

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

ANTIGUA AND BARBUDA

CASE NO: ANUHCR: 2018/0080

BETWEEN:

THE KING

V

MIKHAIL GOMES

APPEARANCES:

Mr Oris Sullivan and Mr Cedric Dyer for the Crown

Mr Lawrence Daniels for the Defendant

2023: February 3rd, 7th

RULING

- [1] **WILLIAMS J:** In May 2017, a charge of murder was laid against the Defendant, Mr Mikhail Gomes. Prior to the laying of the murder charge, the Defendant was on remand at Her Majesty's Prisons for approximately one month on unrelated matters. In mid-July 2017 and then again in late August 2017 and late October 2017, the police recorded statements from three former inmates of Her Majesty's Prisons, in which they informed on conversations that they heard Mr Gomes having with other persons and what Mr Gomes said to them. None of those three inmates are available to testify at Mr Gomes' trial for murder. The Crown would like to have the statements that the former inmates gave to police officers read into evidence.
- [2] The first of the former inmates to give a statement was Mr Wadada Hector. He did so on Monday the 17th of July 2017. His statement to the police was placed before the District

Magistrate, His Honour Mr C. Conliffe Clarke, by the Crown during the Paper Committal Proceedings on the 24th day of May 2018. Mr Hector's statement forms part of the deposition.

- [3] On the 9th of October 2018 when the learned Director of Public Prosecutions indicted Mr Gomes for murder, Mr Hector was listed as a witness in this matter.
- [4] The Crown, by Notice of Additional Evidence, adduced evidence from Immigration Officer Mr Hanson Buckley, that on the 22nd of September 2022, he had checked the Border Management System (BMS) for a Personal Information Detail Report for Mr Wadada Hector and that at the time he checked there was no information that Mr Hector in Antigua and Barbuda. Mr Buckley said he checked up to the very morning that he testified (Tuesday the 31st of January 2023) and based on the information that was accessed, he concluded that Mr Hector was not, legally, in the country.
- [5] The second person who gave a statement was Mr Trevis Martin, also known as 'Ten Pound'. His statement to the police was recorded on the 25th of August 2017. Mr Martin's statement was also included in the bundle of documents presented to the Learned District Magistrate at the committal proceedings. Mr Martin's statement was included in the deposition. He too was listed as a witness on the back of the indictment.
- [6] According to the evidence presented by the Crown, Mr Martin died on the 5th of October 2017; this was 41 days after he gave his statement to the police and long before the Committal Proceedings. Mr Martin died from a "gunshot to [his] head" according to the Certificate No. 0062 signed by Dr Lester Simon.
- [7] The third statement was from Mr Karim O'Garro, alias 'Rambo'. He gave a statement to the police on the 31st of October 2017. Mr O'Garro's statement was not presented to the Learned District Magistrate at the committal proceedings. He was not listed as a witness when the Defendant was indicted in October 2018.
- [8] On the 15th of January 2020, the Learned Director of Public Prosecutions filed a Notice of Additional Evidence indicating "that the prosecution intends to rely on the additional evidence contained in the attached statement of Mr O'Garro."
- [9] The Immigration Officer, Mr Buckley, testified that Mr O'Garro left Antigua and Barbuda on Saturday the 19th of June 2019, on board Delta flight DL652 bound for Hartsfield, Atlanta, in the United States of America. Mr Buckley testified that according to the Immigration Department records, Mr O'Garro has not returned to Antigua and Barbuda since he left in June 2019.
- [10] Retired Senior Sergeant of the Royal Antigua and Barbuda Police Force, RABPF, Mr Marlon Proctor, who is now the Manager of the Investigations Department in the Office of National Drug and Money Laundering Control Policy, ONDCP, said that it was he who

recommended to the Deputy Commissioner of the RABPF that assistance be provided to Mr O'Garro to be relocated to the United States of America. Mr Proctor said that his recommendation was accepted and Mr O'Garro left Antigua and Barbuda on the 5th of July 2019. Mr Proctor said that he remained in communication with Mr O'Garro for some time, but since the 30th of September 2022, the ex-Senior Sergeant has been unable to get in touch with Mr O'Garro.

