

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

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

CRIMINAL CASE No. 4 of 2016

BETWEEN:

THE QUEEN

RESPONDENT

and

ANDREAS NORFORD

APPLICANT

Appearances: Mr. Sherfield P. Bowen & Ms. Ruthilia Maximea for the Defendant/Applicant
Mrs. Tiffany R. Scatliffe Esprit & Mr. Kael London for the Crown/Respondent

2021: November 15th

RULING ON APPLICATION TO EXCLUDE EVIDENCE

[1] **FLOYD J:** This is an application for the exclusion of evidence consisting of the transcripts of recorded conversations between the Applicant and Lenin Joseph. The Applicant is charged with murder contrary to **s. 148 of the Criminal Code 1997 of the Virgin Islands**. The date of offence is 9th May, 2013. The trial began on 1st November, 2021 and continues today. Written submissions were filed on 11th and 12th November, 2021. Oral submissions were received today.

THE FACTS

[2] On the evening of 9th May, 2013, Melbourne Francis, also known as "Trouble," was shot and killed at a place known as "The Stickette", in Long Look, Tortola. The deceased had been socializing with

others in a gazebo, when a gunman approached carrying a handgun. The deceased was shot five times. He died at the scene.

- [3] The police spoke to a number of witnesses. They received a description of the gunman. He wore a hat and a handkerchief covered his face. Further descriptors, including clothing, complexion (from his hands), hairstyle, height and build, were given. The gunman ran from the scene towards Little Dix Hill Main Road. The gunman ran with a limp.
- [4] The police did not charge anyone with this crime for some time. In September, 2013, a new witness, Lenin Joseph, came to the attention of the Royal Virgin Islands Police Force (RVIPF). Although they were not friends, Mr. Joseph knew "Trouble" as they had lived in the same building at one time. Mr. Joseph became acquainted with someone known as "Kip". Mr. Joseph was aware of the killing of "Trouble." At some point, "Kip" informed Mr. Joseph that a friend of his known as "A.J." had told him that he had killed "Trouble." Mr. Joseph, also said that "Kip" told him that "A.J." planned on murdering other people.
- [5] As a result of receiving this information, Lenin Joseph decided to tell his cousin, Detective Inspector Vernon Larocque, of the RVIPF. After doing so, further meetings were arranged between Mr. Joseph and members of the RVIPF. Thereafter, Mr. Joseph agreed to work with the police. This became a covert surveillance operation. The focus of the operation was to gather evidence regarding the murder of Melbourne Francis. The main subject of the investigation was Andreas Norford, also known as "A.J." Lenin Joseph would be given money with which to rent a motor vehicle. A listening device would be installed in the vehicle. Conversations between Lenin Joseph and the Applicant would be recorded. Authorization for this operation was given by Police Commissioner David Morris. It was determined by the police that such a covert operation was necessary and proportionate in order to further investigate this serious murder case. It was determined to be in the public interest.
- [6] From 11th September, 2013 to 19th September, 2013, the Applicant and Lenin Joseph met and socialized. They attended bars, restaurants, night clubs and other locations. They bought and consumed alcohol and marijuana. Conversations inside the rental vehicle were recorded. During those conversations, the Applicant made certain utterances admitting to the killing of "Trouble." He

provided certain details such as shooting “Trouble” in the head and neck while “Trouble” had been texting on his cell phone. He described running towards the church and then to the main road where someone was waiting for him in a car. The Applicant said that “Moonhead” was there when he shot “Trouble.” “Moonhead” saw him and ran away. The Applicant said that he was paid to do this and that he had disposed of the gun. At one point, the Applicant produced a handgun and showed it to Mr. Joseph.

- [7] A covert monitoring post was established in this case. The officer responsible for the management of that post was Detective Richard Taylor. He was aware that audio was being recorded from a device placed in a motor vehicle. He listened to the live audio product which was being simultaneously recorded. He downloaded the audio recordings on to discs. Those recordings were eventually transcribed by Officer Jumo Shortte. The audio monitored and recorded by Det. Taylor commenced on 15th September, 2013 and ended on 16th September, 2013. It also commenced on 18th September, 2013 and ended on 19th September, 2013.
- [8] Sometime in 2013, the Applicant left this Territory and traveled to St. Kitts. An extradition request was eventually made and the Applicant was ordered back to the Territory of the Virgin Islands. On 23rd November, 2015, the Applicant returned in police custody. He was charged accordingly and has remained in detention ever since.

