held at La Immaculada Church in Orange Walk Town on the 26th October, 2022. Alvaro Grajalez was cremated and his ashes placed on his father's grave.
- c) **Corporal Mario Chin regulation number 322** who testified that on the 11th October 2018 he responded to the scene of a shooting on Mahogany Street, Louisiana Area, Orange Walk Town where he saw the body of a male person of Hispanic descent lying in a pool of blood. The male person was identified by his sister Leira Smith to be Jose Medina. The body was then escorted to the Northern Regional Hospital Morgue.

¹ Chapter 95 of the Substantive Laws of Belize, Revised Edition 2020

[8] The parties agreed the following facts to be admitted as evidence on the *voir dire* pursuant to **s106 (1) of the Evidence Act** and the guidance of the Court of Appeal in **Linsbert Bahadur v The Queen**²:

- a) Alvaro Grajalez's cause of death was acute cardiac myocardial infraction secondary to prostate cancer.
- b) Jose Medina died on the 11th October 2018 as a result of traumatic shock due to multiple trauma due to head and body injuries due to multiple gunshot wounds. He was declared dead by Dr. Ida Coleman on 11th October 2018 at around 1:50 pm.
- c) A postmortem was conducted on the body of Jose Medina by Dr. Estrada Bran on the 12th October, 2018.

Law

[9] In the context of this application, **s 123 of the IPA** allows for hearsay statements of the deceased witnesses in the form of Depositions to be admitted into evidence provided the following criteria are met:

- a) The statement is a Deposition within the meaning of the IPA - **Section 2 of the IPA** read in conjunction with **section 36** provides that Deposition includes written statement once it is signed by the purported maker of the statement, has a declaration by the maker of the statement 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 and is served on the other parties to the proceedings prior to being tendered at the Preliminary Inquiry.
- b) The Accused must have been committed for trial.
- c) The Deposition must be of a witness proved at the trial to be dead
- d) The Court is satisfied that the Accused will not be materially prejudiced by the reception of such evidence.

[10]The scope of the exclusionary discretion vested in the court by the phrase "**provided that the court is satisfied that the Accused will not be materially prejudiced by the reception of such evidence**"

² Criminal Appeal no 10 of 2016

was identified by Wit JCCJ in Dionicio Salazar v The Queen³, a decision of our apex court, the Caribbean Court of Justice. Wit JCCJ opined:

“[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.**”

[emphasis mine]

[11]In Bennett v The Queen⁴, the CCJ considered the duty of the court when faced with an application to admit a hearsay statement. The majority, in a judgement delivered by Wit JCCJ, held that

“[27] **During a trial, particularly a jury trial, the judge in Belize has basically two opportunities to evaluate and assess the necessity and reliability of the hearsay evidence, and to decide whether it should be left to the jury. The first occasion occurs when the hearsay evidence is introduced, and the judge must decide whether, at that stage, to admit it. The evidence having been admitted, the second occasion occurs when at the close of the prosecution case a no case submission is made, and the judge must decide whether to uphold that submission. If, on the first occasion, the judge, exceptionally, is clear in his mind that the hearsay evidence cannot in reason safely ever be held to be reliable, the judge must exclude it and, where the prosecution’s case, like here, wholly or substantially rests on that evidence, the judge should stop the trial and direct the jury to acquit the accused. If, however, there is a reasonable 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, the judge should in principle admit the evidence. This is the more so, of course, if at that stage it is already clear that this test is or will be met.**” [emphasis mine]

[12]Whether or not a hearsay statement could in reason safely ever be held to be reliable has also been referred to as threshold reliability. The quoted passage from Bennett shows that threshold reliability is

³ [2019] CCJ 15 (AJ)

⁴ [2018] CCJ 29 (AJ)

therefore established when a hearsay statement is sufficiently reliable to overcome the dangers arising from the difficulty of testing it.

[13] The question of whether a hearsay statement can safely be held to be reliable or has achieved threshold reliability is not strictly concerned with whether the statement is true or not. Whether it is true or not is a question of ultimate reliability and is a matter for the tribunal of fact. The Court's inquiry at this stage is rather concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness. This distinction is not absolute, because in many instances the likelihood of truth of the statement is the very thing that will establish its threshold reliability⁵.