[11] (Although Mr Proctor's testimony is that Mr O'Garro left the country on the 5th of July 2019, the records at the Immigration Department show that it was in fact the 19th of June 2019 that Mr O'Garro traveled out of Antigua and Barbuda and he has not returned since through any of the ports of entry).

[12] Mr Lawrence Daniels on behalf of the Defendant has strenuously resisted the Crown's application to have any of the statements of the three witnesses read into evidence.

The Offence & Background

[13] Mr Gomes is charged with the offence of murder contrary to the common law. The Crown's allegation as detailed on the indictment states that Mr Gomes "between the 7th and 22nd days of April 2017, in Antigua and Barbuda murdered [Miss] Vincia James."

[14] It must be noted that the Crown's case against Mr Gomes is entirely circumstantial. There is no direct evidence that Ms James is dead. Neither is there any direct evidence that Mr Gomes murdered her.

[15] Ms James was last seen alive leaving her workplace in the early afternoon of the 7th of April 2017. She has not been seen since. The Crown is alleging that:

- Ms James is dead.
- Ms James met a violent death.
- The person who caused her death is the Defendant.

[16] Mr Gomes and Ms James by 2017 were discreet intimate partners. Prior to 2017 Mr Gomes and Ms James had an established relationship over a period of a number of years.

[17] Mr Gomes has not made any admissions with regard to Ms James' presumed demise.

[18] None of the three former prison inmates in their statements provided any information that Mr Gomes confessed or made any admissions to them, or to anyone in their presence, about causing Ms James' death.

[19] The Learned Prosecutor, Mr Oris Sullivan, said that the statements from Mr Hector, Mr Martin and Mr O'Garro form a part of the crown's circumstantial case against the Defendant.

Basis of the Challenge

[20] There are two main issues that arise for consideration with regard to the statements: the first is the unavailability of the makers of the unsworn out of court statements to testify at Mr Gomes' trial; and the second is that the three statements fall in the category of what is often referred to as "jail house confessions" – even though in this case they are strictly speaking not confessions, but statements about things said or done by Mr Gomes while on remand at Her Majesty's Prisons.

[21] In an earlier time, none of those written statements could have been adduced as evidence in a criminal trial such as this.

[22] The legislature in Antigua and Barbuda has provided a statutory gateway to permit statements given to the police to be used as evidence in a criminal trial; this is by virtue of the **Evidence (Special Provisions) Act, No: 5 of 2009**, (ESPA).

[23] **Section 37 of the ESPA** addresses 'Admissibility of first-hand hearsay statements in criminal proceedings'. The Crown seeks to rely on the provision of this section to have the statements from Mr Hector, Mr Martin (deceased) and Mr O'Garro admitted as evidence in this case.

[24] **Section 37 of the ESPA** states:

“...a statement made by a person in a document including a witness statement tendered in committal proceedings shall be admissible in criminal proceedings as evidence of fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person

(a) is dead;

(b)

(c) is outside of Antigua and Barbuda and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him,
or

(e)”

[25] The statutory provision therefore establishes a gateway for hearsay evidence - which formerly was excluded from a trial - to be admitted. The Court, however, is still vested with the common law power to exclude evidence. This is done where the evidence is likely to be more prejudicial than probative and to maintain fairness in the dispensation of justice.

[26] The case of **Barnes, Desquottes and Johnson v R, Scott and Walter v R (1989) 37 WIR 330**, (PC), addresses the admissibility of evidence contained in the deposition where the maker is no longer alive and able to testify at the trial. The case also discusses the term “prejudicial effect.” The headnote of the case states, *inter alia*:

“But in the interests of ensuring a fair trial a judge has [the] power at common law to exclude the admission of a deposition, although that power must be exercised with great restraint, i.e. only when the judge is satisfied that it would be unsafe for the jury to rely on the evidence in the deposition.”

Submissions

[27] Mr Sullivan on behalf of the Crown highlighted Lord Griffiths’ speech in **Barnes, Desquottes and Johnson**, page 340 at letter c and following, which referred to exclusion being “a power that should be exercised with great restraint.” Mr Sullivan reiterated the Privy Council’s ruling that the inability to cross-examine the deponent was an insufficient ground for excluding the deposition. Prosecuting counsel pointed to what Lord Griffiths said at page 340 letter e - f:

“It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition.”

