IN THE COURT OF APPEAL OF BELIZE AD 2014

CRIMINAL APPEAL NO 21 OF 2013

VINCENT TILLETT SR Appellant

v

THE QUEEN Respondent

_____

BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram	Justice of Appeal

Anthony Sylvestre for the appellant.
Mrs Cheryl-Lynn Vidal SC, Director of Public Prosecutions, for the respondent.

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18, 19 June and 7 November 2014

MORRISON JA

Introduction

[1] The appellant was originally indicted for the murder of Darwin Phillips ('the deceased'). On 15 November 2013, after a trial before Lucas J, sitting without a jury in the Central – Criminal Session of the Supreme Court, he was found guilty of the offence of manslaughter. On 27 November 2013, the learned trial judge sentenced the appellant to 12 years' imprisonment.

[2] By notice of appeal filed on 28 November 2013, the appellant appealed against both his conviction and sentence. The appeal was heard on 18 and 19 June 2013 and, on the latter date, the court dismissed the appeal and affirmed the appellant's conviction and sentence. These are the reasons which were then promised for the court's decision.

[3] At around 6:00 pm on the evening of 13 February 2011, the deceased was at the home of his girlfriend, Denise Stuart ('Denise'), together with other friends and family members. Among the group of persons socialising and watching television, were Denise's sister, Angela Hyde ('Angela') and a friend of the deceased, Oran Young ('Oran'). It was a birthday celebration, Angela's having been two days before and the deceased's having been the previous day. The prosecution's case was that, in the midst of these activities, the appellant arrived. The appellant had previously had a common-law relationship with Denise, with whom he had had four children. The appellant, who was well known to both Angela and Oran, went to the kitchen and returned shortly afterwards with a knife in hand, which he used to inflict a single stab wound to the deceased's chest. The deceased was pronounced dead at Karl Heusner Memorial Hospital that very evening.

[4] In proof of these allegations, the prosecution sought to rely on the eye-witness evidence of Angela and Oran, both of whom were alleged to have given witness statements to the police at the Queen Street Police Station on the evening of 13 February 2011. Angela's statement was allegedly given to Sergeant Alma Mortis, who was the investigating officer, while Oran's was allegedly given to the late Sergeant Jose Zetina. In evidence at the trial, it emerged that Sergeant Zetina had died subsequently and was buried on 19 September 2013.

[5] The prosecution also relied on an oral statement which was allegedly made by the appellant to Sergeant Mortis at the Queen Street Police Station on 14 February 2011, the day after the deceased was killed.

[6] At the trial, the prosecution was given leave by the judge, pursuant to section 71(2) of the Evidence Act ('the Act'), to treat both Angela and Oran as hostile witnesses. Thereafter, under cross-examination by counsel for the prosecution, they maintained their earlier stance. The learned trial judge then admitted their witness statements in evidence and allowed the prosecution to rely on them to prove its case, pursuant to section 73A (b) of the Act.

[7] The issues which arise for determination on this appeal can be gathered from the amended grounds of appeal filed on the appellant's behalf on 13 June 2014:

> "The learned trial judge erred:
>
> (a) In failing to properly determine the admissibility of the statement of Angela Hyde;
> (b) In failing to properly assess the weight to be given to the statement of Angela Hyde.
>
> 2. The learned trial judge erred:
> (a) In determining on the evidence that Oran Young made a previous inconsistent statement;
> (b) In failing to properly determine the admissibility of the statement of Oran Young;
> (c) In failing to properly assess the weight to be given to the statement of Oran Young."

The statutory framework

[8] Sections 71 and 72 of the Act provide as follows:

> "71.-(1) A witness under cross-examination may be asked whether he has made any former statement relative to the subject-matter of the cause or matter and inconsistent with his present testimony, the circumstances of

the supposed statement being referred to sufficiently to designate the particular occasion and, if he does not distinctly admit that he has made that statement, proof may be given that he did in fact make it.

(2) The same course may be taken with a witness upon his examination-in-chief, if the judge is of opinion that he is adverse to the party by whom he was called, or that his memory is in good faith at fault, and permits the question.

72.-(1) A witness under cross-examination, or a witness whom the judge, under section 71 (2), has permitted to be examined by the party who called him as to previous statements, inconsistent with his present testimony, may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause or matter, without the writing being shown to him or being proved in the first instance but, if it is intended to contradict him by the writing, his attention must, before contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him.

(2) The judge may, at any time during the hearing or trial, require the document to be produced for his inspection, and may thereupon make any use of it for the purposes of the hearing or trial if he thinks fit."

[9] The rule at common law was, as is well-known, that a previous inconsistent statement proved by means of section 71 was not admitted as evidence of the truth of its contents, but went "merely to the consistency and credit of the witness" (Adrian Keane, *The Modern Law of Evidence*, 5th edn, page 181). However, by virtue of section 3 of the Evidence (Amendment) (No 2) Act, 2012, the Act was amended to insert a new section 73A, as follows:

"Where in a criminal proceeding, a person is called as a witness for the Prosecution and –

(a) he admits to making a previous inconsistent statement; or

(b) a previous inconsistent statement made by him is proved by virtue of section 71 or 72,

the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case."

[10] A previous inconsistent statement, which is either admitted or proved by virtue of section 71 or 72, is therefore now admissible in Belize as evidence of the truth of its contents.