[14] The CCJ in **Bennett**, concurring with the reasoning in the judgement of the English Court of Appeal in **R v Riat**⁶, opined that in order to establish threshold reliability the Court should generally consider the following:

- a) The strengths and weaknesses of the proposed evidence
- b) The tools available to the jury for testing it – i.e. whether there are adequate substitutes for testing the evidence which provide a satisfactory basis for the tribunal of fact to rationally evaluate the truth and accuracy of the hearsay statement.
- c) The importance of the proposed evidence to the case as a whole

[15] In assessing the considerations outlined above, the CCJ in **Bennett** further suggested that the section 114(2) factors outlined under the UK Criminal Justice Act can be a useful guide to the Court in its assessment. These factors are:

- a. how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

⁵ Per Barrow JCCJ in **Bennett** *ibid* at para 131

⁶

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

[16] These factors are not meant to be addressed in a chronological order but rather a court must address the significance of the factors that are relevant to the case at bar⁷. When giving reasons for a decision on the admissibility of a hearsay statement, it is unnecessary for a judge to mention and reach a conclusion, one way or the other, on each and every factor⁸.

The Crown's submissions on the application

[17] The Crown submitted orally, at the close of the *voir dire*, that the statement of Jose Medina given on the 11th July 2018 can be safely held to be reliable for the following reasons:

- a) The circumstances surrounding the making of the statement suggest that it can with reason safely be held to be reliable as the witness had established a rapport with Senior Supt Castellanos and that allowed him to feel comfortable in giving the statement.
- b) The statement is consistent with other material found on the scene i.e. a plastic wrap
- c) The identification of the Accused is supported by the hearsay statement of the deceased Albert Vargas Jr. to his brother-in-law that he had received a call from Crisis and the Accused was identified as Crisis by Jose Medina.

⁷ R v S [2007] EWCA Crim 335

⁸ Phipson on Evidence, 20th Edition, para 30-55

- d) Jose Medina had opportunities to recant his evidence and never did so and even went so far as to identify the Accused on a Group ID.

[18] The Crown further submitted that the fact that the statement of Jose Medina is the only evidence against the Accused linking him to the shooting of Albert Vargas Jr is not sufficient prejudice, by itself, to allow for the Court to deny the Crown's application.

Defence Submissions on the application

[19] The Defence submitted that the statement of Jose Medina could not in reason be safely found to be reliable for the following reasons:

- a) The surrounding circumstances of the taking of the Deposition do not suggest that the Deposition could in reason be safely held to be reliable i.e. the witness was in custody and a suspect at the time of the giving of the statement.
- b) The conversation with Senior Superintendent Castellanos amounted to coercion of the witness to give a statement.
- c) There is no evidence which can be lead to support the initial identification of the Accused by Jose Medina. Particularly, the Defence submitted that the conversation that Albert Vargas had with his brother in law where he mentioned receiving a phone call did not amount to a res gestae statement.
- d) The evidence of Jose Medina is the only evidence against the Accused.

Analysis

Are the statements depositions within the meaning of the IPA?

[20] The Court finds as a fact that Jose Medina dictated and signed two statements to the police on the 11th and 12th July, 2018 respectively. The Court also finds that Alvaro Grajalez dictated and signed two statements to the police on the 16th July 2018 and the 18th October 2018 respectively. The statements

all contained declarations to the effect that the contents were true to the best of their knowledge and belief and that they made the particular statements knowing that, if it were tendered into evidence, they would be liable to prosecution if they wilfully stated in it anything that they knew to be false or did not believe to be true.

[21] The Court therefore finds that the statements constitute depositions within the meaning of the IPA. There was no contention between the parties on this particular issue.

Was the Accused Nisani Garcia committed to stand trial?

[22] There was also no dispute between the parties that the Accused Nisani Garcia was committed for trial for the murder of Albert Vargas Jr which is alleged to have occurred on the 10th July, 2018.

Were Jose Medina and Alvaro Grajalez proven at trial to be deceased?

[23] The Court accepts the agreed evidence of Leira Smith, Armando Gomez and Corporal Mario Chin. The Court further accepted the agreed facts submitted by the parties. The Court therefore finds:

- a) Jose Medina died on the 11th October 2018 as a result of traumatic shock due to multiple trauma due to head and body injuries due to multiple gunshot wounds. He was declared dead by Dr. Ida Coleman on 11th October 2018 at around 1:50 pm. His post mortem was conducted by Dr. Estrada Bran on the 12th October 2018 and he was buried on the 13th October 2018.
- b) Alvaro Grajalez died on the 23rd October 2018 as a result of acute cardiac myocardial infraction secondary to prostate cancer. His post mortem was conducted on the 24th October 2022 and he was cremated on the 26th October 2022.