[28] Mr Sullivan was satisfied that the Crown met the statutory requirements to have the statement admitted, because Mr Martin was dead and in the cases of the other two individuals, Mr Hector and Mr O’Garro, they were out of the State.

[29] Mr Daniels on behalf of the Defendant stated that there were different challenges in relation to each of the proposed witnesses.

[30] Mr Daniels was of the view that the statement from Mr O’Garro had to be considered separately. Mr Daniels said this was because with regard to Mr O’Garro’s statement, it was not included in the deposition but rather the Crown was seeking to bring it into the trial by way of Notice of Additional Evidence. Defence Counsel was of the view that Mr O’Garro’s statement was “completely out” because it was not tendered at the committal proceedings.

[31] With regard to Mr Hector, Counsel in his objection noted that there was a paucity of details about Mr Hector’s crossing of Antigua and Barbuda’s borders. Mr Daniels noted that the Immigration Officer did not give the required details of Mr Hector’s movement, such as what carrier he left on, or where Mr Hector was destined for.

[32] Mr Daniels was of the view that the statement from Mr Martin did not meet the threshold to be admitted pursuant to **section 37 (a) of the ESPA**. Counsel accepted that Mr Martin was dead. But Mr Daniels was of the view that the admission of a statement from a dead witness was restricted to cases in which the deceased was the person who had given the statement in relation to the individual who may have done something to cause their death. Counsel pointed to the headnote in **The Queen v Phyllis Taylor, ANUHCR 2016/0007**, a case in which this precise sub-section [37 (a)] was examined. The headnote states:

“A statement made by a victim to an assault who later dies allegedly as a result of that assault, is admissible into evidence as [to] the truth of its contents where it is relevant to matters leading to the death of the victim against a person charged with the murder of that victim.”

[33] Mr Justice Ramdhani in the **Phyllis Taylor** case referred to **R v McGillivray (1992) 157 JP 943** in which he said an almost identical provision in the United Kingdom **Criminal Justice Act 1998** was considered. Justice Ramdhani said at paragraph [17]:

“The court held that where a person had been injured and died before the trial but after having made a statement to a police officer recorded contemporaneously by him and the deceased indicated by speech or otherwise that the record was accurate, he being unable to sign the record owing to some physical disability that was in law a statement made by a person in a document and was accordingly admissible in law under the gateway provisions of the section.”

Section 37 (c) - Absence from State

[34] It is convenient to deal with Mr Hector and Mr O’Garro together, who are, at present, said to be out of the state. This is because the application to have their respective statements read rests on **section 37 (c) of the ESPA**.

[35] The qualifying statutory provision which would make the statement from Mr Hector and Mr O’Garro admissible is, if “it is proved to the satisfaction of the court that such person is outside of Antigua and Barbuda and it is not reasonably practicable to secure his attendance.”

[36] There are two parts to the requirement:

- (1) The maker of the statement is outside of Antigua and Barbuda; and
- (2) It is not reasonably practicable to secure the person’s attendance.

Wadada Hector – Absence from the State

[37] Mr Buckley testified that he checked the Immigration Department’s electronic data base; he observed the information on the screen and printed that information. He said that the

BMS indicated that “Mr Hector was not in Antigua and Barbuda at the time I checked [22nd September 2022].” He said that he made a check up to the very morning that he testified and the system still showed that Mr Hector was “not here in Antigua and Barbuda.”

[38] In cross examination Mr Buckley confirmed that the card written up by a traveler and submitted to an Immigration Officer upon departure is kept at the Immigration Department. Mr Buckley did not make any attempt to retrieve the card that was filled out by Mr Hector. He was not able to compare the signature on the card with the biographical page of Mr Hector’s passport.

[39] Mr Buckley explained that the Personal Information Detailed Report in the Border Management System captures all the biographical information related to a traveler.

[40] Mr Buckley did not testify as to the date Mr Hector left the country; or by what means Mr Hector left; or to which destination. However, the Immigration Officer’s evidence is accepted as establishing that Mr Hector is not in Antigua and Barbuda.

