EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

Claim Number**: NEVHCR2018/0006**

Between **Director of Public Prosecution**

-and-

Lawvington Forbes

Before: His Lordship Justice Ermin Moise

Appearances:

Mr. Teshaun Vasquez with Mr. Vaughn Henderson of counsel for the Crown
Mr. Patrice Nisbett with Ms. Saundra Hector of counsel for the Defendant

Defendant present

2019: November, 22nd

Decision on No Case Submission

1. The defendant is charged with the offence of murder contrary to the common law. The prosecution alleges that on 16th April, 2016, whilst at Pinney's Beach the defendant did murder Vincie Ferlance. At the end of the prosecution's case, counsel for the defendant made a submission that there was no case for him to answer. I have upheld that submission and these are my reasons for doing so.

The Evidence

2. In the early hours of the morning on 16th April, 2016, Vincie Ferlance was shot at the Lime Beach Bar at Pinney's Beach in Nevis. On 17th April, 2016 Lawvington Forbes was charged for his murder. At a Preliminary Inquiry in March, 2018 he was committed to stand trial and an indictment was laid by the Director of Public Prosecutions on 13th March, 2019.

3. The matter came up for trial on 18th November, 2019 and the prosecution led evidence from a number of witnesses. Mr. Nathaniel Webbe merely gave evidence of the fact that Vincie Ferlance is his son and that he died on 16th April, 2016. He witnessed the autopsy and was aware that his son had been buried.

4. The court also heard evidence from Mr. Cicardo Baker, who worked at the Lime Beach Bar at Pinney's Beach. He has worked at that establishment for 4 years. He knew the defendant, Lawvington Forbes as they had worked together at the Lime Beach Bar. In April, 2016 the witness had worked at the bar for a "couple of months." He knew that the defendant was the head pizza chef at the bar. They worked together for 6 days a week. He states that the defendant had a nickname "Bang Bang". He was able to identify the defendant in court. This witness could not initially recall the events of 16th April, 2016. He did however recall giving a statement to the magistrate during the course of the preliminary inquiry. His memory was refreshed from the deposition he had given during the preliminary inquiry. His evidence was however unremarkable, except that it established that the defendant worked as the head pizza chef at the Lime Beach Bar. In Cross examination he was able to state that he had a good working relationship with the defendant and that he was "fairly easy to work with."

5. The prosecution also led evidence from Ms. Jonessa Jeffers. She states that she is a bartender and waitress at the Lime Beach Bar. In April, 2016 she had worked there for about a year. She knew the defendant as they had worked together. She confirmed that he was the pizza chef. She gave a description of the establishment and indicated that there are two bars and a dance floor. On the night in question she worked at one of the bars as a bartender. This was the smaller bar. There was a fundraising event being held at the establishment that night. By the early hours of the morning the crowd was pretty thick. At the bar, there was sufficient light only for her to see the person she was serving. She could not see persons on the dance floor because it was dark. She then heard a loud bang. She held her head and went down. When the lights came back on she heard that someone had been shot. She observed a gold object lodged into the fridge. She remembers seeing the defendant at the establishment earlier that evening.

6. There were at least three police officers who were apparently on the scene when the incident took place. These were Corporal 624 Cleon Michael, PC 747 Alexis and PC 687 Antonio Brown. Corporal Michael was in the lounge area when he heard a loud explosion. He went to the area of the dance floor but did not observe anything. After communicating with the DJ he then observed some persons trying to get an individual into a car. He got assistance from PC Browne and PC Alexis who both left with the individual in the car. Corporal Michael secured the scene and observed what he thought was a spent shell which was shown to him by someone. He later handed over the scene to Corporal Javern Weekes who is a crime scene examiner.

7. PC Browne also gave evidence. He did not witness the shooting but did observe a crowd surrounding a white car. It was about 3:00am on 16th April, 2016. He noticed PC Alexis was in the driver's seat of the car. He observed Vincie Ferlance in the left front passenger seat. He saw what he thought was blood on his face. He pushed the crowd back, boarded the vehicle at the back seat and spoke to Vincie Ferlance. He was of the view that although Mr. Ferlance had not responded to him, he was still alive at the time. PC Alexander drove the car to the hospital where Mr. Ferlance was handed over to the medical personnel upon arrival. No evidence was led about the medical condition in which Mr. Ferlance arrived at the hospital. What we do know from the evidence of the post mortem is that he died as a result of a gunshot wound.