THE POSITION OF THE PARTIES

- [9] Learned Counsel for the Applicant submits that the audio transcript constitutes hearsay evidence and should not be admitted. The real evidence is the recorded audio which will be placed into evidence and which the jury will have access to. Defence Counsel also questions the integrity of the transcripts based upon an inability to identify the recorded voices of the parties. A number of authorities were provided in support of this position.
- [10] Although Counsel for the Applicant agrees that this court ruled upon this issue previously, when it dealt with a pre-trial application, he submits that new evidence has arisen such that the court can reconsider that ruling. Specifically, the evidence of Lenin Joseph does not accord with the statement

he gave to police, and presumably, what he said in the audio recording, and therefore the transcripts. Counsel for the Applicant relies upon the case of **R v Watson**¹ which holds that a court may reconsider a ruling previously made at a later stage of the trial if further evidence emerges which is relevant to the issue.

- [11] Counsel for the Applicant appears to be saying that because the evidence of Lenin Joseph differs from the witness stand as compared to his statements to police and presumably what he said during the audio recordings and therefore the transcripts, the transcripts should not be admitted (nor should the audio recordings) because they are unreliable.
- [12] Counsel for the Applicant went further today in his oral submissions. He expanded his application, for the first time, to encompass the exclusion of the audio recordings. That was not set out in his original application. He now argues that the provisions of legislation known as the **Regulation of Investigative Powers Act 2000 (RIPA)** were not followed as it pertains to the use of a rental vehicle and a recording device.
- [13] Learned Counsel for the Respondent submits that the issue was dealt with in an earlier pre-trial application brought prior to the commencement of this trial. That application dealt with the Crown's intention to submit into evidence covert audio recordings, along with transcripts thereof, and to read into evidence the statements of deceased Crown witnesses. On 17th September, 2021, this court ruled that the audio recordings and the transcripts of the conversations between the Applicant and Lenin Joseph, as well as the statements of Mark Hughes and David Springette, would be admitted into evidence in the trial of this matter.
- [14] Counsel for the Respondent took issue with the amended application brought today, describing it as a poor attempt to re-visit the ruling already made to exclude the audio recordings. In referring to the **Watson** case, she pointed out that the court held that although there could be occasions where a judge should allow counsel to revisit a previous ruling on the admissibility of evidence, those occasions should be rare and counsel should be discouraged from making such submissions, particularly where they are tenuous. In this case, any issue as to the reliability of the evidence of

¹ [1980] 2 ALL ER 293

Lenin Joseph is for the jury to decide based upon all of the evidence, including the audio recordings and the transcripts.

- [15] Counsel for the Respondent submits that the use to be made of the transcripts is as an aid to the jury while the audio recordings are played. The transcripts are not the evidence, the audio recordings are. The hearsay rule does not apply as the transcripts are not tendered for the truth of their content. The accuracy of the transcripts will be addressed by Officer Shortte but it is for the jury to accept or reject the contents and any assistance they may provide. Anything prejudicial to the Defendant or generally inadmissible will be, submits Counsel for the Respondent, redacted from the recordings and the transcripts in order to fully safeguard the rights of the Defendant. A number of authorities were provided in support of the Respondent's position including **R v Stephen Paul Welstead**². In that case, the Court of Appeal found that the trial judge was entitled to leave transcripts of video recordings with the jury since they would be of assistance in following the evidence of the witness. The judge made clear to the jury that the transcripts were made available to them for that limited purpose and that they should concentrate on the oral evidence.

ANALYSIS

- [16] I agree with Counsel for the Respondent that the issue of the filing of transcripts was addressed in the ruling of this court regarding the earlier application brought in this case. However, I note that the main focus of that application and the response, centered around the use of the covert recordings themselves. Indeed, the decision itself is focused on that. The result was therefore a rolled-up ruling that covered the covert recordings, the transcripts and the use of statements of deceased witnesses. It may well have been that Defence Counsel concentrated their arguments elsewhere. Therefore, out of an abundance of caution and to provide absolute fairness to the Defendant in this most serious of trials, I will entertain this application and provide a more detailed ruling on this particular point.
- [17] I am troubled, however, at the attempt by Counsel for the Applicant to significantly expand the parameters of this application to exclude not only the audio transcripts but also the audio recordings themselves. That position was never mentioned during ongoing consultations between counsel and

² [1996] 1 Cr. App. R. 59 (1995)

the court when reviewing transcripts, their editing and their presentation. To raise that substantial issue at this stage not only places the responding party at a disadvantage but the court as well. The reference to the provisions of **RIPA** and their interpretation and application as reviewed by this court in handing down its pre-trial decision, is significant. It goes far beyond what is or may be set out in the **Watson** decision. It is so fundamental to the earlier ruling and would require such review and analysis, that it would be for another court in another forum to determine. I therefore decline to revisit the issue of the admissibility of the audio recordings in this case for the reasons advanced. Even after considering the provisions set out in the **Watson** case, I find no evidence tendered during the trial of this case which would cause me to revisit that issue at this stage.