[41] The Crown however did not provide any evidence to suggest that any effort was made to secure Mr Hector’s attendance. The Crown failed to prove that it was not reasonably practical to secure Mr Hector’s attendance.

Karim O’Garro – Absence from the State

[42] What about Mr O’Garro?

[43] Mr O’Garro gave his statement to the police on the 31st of October 2017. Mr O’Garro then left the State, according to the Immigration Officer, on the 19th of June 2019. He was therefore still in the State on the date of the committal proceedings, which took place on the 24th of May 2018. Mr O’Garro was not named as a witness. The Crown took no steps to make Mr O’Garro a witness until the 15th of January 2020, when the DPP filed a Notice of Additional Evidence. Since by the time of the Notice of Additional Evidence was filed in January 2020 Mr O’Garro was already overseas for more than six months, it is not unreasonable to expect that the Office of the DPP knew how to contact Mr O’Garro or of his whereabouts in order to secure Mr O’Garro’s agreement to testify.

[44] According to retired Senior Sergeant Mr Proctor, he is familiar with Mr O’Garro. In fact he and Mr O’Garro “between October 2018 and July 2019” had “several conversations.” He testified: “Based on those conversations, I recommended to Deputy Commissioner of Police Jeffers that O’Garro be assisted with moving from Antigua to the US for his personal safety.”

[45] Some of the conversations, Mr Proctor stated, related to this case.

[46] Mr Proctor testified that: “The recommendation was accepted and Mr O’Garro left Antigua and Barbuda on the 5th of July 2019.”

[47] Mr Proctor in his *viva voce* evidence did not use the formulation contained in his two witness statements dated the 31st of January 2023 and the 2nd of February 2023, in which he said that Mr O’Garro was assisted to move “to the US as a form of witness protection.”

[48] Mr Proctor testified that he spoke with Mr O’Garro via the whatsapp platform on the 2nd and 5th of August 2022, and on the 5th of September 2022. However: “Since the 30th of September 2022, he has not responded to my attempts to speak to him. And there is no notification that my messages were received by him.”

[49] The retired police officer said he “most recently” tried to reach Mr O’Garro on the 30th of January 2023 and the 31st of January 2023.

[50] In cross examination Mr Proctor said he knew Mr O’Garro from 2015. He did not know whether Mr O’Garro has convictions but is aware that Mr O’Garro has been investigated by the police. Asked specifically if Mr O’Garro was involved in the ‘Harney Motors fiasco with the little girl’, Mr Proctor said he believed so but was not sure if Mr O’Garro was convicted. Mr Proctor said he was not involved in obtaining the statement in this matter from Mr O’Garro. The ex-police officer said he was shown Mr O’Garro’s statement which he skimmed through and “did not read it with the intention of internalizing it.”

[51] From the evidence presented, Mr Proctor’s interaction with Mr O’Garro in relation to this matter concerning Mr Gomes was minimal. The matter came up in conversation and Mr Proctor saw the statement given by Mr O’Garro sometime after it was recorded.

[52] The fact that Mr Proctor no longer has direct contact or access to Mr O’Garro was not surprising; Mr Proctor is no longer a member of the RABPF.

[53] Mr O’Garro was assisted in relocating by the RABPF. If that assistance was indeed in the “form of [a] witness protection,” as stated in Mr Proctor’s witness statements (but not in his oral evidence under oath), it is reasonable to expect someone from within the RABPF to be in contact with Mr O’Garro.

[54] Further, if contact was lost with Mr O’Garro, who was providing assistance to the State (not just in this matter), and he was presumed to be missing, would this not concern the authorities and some diligent effort made to locate him?

[55] The letter and spirit of the statutory provision in the **ESPA, section 37** (c), requires those seeking to invoke and rely on its provisions to not merely prove that the witness is out of the country, but, additionally, they must prove to the satisfaction of the Court that “it is not reasonably practicable to secure his attendance.”

[56] When a witness is out of the jurisdiction, to satisfy the second limb of section 37 (c) of the ESPA, it must be shown why it is not reasonably practicable to get the witness to attend court.

