

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

Claim No. BVI HCR2019/0033

BETWEEN:

REX

v

ROHAN WILLIAMS

Accused

Appearances: Mrs. Kellee-Gai Smith, Principal Crown Counsel and with her, Ms. Khadija Beddeau Senior Crown Counsel

Mr. Michael Maduro for the Accused

**RULING ON THE ADMISSIBILITY OF THE DECEASED'S STATEMENTS
TO WITNESS J.S**

2024: May 15th

- [1] **Teelucksingh J:** Defence Counsel, Mr. Michael Maduro filed submissions objecting to the admissibility of certain statements allegedly made by the deceased, Lenia Green, to witness, J.S¹. The preliminary grounds for objecting to the admissibility of the above evidence were filed by Defence Counsel, namely:

¹ The initials of the witness is used solely in publication as per the application of Crown Counsel and the consent of Defence Counsel

- (a) The statements are strictly hearsay and not capable of falling within the known exceptions of the doctrine of res gestae and/or dying declaration and/or recent complaint;
- (b) The Court cannot exclude the possibility of concoction or contamination or distortion of the statements, in the circumstances of the case; and
- (b) The prejudicial effect of the statements of the deceased far outweigh their probative value, and in those circumstances should not be admitted.

[2] Crown Counsel submitted orally and in writing, that statements of the deceased declarant are admissible and fall within the exception to hearsay pursuant to the **Evidence Act** of the Virgin Islands (as amended), particularly section 71(2)(b) and/or section 71(5) of the Act. The Crown further relied on the case of **Stoutt (Appellant) v The Queen**² to support this contention as to the applicability of the said sections of the **Evidence Act**. Crown Counsel relied in the alternative on arguments that the deceased's statements constitute a dying declaration or can be admitted under the doctrine of recent complaint, and in those circumstances are admissible.

Statements of the deceased identifying the name of the attacker

[3] In her statement tendered as part of the paper committal proceedings, J.S indicated that the deceased made certain utterances to her on the night of 26th May, 2019.

“ ... I then asked what happened and she told me she was raped and shot. I then ran back to the vehicle where I left my phone and called 911 and I informed them of the situation. I went back to her and started asking her questions considering the possibility of her dying. I asked her name and she told me Lenia Green. I then asked who did it and she told me a guy name Rohan Williams. I then asked her if Rohan was inside the vehicle and she answered no. I then asked her who the vehicle belong to. Is it yours and she responded yes. I then asked her where the person went, if they went up or down, and she answered up....”

² (2014) UKPC 14

Law and Analysis

(i) Res gestae argument

- [4] Section 71(1) of the **Evidence Act** of The Virgin Islands applies in criminal proceedings where the person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply in relation to evidence of a previous representation that is given by a witness who saw, heard or otherwise perceived the making of the representation, which is a representation that was -
- (b) made at or shortly after the time when the asserted fact occurred and in circumstances that made it unlikely that the representation is a fabrication.
- [5] This Court finds that Section 71 (2)(b) of **Evidence Act** appears to have codified the common law as it relates to res gestae. In the circumstances, this Court finds that the common law authorities are instructive.
- [6] In the case of **Regina v Andrews**³, the facts are that sometime between 8:35 p.m. and 8:45 p.m., the deceased was found on the landing of the floor below his flat. This was estimated to be within a few minutes of the stabbing “based on Neill’s evidence as to the time when he returned to his flat, and the very nature of the stab wound in the deceased’s stomach, from which the blood was flowing. A 999 call made by the neighbor was at 8:43 p.m. This was followed by the arrival of Officers Worboys and Hanlon, and there was evidence that the ambulance arrived at 9:01 p.m. PC Worboy ‘s main task was in administering first aid, in particular, in stopping the blood pouring from the stab wound in the stomach. It was while he was so doing, he asked the deceased how he received his injuries to which deceased replied that he had been attacked and gave the name of his attackers.”
- [7] At pages 300-301 of the said judgment, Lord Ackner summarized the position which:
- “...confronts the trial judge when faced in a criminal case with an application under the res gestae doctrine to admit evidence of statements, with a view to establishing

³ (1987)1 AC 281

the truth of some fact thus narrated, such evidence being truly categorized as 'hearsay evidence' –

“.....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 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 be considered 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. 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 disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary human fallibility is relied upon, this goes to weight to be attached.”

[8] In the present case, the following are the circumstances in which deceased identified Rohan Williams as her attacker - :

(i) The deceased was lying in the middle of the road in the night

According to J.S, upon reaching her junction at Georges North Side near the Watch Tower while driving towards her home:

“upon reaching near I observed it was a mature female lying in blood in the middle of the road. She was lying horizontally on her side with her lower body turned on the left side and her upper body turned to the right side. Her face was pointing in an Easterly direction and her feet were in a Westerly direction”

- (ii) Physical condition of the deceased when she made those utterances: the deceased was injured and actively bleeding

According to J.S. “...her blood was draining in the street due to the rain. I then saw what looking like a gunshot wound in her right forearm.”

