

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

**CLAIM NO. Criminal Case No. 5 of 2019
BETWEEN:**

THE QUEEN

AND

MAYBE RODRIGUEZ

RAFAEL LORENZO HARRIGAN

VERNON EDELL BERNARD

Appearances: Mrs. Valerie Gordon, Counsel for the Applicant
Mrs. Kelli-Gai Smith, Principal Crown Counsel for the Respondent

2022: March 23rd, 24th, 25th, 28th, 29th

JUDGEMENT ON APPLICATION TO EXCLUDE STATEMENT

[1] **FLOYD J:** This is an application to exclude the statement of the Applicant, Maybe Rodriguez, obtained during a police interview conducted on 3rd March, 2018. The applicant is charged, along with Rafael Harrigan and Vernon Bernard, with the offence of murder.

THE FACTS

[2] On the night of 27th February 2018, Trumayne Daway was shot and killed at Brandywine Bay. His body was discovered inside a parked vehicle in the early morning hours of 28th February, 2018. Two vehicles were discovered on the beach at that time. A post mortem examination revealed multiple gunshot wounds to the body. One wound to the chest caused hemorrhaging and respiratory failure,

resulting in death. The wounds were consistent with high velocity projectile injuries and eighteen cartridge cases were found littered about the area near the vehicle.

- [3] The theory of the Crown's case, as I understand it, is that this was a planned murder, carried out by the defendant, Vernon Bernard, assisted by the defendant, Rafael Harrigan, and the applicant, Maybe Rodriguez. Mr. Bernard had Ms. Rodriguez take the deceased, Mr. Daway, to a prearranged location on the beach area at Brandywine Bay, where he lay in wait. Mr. Bernard then shot and killed Mr. Daway with a high-powered firearm. Mr. Harrigan was also present, waiting to drive the other two defendants away from the scene after the shooting. However, the getaway vehicle failed to start and a second vehicle was stolen from a nearby location. The defendants then traveled to Mr. Harrigan's residence, where they spent the night.
- [4] Investigation into the murder eventually led police to the applicant, Maybe Rodriguez. Police attended her place of work on the afternoon of 2nd March, 2018, where Ms. Rodriguez was placed under arrest. She was transported to her residence, where a search warrant was executed. At the conclusion of that, she was transported to the Road Town Police Station and placed in a holding cell. Later, on 2nd March 2018, Ms. Rodriguez was interviewed by the investigating Officer, D/C Shortt (now D/I Shortt), assisted by D/C Perez. That statement was exculpatory. She was returned to the holding cell, where she remained overnight until she was again interviewed by those officers on 3rd March, 2018. That statement was inculpatory and differed significantly from her earlier statement. It is the second recorded statement given by the applicant during her police interviews, which is the subject of this application to exclude.

THE LAW

- [5] Statements given by detained suspects to police, particularly those described as being confessions, must be given voluntarily. The determination of this is a question of law. Considerations must include whether the statement was influenced by violent, oppressive, inhuman or degrading conduct. If so, it may adversely affect the truth of the statement. For the statement to be admissible, it must be made voluntarily. A statement or confession made to a person in authority implicating the detained suspect must be given without fear, prejudice, hope or advantage. No threats, promises or

inducements can be made to encourage the statement. The judge hearing an application regarding such a statement must ensure a fair trial according to law. The Crown must prove beyond a reasonable doubt that the statement or confession was obtained voluntarily.

[6] **Section 15 (3) of the Virgin Islands Constitution** states that any person who is arrested or detained shall be informed promptly, as prescribed by law, in a language that he or she understands, of the reason for his or her arrest or detention and of his or her right to remain silent. **Section 15 (4)** states that any person who is arrested or detained shall have the right at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his or her own choice, which shall include the right to hold private communication with such legal practitioner and, in the case of a minor, to communicate with his or her parent or legal guardian.