[57] In this instance, the Crown must provide evidence such as like the inability of the witness to travel, or sickness, or immigration restrictions or some supervening condition.

[58] In similar vein, and looking at the succeeding sub-section of the ESPA, 37 (d), demonstrating sufficient diligence in trying to locate the witness may suffice in instances where someone has migrated.

[59] Several steps could be taken to provide the court with evidence that reasonable efforts were made to secure the attendance of the witness when a witness who was sent overseas has become unreachable. In this case, for example: Was contact made with the police authorities where Mr O'Garro last resided? Was the assistance of INTERPOL sought? Did the Crown ask its diplomatic agents overseas to make checks at Mr O'Garro's last known address? Did the authorities communicate with Mr O'Garro's relatives and friends and inquire of his whereabouts? Was anything put in social media seeking the public's help in locating Mr O'Garro? Mr Proctor's evidence that: "since the 30th of September 2022 he has not responded to my attempts to speak with him and there is no notification that my messages were received by him" falls far short of reasonable steps to secure Mr O'Garro's attendance.

[60] The Crown has failed to satisfy the statutory pre-condition of section 37 (c) of the ESPA in relation to Mr Wadada Hector and Mr Karim O'Garro. As a consequence, neither the statement of Mr Hector nor that of Mr O'Garro can be tendered as evidence on behalf of the Crown.

Statement of the Deceased Person

[61] The Crown, by Notice of Additional Evidence filed on the 4th of October 2022, adduced evidence from Police Corporal No: 558 Lenford Forbes, who is attached to the Office of the DPP. Corporal Forbes obtained a death certificate in the name Trevis Alexis Martin who died on the 5th of October 2017.

[62] It does not appear that when the committal proceedings were held the fact that Mr Martin was already dead in excess of seven months was brought to the attention of the District Magistrate – or indeed the Defendant. As indicated earlier, the Notice of Additional Evidence to which the death certificate was annexed was filed in October 2022. Counsel for the Defendant however did not take issue with that aspect of Mr Martin's statement, as to whether the statement of a deceased person is admissible at committal proceedings; that is, whether the provision only applied to a person who died after the committal proceedings.

[63] Mr Daniels submitted that based on The Queen v Phyllis Taylor, the statement of the deceased sought to be admitted under the ESPA ought to be one made by the victim – and Mr Martin was not the victim in this matter. Mr Sullivan submitted that there was “no requirement for a witness to be killed as a result of an assault to make the statement admissible.”

[64] **Section 37 (a) of the ESPA** is crystal clear and uncomplicated. Once a witness is dead, any statement made in a document or witness statement at a committal proceeding, is admissible at trial.

[65] The Phyllis Taylor case which Mr Daniels referred to, was a case in which the victim of the assault died subsequently to making the statement. That however does not mean that the provision is restricted to such narrow circumstances. What Parliament sought to enact was a gateway, not to erect a fence, with regard to statements of a person who is now dead.

[66] On the face of it Mr Martin’s statement is admissible pursuant to the provisions of the ESPA. Mr Martin gave a statement; his statement forms part of the deposition; he is now dead.

[67] The issue is: should Mr Martin’s statement be admitted?

Other Considerations

[68] Even though the statute makes certain material admissible that otherwise may have been adjudged to be hearsay evidence, the Judge still has a duty to determine whether - in the totality of the circumstances - to admit the statement, and if the statement is admitted, what appropriate directions ought to be given in order to ensure fairness and justice.

[69] Lord Griffith in Barnes, Desquottes and Johnson noted at page 340 letter f that:

“The deposition must of course be scrutinized by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.”

[70] Mr Sullivan acknowledged that in this case, the “Judge must issue extreme caution” to the jury in relation to the statement. The Prosecutor acknowledged that there may have to be “the editing of prejudicial material.” He said that there was no discussion between the Crown and the Defence regarding the editing of any of the statements.

