

COMMONWEALTH OF THE BAHAMAS

CRI/VBI/283/12/2018

IN THE SUPREME COURT

Criminal Division

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

AND

DEVON ELLIS

Respondent

Before: The Honorable Mr. Justice Dale Fitzpatrick

Appearances: Mr. Akire Nicolls for the Applicant
Mr. Glendon Rolle for The Respondent

Heard on the Papers

DECISION

FITZPATRICK J.

Introduction

[1.] The Director of Public Prosecutions (DPP) brings an application to have the statement of a now deceased witness, Seth Strachan, read into evidence pursuant to section 66 of the *Evidence Act* (the “Application”).

Case Background

[2.] The Respondent is charged with Attempted Murder (two counts) contrary to section 292 of the *Penal Code*.

[3.] The Respondent is alleged to have, on October 26, 2018, pulled a gun from his waist and fired multiple shots at Seth Strachan and Trevor Mackay Jr. as both drove past on a scooter driven by Mr. Strachan. Mr. Mackey was a passenger on the scooter and was shot in the back. Mr. Strachan was not injured.

[4.] Seth Strachan attended with Woman Sergeant 2712 Barr at the Central Detective Unit on October 26, 2018. Mr. Strachan then gave his statement detailing what he observed in relation to the shooting. Mr. Strachan’s statement provides that:

- i. He knows the Respondent as “Devie” who lives in Hospital Lane, Nassau;
- ii. He has known the Respondent from when Mr. Strachan was in primary school;
- iii. He was at his place of work, Cool Breeze Scooter Rental, on October 26, 2018. Trevor Mackey was at work with Mr. Strachan that day;
- iv. He and Mr. Mackey left work together on October 26th at about 4:30 p.m. on a scooter borrowed from their employer. Mr. Strachan was the driver and Mr. Mackey the passenger;
- v. He and Mr. Mackey were travelling down the hill on Hospital Lane when they passed six or seven males sitting in an open yard. One of the males sitting in the yard was close to the road who Mr. Strachan recognized as the person he knows as “Devie”;
- vi. He stared into the yard and saw Devie pull a black hand gun from his waist firing repeatedly at Mr. Strachan and Mr. Mackey;
- vii. He sped off and Mr. Mackey told him he had been shot. Mr. Strachan then took Mr. Mackey to the hospital;
- viii. He described Devie as “dark, short, slim build and I believe he had his hair rowed down”; and,
- ix. He stated that “I never had no problems with Devie...I don’t know why he would fire shots at us”.

[5.] Mr. Strachan signed his statement to the police along with his mother, Maria. Their signatures were dated October 26, 2018. The statement was also signed by Woman Sergeant 2712 Barr and dated October 26, 2018.

[6.] Mr. Strachan attended with Detective Sergeant 957 Taylor at the Central Detective Unit on November 21, 2018 to view a twelve man photographic line up. Mr. Strachan then positively identified the Respondent as “the male I know as Devie, who shot Trevor”. Mr. Strachan signed his related statement to the police along with his mother, Maria. Their signatures were singularly dated November 22, 2018. The statement was also signed by Detective Sergeant 957 Taylor without being dated. Mr. Strachan signed the photographic line up and dated that document November 21, 2018. Maria Strachan also signed the photographic line up and dated that document November 21, 2018.

[7.] Trevor Mackey Jr. attended with Detective Corporeal 3478 Rolle at the Central Detective Unit on October 27, 2018. Mr. Mackey then gave his statement detailing what he observed in relation to the shooting. Mr. Mackey’s statement provides that:

- i. He was at his place of work, Cool Breeze Scooter Rentals, on October 26, 2018. A person he knows as “Seth” was at work with Mr. Mackey that day;
- ii. He and Seth left work together on October 26th at about 5:00 p.m. on a scooter borrowed from their employer. Mr. Strachan was the driver and he was the passenger;
- iii. He and Mr. Strachan were travelling on Hospital Lane down the hill when he heard two shots. Mr. Mackey looked behind him and saw two sparks from a gun being held by a dark skin male about five feet ten inches tall, slim build with plaits in his head dressed in a green and orange fluorescent vest. The male was then standing twenty feet away;
- iv. He felt numbness in his lower back. The male then ran behind them firing four more shots;
- v. He had an unobstructed view of the male shooter with light from the gun sparks and the outside light of a house that was nearby; and,
- vi. He blacked out and awoke in a hospital bed.

[8.] Mr. Mackey did not identify the Respondent in any photographic line up, identification parade, group identification or otherwise.