8. Ms. Angelica Marshall was tendered as a witness for cross examination. Much does not turn on her evidence. She was present at the Lime Beach Bar on the evening, having arrived at about 1:00am. She confirmed that the dance floor was dark. The crowd was thick and people were enjoying themselves.

9. The prosecution then led evidence of PC660 Javern Weekes. He states that he is a crime scene officer and outlined his training and expertise. He attended the scene on the morning of the incident at about 3:00am. He described the establishment as being wooden with two-stories. He noted that there were four dining areas and 3 serving bars; one of which was on the second floor. He observed that the first floor had a bar in the center and another at the southern end. The chairs and tables were removed. He collected the spent shell of a 9mm pistol which was lodged in a refrigerator in the southern bar. He also observed blood droplets at the scene. He followed the droplets to the outside of the bar to the southern end parking area where he saw a puddle of blood.

He visited the hospital and saw Vincie Ferlance lying on a bed and attended the autopsy. Despite his qualifications as a crime scene examiner, PC Weekes gave his evidence entirely from memory and orally. There was not one single photograph of the crime scene and no measurements whatsoever regarding the location of blood and the spent shell in comparison with any other area at the crime scene. Although this witness had collected the shell casing from the crime scene, he could not speak to its current location or what happened to it after he handed it over for safe keeping.

10. Evidence was led from Doctor Valery Alexandrov. He is a qualified pathologist and entered his curriculum vitae into evidence. He states that he conducted a post mortem examination on the body of Vinci Ferlance on 19th April, 2016. He was of the opinion that Mr. Ferlance died from a single gunshot wound to the chest. He explained that a bullet had entered the body through the left mid back, below the shoulder blade. He states further that the bullet perforated the left lung and travelled across the chest. The bullet kept travelling and perforated the right lung and then exited the chest, re-entered the body and exited through the right arm. The amount of blood lost as a result of this injury would have been fatal. It was Dr. Alexandrov's opinion that Mr. Ferlance was shot from the left side and was of the view that the shooter was within a range of 4 to 5 feet from where Mr. Ferlance was standing.

11. The most important witness for the prosecution was Mr. McKinnon Claxton. It is on his evidence that the prosecution has ultimately hinged its case. During the course of the police investigation he was the only witness who claims to have seen the defendant at the time of the shooting. In a witness statement to the police on 16th April, 2016 taken between 15:30 and 17:30 at the Cotton Ground Police Station, Mr. Claxton indicated that he had known the defendant for over ten years. He knew him as Vinton or "Bang Bang". He was aware that he worked at the pizza shack of Lime Bar. He states that he arrived at the bar on 15th April, 2016 at about 12:00pm. On arrival at the bar he had a Guinness and spent the evening at what he described as the small bar. Mr. Claxton stated in that witness statement that the house lights were off but the bar lights were on and that he could see persons at the bar and up to two and a half meters away from the bar. Vincie Ferlance had moved about four steps away from him. The crowd wasn't jam packed but he could see faces

clearly. He had a 180 degree view in and out of Lime Bar. He was drinking and people were partying.

12. This witness, in the statement to the police indicated that at about minutes to three he heard a loud bang and saw a flash. He said the flash came from the defendant's hand and that it was pointing in the direction of the Sunshine Beach Bar. He said that the flash which came from the defendant's hand "illuminated" his face. He couldn't say how the defendant was dressed but that he observed that the defendant quickly disappeared. He later realized that his cousin was lying on the ground with blood coming from his body.