The evidence

[11] Angela was the first witness called by the prosecution. From the very outset of her evidence, Angela, as Lucas J put it, "manifestly displayed an attitude that she was unwilling to give evidence". When asked if she remembered giving a statement in the matter, her answer was, "I noh memba". When shown the original written statement taken by Sergeant Mortis, Angela identified "[f]ive signatures that look like my signature". But, having read over the statement, she stated that she did not remember what had happened on 13 February 2011. Sergeant Mortis gave evidence of having taken the statement from Angela and having observed her, of her own free will, sign it in five places after reading it over.

[12] Formally invited to refresh her memory from the statement, Angela still could not remember the events of 13 February 2011, whereupon the learned judge granted (without objection from the defence) the prosecution's application for permission to treat her as hostile. Cross-examined by the prosecution on the statement, Angela's position remained that she "noh rememba". However, under further questioning by the appellant's counsel, Angela agreed that she did "have an occasional glass of alcohol":

> "Q: You normally celebrate your birthday by drinking?
> A: I have a stressful life, you know, so when my birthday dat da di only time when I like free up. I work da market from morning till night every week, whole year round, Christmas and holiday so when my birthday I just free up.
> Q: And you free up with a?
> A: I just free up with a drink."

[13] On the strength of this evidence, the learned trial judge granted the prosecution's application (which was opposed by the appellant's counsel) to admit Angela's statement in evidence as a previous inconsistent statement. The judge said this:

> "Ms. Angela Hyde the first witness for the Crown, I find to be an invasive [sic] and hostile witness, hence, I allowed the Crown Counsel to treat her as a hostile witness.
>
> Prior to the witness Hyde being treated as a hostile witness, the statement which she gave Woman Sergeant 634 Alma Mortis was proved, after the proof of the statement witness Hyde was allowed to refresh her memory from her statement in Court.
>
> Ms. Hyde when shown the statement did not given[sic] by her to Woman Sergeant Mortis did not distinctly admit that she made the statement. She was allowed to refresh her memory whilst in Court. The Court was adjourned to facilitate her to refresh her memory.
>
> Ms. Hyde could not recall giving the statement on the 13th February 2011 or any statement in relation to this matter on hand to the police.
>
> During the treatment of Ms. Hyde as being a hostile witness, she persistently said that she could not remember anything on questions posed to her by Crown Counsel Grant from the contents of the statement given by her and recorded by Woman Sergeant 634 Alma Mortis.
>
> Ms. Grant has taken all the steps which is [sic] required before a previous inconsistent statement made [sic] witness Angela Hyde be admitted into evidence and read.
>
> Act No. 6 of 2012 has removed the barrier created by a hostile witness by having a witness' previous inconsistent statement admitted in evidence.
>
> The application of the Crown to recall the second witness, Woman Sergeant 634 Alma Mortis for her to read the statement which she recorded from witness Angela Hyde, which is already marked for identification purposes M.A. A is granted."

[14] In the statement which was then read out in court by Sergeant Mortis, Angela was recorded as having said this:

"I am the co-owner of Astor Hydes [sic] Supermarket located at #1 Hicatee Street, Belize City. On Sunday 13th February 2011, at approximately 4:50 pm I went to my sister Dennise [sic] Stuarts [sic] house located at #170 Antelope Street Extension, Belize City. I sat down and started watching a lifetime movie along with my sister, then sometime around 6:00 pm a youngman whom I know as Darwin Phillips and who is in a relationship with my sister Dennis [sic] Stuart, arrived at the house. Dennis [sic] had cooked some dinner to celebrate my birthday which was the 11th and Darwin's birthday which was the 12th February. About ten minutes after Darwin arrived at the house his friend Oran Young came to the house. We were all sitting down watching television. Sometime after 7:00 pm Vincent Tillett whom [sic] is also known as "Steeno" and whom [sic] have children with Dennise[sic] came back with two of his sons that he took for a ride in his car, came back [sic]. When Steeno came back he brought the kids inside the house and then he went straight into the kitchen area. He stayed inside the kitchen for about two minutes. At this time Jenay who is the oldest child for Dennise [sic] was in the kitchen. Dennise [sic] then told Jenay to come out of the kitchen. As Jenay was coming out of the kitchen Steeno came right behind her, and went straight towards Darwin who was seated on a chair and Dennise [sic] was seated beside him. I then noticed when Steeno hit Darwin in his chest as I heard the sound as when someone is hit or being punched. I then noticed that Darwin held his chest and leaned over. I then noticed blood coming from his chest area running down on his shirt. At this point I shouted Steeno!! And I hold Steeno by his two hand[sic] and I noticed that he had a small board handle knife in his right hand. At the same time when I was holding Steeno I told Dennise [sic] to open the back door so that Darwin could get out of the house. Denise opened the door and Darwin ran through the door. By this time Steeno had already gotten away from me because I could not hold him anymore as he is stronger than I am. When I was holding him I somehow pushed him against the room door and that's how he got away because the room door opened. Steeno then ran outside and went after Darwin but Darwin had already fell [sic] to the ground and did not appear to be moving. I then noticed Steeno started chasing Oran around the lane. I then went to where Darwin fell on the street and I noticed that he was face down and was breathing in the water that was on the street. I then told Dennise [sic] to call 911 which she did and we waited until the police had arrived. I turn Darwin over so that he don't[sic] breathe in the water. The police then arrived and took Darwin to the hospital. After Steeno finished chasing Oran I noticed that Steeno came back and I thought he was coming back to hurt Darwin but he past [sic] me and went straight to his car and drove off towards the direction of Pelican Street. Thereafter the Police came and assisted us to take Darwin to the hospital. We meaning Dennis [sic], Oran and myself. A few minutes later whilst at the hospital Doctors told us that Darwin was dead. This was about 7:30 pm. **I need to mention that my sister Dennise [sic] and Vincent Tillett also known**