Analysis

[9.] There is no doubt that the DPP has met the threshold conditions presented in section 66 of the *Evidence Act*. Mr. Strachan provided his statement to the police while in attendance at the Central Detective Unit on each of October 26, 2018 and November 21, 2018, as part of the police investigation into the shooting on October 26, 2018, thereby satisfying section 66(1)(a).

[10.] Mr. Strachan died from gunshot wounds on September 7, 2023, as confirmed by the Certified Copy of the Death Registration filed by the DPP, thereby satisfying section 66(2)(a)(i).

[11.] Mr. Strachan’s statement **may** be admitted. The only debate is whether his statement **should** be admitted.

[12.] Section 66(4) of the *Evidence Act* provides the Court with discretion to admit the statement of a deceased witness that meets the threshold conditions identified in section 66(1) and (2) where

it would be “in the interests of justice” to do so. Essentially, this requires the Court to engage in a balancing between probative value and prejudice.

[13.] The Respondent objects to the Application on the basis that there is no evidence connecting the Respondent to the allegations, Mr. Strachan’s statement is not of sufficient quality to be considered reliable, Mr. Strachan’s signature for his photo line up identification statement is November 22, 2018 whereas the body of the document states he attended to view the line up on November 21, 2018 thereby further degrading reliability, that his statement will be the only identification evidence at trial and that Mr. Strachan will not be present for cross-examination, including with respect to any improper motive, third-party influence, and/or self-serving interest for giving the statement, all thereby depriving the Applicant of his right to a fair trial as provided by section 20 of the *Constitution*.

[14.] The probative value of any evidence is found in its contribution to proving a fact in issue at trial.

[15.] The prejudicial impact of any evidence is not measured in the potential harm it may do to a party’s position, including that an accused may be viewed in a negative light or found guilty based on the disputed evidence. The prejudice to be considered is the risk that the trier of facts, in particular a jury, will misuse the evidence for an improper purpose, including that the evidence will arouse bias, prejudice, sympathy, or fear, with these emotions contaminating the decision-making process.

[16.] The issue of the identification of the shooter is central in this case. Mr. Strachan’s statement presents evidence that is relevant to the identification issue.

[17.] Mr. Strachan said that he has known a male he referred to as “Devie” since primary school. He asserted that Devie lived in Hospital Lane. It is noteworthy that the Respondent confirmed that he has lived in a residence on Hospital Lane “all of my life” during his police interview on November 21, 2018.

[18.] Mr. Strachan stated that he was travelling by scooter on Hospital Lane when he saw Devie sitting close to the road in an open yard with other males. Mr. Strachan said he stared into the yard. He attested to seeing Devie pull a gun from his waist and shooting repeatedly at Mr. Strachan and Mr. Mackey as they rode past on the scooter. Mr. Strachan indicated that there were no problems between he and Devie such that Mr. Strachan could not explain why Devie would shoot at them.

[19.] As the above demonstrates, Mr. Strachan’s statement itself presents badges of reliability. His statement records his direct observations of the male he says was the assailant along Hospital Lane the early evening of October 26, 2018. He noted the opportunity for his observations. He noted the male’s skin color, height, build and hair. He noted the particulars of his prior knowledge of the Respondent. Based on all of these cumulative factors, he, unequivocally, identified the Respondent as the shooter in both his substantive statement detailing what he observed in relation to the shooting and his statement after viewing the photographic line up.

[20.] Mr. Strachan gave his substantive statement to the police the same day of the shooting. He selected the Respondent from a photographic line up about four weeks later, noting him as “the male I know as Devie, who shot Trevor”. Mr. Strachan’s statement and the related photographic line up identification were provided proximate to the shooting serving to bolster reliability.

[21.] Mr. Strachan also noted the absence of animus between he and the Respondent thereby addressing the concern that his statements were improperly motivated.

[22.] It is well established that a prior criminal conviction is relevant to the trustworthiness of a witness. Mr. Strachan had no criminal convictions at the date of his death, as confirmed by the Royal Bahamas Police Force Criminal Records Antecedent Form provided by the DPP. He did have one outstanding charge for Attempted Stealing at the time of his death. Outstanding charges are nothing more than unproven allegations. This allegation would not be open for cross-examination of Mr. Strachan, if alive, by the Respondent’s counsel. This allegation does not impact the reliability of Mr. Strachan’s statement.