[7] **The Evidence Act of the Virgin Islands** deals with confessions and admissions. **Section 82** states that evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct... or by a threat of conduct of that kind or by any promise made to the person who made the admission or to any other person. Oppression is defined at **section 83 (8)** as including torture, inhumane or degrading treatment and the use of threat of violence, whether or not amounting to torture. **Section 83 (2)** states that if a confession may have been obtained by oppression or in consequence of anything that would render the confession unreliable, then it is incumbent upon the Crown to prove beyond a reasonable doubt that it was not obtained by those means. Further, under **section 84 (2)**, evidence of a confession is not admissible unless it was reasonably practicable to tape record the confession and the questioning of the person, (and) everything said to and by the person during that questioning was tape recorded. All of this legislation codifies much of the case law established in this area and relates it directly to proceedings in this Territory.

THE POSITION OF THE PARTIES

[8] Learned Counsel for the applicant submits that the applicant was induced into giving a statement without first consulting with a lawyer, which was her right. Counsel relied upon the **Judges' Rules and Administrative Directions to the Police** as issued by the Home Office, as well as the **Police**

and Criminal Evidence Act 1984 (PACE), which is a legislative framework for the powers of police officers in England. Such legislation, if submitted, is applicable in this Territory pursuant to **section 12 of the Evidence Act**. That section provides that any questions arising in criminal proceedings regarding the admissibility of evidence may be decided according to the law and practice administered in England where it is not provided for under any Act or law in force in the Virgin Islands. Accordingly, the treatment of the applicant was not in accordance with the rules of detention and questioning of suspects by police under that legislation. Therefore, the statement should be excluded. Counsel for the applicant and the respondent were in agreement about the applicability of the **Judges' Rules** as being applicable in this jurisdiction, particularly as it pertains to detainees and their interactions with police. I must say, however, that I am not persuaded that the terms of the **Constitution and the Evidence Act** of the Virgin Islands are insufficient to deal with the issues at play in this case such that **PACE** should be applied as a whole. Its principles may, however, be of general assistance.

- [9] Counsel for the applicant submits that the second statement given by the applicant was as a result of ill treatment by the police. The statement was not given voluntarily and the conduct of the police was oppressive. Furthermore, the applicant's right under **section 15 (4) of the Constitution**, to retain and instruct counsel, was breached.
- [10] Counsel for the applicant highlighted the applicant's youthful age, lack of experience in dealing with police and the fact that she was pregnant at the time of the police interaction. Counsel submitted that the applicant was feeling ill, frightened, scared and confused. She was not provided with adequate nourishment and refreshment, was not allowed to see or speak to her mother and did not receive timely medical treatment. She was housed in unsanitary conditions and forced to use filthy facilities.
- [11] Counsel for the applicant submits that the investigating officers acted in bad faith and relies upon the evidence of the applicant. The police promised medical attention, refreshment, contact with her mother and the freedom to return home if the applicant provided a statement. The behaviour of the police was oppressive, and overall, it resulted in the applicant's free will eventually being lost. It was also curious that an exculpatory statement was given one day and the very next day an inculpatory

statement was provided. The second statement could not be said to have been freely given by an informed and consenting detainee. It was not a voluntary statement and should therefore be excluded. Counsel for the applicant provided several authorities to support her position.

[12] Learned counsel for the Respondent submits that both statements provided by the applicant to police were voluntarily given after she was properly informed of her rights. Those rights were clearly understood as confirmed by the request of the applicant to telephone her mother regarding legal representation, which was granted.

[13] Counsel for the respondent relies upon the evidence of the investigating officers, as confirmed in the recorded interview statements. The applicant did not request medical attention and was not in distress. She appeared comfortable, relaxed and at ease. She freely took part in the interviews after caution, providing her informed consent. No threats, inducements or promises were made by police to illicit the statements. The treatment that the applicant received at the police station was humane and must be considered in light of the facilities available there. It is, counsel submitted, a contextual consideration.