> **as 'Steeno' were living together for about ten years now and on 2nd January 2011, she and Steeno had a misunderstanding due to Jenay as it was found out that he was trying to molest Jenay. Denise told him to come out of the house and he left the next day which was the 3rd January 2011. I have not seen Steeno since then until sometime last week and today**. I have known Vincent Tillett as Steeno and have known [sic] for the past ten years, since he had a relationship with Dennise [sic]. He and Dennise [sic] have four children together. Vincent is of dark complexion about 5 feet 9 inches in height and is of medium built [sic]. He has long dreads in his hair and front of his head is a bit bald. If I see Vincent again I will be able to recognize him. The incident took place inside the living room area of the house whilst Darwin was sitting down in the sofa. All the children were inside the living room when the incident happened, Dennise [sic] have six children total the oldest is Jenay and four younger ones for Vincent and then the last child is for Darwin Phillips." (Emphasis supplied)

[15] Oran's evidence described a generally similar course. He confirmed that he was at Denise's house with Angela on the evening of 13 February 2011. However, his only recollection was that, while he and Angela were in a room at the back of the house, "we heard some noise in the hall and thing but we never did come out". Finally, after about "five or ten minutes, when we hear wa lee ruction", he emerged from the room at the back, went onto the verandah and from there "saw one a my friend lay down pan did street". That "friend" was the deceased. When Oran was further questioned in chief by the prosecution, the following ensued:

> "Q: Can you tell us why he was lying on the street?
>
> A: I observe a stab wound in his chest.
>
> Q: Can you tell us how he got that stab wound to the chest?
>
> A: I am not sure ma'am. I just went up the street looking for someone to help me ker the man da hospital. At that time a police vehicle was coming up the street and I hail them and I jump in the truck back.
>
> Q: You heard the vehicle coming up the street and I?
>
> A: Stop them and told them that how my lee bwoy deh pan di street.
>
> Q: I stop them and told them?

A: That someone had been stabbed, that one of my friends had been stabbed and I took them to the place where he was lying down on the street. We put him in the truck and took him to the hospital.

Q: So you went to the hospital too?

A: Yes ma'am.

Q: Now Oran Young, do you recall giving a statement to the police in relation to this matter?

A: No ma'am.

Q: My question should have been, do you recall giving a statement to the police in this matter on the 13th of February 2011, at around 8:00 p.m.?

A: I don't recall that.

Q: At the CIB Office here in Belize City?

A: I don't recall that.

[16] Evidence of the taking of a statement from Oran was given by Sergeant Mortis. She and the late Sergeant Zetina had enjoyed, she told the court, "a close working relationship". On 13 February 2011, Sergeant Zetina was the supervisor of the homicide team of which Sergeant Mortis was a member and they were working together. Her evidence was that, at about 8:00 pm that night, Sergeant Zetina recorded a statement from Oran in his (Sergeant Zetina's) own handwriting. Having done so, Sergeant Zetina immediately handed over Oran's statement to her. However, Sergeant Zetina subsequently died and she attended his funeral on 19 September 2013. Sergeant Mortis testified that she was familiar with Sergeant Zetina's handwriting and his signature, having seen some 20 – 30 statements previously recorded by him. Some of them, she had actually seen him write. But she was not actually present in the room in which Oran was interviewed by Sergeant Zetina, she did not hear the statement read over to Oran and she was unable to say whether he had actually given it or read it over.

[17] The statement was in due course read over to Oran, on the judge's instructions, by the assistant marshal of the court. However, Oran again denied giving any statement

to the police and the judge gave permission for him to be treated as a hostile witness. Cross-examined, Oran maintained his position that at the material time he had been in the room at the back and did not see the appellant stab the deceased.

[18] Over strenuous objection from the appellant's counsel, primarily on the basis that the person to whom the statement was allegedly made (Sergeant Zetina) was not available to give evidence, the learned judge admitted the statement pursuant to section 73A (b) of the Act:

> "I find the Woman Sergeant Alma Mortis in her evidence has proved that the statement was recorded from Oran Young. I am also sure that Sergeant 803 Jose Zetina is dead. Accordingly I rule that statement recorded from Oran Young by later [sic] Sergeant Zetina is admissible in evidence. The prosecution may adduce the statement in evidence."

[19] Oran's statement was also read to the court by Sergeant Mortis, leaving out certain parts which the learned judge, after consultation with counsel, deemed to be prejudicial to the appellant:

