

COMMONWEALTH OF THE BAHAMAS

CRI/VBI/43/3/2015

IN THE SUPREME COURT

Criminal Division

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

AND

LATARIO SERGIO MISSICK

Respondent

Before: The Honorable Mr. Justice Dale Fitzpatrick

Appearances: Ms. Jacklyn Burrows for the Applicant
Mr. Glendon Rolle for The Respondent

Heard on the Papers

DECISION

FITZPATRICK J.

Introduction

[1.] The Director of Public Prosecutions (DPP) previously brought an application to have the statement of a now deceased witness, Johnny Guerrier, admitted into evidence pursuant to section 66 of the *Evidence Act* (the “Original Application”).

[2.] The Original Application was granted, in part, on the basis of two other eyewitnesses, Advardo Ferguson and Leonard Collins, being available to testify at trial where they could be subjected to cross-examination by counsel for the Respondent.

[3.] Subsequent to granting the Original Application, the DPP indicated to the Court that Mr. Collins is also now deceased. The DPP has recently advised that no section 66 application will be made respecting the statement provided to the police by Mr. Collins and that his evidence will not otherwise be relied upon. Mr. Ferguson is not deceased. However, the DPP has also recently advised that his evidence will not be relied upon.

[4.] The Court indicated that the granting of the Original Application would need to be revisited with consideration to the changed evidentiary landscape. Written submissions were filed by both sides and the Court’s decision is set forth below.

Case Background

[5.] The Respondent is charged with Murder (one count) contrary to section 291(1)(b) of the *Penal Code*, Attempted Murder (two counts) contrary to section 292 of the *Penal Code*, and Possession of a Firearm with Intent to Endanger Life (two counts) contrary to section 33 of the *Firearms Act*.

[6.] The Respondent is alleged to have, on January 3rd, 2015, walked out from behind a building with a gun in his hand, shooting about ten times at various individuals present. It is alleged that the Respondent did thereby murder Carlos Taylor and attempted to murder Johnny Guerrier and Advardo Ferguson.

[7.] Johnny Guerrier attended with Detective Sergeant 2539 Miller at the Central Detective Unit on January 5th, 2015. Mr. Guerrier then gave his statement detailing what he observed in relation to the shooting. Mr. Guerrier’s statement provides that:

- i. He knows the Respondent as “Juvi” from the southern area of New Providence, where Mr. Guerrier had lived most of his life and where the events forming the narrative for these offences occurred;
- ii. He was in the area of Deliverance Way on January 3rd, 2015 at about 8:30 p.m., sharing time with friends;
- iii. He saw a male walk out from behind a building towards him and the others gathered. The male had a gun in his hand and fired about six (6) shots at Mr. Guerrier;
- iv. Mr. Guerrier ran off into the bushes, where he heard about three more shots;
- v. Mr. Guerrier remained in the bushes fearing for his life. When he came out from the bushes he learned that one of the gathered persons, whom he knew as “CJ,” was shot;

- vi. He later learned that “CJ” had died; and,
- vii. Mr. Guerrier had the opportunity to observe the shooter with the outside house lights on. Mr. Guerrier noted that the male was wearing camouflage pants and a dark coloured sweater. He looked at the shooter’s face, and they made eye contact. Mr. Guerrier stated that he “looked good” at the male. He noted that the shooter had the same build, height, walk, and skin color as the male he knows as “Juvi”.

[8.] Mr. Guerrier positively identified the Respondent as the person responsible for the shooting, whom he knows as “Juvi”, after viewing an identification parade on January 5, 2015.

Analysis

[9.] There is no doubt that the DPP has met the threshold conditions presented in section 66 of the *Evidence Act*. Mr. Guerrier provided his statement to the police while in attendance at the Central Detective Unit on January 5th, 2015, as part of the police investigation into the shooting on January 3rd, 2015, thereby satisfying section 66(1)(a).

