In the Supreme Court of Belize
(Criminal Jurisdiction)

Central District

Indictment No C83/2013

THE QUEEN

AND

DIONICIO SALAZAR

BEFORE: **The Hon. Chief Justice Kenneth Benjamin.**

June 26, 2015.

Appearances: Mr. Linbert Willis, Senior Crown Counsel, for the Crown.
Mr. Oscar Selgado for the accused.

RULING ON VOIR DIRE

[1] The accused is on trial for murder. The Crown applied for the transcript of the evidence of Janelle Longsworth upon oath at a previous trial to be admitted into evidence as part of the case for the Crown. The said transcript was generated by a court stenographer who certified its accuracy with a certificate.

[2] Learned Senior Crown Counsel invited the court to conduct a voir dire in the absence of the jury. At the voir dire, three witnesses were led, namely, PC 1384 Harry Hill, PC 908 Errol Jones and Ms. Elvia Cowo, the stenographer. The first two witnesses testified as to what steps they took to serve upon Janelle Longsworth a sub-poena

issued by the Supreme Court for her attendance to give evidence for the Crown. The thrust of the application was that the witness, Janelle Longsworth could not be located up to the present.

[3] The submissions in support of the application made reference to the common law discretion with which a trial judge is clothed upon a re-trial to admit the transcript of a deceased witness' evidence given at a previous trial in a criminal case. This was the ratio of the case of **R v Hall [1973] 1 All E R 1** subject to the proviso that the transcript was appropriately authenticated. The discretion as to whether or not to admit such evidence was circumscribed by the overarching consideration of whether it would be unfair to the accused to admit same. It is plain that this case is distinguishable on the basis that it invokes a common law principle in respect of a deceased witness. Forbes J, sitting in the Court of Appeal, put the matter thus after reviewing the authorities:-

> "From this line of authorities, we think it plain that a deposition properly taken before a magistrate on oath in the presence of the accused and where the accused has had the opportunity of cross-examination was always admissible at common law in criminal cases if the original deponent was dead, despite the absence of opportunity to observe the demeanour of the witness. The only difference between such a deposition and the transcript of evidence given at a previous trial is that the transcript is not signed by the witness. Provided it is authenticated in some appropriate way, as by calling the shorthand writer who took the original note, there seems no reason to think that such a transcript should not be equally receivable in evidence."

Inasmuch as His Lordship was prepared to equate a deposition to a properly authenticated transcript, he went on to issue the warning that the transcript is receivable subject to the discretion of the judge to exclude such evidence if he considered it unfair to the accused to admit it.

[4] The Crown also cited the case of **R v Thompson [1982] 1 All E R 907** which was concerned with the admissibility of the transcript of a witness' evidence at a retrial.

However, this case can be dealt with shortly as it concerned the application of section 13(3)(a) of the Criminal Justice Act 1925 which provides for a witness' deposition to be read as evidence at the trial of the accused under certain stated circumstances and paragraph 1(b) of Schedule 2 to the Criminal Appeal Act, 1968. In that case, the witness was unable to travel to court because of her medical condition. It was posited that the legislation merely restated the common law position.

[5] In seeking to provide a legal platform to ground the application, Mr. Willis quoted section 123 of the Indictable Procedure Act, Chapter 96 which provides as follows":-

> ":123.-(1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in subsection (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.
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> (2) The conditions hereinbefore referred to are that the deposition must be the deposition either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel or is absent from Belize."

For completeness, 'deposition' is defined in section 2 of the Indictable Procedure Act as including 'a written statement' which in turn is stated to mean 'a statement made by a person about a crime which is reduced into writing by the person making the same or which is recorded by a police office before whom it is made and signed by the maker'. It cannot be gainsaid that the transcript sought to be tendered pursuant to the application at hand does not qualify as a 'deposition'.