> "I am a Belizean, unemployed presently residing at No 70 Pelican Street Extension, Belize City. On Sunday the 13th day of February 2011, sometime around 6:00 pm, I left my house and went to a friend namely Denise Stuart as to celebrate our birthday since I am celebrating my birthday on 10/2/11, Angela Hyde who is Denise Stuart [sic] is celebrating her birthday 11/2/10 [sic]and Darwin Phillips who is my friend is celebrating his birthday on 12/2/10 [sic]. So we all decided to do a party at Denise Stuart house that is the reason I went to this address. Upon my arrival I met Darwin Phillips, Angela Hyde and Denise Stuart at Denise Stuart house which is located at #170 Antelope Street Extension also there were some kids who are Denise [sic] kids, Angela [sic] kid and a daughter of Darwin Philips. I met all these persons inside Denise Stuart house in the living room area. I went into the house and start to socialized [sic] with my friends who I mentioned before. All of us were watching television. I was awaiting [sic] for a food. I was seated on a sofa which is a double seat and I was seated beside Angela Hyde who was on the left and Darwin Phillips who seated [sic] on the other double sofa along with Denise Stuart also was on the left side of Darwin Phillips and the kids were playing in the middle of the living room whilst I was watching television. Suddenly I noticed that Vincent Tillett Sr. entered the house

along with three kids who are his kids and I know that Denise Stuart is the mother of these kids. I must say that I know Vincent Tillett as ‘Steeno’ and he used to be Denise Stuart [sic] common law husband …When Steeno who is Vincent Tillett arrived at the house which is Denise Stuart [sic] house where I was socializing as Vincent Tillett or Steeno open the door his three kids that along with him entered the house and went to play with the other kids. Vincent Tillett or Steeno did not say a word and he went to the kitchen area and he stayed a little while there. I then noticed that Vincent Tillett or Steeno then came out to the living area I did not see if he had anything in his hands since I was looking at the television. I only noticed that Vincent Tillett then lift his right hands [sic] and bring it down like if he was to punch Darwin Phillips to the chest area and then he withdraw his hand that is when I noticed that Vincent Tillett or Steeno had a knife in his right hand. The knife had about six inches of blade with black handle. I must say that the light of the living room were [sic] off but the television which was on gave good visibility to the area which allowed me to see this event also the light of the kitchen area was on which gave a reflection to the living room. I noticed it was Vincent Tillett or Steeno who was in front of Darwin Phillips with a knife in his hand but at this time I did not know if he had stabbed Darwin Phillips. I thought that Vincent Tillett or Steeno had punched Darwin to the chest. I then get up and approached Darwin Phillips when I lift his shirt and noticed that blood was coming out his chest area. At this time Vincent Tillett was still standing behind the sofa where Darwin Phillips was seated. I then realized that Darwin Phillips had got stabbed and I help him stand up and told him let’s go and he got up with my help and we exit the back towards an unnamed street which is at the corner of Denise Stuart’s house and as we was walking on this unnamed street I noticed that Darwin Phillips collapsed. At this time Vincent Tillett had come out by the front door and he was infront of me with the knife in his hands so I left Darwin Phillips in the middle of the street and I ran and Vincent Tillett set chase after me up to the corner of Antelope Street Extension and this unnamed street where I met a police mobile coming up and I told the officer what had happened and I jumped to the back of the police truck and took them to the area where this incident took place. I must say that whilst I was running on Antelope Street Extension I noticed that a light green car wagon car passed me which is the vehicle Vincent Tillett or Steeno came with and the vehicle left the area. Upon my arrival to where Darwin Phillips was I noticed that he was vomiting so we placed him on board the police vehicle and he was taken to the hospital. Upon my arrival at the hospital I stayed outside where I then learnt that Darwin Phillips died in the hospital. I know that Vincent Tillett or Steeno stabbed my friend Darwin Phillips and he also attacked me with the knife...When Vincent Tillett stabbed my friend the area was well lit by the television which gave good visible [sic] to the area and there was nothing obstructing my view. It is Vincent Tillett that stabbed my friend

> Darwin Phillips and I will testify in court in regards to the incident because he should not do this to my friend…"

[20] On the day following these events, 14 February 2011, Corporal Renaldo Bruhier was on mobile patrol in Belize City. At about 11:45 am, he received a call on his cellular phone from a person who identified himself as the appellant, who was known to him before. After identifying himself, the caller said that he was wanted by the police and wanted to turn himself in. As a result, Corporal Bruhier proceeded to a spot on the Philip Goldson Highway, where he saw the appellant "in some bushes". Corporal Bruhier brought the police vehicle which he was driving to a stop, picked up the appellant and drove him to the Queen Street Police Station. There, Corporal Bruhier escorted the appellant to the Criminal Investigations Branch, where he handed him over to Sergeant Mortis.

[21] Sergeant Mortis informed the appellant that he was under arrest for the murder of the deceased and cautioned him. She then proceeded to escort the appellant to the Homicide Unit office and, while doing so, he told her that he wanted to tell her his side of the story. When they were inside the Homicide Unit office, Sergeant Mortis testified, the appellant told her that, "I stab Darwin Phillips because he say he wash kill me". The appellant then continued to tell Sergeant Mortis "certain things", but, when she asked him if he wished to make a statement under caution, he answered no, saying that "… my lawyer Dickie Bradley told me not to give a statement".

[22] That was the case for the prosecution. The appellant opted to give evidence on oath and, in answer to his counsel in examination-in-chief, he said the following:

> "Q: Mr. Tillett, I want you to take your mind back to the 13th February 2011; as it relates to what you've heard here in Court, what can you say about that day?
>
> A: I cannot say anything about that day.

Q: In relation to the matter for which you are here, can you say what if anything happen at that location; at the location where it is alleged an incident took place?

A: I cannot say anything because I don't know anything about that.

Q: Mr. Tillett, as it relates to the deceased Darwin Phillips, you knew him?

A: I knew him.

Q: Did you come in contact with him on the 13 February 2011?

A: No, My Lord.

Q: The address you gave as your residence, 170 Antelope Street Extension, Belize City, is that the same location where your common-law wife lives?

A: Yes.