Also J.S described that the deceased was “lying in blood.”

- (iii) State of dress/undress of the deceased

The deceased was not just lying on the road, she was described by J.S as dressed in a black nightgown and was bare feet.

- (iv) Deceased’s vehicle engine running, and its lights on near body of deceased

The deceased’s vehicle was not properly parked and its lights were on.

According to J.S.: “I looked up to see if there was anyone around but I saw no one but a dark GMC coloured jeep registration number PI 250. The GMC jeep engine was running and the lights were on therefore I thought someone was inside the vehicle...”

- (v) Lenia Green was not in a state of being completely unconscious

According to J.S, the victim was “...wake but not alert. Her eyes were opened. I asked her who did it and she told me a guy called Rohan...”

“ ... I noticed that she was in a state of unconsciousness because her eyes were rolling back. I then slapped her softly and asked her to look at the lights on our vehicle...”

[9] Applying the five propositions of Lord Ackner in the case of **R v Andrews** (*supra*), this Court is satisfied that the event of being shot and raped, was so unusual and startling that it dominated the thoughts of the victim so that her utterance in identifying her attacker as Rohan Williams, was an instinctive reaction to that event giving ‘no real opportunity for reasoned reflection’ despite the answer was elicited by a question posed by the witness J.S as to the identity of her attacker.

[10] The deceased in this case made an application for a protection order against the accused and it may be argued this potentially is a special feature of malice. This Court is however satisfied that there is no room for the possibility of concoction or distortion when the deceased verbally identified the accused was her attacker, at the time she was dressed in

a nightgown, it was raining in the middle of the night and she was lying on the road, bleeding from a gunshot wound. I share the view of the Common Sergeant in the case of **Andrews** (supra) that :“ *I think that the injuries which the deceased sustained were of such a nature that it would drive out of his mind any possibility of him being actuated by malice,*” (in this case, the deceased).

- [11] As to the possibility of error in the facts narrated in the statements by the deceased Lenia Greene, this goes to the weight to be attached to these statements and not to their admissibility. In those circumstances, such is a matter for the jury to decide what was said and to be sure that the witness, J.S was not mistaken in what she believed had been said to her. The jury would have to be directed that they must be sure that the deceased was not mistaken in identifying her attacker as the accused. In considering any special features that may give rise to the possibility of error, it may be argued that the identification was made in circumstances of particular difficulty in the night where according to J.S, the deceased declarant was ‘wake but not alert.’ However, this Court is satisfied that the possibility of error can be excluded on the part of the declarant since in addition to identifying her attacker, the deceased provided accurate information to J.S as to her husband’s name and contact number so that a call was able to be made to him. The deceased was alert to the extent she was able to provide accurate details as to her own name, the direction the attacker ran and that she owned the vehicle with the engine that was running.
- [12] This Court also relies on the case of **Devin Maduro v The Queen**⁴ in which the Court of Appeal held that the statement of the father of the deceased on discovering the body of his son lying on his back motionless in a pool of blood when he cried out aloud “*Andy is dead, Andy is dead, the guy killed Andy before he went upstairs*” was admissible as part of the doctrine of res gestae. The Court of Appeal concluded that the statement was spontaneous and the events which provoked it, was so unusual or startling, so as to exclude the possibility of concoction or distortion.

⁴ Criminal appeal (BVI) Case no. 3/2005

- [13] It was argued by the Defence in that case, that these statements were inadmissible as they were uttered in the absence of the accused, those words were highly prejudicial and there was no evidence that the appellant heard them.
- [14] That Court observed that the Defence counsel had not objected to the admissibility of the evidence at the trial and the trial judge was not called upon to exclude the statements based on its prejudicial effect
- [15] Justice Hamilton in applying the principles enunciated in **Andrews** (supra) stated at paragraph 14 :
- “ ...it can clearly be stated that the events were so spontaneous and startling to Augustine Paul, having seen blood everywhere on his entry into the house, and having seen the appellant upstairs, that he said those words and started to scream. There was no possibility of concoction and rather than distort what he saw, drew the only conclusion available on the state of his then knowledge that the appellant was responsible. In these circumstances, it is the view of the Court that the statement made by Augustine Paul was admissible as part of the gestae...”*
- [16] It is in these circumstances that this Court finds that the statements made to the deceased on the night of 26th May 2019 to J.S are admissible as part of res gestae and pursuant to section 71 (2)(b) of the **Evidence Act** as they were made at or shortly after the time when the asserted fact occurred and in circumstances that made it unlikely that the representation is a fabrication.
- [17] This Court also relies on the case of the Privy Council case of **Stoutt** (supra). In that trial, Defence Counsel cross examined on a hearsay conversation between the brother of the deceased and the deceased that in the period between October and his death, the deceased had spoken on more than one occasion of “guys” in the East End of Tortola who were harassing him, and had said that if they continued to do so, he may have to defend himself.
- [18] The Privy Council noted, with particular reference to that conversation between the deceased and his brother that while the Court of Appeal was correct in ruling that such conversation was hearsay, Lord Hughes at paragraph 20 stated:

“....More importantly, whilst this evidence was certainly hearsay, it was not in fact inadmissible. Hearsay is regulated in the British Virgin Islands by sections 67-74 of

the Evidence Act 2006 and section 71 makes it admissible in criminal proceedings in defined situations. There might be scope for argument as to whether this piece of hearsay evidence was admissible under section 71(2)(b), as made at or shortly after the time when the asserted fact occurred and in circumstances which made it unlikely that the representation was fabrication. But whatever the position might be under that subsection, this evidence was admissible under section 71(5), which provides: "The hearsay rule does not prevent the admission or use of evidence of a previous representation adduced by a defendant, being evidence that is given by a witness who saw, heard or otherwise perceived the making of the representation."