Whether the Accused will be materially prejudiced by the reception of the evidence at trial

[24] The test for exclusion is whether the proposed hearsay evidence could not in reason safely ever be held to be reliable. If, there is a reasonable possibility that, depending on how the trial progresses, sufficient evidential material would emerge which could buttress the proposed hearsay evidence so that in the end it could be held to be safely reliable, the Court should in principle admit the evidence. The Court should lean towards admitting the evidence if at the admission stage it is already clear that the test was or would be met.

[25] The Court is not required at this stage to make a finding on the truthfulness or substantive reliability of the proposed hearsay evidence. Instead, the Court's enquiry is limited to the question of whether the proposed hearsay evidence has passed the test for threshold reliability set out above.

[26] The Court notes the suggestion by both the majority and Barrow JCCA in **Bennett** that the 114(2) factors outlined under the UK Criminal Justice Act can be a useful guide to the Court in its assessment.

[27] It was acknowledged by the Crown that their case depended wholly on the evidence of the initial identification by Jose Medina contained in his first statement and its admission into evidence. Accordingly, should the Court rule against the admission of the first statement into evidence, the Crown will be unable to prove their case against the Accused. The Court will therefore begin with an assessment of the first statement of Jose Medina through the lens of the section 114(2) factors:

a) The probative value of the statement and its importance in the context of the case as a whole

The evidence of Jose Medina is that on the 11th July, 2018 he was in his green Ford Escape with Albert Vargas Jr and the Accused when he saw the Accused shoot Albert Vargas. He is the sole witness for the Crown who purports to witness directly the shooting of Albert Vargas. Without his evidence of the initial identification, the Crown will be unable to prove its case.

b) The circumstances surrounding the making of the statement

A particular relevant factor in this case is the circumstances surrounding the making of the first statement of Jose Medina. The Court therefore scrutinized the circumstances surrounding the

making of the first statement in order to see whether it could in reason safely ever be held to be reliable. After examining the evidence, the Court finds that the circumstances surrounding the making of the statement cast serious doubt on whether the first statement of Jose Medina could meet the test for threshold reliability.

The evidence is that Sergeant Pascual detained Jose Medina at around 9:30 pm and took him and the green Ford Escape to the Orange Walk Police Station. While Sergeant Pascual did not caution him, it is clear from the circumstances that Jose Medina was detained and being treated at the very least as a person of interest at that point. At 10:39 pm Jose Medina's status while in custody, in the mind of this Court changed, when he was cautioned and informed of his constitutional rights by the lead investigator Inspector Rodriguez. Thereafter at all material times prior to the end of the giving of his first statement, Jose Medina remained a suspect. He was uncooperative with investigators until the intervention of Senior Superintendent Luis Castellanos. Mr. Castellanos spoke to the then suspect Jose Medina without any Attorney present, without the presence of another police officer to record the conversation and told Jose Medina *inter alia* that if he didn't say what happened, the police would look at him as the primary suspect. Senior Superintendent Castellanos further added to the pressure on Jose Medina, in the mind of the Court, when he told him that he knew his family. All of this was operating on the mind of Jose Medina, who it must not be forgotten was already in custody for almost 12 hours, when he finally decided to implicate the Accused who he had not mentioned at all before. Jose Medina was then released shortly after giving this statement. JP Ruben Vargas was also not informed of Jose Medina's status as a suspect when he came to witness the giving of the first statement.

The circumstances of the making of the statement suggest a clear factual basis for Jose Medina having an interest to serve or an improper motive in naming the Accused as the shooter. There was a clear incentive for Jose Medina to name someone other than himself as the shooter of Albert Vargas at the time that he gave the first statement as he was told that he would be the primary suspect if he didn't speak. The Court therefore finds that at the time of the making of the first statement, Jose Medina was a witness with an interest to serve in naming the Accused as the shooter of Albert Vargas Jr.