Q: Were you there on the 13th of February 2011?

A: No, My Lord.

THE COURT: That means at the common-law address?

MR. SALDIVAR: Yes, My Lord.

Q: Could you tell the Court where you were on the 13th of February 2011?

A: The area of Sandhill Village.

Q: Did you make a call to the police on the 13th or any day in regards to anything?

A: I didn't make no call to no police.

Q: What if anything did you say to Woman Sergeant of Police Alma Mortis in respect to this matter?

A: I didn't say nothing to Ms. Mortis.

Q: Did you make any admission to doing anything, in relation to this matter?

A: No, I did not.

MR. SALDIVAR: No further questions, My Lord."

[23] Under cross-examination by counsel for the prosecution, the appellant maintained his position that he knew nothing about the killing of the deceased and that he had made no statement to Sergeant Mortis. However, in answer to questioning about the circumstances in which he came to be taken into custody, the appellant said this:

"Q: You agree with me though that on the 14th day of February Officer Bruhier picked you up in the area of the Haulover Bridge here in Belize City, correct?

A: Yes, My Lord.

Q: And would you agree with ms[sic] Mr. Tillett that you were not surprised that Officer Bruhier had picked you up in the area of the Haulover Bridge on the 14th?

A: No, My Lord, I was not surprised.

Q: And you agree with me that you were not surprised that Officer Bruhier had picked you up because you knew that the police were looking for you?

A: No, My Lord.

Q: No what?

THE COURT: The question is, you agree with the Counsel that after Bruhier had picked you up because you knew that the police were looking for you?

ACCUSED: I didn't know that the police were looking for me.

Q: So Mr. Tillett, why you were in the bushes in the area of the Haulover Bridge on the 14th of February 2011?

A: I wasn't in no bushes.

Q: Where were you?

A: I was standing on the roadside. No bush in there but I was standing on the roadside.

Q: Why were you standing on the roadside Mr. Tillett?

A: I was standing by the roadside because Mr. Bruhier or how he name was coming to pick me up.

Q: So you know that Officer Bruhier was going to pick you up?

A: No, I did not know.

Q: So Mr. Tillett, you have given me quite a confused response now. You were standing at the roadside because Mr. Bruhier was coming to pick you up. Yet you did not know that Mr. Bruhier was coming to pick you up?

A: I didn't know the person who was coming.

Q: So can you explain to me Mr. Tillett, if you never knew that it was Mr. Bruhier that was coming to pick you up, why were you standing on the roadside?

A: Because someone told me to wait there.

Q: Wait there for what?

A: For someone to pick me up.

Q: Pick you up for what, Mr. Tillett?

A: I did not know pick me up for what.

Q: Did you ask Officer Bruhier why he was picking you up?

A: I didn't ask him.

Q: But you felt comfortable to go with Officer Bruhier?

A: I didn't feel comfortable to go with him.

Q: You knew him before?

A: I know him for 19 years.

Q: Was he a friend or a foe?

THE COURT: Change that word foe.

Q: Was he friend of yours or were you enemies for 19 years?

A: We were just friends.

Q: And you never ask your friend why it is that he is picking you up from roadside?

A: No, I didn't ask him but he told me that he come pick me up because he heard that something went wrong in my house.

Q: And he took you to the police station, correct?

A: Yes."

The verdict

[24] During the course of his full and careful summation, about which no complaint was made on appeal, Lucas J, after rejecting the appellant's alibi, found that the prosecution had "proved all the elements of the crime of murder, except the element of the accused [sic] specific intention to kill Darwin Phillips". In the result, the learned judge found the appellant not guilty on the charge of murder, but guilty of the offence of manslaughter. Although he considered that a sentence of 15 years' imprisonment was justified in the circumstances of the case, the learned judge, taking into account the time already spent on remand by the appellant, sentenced him to 12 years' imprisonment, with effect from 27 November 2013.

The submissions on appeal

[25] Sensibly, in our view, Mr Sylvestre for the appellant did not seek to challenge the learned judge's determination that both Angela and Oran fell to be treated as hostile witnesses. From the very outset of their evidence, both witnesses had plainly demonstrated that they were "adverse to the party by whom [they were] called", within the meaning of section 71(2) of the Act.

[26] But Mr Sylvestre strongly contended that, in relation to both witness' statements, the learned judge, by approaching the matter of the admissibility of the statements on the basis that, once either of the conditions in section 73A (a) or (b) was established, the court was obliged to admit the statements in evidence. It was submitted that the legislature's use of the phrase "is admissible" in section 73A does not make the statements automatically admissible, in that the trial judge still retains a discretion to determine whether to exclude or admit a statement, even if the conditions of admissibility have been met. It was also submitted that, having admitted the statements, the learned judge erred in assessing the weight to be given to the statements, in that he failed to give consideration to all the circumstances in which the statements were made. Mr Sylvestre was particularly concerned to suggest that Angela's remark in her statement that the appellant's relationship with Denise had ended after "it was found out that he was trying to molest" one of their daughters (see the passage highlighted at para 14 above), demonstrated some kind of 'animus' towards the appellant. And finally, as regards Oran's alleged statement to Sergeant Zetina, Mr Sylvestre submitted that the evidence of Sergeant Mortis was insufficient to establish beyond reasonable doubt that the statement was in fact Oran's statement.

[27] In support of these submissions, Mr Sylvestre referred us to and relied on the decision of this court in **Micka Lee Williams v The Queen**(**Criminal Appeal No 16 of 2006**, judgment delivered 22 June 2007); and of the Supreme Court of Canada in **R v B (K.G.) [1993] 1 S.C.R. 740**.