13. This witness allegedly also gave a second witness statement to the police on 21st April, 2016. He however insisted on oath that he only gave one statement to the police. The statement starts off by stating that he was at the bar "when Vinton shot Vincie." I note that in his initial statement he didn't specifically state that the defendant was the shooter but rather that he saw a flash coming from the defendant's hand and that it was pointed towards the Sunshine Beach Bar and Grill. He stated that although the place was dark, he could have seen persons all around. He identified the person who he described as Vinton as Lawvington Forbes and that he lived at Hamilton. He stated that he knew the defendant's brother Lawton Forbes. They had gone to school together and played together. He states that he didn't see what object was in the defendant's hand. He heard the loud bang, saw the flash and noticed that the defendant was pointing in the direction of Vincie Ferlance. He states that the defendant was about 12 feet away from him and that Vincie was 8 feet away from him. He had no vision problems and was definite in his assertion that he saw the defendant's face as the flash of the gun lit up the place. All of this evidence came in the second statement which was dated 21st April, 2016.

14. Despite the statements given the to police, this witness gave a deposition during the preliminary inquiry on 1st March, 2018. During that inquiry the witness resiled from some critical content of his previous statement. Insofar as it relates to the defendant he states in his deposition that:

> ***"there was a loud bang and a lot of commotion. That was after twelve. Yes I saw the accused in the area. I know the accused for a while. About ten years. Yes I would say I know him well. When I heard the loud bang I saw a brief flash. I could not tell which***

direction the sound came from. Music was playing. The flash was a big flash and I didn't not know which direction it came. The accused was in the vicinity of the flash. No I did not see when the accused came onto the dance floor. I can't recall seeing anything about the accused after the flash."

15. During the Inquiry the defendant had acknowledged his statements to the police and read them into evidence. That was the extent of his contribution to the preliminary inquiry insofar as it relates to the allegations he had previously made about the accused.

16. On the day of the trial, the court held a vior dire to determine the admissibility of the identification evidence of Mr. Claxton. The sole issue for consideration under the provisions of section 110 of the New Evidence Act was whether an identification parade was held and if not whether it would have been unreasonable to do so. I ruled that the identification evidence was admissible given the witness' prior knowledge of the defendant. However, on the following day when the witness was called, he failed to appear. A warrant was issued to secure his attendance. He appeared on the following day and gave evidence denying the most relevant portions of his statement to the police. At that point the prosecutor made an application to deem the witness hostile. After extensive submissions in the absence of the jury the court allowed the witness to be cross examined by the prosecutor.

17. Under oath at the trial, Mr. Caxton stated that he heard the loud pop but he didn't know who caused it. He stated further that, persons were having fun, playing and drinking and that there were lighters in the air. He heard a loud bang and there was a flash. That flash was about 15 to 20 feet away from him and he could not tell who it had come from. He said the lighting was moderate but the dance floor was dark. He observed a lot of people when he heard the bang and saw the flash.

18. The previous statements were put to the witness and he maintained his position that he never told the officers that he saw the defendant in the flash pointing anything in the direction of the deceased. In fact, the witness took issue with the terminology of the statement. He indicated that he does not use words such as "illuminate". He therefore gave evidence entirely contrary to the most significant portions of the witness statement, in that although he acknowledges seeing the

defendant in the vicinity of the flash he didn't recognize the flash as having come from his hand, neither did he see the defendant pointing anything.

19. I pause here to refer to an issue which arose during Mr. Claxton's testimony. He stated that during the time which the court was considering the submissions on whether to deem him hostile, he had a conversation with one of the police officers. It turned out that this was the very officer who took the statement from him on 21st April, 2016. The jury was excused and the officer called to verify the allegations on oath. He confirmed that he had spoken to the defendant during the recess. This was a time during which the witness remained under oath. He stated that the defendant had asked for him and enquired as to why he was under arrest. The witness denied to him that he had made the representations contained in the statement. He said to the witness that he gave a statement to the police and that was it. I expressed my displeasure at this. The witness was brought to court under warrant. The officer was not in charge of keeping him. There ought to have been no interactions with this witness whatsoever, regardless of whether the witness had sought to initiate this interaction himself. The statement taken by this very officer on 21st April, 2016 was very crucial to the issues at hand in the trial and his interaction with the defendant was not only inappropriate but perhaps prejudicial to the integrity of the process itself. Despite this, I allowed the trial to continue and was of the view that perhaps a proper warning to the jury could cure whatever negative impact this issue would have had on their minds. However, the witness, even after this incident, continued to insist under oath, and in the presence of the jury, that the officer had spoken to him.