ANALYSIS

[14] There can be no doubt that a detainee has the right to remain silent. A person whose liberty is placed in jeopardy by the criminal justice process cannot be required to speak or give evidence against herself but rather has the right to choose whether to speak or to remain silent. The issue is whether the conduct of the authorities, considered on an objective basis, effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not. However, the mere fact of detention does not render all speech involuntary. The nature of the exchange and the nature of the relationship between the parties are considerations in determining whether there was a link between the conduct of the state agent in the making of the statement by the detainee. A finding of voluntariness is necessary. The detainee's right to freely choose whether to speak or not must be scrupulously protected. But the use of legitimate means of persuasion by police is permitted. The question becomes whether the statement obtained was the product of the detainee's free will. Detainees are under no obligation to assist police with their investigations.

- [15] Police have an informational duty to advise a detained person of the right to remain silent and the right to retain and instruct counsel. There is also an implementational obligation imposed upon police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This right was understood by D/I Shortt as evidenced by his testimony that he was present when the applicant was given what he described as her one free telephone call. It follows therefore that the police must refrain from eliciting incriminating evidence from the detainee until she has either had a reasonable opportunity to exercise her right to retain and instruct counsel or has unequivocally waived the right to do so. The purpose of the right to counsel is to allow the detainee not only to be informed of her rights and obligations but equally, if not more importantly, to obtain advice as to how to exercise those rights.
- [16] The right to counsel is constitutionally guaranteed because when an individual is detained by authorities of the state, she is put in a position of disadvantage. Not only has she suffered a deprivation of liberty but she may also be at risk of incriminating herself. It is imperative therefore that she knows the extent of her jeopardy so that she can exercise her rights in a meaningful way. Once a detainee asserts her right to counsel, the police should not compel her to make a decision to participate in a process that could ultimately have an adverse effect upon her in the conduct of an eventual trial, until that person has had a reasonable opportunity to exercise that right. Similarly, given the concern for the fair treatment of a detainee and the exercise of her rights, any waiver of those rights must be carefully considered and clearly and unequivocally given with full knowledge and understanding.
- [17] In this case, both investigating officers knew the applicant previously. D/C Perez knew her when the applicant worked at Royal Cell and she would speak to her there. D/I Shortt knew her from seeing her as a child accompanying her mother to the building where his office was located. He therefore also knew her mother. Both officers were aware of the age of the applicant and both were aware that the applicant was not known to police in the sense that she had no previous dealings with them. Both officers were aware that the applicant was pregnant when they dealt with her in March, 2018. In fact, during the course of the police interview on 2nd March, 2018, the applicant referred to either her pregnancy or the pain she experienced on 27th - 28th February, 2018 as a result of her pregnancy, eight times. Clearly, the police were therefore aware of her condition.

- [18] Both officers testified that at all times during their dealings with the applicant, she appeared comfortable, relaxed and well. D/C Perez described the applicant as “happy” but D/I Shortt found her demeanor odd for someone charged with murder. Both officers testified that the applicant made no complaints and made no request for medical treatment. Both officers confirmed that no threats, inducements or promises were made to the applicant. The applicant was not handcuffed during questioning.
- [19] The testimony of the applicant was completely different to the police testimony. The applicant described being in a state of shock at being arrested. She was sternly spoken to. She was physically grabbed when arrested. She was frightened, uncomfortable, confused, unhappy, in physical pain and discomfort throughout. The applicant testified that when she was at the police station, she was asked if she wanted a lawyer and she clearly indicated that she did. She endorsed the custody log that she wanted contact with a lawyer as soon as practicable. However, this request was not carried out. She denied giving a telephone number to the police. No telephone call was placed to her mother. No telephone conversation occurred in Spanish. In fact, no telephone call was ever placed by the police on her behalf. This was supported by the testimony of Martha Rodriguez, the applicant’s mother. Mrs. Rodriguez testified that she received no telephone call from her daughter on either 2nd March or 3rd March, 2018.
- [20] D/C Perez testified that she is fluent in Spanish and both she and D/I Shortt were aware of the applicant’s Latina background. D/C Perez testified that her role was not, however, to act as an interpreter because she knew the applicant to be fluent in English. If we accept that such a telephone call was made, it is curious, therefore, that the female officer assigned to deal with a female suspect just happened to understand Spanish and was present when the applicant telephoned her mother, and had a conversation in Spanish. The call was made as a result of the applicant’s right to counsel being given and took place in the presence of police officers, in the office of the custody officer, with the telephone on speaker. The content of the conversation was provided to D/I Shortt by D/C Perez on their way back to the station. The lack of privacy afforded to a suspect in a murder case who indicates a desire to exercise her right to retain and instruct counsel and to therefore make a telephone call, even if the call is made to a family member and not to a lawyer directly, is troubling.