[28] In response, the learned Director of Public Prosecutions pointed out that section 73A has not abrogated the common law power of a trial judge to, in the exercise of his discretion, exclude evidence where its prejudicial effect outweighs its probative value. It was submitted that, once the precondition of admissibility of the statements was met in this case, that is, that they were "proved", the only circumstances in which the judge would have been justified in excluding them would be if he were of the view that it would be unsafe for the fact finding tribunal to rely on them. Nothing had been put forward by the appellant to suggest that there were circumstances that militated against the

admission of the statements; or that the statements themselves contained material that was not fit for consideration. Further, the Director submitted, the judge did not approach the matter on the basis that, once the statements were admitted, he was bound to rely on them. Rather, in the case of both of them, he considered their evidential value, bearing in mind the circumstances in which they were allegedly given. And, as regards Oran's statement, the Director submitted that there was sufficient evidence before the judge to enable him to conclude that the statement was given by Oran to Sergeant Zetina in the circumstances described by Sergeant Mortis. In any event, some of the details which were contained in the statement and were accepted by Oran when he was in the witness box, indicated that he must have been the author of the statement.

Discussion and analysis

[29] We start with a brief consideration of the authorities to which we were referred. In **Micka Lee Williams**, the court was concerned with section 105 of the Act. That section provides for the admissibility in evidence in criminal proceedings of a statement made in a document by a person who (a) is dead or, by reason of his bodily or mental condition unfit to attend as a witness; (b) is outside of Belize and it is not reasonably practicable to secure his attendance; or (c) cannot be found after all reasonable steps have been taken to do so. The question was whether, given that the section does not in terms reserve to the court any residual power or discretion to exclude evidence on the ground that its prejudicial effect outweighs its probative value, such a discretion nevertheless remains vested in the court.

[30] In answering this question in the affirmative, Mottley P, writing on behalf of the court, pointed out, firstly, (at para 20), "that the subsection states that the statement shall be 'admissible'…[i]t does not state that the statement shall be 'admitted'". Secondly, reference was made (at para 21) to the longstanding rule of the common law that "a judge in a criminal trial has an overriding discretion to exclude evidence if the prejudicial effect outweighs the probative value"; and to Lord Bingham's statement in **Steven Grant v R [2006] UKPC 2** (at para 21(3))that the discretion extends to

excluding evidence “which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself”. On this basis, the court concluded (at para 22) that, although the Act did not contain an express provision to this effect, “the common law right of the trial judge to exclude such evidence was not abolished”.

[31] In **R v B (K.G.)**,the Supreme Court of Canada was invited to reconsider the common law rule in that jurisdiction which limited the use of previous inconsistent statements (described in Canada as “prior inconsistent statements”) to impeaching the credibility of the witness. The court decided unanimously that the rule should be replaced by a new rule permitting reliance on previous inconsistent statements as substantive evidence of their contents. All members of the court considered that, in order to be admissible for this purpose, a previous inconsistent statement had to satisfy the requirement of reliability.

[32] However, the court was divided on how this requirement might be satisfied. The majority (Lamer CJ, Sopinka, Gonthier, McLachlin and Iacobucci JJ), in a judgment delivered by Lamer CJ, considered (at page 67) that, as a general rule, it would only be satisfied if(i) the previous inconsistent statement was made under oath or solemn affirmation, following a warning as to the existence of sanctions and the significance of the oath or affirmation; (ii) the opposing party has a full opportunity to cross-examine the witness respecting the statement; and (iii) the statement was videotaped. Alternatively, Lamer CJ continued (at page 68), “other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability…”For the minority (L’Heureux-Dubé and Cory JJ), on the other hand, these tests were too restrictive and they considered that previous inconsistent statements should be admissible for all purposes, provided (i) the evidence contained in them was otherwise admissible; (ii) they were voluntarily made; (iii) they were made in circumstances in which the importance of telling the truth was brought home to the witness; (iv) they were reliable, in the sense of having been fully and accurately transcribed or recorded; and

(v) they were made in circumstances that the witnesses would be liable to criminal prosecution for making deliberately false statements (see per Cory J at pages 105 – 106).

[33] But both the majority and the minority were agreed that, whatever criteria of admissibility for substantive purposes of the previous inconsistent statements were applied, the trial judge should hold a *voir dire* to, as Lamer CJ put it (at pages 75-76):

> "…satisfy him or herself that the indicia of reliability…are present and genuine. If they are, he or she must then examine the circumstances under which the statement was obtained, to satisfy him or herself that the statement supported by the evidence of reliability was made voluntarily if to a person in authority, and that there are no other factors which would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence."

[34] In the later decision of the Supreme Court of Canada in **R v U (F.J.) [1995] S.C.R. 764**, to which counsel's attention was drawn by the learned President, Lamer CJ restated and affirmed his own earlier analysis in **R v B (K.G.)** of the criteria of admissibility of previous inconsistent statements. However, in that case, in which there was also another statement which was substantially admissible (the defendant's own statement), Lamer CJ added, as a further criterion of substantive admissibility of the previous inconsistent statement, the question of the striking similarities between the two statements: if they are so sufficiently striking "that it is unlikely two people would have independently fabricated [them]", then the trier of fact may draw conclusions from that comparison about the truth of the statements (see per Lamer CJ at page 791). (Save that she preferred "significant" to "striking" similarity as the relevant criterion, L'Heureux-Dubé J agreed with the Chief Justice's analysis – see pages 797–799.)