[19] Based on the aforementioned, all statements of the deceased to witness J.S are also admissible pursuant to Section 71(5) of the **Evidence Act** of the Virgin Islands.

[20] In conducting the balancing exercise, I am of the view that the probative value of this proposed evidence (statements of the deceased to J.S.) far outweighs any prejudicial effect that such evidence may have on the trial. It is in these circumstances, that this Court will not exercise its common law discretion to exclude this evidence.

(ii) **Dying Declaration argument**

[21] In the case of **Selwyn Foye**⁵, the facts are that on 2nd October 2004, at around 9:00 p.m., the deceased was shot in the dark .There were no witnesses. He ran to a shop but collapsed. There he said "Kashie shot him" and that he had seen Kashie. A male attendant at the hospital, stated that he also heard the deceased say "Kashie shoot me Kashie shoot me. I going dead." Upon arrival at the hospital, when asked by his son who had done that to him, he replied" Kashie." The deceased later died. The accused later known as" Kashie" was charged. The Prosecution's case rested exclusively on statements of the deceased that Kashie had shot him. The accused was convicted but the appeal was allowed.

[22] It was held inter alia by the Court of Appeal in that case, that a dying declaration may be admitted where it is shown that the maker of the statement died; that a trial for his murder followed; that the statement related to the cause of his death; and that when making the

⁵ HCRAP 2007/008

statement he was shown to have a hopeless expectation of death. While the conditions were met in that case, the Court of Appeal indicated that a trial judge has a discretion to exclude the evidence of a dying declaration if in his opinion it is so unreliable, meaningless or ambiguous that it would be unfair to invite the jury to consider it.

[23] In the case of **Nembhard v The Queen**⁶ the appellant was charged with the murder of a police officer. He had been shot at the gate of his home but there were no eyewitnesses. When his wife heard the shots, she ran out to the deceased and he told her that he was going to die, she was going to lose her husband and that the appellant had shot him. He died a few hours later. The trial judge admitted the deceased's statements to his wife.

[24] The wife of the deceased testified that the deceased said to her:-

"you are going to lose your husband. It is Neville Nembhard. Miss Nembhard's grandson that shot and take my gun. Your husband did not do him anything. Just as I came through the gate and turned to lock the gate, I saw him over me, and your husband could not help himself."

[25] The learned judge in that case stated at page 185:

"... it is not difficult to understand why dying declarations are admitted in evidence at trial for murder or manslaughter and as a striking exception to the general rule against hearsay. For example any sanction of the oath in the case of a living witness is thought to be balance at least by the final conscience of the dying man, nobody, it has been said would wish to die with a lie on his lips . So it is considered quite unlikely that a deliberate untruth be told, let alone a false accusation of homicide, by a man who believed he was face to face with his own impending death..." (emphasis mine)

[26] In the present case, the deceased's statements to J.S were not such that the deceased is shown to have "a *hopeless expectation of death*." Nothing in the words of the deceased, Lenia Greene, explicitly indicated that her impending death was operative in her mind when she spoke to J.S and identified the accused as her attacker. In the circumstances, this Court finds that the dying declaration principle to be inapplicable in this case.

⁶ (1982)1 All ER 183

(iii) **Recent Complaint argument**

[27] The Crown relies on doctrine of recent complaint to demonstrate that the statements of the deceased to J.S are admissible. The Crown cited cases including that of **Regina v Lillyman**⁷ at page 170 which stated the following –

“It is clearly admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be issued as evidence of the consistency of the conduct of the prosecutrix with the story told her in the witness box, and as being inconsistent with her consent to that of which she complains.” (emphasis mine)

[28] In the present case, the Crown relies on the statements of the deceased to J.S, primarily to establish the identity of the attacker in a case where identification is a central issue. This Court finds in those circumstances that the doctrine of recent complaint cannot be relied on in this case to prove the identity of the attacker as recent complaint is limited:

“...as evidence of the consistency of the conduct of the prosecutrix with the story told her in the witness box, and as being inconsistent with her consent to that of which she complains...” (per **Lillyman**)

[29] Based on the aforementioned, the doctrine of res gestae is inapplicable to this case.

[30] This Court is grateful to both the Crown and Defence Counsel for their helpful submissions.

Angelica Teelucksingh
High Court Judge

By the Court

Registrar

⁷ (1896) 2 QB 167