

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 2015/0079

REGINA

V

SHELTON HUNTE

TREVORN FRANCIS

ADRIAN SHAND

APPEARANCES

Mr Adlai Smith for the Crown.

Mr Ralph Francis for Hunte.

Mr Lawrence Daniels for Francis.

Mr Michael Archibald for Shand.

2018: FEBRUARY 22

RULING

On the admissibility of two statements by reason of fear

- 1 **Morley J:** On 19.02.18, I allowed a prosecution application despite opposition from two defendant counsel to admit into evidence the statements of Takuma Forde and his sister Tayika Forde by reason of both being too fearful, if giving evidence, of injury or death at the hands the defendants, their associates, and in particular of Shand. I promised written reasons, which are these.

- 2 The three defendants face a thirteen count indictment alleging *inter alia* shooting with intent to murder and possession of firearms with intent to injure. It is alleged this is a gangland case, where Hunte and Shand were in a gang trying to kill Francis from another.
- 3 On 06.08.13, at around 8pm, there was a shoot-out between two groups among the crowds of carnival at Shantytown on Antigua. A bystander, Judith Wynter, in her sixties, was paralysed. On the prosecution case, Francis had called a man in a yellow shirt a 'pussyhole', or 'punk', for which grave offence led to Hunte striking the face of Francis, both pulled guns, Hunte fired four 9mm shots at Francis (striking Wynter in the spine and Francis in his leg), Francis fired two 0.38 shots at Hunte (striking him superficially in his upper right chest and shoulder near his neck and Takuma Forde in his right hand); Francis ran off, and was pursued, so that at Country Pond, Shand then fired 13 9mm shots at him, emptying an entire magazine, (striking him twice more, in the neck and the other leg).
- 4 On the evidence, Francis, (also known as 'Speedie') was with at least one other, being 'Mika'; while Hunte (known as 'Demon') and Shand (known as 'Yardman') were with at least four others, being Maximillian Roberts, ('Max'), Cadaphey Evanson ('Jon-Jon'), Takuma Forde ('Squal'), and someone called 'Junior Mason'. The two 9mm weapons, each a Glock, said to have been used by Hunte and Shand, (one Glock being linked forensically by an expert named Husbands to the four 9mm shells at Shantytown and the other Glock to the 13 9mm shells at Country Pond), were later found hidden in a vehicle associated with Evanson, who was convicted after trial in the Magistrates Court of their possession and was sentenced to four years imprisonment.
- 5 In police interviews, though not evidence against co-defendants, Hunte said he was with Max, Yardman and Squal at Shantytown, Speedie shot him, and Yardman later told him on the phone he had fired at Speedie and Mika at Country Pond; Francis said Max, with Jon Jon, and called him a pussyhole, while Jon Jon then told Max to shoot who he wants, whereupon Francis was shot in his foot, and that a Jamaican shot at him at Country Pond; Shand, a Jamaican, denied shooting at anyone at Country Pond.

- 6 In summary, 19 shots were fired in public, in two places, between two rival criminal gangs, over someone being called a name, leading to six gunshot wounds, one paralysing an innocent.
- 7 Takuma Forde made a statement to police on 26.08.13 in which he said 'Speedie' had pulled a gun and later in the evening Shand had confessed to him he had fired shots at Speedie at Country Pond. His sister Tayika Forde made a statement on 09.08.13 in which she described, though often hearsay, collecting Takuma that night, he was frightened, his hand was damaged, he had been shot, he refused to go to hospital or make a police report and he told her Speedie had been firing shots.
- 8 On 27.01.18, Tayika made a further statement that Takuma had been threatened by Shand that he would be killed for informing on him, and so had left Antigua in 2014. Shand had also shown her the 'gun finger' on two previous occasions, in 2014 and 2016, when he had seen her in town, suggesting he was threatening to shoot her if she gave evidence. Neither she nor her brother Takuma wanted to give evidence out of fear.
- 9 On 02 and 07.02.18, Cpl Chatham through assistance from Tayika spoke on WhatsApp with Takuma. The conversations were recorded and transcribed.
- a. On 02.02.18, during 3 mins 37 secs, interalia Takuma said:
- Chatham: The statement that you gave the police about Adrian firing shots after Speedy is that a true statement?
- Takuma: Yeah it is.
- Chatham: I'm sorry?
- Takuma: Yes.
- Chatham: Ok. What's the reason why you leave Antigua?
- Takuma: *(Phone breaking up)* dem going kill me *(not discernible)*
- Chatham: I'm sorry. You were breaking up just now. Can you repeat what you just said?