[35] Lastly, we would mention **R v Joyce and another [2005] EWCA Crim 1785**, to which the learned Director referred us. That was a case in which the Court of Appeal of England and Wales was concerned with sections 119(1) and 125(1) of the Criminal Justice Act, 2003. Section 119(1), in very similar terms to section 73A of the Act;

provides for the admissibility as evidence in any criminal proceedings of any matter stated in a previous inconsistent statement which the witness admits having made or has been proved by virtue of provisions analogous to section 71 of the Act (sections 3, 4 and 5 of the UK Criminal Procedure Act, 1865). Section 125(1) goes on to provide that:

> "If on the defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the prosecution that –
>
> (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and,
>
> (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,
>
> the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a re-trial, discharge the jury."

[36] In assessing the credibility of previous inconsistent statements proved under section 119, the court accepted that (a) section 125 provides "an additional safety valve obliging a judge to direct an acquittal where the previous statements are particularly unpersuasive" (per Rose LJ at para [19]); and (b) in considering whether the evidence provided by the previous inconsistent statement is "so unconvincing" in terms of section 125(1)(b), it is relevant for the judge to have regard to the surrounding circumstances.

[37] In relation to the Canadian authorities, at least two important points immediately emerge. The first is that, as is clear from the decision in **R v B (K.G.)**, in that jurisdiction the reform of the rule that a previous inconsistent statement was not evidence of its contents, but went merely to the weight to be given to the witness' oral evidence, was an entirely judge-made reform. As Lamer CJ observed (at pages 45-46), reflecting the Supreme Court of Canada's modern approach to the development and adaptation of the common law to meet changing circumstances in that society –

> "…I do not believe that considering a change to a reformed prior inconsistent statement rule is a matter better left to Parliament; the rule

> itself is judge-made and lends itself to judicial reform, and it is a natural and incremental progression in the development of the law of hearsay in Canada by this Court."

[38] It follows naturally from this that the detailed elaboration of the criteria of admissibility of previous inconsistent statements for substantive purposes in that jurisdiction would inevitably fall to the courts, and not to Parliament. In Belize, by contrast, the reform of the previous inconsistent statement rule has (as in England and Wales) been entirely statutory. In these circumstances, it seems to us that, subject to any issues of statutory interpretation, which will always be for the courts to decide, the primary source of admissibility for substantive purposes of previous inconsistent statements must, equally inevitably, be located in section 73A itself.

[39] The second point of note in respect of the Canadian approach is that, under section 9 of the Canada Evidence Act, which makes provision for the circumstances in which a party will be allowed to treat his or her own witness as hostile, a *voir dire* is usually held to determine whether the section has come into play. It is in these circumstances that in **R v B (K.G.)**, as Lamer CJ later explained in **R v U (F.J.)** (at page 793), an expanded role was assigned to the *voir dire* in relation to the admissibility of previous inconsistent statements:

> "I set out the proper procedure for the *voir dire* in my reasons in B. (K.G.), at pp. 799–804. After the calling party invokes s. 9 of the Canada Evidence Act, and fulfils its requirements in the *voir dire* held under that section, the party must then state its objectives in tendering the statement. If the statement will only be used to impeach the witness, the inquiry ends at this point. If, however, the calling party wishes to make substantive use of the statement, the *voir dire* must continue so that the trial judge can assess whether a threshold of reliability has been met."

[40] And, in relation to **R v Joyce and another**, it suffices to observe that it demonstrates that in England and Wales, where the reform of the rule was, as in Belize, purely statutory, it is to section 125(1) of the Criminal Justice Act, 2003 itself that regard must usually be had to determine the admissibility of the previous inconsistent statement.

[41] This brings us back then to section 73A. As in section 105 of the Act, the legislature has chosen the phrase “is admissible” to describe what use may be made of a previous inconsistent statement which a witness for the prosecution admits having made or which is proved to have been made by him. Unlike in section 125 of the English Criminal Justice Act 2003, there is no provision further limiting or qualifying the circumstances in which such a statement may be admissible. However, we consider that, as this court held in relation to section 105 in **Micka Lee Williams**, the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage or depriving him unfairly of the ability to defend himself.

[42] In this case, there was in our view absolutely nothing to suggest any prejudice to the appellant, beyond the obviously probative force in the statements. Mr Sylvestre’s insistence that Angela’s remark in her statement that the appellant’s relationship with Denise had ended after “it was found out that he was trying to molest” one of their daughters, demonstrated some kind of ‘animus’ towards the appellant was, it seems to us, entirely unsupported by its context, which demonstrates that all she was seeking to do was to establish that the appellant was someone who was well known to her. In any event, although the transcript of the evidence itself suggests (at page 51) that, once admitted, the statement was read to the court by Sergeant Mortis in its entirety, it is not without significance that the particular passage of which complaint was made was omitted by the judge from his summation, on the explicit basis that he was “excluding inter alia the prejudicial and hearsay portions of the statement”. Added to this, in relation to Oran’s statement, the judge was even more scrupulous, ensuring that potentially prejudicial material was elided before the statement was even read to the court by Sergeant Mortis (see para [19] above). In these circumstances, it seems to us that there is absolutely no basis for the suggestion that this very experienced trial judge was not fully alive to the need to protect the appellant from the possibility of prejudice in admitting the statements pursuant to section 73A of the Act.