[23.] The Respondent also challenges reliability given that Mr. Strachan’s signature for his photo line up identification statement is dated November 22, 2018 whereas the body of the document states that he attended to view the line up on November 21, 2018. This can be canvassed at trial through two available witnesses and related documents. The statement was signed by Mr. Strachan and his mother, Maria Strachan. Either party is at liberty to call Maria Strachan as a trial witness to question her about dates or otherwise. Detective Sergeant 957 Taylor gave a statement dated November 21, 2018 where he described meeting with Mr. Strachan and his mother, Maria Strachan that day where both reviewed and signed the photo line up. Detective Sergeant 957 Taylor is also an available trial witness. Finally, both Mr. Strachan and Maria Strachan signed and dated the photo line up for November 21, 2018. Any reliability concerns for the Respondent related to the November 22, 2018 date on Mr. Strachan’s identification statement can be pursued at trial.

[24.] Given the above and simply stated, the Court rejects the Respondent’s submission that Mr. Strachan’s statement lacks sufficient details or is otherwise unreliable. His statements to the police were given the same day or shortly following the shooting and he provided the numerous details noted above. The Court finds Mr. Strachan’s statement reliable and highly probative on the central issue of identification connecting the Respondent to the allegations, if accepted by the jury, even without identification corroboration.

[25.] It is not disputed that the Respondent is placed at some disadvantage arising from the inability to cross-examine Mr. Strachan on his statement. This is a factor to be considered that weighs against admission in the balancing of probative value and prejudice. However, it is well settled that, alone, the inability “to cross-examine a witness is not a legitimate reason for his statement to be excluded from evidence” [see: *Joel Bullard v. Director of Public Prosecutions* BS 2022 CA 166 at paragraph 28].

[26.] As noted above, Mr. Strachan's identification evidence is not corroborated by any other witness. For unknown reasons, Mr. Mackey did not identify the Respondent in a photo line up, identification parade or otherwise. In other words, Mr. Strachan's statement identifying the Respondent as the shooter will be the only identification evidence available to the Applicant at trial should the Court permit it. Clearly, that is an additional factor directing this Court against admitting the statement.

[27.] Again, the overall risk to assess is whether the jury will misuse the evidence thereby prejudicing the Respondent, including and in particular his right to a fair trial.

[28.] The risk of misuse of a statement can be buffered by the presence of other evidence, including from another witness, that corroborates the evidence contained in the statement under consideration. This buffer is present in this case to some extent. Mr. Mackey did provide a statement to the police proximate to the shooting where he corroborates the narrative of events provided by Mr. Strachan along with a description of the shooter. Mr. Mackey will be available to be cross-examined, including regarding any and all factors impacting his and, by relation, Mr. Strachan's, ability to observe the shooter while travelling on a scooter.

[29.] Any risk of misuse of Mr. Strachan's statement by the jury can otherwise be minimized by an appropriately worded instruction from the Court that should include the following:

- i. Warning the jury of the need to be cautious before convicting in reliance on the correctness of eyewitness identification, especially where there is only one identification witness as here;
- ii. Warning the jury about the frailties of eyewitness identification, noting in particular that an honest witness, including one who says he knows and recognized the person observed, can still be mistaken;
- iii. Warning the jury that when they are considering whether to accept none, some or all of Mr. Strachan's statement evidence that they should take into account that he was not able to testify in person before them under oath where his evidence could be tested by cross-examination, including with respect to any improper motives and influences, and also depriving them of the opportunity to observe Mr. Strachan's demeanour; and,
- iv. Addressing the quality and accuracy of Mr. Strachan's identification evidence, including the degree of detail provided, the duration of observation, the lighting and other conditions, including that these observations were made in the context of a shooting where Mr. Strachan was travelling on a scooter and presumably in fear for his life once shots were fired.

[30.] The risk of any misuse can further be minimized by the Court editing the tendered statement to remove any extraneous, prejudicial content. Any statement admitted pursuant to section 66 of

the *Evidence Act* must be scrutinized to ensure that only information relevant to a trial issue and otherwise admissible is read into evidence. This is an exercise that should be undertaken with the benefit of submissions from counsel.

[31.] In conclusion, the probative value of Mr. Strachan's statement with respect to the central issue of identification in this case significantly outweighs any prejudice flowing from admitting his statement to form part of the trial evidence. Any potential prejudice will be buffered by the expected corroborating narrative testimony from Mr. Mackey who can be cross-examined, including with respect to the factors that would impact his and Mr. Strachan's ability to observe the shooter while travelling on a scooter, along with the Court undertaking any necessary editing of the statement to remove any extraneous content and by the Court providing the jury with appropriately worded instructions. In other words, admitting the statement in these circumstances accords with both the right to a fair hearing provided for by section 20 of the *Constitution* and the interests of justice.

Dated this 26th day of June, A.D. 2026

Fitzpatrick J