- [21] In cross examination, D/C Perez confirmed that she kept a notebook and used it in regard to this investigation. When asked if she made an entry regarding the applicant's phone call, she could not remember. She said it was not customary to make notes about what happens to detainees in the care of the custody officer. D/C Perez agreed that this was a serious case and in fact she did make notes. However, her notebook was lost when she moved residence. She went on to say that the loss of the notebook did not come to her attention until she was notified of this upcoming trial and searched for it in order to prepare. This incident occurred four years ago. She clearly thought note taking was an important aspect of her job, as she sought to refer to her notes to refresh her memory when the trial approached. This is an important issue in a serious case. Therefore, not only does the loss of the notebook impact the subject of disclosure in this case, it reflects a degree of unpreparedness and a general lack of care and diligence on the part of this police witness. That, in turn, must have an impact on the credibility of the witness.
- [22] The conditions of the holding cell and the prisoner's bathroom were canvassed with the police witnesses. D/C Perez was asked if she saw the holding cell on 2nd March and she replied yes, it was fine and clean. She said the prisoner in the holding cell uses a bathroom also used by police officers. However, in cross examination, she could not recall whether she actually entered the holding cell that day and agreed that she could not actually comment on the cleanliness of the cell. Similarly, she agreed that she did not enter the bathroom that day and therefore could not comment on the state of that facility.
- [23] D/I Shortt was also asked about the holding cell and prisoner's bathroom. He said that on 3rd March the cell condition was good. There is no bathroom in the cell and the prisoner must therefore attract the attention of an officer to use the public bathroom. In cross examination, he admitted that he did not enter the cell but did see inside from the door. He noted no unusual odours.
- [24] The applicant testified that the conditions of the cell she was placed in, the bathroom that she was given access to and the shower area in another cell that she made use of, were all terrible. Conditions were variously described as being filthy, full of mosquitoes, extremely hot, rank, odorous, full of urine and excrement. It caused her to be physically ill. I found one comment from the applicant in this regard to be particularly compelling and to have the ring of truth. The applicant said that the bathroom

toilet was so blocked with human waste and paper, and the surrounding floor was so filthy that she chose to urinate in a garbage bin close by. The description of the facilities was corroborated to an extent by Vernon Bernard, who testified that he was arrested on 4th March, 2018. He was placed in a cell at the Road Town Police Station that was so filthy that it caused him to contract skin rashes and infections. This cell contained a shower facility that all prisoners used. I note the applicant described entering the cell with shower facilities as being an occupied cell judging by the personal effects and belongings contained therein. Similarly, Raphael Harrigan testified to being arrested in March 2018. At the Road Town Police Station, he initially spent a good deal of time on a bench outside the Inspector's Office, just as the applicant did. When he made use of a nearby bathroom, he discovered it to be in an atrocious condition. It was filthy, covered in urine and excrement, with a stench so strong that it "slapped him in the face" upon entry. All of that appears to accord with the applicant's testimony.

[25] Of paramount significance to this inquiry are the events surrounding the making of the statement on 3rd March, 2018. After departing the station on 2nd March, the investigating officers became aware of additional evidence coming from the applicant's phone, which had been seized and examined by police. This caused the officers to return and seek a second statement from the applicant. In considering the testimony of the police witnesses and indeed the testimony of witnesses for the applicant and the applicant herself, I bear in mind that it is never a question of simply preferring the evidence of one witness over that of another. A basis must be articulated for that. If there are two competing narratives, a decision must be reached, not simply by choosing between the two versions but rather by considering the totality of the evidence. We often encourage a jury to make use of their common sense and life experience when considering the testimony of witnesses. I instruct myself in a similar manner when considering what facts to accept from a consideration of all of the evidence.