Takuma: I leave because I was threatened by them.

Chatham: By whom?

Takuma: You hear me?

Chatham: By whom?

Takuma: By Adrian

Chatham: Oh by Adrian?

Takuma: Yeah.

Chatham: And how did you know you were threatened by Adrian?

Takuma: I get a call right and he said that...I probably get a call maybe twice. One time he said them don't like me like oh he go send somebody or something like that.

Chatham: Ok and this would have been when?

Takuma: What's that?

Chatham: When was this? When you got the call?

Takuma: That's before I leave, before I leave Antigua.

Chatham: And where was Adrian at the time?

Takuma: He was locked up?

Chatham: Ok. So it was somebody else that gave you that information?

Takuma: No. He call one time on a private number and tell me that.

b. On 07.02.18, during 12 mins 45 secs, interalia Takuma said:

Chatham: I have a few questions that I need to ask you concerning that same matter, so the first question is do you wish to give evidence in this matter, remember this is the matter concerning the shooting up at the east bus station carnival last lap in 2013?

Takuma: Yea I am willing to give the answer.

Chatham: Are you willing to give evidence in this matter?

Takuma: When you say evidence what do you mean?

Chatham: Ok remember you gave the Police a statement about the conversation you had with Adrian after the incident?

Takuma: Yea.

Chatham: Right, that is what we want to know, if you are willing to speak to the court about that statement you gave to the Police?

Takuma: One thing I want to say right I don't mind answering no questions right, I just don't want it to look like I am talking on them and they know.

(Break in connection)

Takuma: What I am saying right, I don't mind answering the question, I just don't want it seem like whatever you guys are asking or whatever you guys are going to say in court and then it end up something else, you know, this is what I am trying to run from, cause the whole drama is I move because of all of this, you know what I mean, I don't mind answering the questions, but I just run from all a this, then I say certain things, and then you know, people come and go after my family and all a that, you know, a just one different story.

Chatham: Ok so you are basically saying you are concerned for your family safety?

Takuma: Yea.

Chatham: If you give evidence in this matter?

Takuma: Sometimes you know I don't understand what it is really all about, you know what I mean, I give a statement already, and then you know so it's kinda like you know, I just kinda worry a kinda how about this, but I don't mind answer the question, me just a worry about my people, them.

Chatham: I understand ok so tell me again why did Adrian threatened you or what you believe is the reason he threatened you?

Takuma: My believe the way the thing happen after whatever I try to come here and as far as I know what they are saying is I rat them out and then run off, so this a way all the threat comes in you know.

Chatham: I understand that and at this moment you are still, that threat is still affecting you, right?

Takuma: Yea, hello? Yea, yea, because when he came out a prison me big sister tell me that he see she and a say to she all kind a thing and a show she gun finger and all a that, so you know

Chatham: Ok would you have a problem if your evidence was video recorded or pre-recorded?

Takuma: No. So let me ask you this, I am giving you all this information, now when you in the court what they do play over this?

Chatham: Well, I have to report to the Judge as to my conversation.

Takuma: I don't want the court, I don't want nothing lead back that the guys them know ok, is he saying this, and they hear me saying this, you know things like that, you know, I don't mind, you know what I mean.

Chatham: Ok I understand.

Takuma: I don't want nothing lead back that way, cause I have people out there and I know them guys how they think, if they can just call me and say they going to do this to me and ra ra and all a that, you know, it's a different story with this thing, cause I just don't know, man.