The Court is well aware that the Crown has to deal with their witnesses as they find them. The Court also reminds itself that simply because a witness has an interest to serve in giving particular evidence is not necessary fatal to the reliability of that witness and does not automatically mean that they are not worthy of belief as a tribunal of fact can still look for other corroborative facts that bolster the credibility and reliability of the witness in order to decide whether it is safe to rely on it. The evidence of each such witness must be viewed in its own peculiar set of circumstances. However, whether or not Jose Medina had an interest to serve or an improper motive in naming the Accused as the shooter is directly relevant to the exercise of the Court's discretion as it impacts squarely on the question of whether or not the first statement meets the test for threshold reliability. Notwithstanding this finding the Court does not reject Jose Medina's evidence as incapable of meeting the test automatically but will look holistically at the other factors to see whether sufficient evidential material can emerge which could buttress the first statement of Jose Medina so that in the end, in the round, it could be held to be safely reliable at trial.

c) Reliability of the maker of the statement

The Court now reviews the reliability of Jose Medina as it considers, in the round, whether his first statement reaches threshold reliability. In his statement Jose Medina describes Crisis on the 11th July 2018 as a dark skin male, 5 feet 6 inches in height, dressed in a blue in colour t-shirt and wearing a blue in colour cap. He says that Crisis boarded his vehicle and he was able to observe that he had a beard and moustache. The entire time that Crisis was in his car was 15 minutes. He had Crisis under observation for 3 minutes while he wrapped the weed around his legs to take it back to Belize City and then again for 5 seconds when he pointed the gun at Jose Vargas Jr. He further indicated that he knew Crisis from seeing him in prison two years prior at the Kolbe foundation when he was on a charge for wounding but that he had never spoken to Crisis at that time. He then spent about three days in Orange Walk with crisis about 9 months prior to the shooting and they became friends on Facebook. In the mind of the Court, these details do not add to the reliability of Jose Medina's primary deposition as no other person identifies the shooter as wearing the clothes listed out above. Similarly, it is of little value towards establishing the threshold reliability of his first statement that Jose Medina was able to state the height and build of someone who was known to him because he could have given those particulars from memory.

Jose Medina's first statement does contain a declaration signed by him acknowledging liability if he were to state anything in his deposition that he knew to be false or believed to not be true then he would be liable to prosecution. Generally such a declaration can be an aid by which a tribunal of fact can objectively assess the reliability of hearsay evidence and acts as a possible circumstantial guarantee of the reliability of the maker. However, in the particular circumstances of this case, this adds little to the case for threshold reliability for the proposed evidence in light of the Court's finding that Jose Medina can be viewed as having an improper motive or an interest to serve in naming the Accused as the shooter. The weight and use to which the declaration can be relied on by a tribunal of fact in those circumstances are limited unless there are other circumstantial guarantees of reliability which bolster the first statement.

For similar reasons, the fact that Jose Medina did not recant his identification of the Accused, in the particular circumstances of this case, cannot lend support to the Crown's proposition that the first statement of Jose Medina can in reason be held to be safely reliable. Having already decided to name the Accused after having been told that if he didn't speak, he would be the main focus of the police investigation and then being released from custody after having done so, it is unlikely that he would recant and place himself in the same jeopardy as before.

d) Reliability of the evidence of the making of the statement

There is clear evidence from Officer Camara and JP Ruben Vargas that the first statement was made and authenticated by Jose Medina.

e) Supporting evidence

Having regard to the Court's findings above, the Court then carefully scrutinized whether or not there was any supporting evidence that would bolster the case for threshold reliability of Jose Medina's first statement. This meant considering whether on the trial sufficient evidential material would emerge given which the hearsay evidence could in the end be safely held to be reliable.

In submissions the Crown acknowledged that there is no forensic evidence to come at trial that will link the Accused to the shooting of Albert Vargas in the form of fingerprints, DNA or Ballistics.

The Crown however suggested that the oral utterance by the deceased Albert Vargas Jr to his brother in law Gian Cordova prior to being picked up by Jose Medina that he had received a call from

crisis. The Crown submitted that this hearsay statement could be admitted as part of the Res Gestae and lend support to the initial identification of Jose Medina. The Court finds itself unable to agree with the Crown's suggestion for the reasons stated below.