[43] In addressing the evidential value of the previous inconsistent statements of Angela and Oran, Lucas J said this:

> "…I bear in mind that when these two witnesses were dictating their statements they were not sworn on oath. Obviously the accused and his Attorney were not present to cross-examine them. Despite what section 73A of the Evidence Act provides the statements require assessment vis-à-vis the witnesses' evidence during the trial and that of the accused sworn testimony. In doing so I must be satisfied that Mrs. Hyde and Mr. Oran Young gave their statements voluntarily and were not concocted by the police recorders. I am sure that, in the circumstances Mrs. Hyde and Mr. Young gave their statements voluntarily on that night of the incident.
>
> Of course there are three options for my consideration. First, I might accept as true the written statements dictated to the police officers. Secondly, I might accept as true that Mrs. Hyde did not give the contents of the statement and so too with respect to Mr. Young's statement and if so I would necessarily reject the first option. Thirdly, I cannot rely on either the sworn testimony of each of the two witnesses or the contents of their written statements. It is difficult to fathom, though, how these witnesses were able to describe the event so lucidly and descriptively without being present at the scene and witnessing the occurrence. I am convinced, having made my assessment, to the extent that I am sure that both witnesses were present at the time of the incident. I am also sure that they were speaking the truth (contained in their statements) of their seeing the accused stabbing Darwin Phillips."

[44] In our view, this detailed assessment of the evidential value of the statements of both witnesses makes it, as the Director submitted, impossible to argue successfully that the learned trial judge did not give full and careful consideration to the weight to be attached to them.

[45] Finally, as regards the question whether the statement allegedly made by Oran to Sergeant Zetina was in fact made by him, this was, in our view, a pure issue of fact for the determination of the judge. There was plainly a considerable amount of circumstantial evidence coming from Sergeant Mortis to indicate that the statement produced by her, written in what she was able to confirm was Sergeant Zetina's handwriting, was in fact given to him by Oran at the Queen Street Police Station on the

night of 13 February 2011, after which it was immediately handed over to her by Sergeant Zetina. In any event, as the Director submitted, it is clear from the evidence that Oran did feel able to give at the trial about the events which took place at Denise's house earlier that evening, which coincided with what was contained in the statement, that he must have been its author.

Conclusion

[46] The contents of both Angela's and Oran's statements plainly provided ample support for, at the very least, the verdict of guilty of manslaughter which the learned trial judge returned. In addition to this, there was the appellant's oral statement to Sergeant Mortis which received careful and, in our view, eminently fair treatment from the learned judge:

> "In terms of the confession made by the accused to Woman Sergeant Mortis, Mr. Arthur Saldivar, learned defence Counsel had objected to the admittance of the verbal statement in evidence. The complaints of Mr. Saldivar were: (1) The caution in accordance with Judges [sic] Rules was not properly administered to the accused by Woman Sergeant Mortis and that the wording of the caution was inadequate. (2) There was no third party present because, said learned defence Counsel, from the series of events it appeared that Ms. Mortis was escorting the accused to the Homicide Unit Office to conduct an interview of the accused.
>
> The caution administered by Woman Sergeant Mortis to the accused contained sufficient information to convey to him that there was no requirement for him to say anything but if he did so it will be written down and may be given in evidence. The absence of a third party is of little concern in this case. The accused blurted out the admission before he and Ms. Mortis were settled in the Homicide Unit Office. The complaint on this score does not assist whether or not the verbal statement made by the accused to Woman Sergeant Mortis was freely and voluntarily made. With regard to the accused not being informed of his right to communicate with a legal practitioner of his choice, Woman Sergeant Mortis deposed to, in cross-examination, that she told the accused of his right to an attorney. But this right of the accused was not expressed in Ms. Mortis' examination-in-chief. She said, in cross-examination, that she cautioned the accused when he arrived at the Criminal Investigation Branch; but it was at the point she was escorting the accused to the Homicide Unit that

she informed him of his right to an Attorney-at-Law. Ms. Mortis agreed that in none of her statements she mentioned of her conveying to the accused his right to an Attorney-at-Law.

I am not sure whether witness Mortis told the accused about his constitutional right to an Attorney-at-Law of his choice. I give the accused the benefit of the doubt. However, when Ms. Mortis invited the accused to put in writing what he told her the accused informed her, "my lawyer Dickie Bradley told me not to give a statement." Obviously, the accused had an Attorney-at-law and who had advised him not to give a statement. So therefore even if Ms. Mortis did not inform the accused of his right to an Attorney-at-law that omission does not, from a constitutional stand point, adversely affect his giving of the statement.

In all of the circumstances, I am sure that the accused gave the verbal statement to Woman Sergeant Mortis freely and voluntarily. I am also sure that the admission is true. I have also considered whether the admission negatively affects the fairness of the accused's trial. There is nothing which deterred me in exercising my discretion in admitting into evidence the verbal statement of the accused to Woman Sergeant Mortis. There was no pressure or any sort of inducement offered to the accused. He was cautioned and he was aware of his right to an Attorney-at-law of his choice."

[47] Against this background, Mr Sylvestre's submission that there may have been a miscarriage of justice, rendering the appellant's conviction unsafe, finds no support in either the evidence or in the manner in which the trial was conducted by the trial judge. It is for these reasons that the appeal was disposed of in the manner stated at paragraph [2] above.

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SOSA P

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MORRISON JA

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HAFIZ-BERTRAM JA