Chatham: Ok. Let me ask you this other question, do you believe that Adrian Shand is capable of carrying out the threats to your family?

Takuma: Yes.

Chatham: Why you think that?

Takuma: Because two a me sisters tell me he see them and say certain things to them.

Chatham: Do you mind telling me what he said to your sisters?

Takuma: Well one a them tell me he say he say he go shoot which a the big one, or something like that, one day she say she drive pass him someway on one a them street, and he pass her, and he see her, and he look at her, I think either he put gun finger or something, but she say that, I don't know if she did.

(Break in connection)

...

Chatham: Ok the way the system works in court seem as you are overseas, we can have, we can speak with you via Skype, so that is what I want to know, if you are ok with doing it via Skype, or if you do not want to give evidence at all?

Takuma: I don't want to do no Skype I don't mind telling you and you can write it down, and you read it out. I don't want to do no Skype, I don't want to be no target to nobody, I don't think that's right.

Chatham: Ok I understand that, what about for your family members?

Takuma: The same thing, you know like, if you going and Skype they going to know who saying what, you know what I mean, if it can be another way I don't mind like, if I can give you whatever and you guys just read it out or something like that, I don't think that.

(Break in connection)

Chatham: Hi, so you are saying you are not comfortable with Skype?

Takuma: No, the Skype, no. If you can maybe write, you ask the question and I tell you exactly what it is, I will be more safer with that than to be on Skype in a court – na - even if these guys get locked up things can still happen, because they all have phones, they have contact with everybody, they got people out there, you know what I mean?

...

Chatham: Ok, did Adrian specifically threatened to send someone to kill you?

Takuma: Yea. He call on the phone from a private number and say, oh he go send somebody to shoot me, and like I say, one time I was walking after that call some car was following me, they driving behind me, and then I end up and realize that this car is following me, and I end up and take off.

10 On Antigua and Barbuda, **s.37(e) Evidence (Special Provisions) Act No.5 of 2009** provides that:

A statement made by a person in a document including a witness statement tendered in committal proceedings shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person— ... (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.

- 11 I am satisfied that the person on the recording was Takuma Forde because it was Cpl Chatham who originally took his statement of 23.08.13, therefore knew him, and from the recordings it is clear that she was so satisfied.
- 12 I am also satisfied that in the recorded conversation that Takuma Forde was telling the officer of a genuine fear. The indicia of reliability are that what he said was corroborated by his sister in her statement of 27.01.18, and he cross-corroborated her, learning of her fears of her seeing the gun-finger from Shand; moreover, he was desperate not to implicate the defendants, not wanting what he was saying to go back to them, so that it would be illogical for him to lie about a thing he hoped they would never learn. Therefore, though there is the absence of a signed statement from Takuma testifying to his fear, in like fashion to the one from Tayika, where there is a declaration as to the truth of the statement's contents, nevertheless in my judgment I can properly take account of the recordings, which I find to be truthful, as indicating fear.
- 13 In particular, Takuma is fearful of being shot by Shand or someone sent by him for 'ratting' him out, and is further fearful of harm to his sisters by shooting by Shand or someone sent by him. Specifically, he reports that Shand called him and threatened to shoot him. There is therefore established under s37e 'a threat of bodily harm'.
- 14 Takuma is no longer in the jurisdiction of Antigua, being now in Canada, at an unknown location, having left precisely because of his fear, putting himself beyond the reach of the court, and therefore no reasonable steps can be taken to protect him within the power of the court.
- 15 In the recording, at first Takuma appears to be willing to answer questions, but when pressed as to whether he will give evidence, which would have to be by skype as he is overseas, he is categorically against it, saying: *"I don't want to do no Skype I don't mind telling you and you can write it down, and you read it out. I don't want to do no Skype, I don't want to be no target to nobody.... No, the Skype, no. If you can maybe write, you ask the question and I tell you exactly what it is, I will be more safer with that than to be on Skype in a court – na - even if these guys get locked up things can still happen, because they all have phones, they have contact with everybody, they got people out there, you know what I mean?"*

