

COMMONWEALTH OF THE BAHAMAS

cri/vbi/24/1/2019

IN THE SUPREME COURT

Criminal Division

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

FRANKLYN EDGECOMBE aka "Chili"

Before: The Honourable Mr. Justice Franklyn K M Williams KC

Appearances: Timothy Bailey with him Tamika Roberts for the

Director of Public Prosecutions

Ms. Marianne Cadet for Edgecombe

Hearing Date: 27 June 2023

RULING

Murder – Deceased witness – Witness statement identifying accused – S.66 Evidence Act – Hearsay Evidence – Whether a statement made to police is a document which is a part or forms a part of a record compiled by a person acting under a duty – Judicial Discretion

On the 11th December 2018 Rico Archer was killed at North Street, Fort Fincastle. The defendant is charged with the murder of Rico Archer. A jury trial commenced on 26th June 2023.

The prosecution have applied pursuant to the section 66(1) and (2) (a) (i) of the Evidence Act to have the statement of a deceased identifying witness Valentino Williams admitted into evidence. The defence are opposed and submit the statement is more prejudicial than probative.

Elshadae Ferguson v Regina SCCrApp No. 4 of 2016
considered

Giovanni Ivan Clarke v Regina SCCrApp No. 156 of 2017 applied

Williams J

1. Section 66(1) of the Evidence Act provides:

“66(1) Subject to section 67 a statement in a document shall be admissible in any criminal proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if –

(a) The document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information;

and

- (b) any condition relating to the person who supplied the person who supplied the information which is specified in subsection (2) is satisfied.**

(2) The conditions mentioned in paragraph (b) of subsection

(1) are –

(a) that the person who supplied the information –

(1) is dead or by reason of his bodily or mental condition unfit to attend as a witness,...

2. The death of Valentino Williams has been proved with the handing over of the original of his death certificate, the fact of which has not been contested by the defence.
3. A statement given to a police officer during the course of an investigation falls within section 66 (1) (a). The statement of Valentino Williams was taken by Sergeant Raphael Miller on 15 December 2018 during the course of the investigation into the murder of Rico Archer. Per the contents of the statement, Williams had personal or direct knowledge of the facts referred to.
4. Mr. Bailey for the Director of Public Prosecutions (“the DPP”) referred the Court to section 258 (11) of the Criminal Procedure Code:

“Every statement purporting to be the evidence of a witness admitted under this subsection shall be deemed a deposition taken in accordance with the provisions of the Evidence Act relating to the taking of oral evidence and shall, notwithstanding anything to the contrary in any other law be treated as evidence taking under Part 5 of this Code.”

5. The DPP grounded its application in the case of *Elshadae Ferguson v Regina* SCCrApp No.4 of 2016
6. Mr. Bailey submitted that the probative value of the Williams statement outweighs any prejudice to the defendant, that the statement shows that the offence took place, coupled with a positive identification of the defendant as the murderer.
7. Mr. Bailey further submitted that the principle to be applied in the circumstances is fairness. That fairness, he says must include both fairness to the accused and fairness to the deceased, his family and the prosecution. Fairness demands that all available evidence be put to the jury. The rights of the accused must be balanced against the interest of the community to be safeguarded from crime. The interest of the accused is safeguarded by the court with an appropriate direction to the jury as to how it should assess and what weight should be given to the statement of the deceased.
8. Ms Cadet for the defendant submitted that the DPP's application should not be granted, referring the court to section 66(4) of the Evidence Act:

“ (4) Where –

- (a) A document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated criminal proceedings; and
- (b) the document falls within subsection (1)

a statement contained in it shall not be given in evidence by virtue of this section without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice having regard –

- (i) to the circumstances in which leave is sought and in particular to the contents of the statement, and

(ii) to any likelihood that the accused will be prejudiced by its admission in the absence of the person who supplied the information on which it is based.”

9. Ms. Cadet buttresses her submission with reference to the case of *Regina v Michael Ricardo Brown* cri/vbi 2/1/2012 in which a then deceased complainant purported to recognize the eyes and voice of the defendant. The Court there, in my view rightly determined that **that particular** evidence was unreliable.

10. That is not the case here. The witness Williams, states:

“As the male walked under one of the lamp – pole lights, **I was able to see his face clear and I recognized this male immediately.** It was an old male with a gray dingy beard I know as “Chilly” from Mason Addition. “Chilly” grew up in Mason Addition, and I know him from hanging through McCollough Corner.” (Emphasis added)

11. I find that the statement given by the witness Williams to Sgt. Miller falls within section 66(1)(a) and is admissible.

12. The statement of the witness Williams, if accepted by the jury, is strong evidence of the identification of the defendant as the shooter even in the absence of corroborative evidence. The identification evidenced there is not that of a stranger with a fleeting glance. Ms. Cadet complains that the statement contains no indication about distance and lighting and the exact position of the witness at every point of the unfolding circumstance. In my view, this may be dealt by an appropriate caution given to the jury. (See *Giovanni Ivan Clarke v The Attorney General* SCCrApp &CAIS No.156 of 2017)

13. In my view, the probative value of the statement outweighs its prejudicial effect and the weight to be given to the identification of the witness Williams is a matter for the jury.

14. In the premises, I exercise my discretion to have admitted the statement of the witness Williams.


Franklyn K M Williams KC

Justice

11 July 2023