[71] The statement of the deceased witness, Mr Martin, upon which the Crown would like to rely to build its circumstantial case that the Defendant committed the act of murder, includes Mr Martin’s opinions and assumptions, as well as material that begs for

clarification. Mr Martin details that he overheard the Defendant on a telephone call with a person named 'Bro'. This was months before he (Mr Martin) gave the statement to the police. The statement records in part:

"Bro said: 'If you just gee the gal she subben e wouldn't escalate to this.' And Mikhail replied: 'Just cool. Na ha nutten to say to them; them can't bang yo fu talk.' Bro told Mikhail that he 'lose big time' because he lost his boat and Mikhail promised to give him his car as compensation. When Bro mentioned the 'subben' I knew that he was referring to Mikhail's Blue Honda. Sometime prior Mikhail and I had a conversation about the said car and he told me that the said car belonged to Vincia but he had ordered it in his name and because the two of them mash up it became a problem. He told me that he was willing to give her the car but he wanted back what he already put into the car. He never told me what he 'put' into the car. When he told me that, I told him that that was 'badmindedness.' He then said to me that I need to keep out of his business and the conversation ended. At that time I also had a cellular phone and would speak to Jidoni Charles of All Saints among other people. Jidoni is an ex-girlfriend and when Vincia disappeared she expressed to me that she believed that Mikhail killed her. At that time I doubted her because you can't just jump to conclusion just like that. However, after listen[ing] to the many conversations between Mikhail and 'Bro', I was convinced that he killed Vincia and took her to sea. As a result I communicated to Jidoni that I had something to tell her. She asked me what was it and I told her to be careful not to let anyone know about our conversation because I could get hurt in jail. I then told her that I overheard conversations with Mikhail and I believe that he did kill Vincia. While in jail Mikhail and I never had any personal dispute or disagreement. He was moved to maximum security sometime in late May and we never communicated after that. During my time spent with Mikhail I realized that he is a very sly person who doesn't trust people easily. The day that he told me about the car I was surprised. He was frustrated and I offered him a smoke of the marijuana joint I had. He told me he didn't smoke but I encouraged him to take a two pull and he did so. It was after that the conversation started and he revealed the information about the car. Although he is very quiet I know he has a very wicked temper. I witnessed it for myself one day when he and a fellow inmate got into a dispute over a phone charger. Even after the inmate pulled a knife Mikhail still wanted to go after him and threatened to cut his throat. Everyone was surprised. In previous conversations Mikhail had said to me that when people f... with him, he just tek them up and carry them ah sea. He said that as long as nobody see when they get on the boat then it doesn't leave any trace for police."

[72] It is noted that when Mr Gomes was first placed on remand at Her Majesty's Prison in April 2017 that he was not at the institution for anything having to do with Ms James. He was on remand for an unrelated matter. He was however a person of interest in relation to Ms James and was interviewed by the police on more than one occasion.

[73] Retired Sergeant of Police, Mr Rohan Gittens, who was the lead investigator in the matter, testified that he arrested and charged Mr Gomes for the murder of Ms James on the 9th of May 2017 – that is one month and one day after Mr Gomes was first questioned in relation to the matter.

[74] There is no indication regarding what Mr Martin was on remand at the prison for. Neither is there any information as to whether Mr Martin was on bail at the time he made the statement to the police and if he was on bail, when he got the bail.

[75] There is some information regarding how Mr Martin came to be giving a statement.

[76] Retired Senior Sergeant Proctor was the Supervisor of the Serious Crimes Unit based at the Langford Police Station in 2017. He testified that he was at work on the 25th of August 2017 having a conversation with Mr Martin, whom he knew “going back to teenage years and he and I had a very good rapport.”

[77] Mr Proctor continued:

“I was actually asking him about another matter when he began to share some information about something that transpired while he was in prison with this accused (Mr Gomes).... I immediately called Sergeant Gittens who is the lead investigator for this matter and Sergeant Gittens came to my office, spoke with Travis and recorded a statement from him in my office in my presence. At the end Sergeant Gittens read it back to Travis who then signed in several places and I also signed as a witness and Sergeant Gittens signed as author.”

[78] Asked by the Prosecutor whether anyone beat, threatened or promised anything to Mr Martin to give the statement, Mr Proctor said no.