- 16 Arising from how he expresses his fear and his reluctance to give evidence, I am satisfied he is being 'kept away' from the proceedings, in the sense that he is keeping himself away though fear.
- 17 As such, I am satisfied, in the sense that I am sure, that under s37e, Takuma is being '*kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect*' him.
- 18 In these circumstances, the legislation says that his statement 'shall' be admissible.
- 19 The statement is direct evidence of Francis and Shand firing shots. Moreover, it is on the prosecution case the only admissible evidence against Shand.
- 20 Though admissible, the legislation does not mandate admission. Instead I have a discretion. I must weigh the interests of the defence. In particular Counsel Archibald for Shand sensibly argues:
- a. Takuma must be considered an accomplice, as a gang member, and may have self-serving and dishonest reasons for wrongly implicating Francis and Shand;
 - b. Admission of his statement will prevent the defence from showing potentially he was the shooter, in place of Hunte and Shand, and lying about Francis, noting:
 - i. he has distanced himself from the fracas when he must have been in its centre if shot in the hand,
 - ii. and in Hunte's interview Takuma was wearing a yellow shirt,
 - iii. while the witness Rowan Irish says a man in a yellow shirt lifted his top to reveal a gun in his waistband; and
 - c. It would be wrong to admit the evidence if it is the only evidence against Shand, knowing it cannot be challenged before the jury.

- 21 In considering my discretion, there is guidance in **s116 Criminal Justice Act 2003**¹ in the UK on how to approach admission of a statement where there is an established fear of giving evidence. Specifically, at s116 (4) it says:
- Leave may be given [that through fear the...person does not give... evidence] only if the court considers that the statement ought to be admitted in the interests of justice, having regard—
- (a) to the statement's contents;
 - (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence);
 - ...
 - (d) to any other relevant circumstances.
- 22 Turning to 'the statement's contents', they directly implicate Francis and Shand in a serious matter and as such it is the interests of justice to admit it.
- 23 Turning to 'unfairness' and inability 'to challenge', careful direction in clear language, and in writing to the jury, agreed in advance with counsel, will warn the jury of how, before a jury should rely on anything said in the statement, that Takuma may be considered an accomplice and gang member whose implication of others may be dishonest self-service, how a jury must be sure of what Shand may have said to Takuma and that it was true rather than bravado, and how they must reflect carefully on how the defence could not cross-examine him to draw out in court what on the defence case are lies or mistakes. Moreover, the jury will be cautioned to look for supporting evidence before they may feel they should rely on what is in Takuma's statement. With these warnings I consider there will be no unfairness.
- 24 The one remaining 'relevant circumstance' is that for Shand the only admissible evidence against him as the prosecution closes its case is the statement of Takuma. However, there is an indication the statement is true, albeit it stands alone, because Shand and Takuma were friends, sharing accommodation, powerfully suggesting that Takuma would not lie or be mistaken. Owing to their hitherto close relationship, it is more in the interests of justice to admit

¹ See Blackstones 2017 para F17.8.

the statement, than not to by reason of it being the only evidence at the conclusion of the Crown's case.

25 Of course, the position regarding how much evidence there is against Shand may change when and if any defendant later gives evidence implicating him.

26 Concerning Tayika, I am similarly satisfied so that I am sure she is '*kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect*' her, or her children and family. In particular there is no witness protection scheme on Antigua. As to there being a discretion to admit the statement, the 'statement's contents' do not directly implicate anyone (they simply complete the story of Takuma going home that night), and as such there are no other relevant circumstances, leading to no unfairness in admitting her statement.

27 I should mention in concluding:

- a. Counsel for Hunte wants the statement of Takuma and Tayika in evidence; and
- b. In any event, it might be said that the fear expressed by Takuma and Tayika are squarely within the very reason why s37e was enacted.

28 It follows that I have ruled that the statements can be read (and were on 19.02.18), shorn of hearsay, with no reference before the jury to the fears expressed.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

22 February 2018²

² As finalized on 22.02.18 on reading, with digital signature, JM.