[6] Also referred to was section 105 of the Evidence Act, Chapter 95 which is of relatively more recent vintage. Its purport is to introduce a statutory exception to the common law rule against hearsay. Section 105 provides as follows:

> '105.-(1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to subsections (4) and (5), a statement made by a person in a document shall be admissible in criminal proceedings (including a preliminary inquiry) as evidence of any fact of which direct or oral evidence by him would be admissible if –
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> (a) the requirements of one of the paragraphs of subsection (2) are satisfied; and
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> (b) the requirements of subsection (3) are satisfied.
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> (2) The requirements mentioned in subsection (1) (a) are –
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> (a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
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> (b) that –
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> (i) the person who made the statement is outside Belize; and
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> (ii) it is not reasonably practicable to secure his attendance; or
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> (c) that all reasonable steps have been taken to find the person who made the statement but that he cannot be found.
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> (3) The requirements mentioned in subsection (1) (b) are that the statement to be tendered in evidence contains a declaration by

> the maker and signed before a magistrate or a justice of the peace to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true.'

The reference to 'document' led to the definition in section 2 as including "(b) any disc, tape, sound track or other device in which sound or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment of being reproduced therefrom".

[7] It became apparent that the Crown was relying on section 105 as evidence was led to establish the requirements of section 105(2)(c). The evidence was that the Police Officers over a period of four days visited her home at San Ignacio and that of her parents at Maxboro. Further checks were made with immigration authorities at the international airport and at the border crossing at Benque Viejo, judicially noticed as closest to San Ignacio. Inquiries at the local and general hospitals proved futile. It is fair to say that all reasonable steps were taken to find the witness. I do not accept that leaving a copy of the sub-poena would have altered this state of affairs, as suggested by learned Counsel for the accused. I am satisfied that on the evidence the witness cannot be found.

[8] `However, the Crown must establish that the transcript is a 'statement in a document' to render it admissible and it has failed to do so. It is worthy of note that Sosa, P observed pointedly in Criminal Appeal No. 1 of 2009 that the granting of leave for the transcript of the evidence to be read was not questioned by the Respondent on appeal. For the avoidance of doubt, this Court is not bound by the ruling of a Judge of concurrent jurisdiction, although a different factual scenario presented itself at the previous trial.

[9] In any event, the Crown has failed to fulfil the requirements of section 105(3) as there has been no proof that the transcript contains a declaration by the maker and

signed before a magistrate or a justice of the peace as her belief and knowledge that she is liable to prosecution if the statement contains a wilful falsehood.

[10] Learned Counsel for the accused began his response with the case of **Micka Lee Williams v R** - Criminal Appeal No. 16 of 2006 in which Mottley, P addressed the constitutionality of section 105 aforesaid. Having rejected the challenge to its constitutionality, the President went to say as follows:-

> 22. It is clear that a judge who is presiding over a criminal trial has, at common law, an overriding discretion to exclude evidence where the prejudicial effect outweighs the probative value. Nothing in section 105 of the Evidence Act abrogates that common law power. The Evidence Act of Belize does not contain a provision similar to that of section 31 L of the Evidence (Amendment) Act 1995 of Jamaica. Lord Bingham, in **Grant's** case, was of the view that "section 31L declares that in proceedings the court may exclude evidence if in the opinion of the court, the prejudicial effect of the evidence outweighs its probative value." Clearly the learned Law Lord was of the view that the section 31 L was merely acknowledging the power which the judge had at common law. Even though the Evidence Act of Belize did not contain a section similar section 31L, nonetheless, this Court is of the opinion that the common law right of the trial judge to exclude such evidence was not abolished. The existence therefore of that discretion when "conscientiously exercised … affords the defendant an important safeguard" per Lord Bingham in **Grant's** case.
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> 23. The opening words of section 105 do not exclude the common law right of the judge in a criminal trial to exclude evidence where the prejudicial effect outweighs the probative value in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. As this discretion still exists, we consider that the right of a defendant to a fair trial where a statement is to be read into evidence is adequately protected by the existence of the overriding discretion at

> common law. In the circumstances, we do not consider that section 105 of the Evidence Act offends the constitutional guarantee to a fair trial as provided by s. 6(b) and 3(e) of the Constitution. Accordingly section 105 of the Evidence Act, in our view, does not offend the Constitution.

With respect, I have not been able to derive any assistance from that case. The reason being that until the requirements for admissibility under section 105 are established, there is no need for the exercise of the Court's discretion to safeguard the fairness of the trial for the accused.

[11] Accordingly, the Crown's application to tender the transcript is denied.

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KENNETH A. BENJAMIN
Chief Justice