[26] When considering the events of 3rd March, I begin by confirming the rights and cautions given to the applicant from the very beginning of the investigation the previous day. D/I Shortt testified that when he arrested the applicant on suspicion of murder at her place of employment, he cautioned her. She made no response. When the applicant was taken to the police station, she was again advised of her rights and given a document outlining those rights. She acknowledged receiving all of that. D/I Shortt testified that he explained to the applicant her right to seek legal advice prior to conducting an

interview. At that point, custody officer Howe opened a formal custody record for the applicant. D/I Shortt testified that the applicant indicated she wished to speak to an attorney. Therefore, D/I Shortt was aware of the applicant's desire to exercise her right to counsel. It was at that time that the telephone call was apparently made to the mother of the applicant. All of those proceedings took place in the presence of custody officer Howe. However, the court did not hear from that officer during this application. Similarly, if we accept the testimony of the applicant that no telephone call was made and that custody officer Howe told her, the longer she kept her mouth shut, the longer she would remain at the police station, then Officer Howe would have been an appropriate witness to hear from and to assist in resolving this question. That did not happen.

[27] Thereafter, Officers Shortt and Perez left the station. They returned later that day and Officer Shortt testified that he asked the applicant whether she had consulted with a lawyer. Her response was no and when asked why, she apparently advised that she did not need one. This interaction was not recorded. It constitutes a change in the applicant's position with regard to a lawyer. It was incumbent upon the officers to formally document that. They did not. When the recorded interview on 2nd March begins, Officer Shortt reminds the applicant that she is not obliged to say anything and that she is entitled to seek legal advice at her own cost. The response is "Yes Sir". Officer Shortt then reminds the applicant that she has the right to seek legal advice at her own cost and he asks if she understands what that means. The response is "Understood". The issue is not explored any further. Surely, the next question should have been, particularly in light of the apparent change in the position of the applicant regarding legal representation and advice, "Do you wish to speak with a lawyer"? This was an investigation into a serious crime, conducted by seasoned officers, and the suspect was a young, inexperienced, pregnant female.

[28] When officers Shortt and Perez returned to the station the following day, Officer Shortt was intent on reinterviewing the applicant because he believed she had been untruthful in her first statement. He therefore approached the applicant in the holding cell. Officer Perez was present but could not recall what Officer Shortt said to the applicant and could not recall exactly where that conversation took place. She testified that the custody officer had been spoken to by Officer Shortt before he spoke to the applicant. It was unclear where the custody officer was during the conversation. The court did not hear from that officer in the course of this application, although that officer was identified as

someone named Monsanto. The applicant also testified about that interaction at the cell door. However, she described the conversation differently, indicating only that D/I Shortt told her that they needed to do the interview again. Regardless of the specifics of the conversation, the applicant was clear that a female officer unlocked the cell door and stood close by. Presumably, this was custody officer Monsanto. In resolving the differences between the applicant's evidence and the investigating officers' evidence on this issue, the testimony of Officer Monsanto would have assisted greatly. Officer Perez indicated the conversation was brief and the trio proceeded to the interview room. She said the recorded interview began straightaway.

[29] Officer Shortt testified that he attended at the holding cell with the custody officer and D/C Perez. The conversation and the utterances made by the applicant took place, he said, in the presence of the custody officer and D/C Perez. It is at this time that D/I Shortt says the applicant told him, in the presence of the other officers, that it was her boyfriend, Vernon, who killed Passion. If this happened as Officer Shortt described, this was significant evidence. Not only could it advance the investigation but it could increase the jeopardy the applicant was exposed to. It was therefore incumbent upon Officer Shortt to re-caution the applicant. In cross examination, he confirmed that he did not do that. He also testified that Officer Perez was close enough to have heard the conversation. Again, the court did not hear from custody officer Monsanto and Officer Perez indicated that she had no recollection of that conversation.