A res gestae statement is generally a statement made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded. This is generally considered to be an exception to or not at all hearsay. An example would be the statement of a person, as a witness to a crime, so emotionally overwhelmed by an event there is no possibility of distortion or concoction of the utterance: Andrews⁹. An important precondition for the admissibility of res gestae evidence is contemporaneity. The statement made by the deceased Albert Vargas Jr about receiving a call from crisis in the opinion of the Court lacks the contemporaneity which is one of the preconditions for its admissibility as a res gestae statement. It happened some time before the shooting took place in the vicinity of Landy's Hardware. There is also nothing to suggest that at the time of the making of the statement Albert Vargas was emotionally overpowered by any event so that the possibility of concoction or distortion could be disregarded.

The Crown also highlighted the fact that Jose Medina went on to identify the Accused on a group identification as evidence capable of supporting the initial identification. However in light of the Court's finding that the circumstances surrounding the initial identification betray that Jose Medina may have had an interest to serve or an improper motive in naming the Accused as the shooter, the group identification which merely confirmed the impugned initial identification lends little support to the case for threshold liability for the first statement.

The Court also considered whether the presence and evidence of the Justice of the Peace Ruben Vargas assisted in making the case for threshold reliability. Generally, the presence of a Justice of the Peace (JP) is meant to lend impartiality to proceedings, as the JP is there to stand in and seek to ensure the fairness of the proceedings. In these particular circumstances however the presence of JP Ruben Vargas merely served to rubber stamp the proceedings and does not reassure this court that the first statement can safely in reason ever be held to be reliable. JP Ruben Vargas had no private conversation with the witness to advise him or ascertain his willingness to give the statement or whether he was coerced or induced into giving the statement. Further and quite curiously the

⁹ [1987] AC 281

police failed to disclose to JP Ruben Vargas, prior to the making of the 1st statement or at all, the fact that Jose Medina was in custody as a suspect for the offence. No explanation was given on the evidence for this failure. JP Vargas even indicated that had he known he would have acted differently beginning with speaking to the officer and getting to know the totality of the situation at hand. The Court therefore does not consider the evidence of JP Ruben Vargas as supportive of threshold reliability as it is clear to the Court that he was there to lend a faux air of authenticity to the proceedings rather than to ensure that fairness prevailed in the circumstances.

The Court has already considered the potential support that can be lent by the declaration contained within the first statement of Jose Medina and for the reasons listed above holds that any potential support that it can lend to the case for threshold reliability, on these facts, is considerably weakened.

f) Whether oral evidence of the matter can be given and if not, why it cannot

In light of the Court's findings that Jose Medina died, it is clear that oral evidence cannot be given of the particulars of the shooting of Albert Vargas Jr on the night in question.

g) The amount of difficulty involved in challenging the statement

Owing to the death of the witness, it would be almost impossible for the Accused to challenge the veracity of Jose Medina's first statement. The Accused will be unable to cross examine Jose Medina at trial and challenge certain key aspects of his version of events and also to probe Jose Medina on the bona fides of the first statement in light of the issues that arise at the time that it was made.

h) The extent to which that difficulty would be likely to prejudice the party facing it

The Accused would be placed at a significant disadvantage as the evidence of Jose Medina in his primary deposition is the sole and decisive evidence in this case. The Court acknowledges that generally this factor alone is not determinative of the question of admissibility. However when married with other cogent factors collectively it can cause a Court to lean against admitting proposed hearsay evidence.

Disposition

[28] The Court has carefully scrutinised the first statement of Jose Medina to ascertain whether it could safely be admitted having met the test for threshold reliability outlined in **Bennett** and **Salazar**. The Court finds, on its analysis set out above of the evidence in the *voir dire*, that the first statement of Jose Medina cannot in reason safely ever be held to be reliable.

[29] The Court therefore finds that this case falls within the group of cases in which the Court must exercise its discretion exceptionally not to admit the first statement of Jose Medina. For clarity and using the exact words of the exclusionary discretion bestowed on the Court by s123 of the IPA, the Court finds that the reception of the first statement of Jose Medina into evidence would materially prejudice the Accused and accordingly the Court refuses the Crown's application to admit the first statement of the deceased witness Jose Medina.

[30] As stated above, the primary focus of the Crown's application is the first statement of Jose Medina. The Crown accepted that if the Court found that the first could not in reason safely ever be held to be reliable, then the Crown would not be able to prove its case against the Accused.

[31] The Crown offered no further evidence after the Court gave its oral ruling. The Court therefore following the guidance in **Bennett**, stopped the trial and acquitted the Accused.

Raphael Morgan
High Court Judge
Dated 30th May 2024