- [18] The issue regarding the use of the transcripts appears to be a very clear one. It is dealt with in both **Archbold** and **Blackstone's**. In **Archbold Criminal Pleading Evidence and Practice 2015 at 8 - 194** under the heading "Tape Recordings and Transcripts", reference is made to the case of **R v Ali and Hussain**³ wherein it was held that "having a transcript of a tape recording is... a most obvious convenience and a great aid to the jury. Provided that a jury is guided by what they hear themselves and on that they base their ultimate decision we can see no objection to a copy of a transcript, properly proved, being put before them."
- [19] Similarly, in **Blackstone's Criminal Practice 2020 at F8.53 and following** under the heading "Audio Recordings and Transcripts", reference is made to the **Ali and Hussain** case stating that "at common law, it was held that there is no objection to a properly proved transcript of the recording being put before the jury, provided they are guided by what they hear". The text goes on to refer to the case of **R v Rampling**⁴ stating that "the transcript, not in itself evidence, may be used as a convenience to the jury... The transcript of the recording can be produced by the officer, who, before the trial, should have checked it against the recording for accuracy... Use of the transcript is an administrative matter to be decided in his discretion by the trial judge... It is for the judge to decide whether the jury should have the transcript, in order to follow the recording, and have it with them when they retire; the use of the transcript is usually of very considerable value to the jury, but each case has to be decided on its own facts." Reference is also made in the text in support of the editing out of any

³ [1966] 1 Q.B. 688, 49 Cr. App. R. 230, CCA

⁴ [1987] Crim LR 823

inadmissible material. All of this appears to be what the Respondent seeks to do with the transcripts in this case.

- [20] The issue of the introduction of transcripts prepared from recordings appears, therefore, to be settled law. Indeed, even the authorities produced by Counsel for the Applicant, although not on all fours with this case, appear to confirm that the matter is a discretionary one for the trial judge.
- [21] Two Regional cases provide assistance to this court. The first case from the Cayman Islands, **The Queen v Elvis Kelsey Ebanks**⁵ dealt with transcripts of a recorded telephone conversation between the Defendant and the Complainant. The trial judge, Quin J., referred to the cases already noted above, including **Rampling** and **Ali and Hussain**. The learned Justice found, **at para 17**, as regards placing the transcripts before the jury, that “it would be of very considerable value to the jury in the circumstances of this case. Accordingly, I accede to the Crown’s application to put the written transcripts before the jury as an administrative convenience to assist them in their task.”
- [22] The second case, also from the Cayman Islands, is a ruling of Swift J. (Acting) in the case of **The Queen v Evon George Robinson**⁶. In that case, the learned Justice ruled on whether or not transcripts should be withdrawn from the jury at the conclusion of the playing of the recordings. The case involved a recorded interview of the Defendant. The court referred to the case of **R v Emmerson**⁷ where the UK Court of Appeal held that “if all of the tape had been played in open court there was no reason why the jury should not have the tape... as well as any transcript because it was the tape which was the evidence.” The learned Justice stated, “clearly if the jury are entitled to the audio recording as they obviously are, and are entitled to take it into retirement with them as they obviously are, then there can be no reason to deny them the transcripts. The court in **Emmerson** understandably did not even contemplate the possibility that the jury might be deprived of the transcript”.

⁵ [2014] GIGC J0428 – 2

⁶ [2014] GIGC J111 – 2

⁷ 92 Cr. App. R. 384

- [23] The weight of the authorities is clear. The audio recordings constitute the evidence in this case. However, the transcripts, once they are authenticated, describing their provenance and history, may be used as a convenience to the jury. The jury may have the transcripts in order to follow the recordings and the evidence of the witness, and may take the transcripts with them when they retire to consider their verdict.
- [24] It is, of course, necessary for the trial judge to advise the jury to listen to the audio recording. The transcript is there to help them as a matter of convenience. The audio recording is the real evidence, the transcript is an aid. The jury should be guided by what they hear, taking all of the evidence into account, when they consider their verdict.
- [25] For all of these reasons, the Application to exclude the transcripts of the audio recorded conversations is dismissed. I find the transcripts in question to be admissible. They would be of great assistance to the jury. As noted above, however, they would be the subject of appropriate jury instructions. The role played by the transcripts must be explained to the jury with an emphasis on the need to rely upon and consider the audio recordings only, should they so choose to rely upon them at all.

Richard G. Floyd
High Court Judge

By the Court

Registrar