[79] In response to questions from the Defendant’s Counsel, Mr Proctor said he did not take any notes on the 25th of August 2017 when Mr Martin gave the statement; all that he did was to sign the statement form. Mr Proctor was also asked whether Mr Martin had any convictions. The retired officer replied that he believed that Mr Martin did have convictions; what he did know was that Mr Martin was investigated for matters; but he was unable to speak specifically about Mr Martin’s convictions.

[80] Mr Proctor confirmed that on the 25th of August 2017, he was speaking to Mr Martin “for another investigation” before there was any mention of the matter with Mr Gomes.

‘Jail House’ Confessions

[81] The issue of how to deal with statements made by inmates alleging what another inmate said to them while they both were in the lock up, or what the individual heard the Defendant say about the offence, is a matter that has occupied judicial attention.

[82] In **Pringle v The Queen** [2003] UKPC 9 (PC), Lord Hope said at paragraph [25]

[83] “The problem as to how to deal with evidence of a cell confession is not new. There has long been an obligation on judges to warn a jury about the special need for caution in cases which are analogous to those of accomplices. These include cases where the witness’s evidence may have been tainted by improper motive.... It has been held by the Supreme Court of Canada that a warning was necessary in a case where evidence was given by two prison informants who had a strong motivation to lie and who had approached the police when they perceived that some benefit could be exchanged for their testimony.... The High Court of Australia has held that it would only be in exceptional cases that a prison informer would not fall into the category of witnesses about whom a warning should be given by the trial judge of the dangers of convicting on evidence which is potentially unreliable.”

[84] Then at paragraph [31] Lord Hope said:

“But a judge must always be alert to the possibility that the evidence by one prisoner against another is tainted by improper motive. The possibility that this may be so has to be regarded with particular care.... It is common knowledge that, for various reasons, a prisoner may wish to ingratiate himself with the authorities in the hope that he will receive favourable treatment from them.”

[85] The Privy Council also addressed the concerns of the cell block statements in a joint decision in two cases which arose on appeal from the Eastern Caribbean Supreme Court; this was in **Benedetto v R** and **Labrador v R** [2003] UKPC 27, [2003] 4 LRC 382, (PC). It is stated in the headnote of that judgment:

[86] “The evidence of a prison informer was inherently unreliable by reason of the personal advantage which such a witness might think that he would obtain by providing information to the authorities and by the fact that such a witness tended to have no interest whatsoever in the proper course of justice and would almost always have strong reasons of self-interest for seeking to ingratiate himself with those who might be in a position to reward him for volunteering confession evidence. Further, the prisoner against whom the evidence was given would always be at a disadvantage, having none of the usual protections against inaccurate recording or then invention of words used by him when interviewed by the police, and by reason of the fact that it would be difficult for him to obtain all the information needed to expose fully the informant’s bad character. Accordingly, the trial judge should always be alert to the possibility of evidence in such a case being tainted by an improper motive, and it was the responsibility of the judge to (a) draw to the jury’s attention to any indications that might justify the inference that the evidence was tainted and (b) to advise the jury to be cautious before accepting such evidence.”

[87] The possible remedies identified in Pringle to mitigate the challenges of cell block confessions are:

- (a) Refuse to admit the evidence;
- (b) Require it to be corroborated;
- (c) Give an express warning that the evidence must be treated with caution;
- (d) Draw attention to its potential fallibility and unreliability in the summing up.

[88] Mr Sullivan on behalf of the Crown pointed to the provisions of section 38 of the ESPA which is captioned: 'Admissibility of evidence as to credibility of maker of statement'. This section enables a Defendant to call rebuttal evidence where a statement has been admitted pursuant to section 37. It states:

- (a) any evidence which if that person had been so called would have been admissible as relevant to his credibility as a witness, shall be admissible in proceedings for that purpose.
- (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the party cross examining him.
- (c)

Assessment

[89] It must be borne in mind that the exclusion of evidence is always a last resort and must only be adopted in exceptional circumstances.

[90] An option is to edit the statement. The Crown while acknowledging that the statement cannot be tendered as it is, has not proposed a sanitized, edited, version. Neither is it likely that the Crown and the Defence would agree to an acceptable version. The parties resisted the suggestion to consider that option. This could leave the matter to the judge to make the appropriate deletions of hearsay, opinions and general inadmissible material.