[30] In cross examination, Officer Shortt indicated that he gave two or three statements in this case and confirmed that none of those statements contained a reference to the conversation in the holding cell area on 3rd March, whereby the applicant advised that it was her boyfriend Vernon who killed Passion. Apparently, Officer Shortt made a reference to this conversation in his police notebook. However, that was not initially disclosed. He testified that it is not his practice to disclose his notes unless they are requested. They do not constitute ordinary disclosure. I find that troubling. Cross examination confirmed that an utterance made by an accused person identifying the person responsible for a murder recorded in a police notebook was not disclosed until the trial had commenced. Officer Shortt confirmed that there was no indication of this conversation recorded in the custody log nor in the station diary nor in his statement.

- [31] When questioned about why there were no other entries in his notebook after 3rd March 2018, Officer Shortt testified that he had misplaced his notebook and not found it again until sometime later. When asked about investigation notes made during that time period, he said that he made entries on a note pad. However, when asked to produce the note pad, he said that he did not know where it was. This loss of investigation notes temporary or otherwise is very troubling. Both officers in this case testified that they had lost notes pertaining to a murder investigation. It indicates a lack of care, diligence and competence, and it must have an impact upon their overall credibility.
- [32] After not recording the interaction with the applicant in the area of the holding cell, the applicant was taken by D/I Shortt to the interview room. During the recorded interview, D/I Shortt reminded the applicant that she was still under caution and reminded her that she was entitled to seek legal advice. Again, Officer Shortt did not ask the obvious next question as to whether the applicant wished to exercise that right before giving her statement. It would have been a simple yet important step in confirming the voluntary nature of the statement. With the increased jeopardy to the applicant caused by her earlier unrecorded utterance, it was incumbent upon the officer to confirm, in detail, the rights of the applicant and her specific position with regard to the exercise of those rights. That was not done. Officer Shortt then refers to the applicant speaking to him in the custody area and about not being truthful. However, he does not specify the details of what was said. He simply tells the applicant to go ahead, tell him the truth. Again, it would have been prudent and easy to record what had transpired earlier. That was not done and we are left to speculate why it was not done and what exactly was said. In a murder investigation involving experienced officers, one would expect more.
- [33] The applicant testified about the interview on 3rd March. She said it was a 30 to 40 second walk from the holding cell to the interview room. That accords with the evidence of D/C Perez but not D/I Shortt. She said there were four male officers present, although it is unclear where they were placed and whether some remained in the room. The applicant told Officer Shortt that she was hungry and in pain. A meal request was given to an officer. Pictures and text messages were shown to the applicant and she was told how the interview would proceed. If she wanted medical attention and to go home, she must follow Officer Shortt's directions. She was told what to say and at times written notes with directions were shown to her. Most of this took place before the recording began.

[34] The officers took control of the applicant at 12:14 p.m. and the interview commenced that 12:30 p.m. Officer Perez testified that the trio proceeded directly to the interview room and the interview commenced right away. She estimated the time taken to travel from the holding cell area to the interview room was approximately 30 seconds and certainly less than a minute. That accords with the applicant's testimony. She could not recall any conversation taking place before the interview began. She was unable to account for that 16-minute time period. Officer Shortt had a somewhat different recollection of those events. He estimated that it would take 2 to 3 minutes to travel from the holding cell to the interview room. He said the recording machine takes a "little time" to process. It would take a few minutes for the machine to become operational. However, those activities are not noted in his statement nor in his notebook. Officer Shortt also confirmed that he took written notes during the recorded interview but he did not save the notes and they are not available for review. This is significant, as Counsel for the Applicant submits that the officer was writing things for the applicant to say during the interview. This is even more important because the interview was an audio recording only. Therefore, one cannot observe the parties and the process. It was the police evidence that the video recording room was out of service after it sustained hurricane damage. However, one cannot help but wonder why, for such an important interview in such a serious case, the police would not take some steps to create a video record, even if it meant making use of a cell phone, which must surely have been available. For all of these reasons, the officer failing to safeguard and maintain the notes is very troubling.