[10.] Mr. Guerrier died from a gunshot wound on February 28th, 2015, as confirmed by the Certified Copy of the Death Registration filed by the DPP, thereby satisfying section 66(2)(a)(i).

[11.] Mr. Guerrier’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 Mr. Guerrier’s statement is not of sufficient quality to be considered reliable, that his statement will be the only eyewitness evidence at trial and that Mr. Guerrier 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. Guerrier’s statement presents evidence that is relevant to the identification issue.

[17.] Mr. Guerrier said that he has lived most of his life in the southern area of New Providence and, thereby, became familiar with most of the young men in the area, including a male he referred to as “Juvi”. Mr. Guerrier stated that he observed a male walk out from behind a building at about 8:30 p.m. on January 3, 2015. He said that the outside house lights were on and that he “looked good” at and directly into the face of the male, making eye contact. Mr. Guerrier observed the male’s walk, build, height, and skin. Based on all of this, Mr. Guerrier stated unequivocally that he recognized the male as someone he knows as “Juvi”. Mr. Guerrier said this male fired shots at him and that he heard further shots while fleeing. Mr. Guerrier stated that he emerged after the shooting ended and learned that a male he knew as “CJ” had been shot.

[18.] As the above demonstrates, Mr. Guerrier’s statement itself presents badges of reliability. His statement records his direct observations of the male he says was the assailant the evening of January 3rd, 2015. He noted the conditions and opportunity for his observations. He noted the male’s build, height, walk, and skin color. 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 an identification parade.

[19.] Mr. Guerrier gave his substantive statement to the police two days after the shooting. That same day, he selected the Respondent from an identification parade, noting him as “Juvi, the person responsible”. Mr. Guerrier’s statement and the related parade identification were provided proximate to the shooting serving to bolster reliability.

[20.] It is accepted that a prior criminal conviction is relevant to the trustworthiness of a witness. Mr. Guerrier 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 two outstanding charges for Armed Robbery at the time of his death. Outstanding charges are nothing more than unproven allegations. These allegations would not be open for cross-examination of Mr. Guerrier, if living, by the Respondent’s counsel. These allegations do not impact the reliability of Mr. Guerrier’s statement.

[21.] Given the above and simply stated, the Court rejects the Respondent’s submission that Mr. Guerrier’s statement lacks sufficient details or is otherwise unreliable. His statements to the police were given shortly following the shooting and he provided the numerous details noted above. The Court finds Mr. Guerrier’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 corroboration.

[22.] It is not disputed that the Respondent is placed at some disadvantage arising from the inability to cross-examine Mr. Guerrier 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].

[23.] Mr. Guerrier's identification evidence is not corroborated by any other witnesses. In other words, Mr. Guerrier's statement will be the only eyewitness evidence available to the Applicant at trial should the Court permit it. Clearly, that is an additional factor directing this Court against admitting his statement.

[24.] 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.

[25.] Any risk of misuse of Mr. Guerrier's statement by the jury can 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 witness to the allegations 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. Guerrier'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. Guerrier's demeanour; and,
- iv. Addressing the quality and accuracy of Mr. Guerrier'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. Guerrier was presumably in fear for his life once shots were fired.

[26.] The risk of any misuse can further be minimized by the Court editing the tendered statement to remove any extraneous, prejudicial content. For example, Mr. Guerrier's statement includes a reference to a prior threat made by the Respondent "to kill CJ". There is no detail as to whether Mr. Guerrier was present for this threat or heard it from a third party, with obvious concern of hearsay and prejudice. Mr. Guerrier's statement also includes a comment that he learned that "Juvi was responsible" for C.J.'s death. Again, there is hearsay and prejudice issues flowing from this comment. 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.

[27.] In conclusion, the probative value of Mr. Guerrier'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 in this case can be addressed by the Court providing the jury with appropriately worded instructions and by editing

the tendered statement to remove any extraneous content. 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