[91] The fact is that the statement does not contain anything resembling a confession made by the Defendant. It therefore is not the typical 'jail house confession' where the maker is alleging that he heard the Defendant admit to committing the offence. By itself, Mr Martin's statement is not probative of the Defendant's guilt. Rather, what the Crown is hoping for, is that a forum of fact will make adverse findings in relation to one thing or another contained in Mr Martin's statement and use that finding as a circumstance in the chain of determining the Defendant's guilt.

[92] Mr Martin's statement is impacted by two factors which would ordinarily require special directions to a jury:

- The maker is now deceased, thereby depriving the jury from seeing and hearing him, as well as denying the defence any opportunity to cross examine him;
- The statement is from someone whom the collective experience of the court has shown requires special attention.

[93] Conceivably, strong warnings, cautions and care directions that must be given in relation to Mr Martin's evidence if admitted could result in the statement amounting to nought.

[94] The **ESPA** provides for the Defendant to call rebuttal evidence. In the circumstances of this case that may amount to virtually a reversal of the burden of proof, with the Defendant not only having to seek out and present evidence about the credibility of the maker of the statement, but to refute any of the several allegations that are in Mr Martin's statement.

[95] Attention must be drawn to the circumstances in which Mr Martin came to be making the statement. Having been in prison during the period April to May 2017, he was either on remand or serving a sentence. The Crown's witnesses were not able to provide the precise circumstances of Mr Martin's time in prison or indeed whether he was on bail in August 2017 when he made the statement. However, on the morning of the last Monday in August 2017, Mr Martin is at the office of the Supervisor of the Serious Crimes Unit. It is apparent that Mr Martin is providing information to Mr Proctor, the Serious Crimes Unit Supervisor. The initial information Mr Martin provides has nothing to do with the Defendant in this matter. But when Mr Gomes' matter is mentioned, Sergeant Gittens who is the investigator in Mr Gomes' matter is summoned and a statement is recorded from Mr Martin. Mr Proctor's evidence indicates that Mr Martin was at the Langford Police Station providing information on certainly more than one matter. On the face of it one may well conclude that Mr Martin was trying to ingratiate himself with the authorities. If indeed that was what Mr Martin was doing, then it would be necessary to consider whether he was concocting a story, or genuinely recalling what transpired months earlier at the prison.

[96] Statements ought to be in the words of the maker. Mr Martin was a 30-year-old welder of Tindale Road. It is noticeable that all the dialogue contained within the statement is in the rich Antiguan dialect; however the rest of the body of the statement is in Standard English. This dichotomy may well excite some concern as to whether the statement was recorded in the maker's own words. The officer who wrote the statement did not give any evidence of recording Mr Martin's statement, as the Crown relied on Mr Proctor who signed the document as witnessing it being recorded to put the statement before the Court and to speak of the circumstances in which it was obtained.

Conclusion

[97] The observations made by **Ramdhani J** in **The Queen v Phyllis Taylor** at paragraph [20] is worth repeating here:

“In some cases it is possible that even these safeguards might not truly mitigate unfairness.... [T]he court should be prepared in an appropriate case to exclude the evidence in the exercise of its common law discretion to exclude admissible evidence to ensure fairness; the discretion has not at all been affected by the new provisions of the Evidence Act.”

[98] The statement of the deceased witness, Mr Trevis Martin, ought not to be tendered in evidence in the interest of fairness. Mr Martin’s statement was given to the police some months after he said he heard the Defendant, Mr Gomes, say certain things while they were both in the cell along with others at Her Majesty’s Prisons. Mr Martin’s statement does not contain any admissions made by the Defendant. The statement itself contains a lot of hearsay and opinion of the maker and the opinion of others. To admit such evidence may be overly prejudicial and could lead to a miscarriage of justice. This is one of those rare cases when the discretion to exclude the evidence has to be exercised.

[99] It is unsafe to put before the jury any of the statements of the persons who are unable to testify. In the case of Mr Hector and Mr O’Garro the Crown did not satisfy the necessary pre-conditions for admissibility. In Mr Martin’s case it will be unfair to do so.

Colin Williams

High Court Judge

By the Court

Registrar