[35] We know that these officers took control of the applicant at 12:14 p.m. We know that the interview began at 12:30 p.m. and ceased at 1:45 p.m. Officer Shortt said that they stopped for lunch. However, the transcript indicates that D/I Shortt said space was running low on the recording, so he would stop the interview and resume after the applicant had lunch. It is questionable, therefore, whether the interview ended because of compassion for the applicant or trouble with the recording equipment. The interview recommences at 2:05 p.m., after only 20 minutes. Officer Shortt could not recall, under cross examination, whether he ascertained when the applicant last ate or received refreshment, before commencing the recorded interview. The officer also confirmed that the applicant did not eat the lunch that was provided to her during the break. The transcript indicates that the applicant "attempted to eat her lunch." I accept the evidence of the applicant that she had little or no food that day prior to the interview. I am also satisfied that the investigating officers failed

to make sufficient inquiries to confirm exactly what nourishment had been provided to the applicant and ensure that she was adequately provided for in that regard. The interview recommenced and continued until 3:10 p.m. Officer Shortt testified that there was “usually” water available in the interview room. Therefore, there is no confirmation of any substantial food or refreshment given to the applicant from before 12:14 p.m. to 3:10 p.m. Certainly, she did not consume lunch. I find it difficult to accept that a young, pregnant woman would forego nourishment and elect to continue being the subject of questioning at a police station. D/I Shortt testified that it was the applicant who requested they carry on with the interview. Again, I find that difficult to accept. I note the transcript reads at p.49, “She didn’t eat much since what her mother provided she did not like it. It was making, getting her stomach upset. **So we, she’s** opted to continue the interview.” (Emphasis added) In those circumstances, it would have been simple and actually sensible to suspend the interview until an appropriate meal was provided. The fact that it did not happen, is troubling. Indeed, it is incumbent upon the authorities to ensure such procedure is followed for detainees, particularly when one considers the physical condition of the applicant at the time. I find that continuing the questioning in this manner accords with the definition of oppressive behaviour as described at **15-317 of Archbold 2015 edition**, where it refers to “questioning which by its nature, duration or other circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears **or so effects the mind of the subject that his will crumbles and he speaks** when otherwise he would have stayed silent”. (Emphasis added)

- [36] The behaviour of the police in this case is deeply concerning to the court. If we accept the evidence of the applicant that, even though she requested communication with a lawyer, no telephone call was placed, then surely her constitutional rights were breached. If we accept the evidence of the police witnesses, then they listened to the applicant exercise her right to counsel on speaker phone, even if it was not a conversation directly with a lawyer. Either way, her rights have not been respected. In the police evidence version, they knew the applicant was going to speak to her mother regarding legal representation. A lack of privacy in such circumstances is therefore very troubling. The police ensured that a Spanish speaking officer was present, knowing that the applicant comes from a Latina culture and was about to speak to her mother. In preparation for both recorded statements, the police do not clearly confirm and document that all rights have been given, clearly explained and understood, and they do not confirm and document that the detainee does not wish

to exercise those rights before being formally interviewed. An express and informed waiver is not clearly documented. This is particularly significant where the detainee has apparently changed her mind about speaking to counsel and when her jeopardy has increased. It must be a rather hollow right indeed if a young, pregnant female who comes from a different cultural background and is unfamiliar with the workings of the criminal justice system is not plainly and fully confirmed in the provision of and her response to her rights. This is noted at **F18.37 of Blackstone's Criminal Practice 2020 edition** wherein it states that "waiver of legal advice should be voluntary, informed and unequivocal...This was particularly significant in the light of (a) lack of familiarity with police procedures and meant that (the) confession ought to have been excluded."

[37] Events in this case take place in the presence of other officers who should be able to either confirm or deny what is going on at the time. But those custody officers, Howe and Monsanto, were not called. Officer Shortt questions the applicant, a person in detention, charged with murder, in an unrecorded area and without formally cautioning her. Worse yet, he fails to disclose the results of that conversation, offering the surprising explanation that as a matter of practice, he does not disclose his notes until he is asked. It matters not, presumably, that those notes contain highly relevant information about who committed a murder. Not one but both investigating officers testified that they had lost notes and note books that pertained to the case. I note the terms of **section 84 of the Evidence Act**. If we accept the police evidence, then the discussion between D/I Shortt and the applicant in the holding cell area must be classified as a confession and it surely must qualify as "official questioning" under **section 84 (1)**. How could it be otherwise? If it is, and I believe it to be, then **section 84 (2)** states that evidence of such a confession is not admissible unless it is recorded. That includes the questioning and everything said. That was not done and therefore that confession cannot be admissible. If that statement was not admissible, can it not be argued that any subsequent recorded confession is tainted by the fruit of the poison tree? It certainly appears that way. As was noted at **15-318 of Archbold 2015 edition**: "Oppression at one interview may taint subsequent interviews."

[38] Once the police are in receipt of important and unrecorded information solicited from a detainee without caution, they convey her to a room where she will be questioned about that utterance and more. However, one officer is unable to explain what transpired for 16 minutes between those two

events. The other officer refers to machine set up and a very long walk, which I simply do not accept. The behaviour of these officers, as I have already referred to, impacts their credibility significantly and I have difficulty, therefore, accepting the rest of what they have testified to. Even if we accept the testimony of the applicant that no confession was obtained at the cell door, we are left with the applicant's assertions that prior to the recorded statement and during this 16-minute interval, she was pressured and instructed as to what to say when the recorded statement began. The same issues and unanswered questions arise in that scenario.

[39] I pause at this point to note that, overall, I found the testimony of the applicant to be credible. She answered every question put to her in a direct and forthright manner. She maintained her position even under cross examination. She was not evasive. For the reasons already noted, I was less impressed with the testimony of Officers Perez and Shortt. Their behaviour and actions in the course of this investigation causes me concern.

[40] The lack of formal confirmation of sustenance and comfort being afforded to a young pregnant suspect prior to and during her questioning is very troubling. Such behaviour, when combined with the placing of the applicant in squalid and filthy housing, toilet and washing facilities, which I accept occurred, must be viewed as being oppressive. Indeed, the cavalier attitude towards her rights, with a total lack of recorded confirmation, must also be viewed as oppressive. I am unable to say that no pressure was asserted upon the applicant in order to elicit her second statement on 3rd March, 2018. The recorded statement may appear to reflect voluntary cooperation freely given by the applicant but the steps taken and the conduct of the police in reaching that point are not clear, unequivocal and beyond reproach, as they must be.

[41] This is a seriously violent crime where a young man lost his life in a hail of gunfire. It demands a fulsome investigation with meticulous record keeping and the confirmation of the respect required to be given to the rights of an accused person while in detention and while being interrogated. The intention was to use the applicant's inculpatory statement against her interests. The state has the means to confirm, record and prove every step taken in obtaining this statement but they have not done so. Although the evidence of the applicant and the evidence of the police witnesses diverges on several points, I find that I need not reconcile all of those differences for the purpose of this

application. Taken at its highest, the evidence of the police witnesses and therefore the case for the respondent, leaves too many questions unanswered and does not confirm the voluntariness of the confession. I cannot be satisfied that some or all of the assertions made by the applicant are untrue and if even some of those assertions are true and correct, then I cannot be satisfied beyond a reasonable doubt that the statement was obtained voluntarily. I am satisfied that the treatment that the applicant received while in detention was oppressive. Insufficient attention was paid to her needs for comfort, food and nourishment. A lack of careful attention to her constitutional rights, including her right to counsel and her right to silence, is absent here and is further evidence of oppressive behaviour on the part of the police. I am guided by the reference in **15-317 of Archbold 2015 edition** which defines oppression to include “the exercise of authority or power in a burdensome, harsh or wrongful manner.” That is exactly how the police behaved in this instance. Further, I find the confession to be inadmissible in consequence of the police actions that I have already outlined which render it wholly unreliable as was defined in **R v Fulling [1987] 2 ALL ER 65**.

- [42] For all of these reasons, I am satisfied that the Crown has failed to prove beyond a reasonable doubt, as they are required to do under **section 83 (2) of the Evidence Act**, that the statement given in the form of a confession on 3rd March, 2018 was obtained voluntarily. In the interests of fairness in this trial, the application is therefore granted and the statement given on 3rd March, 2018 shall be excluded.

Richard G. Floyd
High Court Judge

By the Court

Registrar