20. The witness continued to deny making the representations claimed in the witness statement. He acknowledged attending the Cotton Ground Police Station and giving one statement, but not two. He recognized his signature on both statements but denied the most critical content therein.

21. The investigating officer was the last witness to be called by the prosecution. He states that he responded to a report on 16th April, 2016. He arrived at the Lime Beach Bar and found that the crime scene officer was at the scene. The investigator was present when the spent shell was recovered from the refrigerator. It was packaged and sealed. The investigator stated that the signed the package. He however could give no further evidence regarding what happened to the spent shell. He also observed blood at the scene but made no further representations regarding that issue.

22. The investigator indicated that he continued his investigations and took a statement form McKinnon Claxton at the police station in Cotton Ground on the afternoon of 16th April, 2016 at about 3:00pm to 5:00pm. He said the statement was requested by the witness but did not give much detail as to how this witness came to be at the police station in the first place. He obtained a warrant to search the premises of the defendant. The warrant was executed on 17th April, 2016 but nothing of any relevance was recovered. The officer essentially denied the evidence given by Mr. Claxton under oath. It was his evidence that he charged the defendant on the basis of the statement made by Mr. Claxton.

The Law

23. The test for determining whether a no case submissions should be upheld is that laid down in the case of ***R v. Galbraith***[1]. It was determined in that case that ***"if there is no evidence that the crime alleged has been committed by the defendant… the judge will of course stop the case."*** Failure on the part of the crown to lead any evidence that the defendant committed the offence will create on obligation on the judge to bring an end to the proceedings. It is however, on the second limb of the test in ***Galbraith*** that the issue becomes far more complicated. The court determined that the challenge arises where ***"there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence."*** In that case Lord Lane determined that:

> ***"(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that the strength or weakness depends on the view to be taken of the witness's reliability, or other matters which are generally speaking to be taken within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."***

[1] [1981] 2 All ER 1060

24. The question for determination therefore, is whether or not the evidence presented by the prosecution, taken at its highest, is such that the jury in this particular case could not properly convict on it. Throughout the trial, the troublesome issue had always been the manner in which to treat the evidence of Mr. McKinnon Claxton. The court ruled his evidence of identification admissible in accordance with section 110 of the Evidence Act. Later on in the trial he was deemed a hostile witness. However, hostile witnesses can also be uncontrollable witnesses; and Mr. Claxton proved to be just that. He gave evidence of a conversation he had had with one of the officers who took his statement on the very day of the trial. He resiled from the most damaging evidence given to the police and insisted that he never saw the defendant shoot the deceased. What is important to note however, is that without his evidence there can be no conviction of the accused. This makes his evidence highly probative but also somewhat prejudicial as the prosecution seeks to rely on hearsay evidence which runs contrary to what the witness had to say under oath.

25. During the course of the submissions on the issue of whether the witness should be deemed hostile and his previous witness statement be put to him in evidence, the court pointed the prosecution to the case of ***The Queen v. Kerwin Charles***[2]. In that case, Cumberbatch J held a voir dire to determine the admissibility of evidence of identification. The particular witness had given a previous statement to the police claiming that he heard about 8 or 9 loud explosions which sounded like gun shots. The deceased came staggering towards him and stated that "the man shot me Charlie and I feel like dying." The witness looked up and saw the defendant about twenty feet away with a chrome coloured firearm in his hand." Despite this statement, the witness resiled from that evidence at the voir dire. The crown called no other identifying witnesses and Cumberbatch J was therefore of the view that the evidence ought not to be admitted to the jury.

26. The challenge therefore for the prosecution is that no one else claims to identify the defendant as the shooter and the question for determination is whether it would be safe to allow a jury to prospectively convict the defendant, not on the evidence given by the witness in court, but on a previous statement which he had given to the police? Cumberbatch J was of the view in the case of ***Kerwin Charles*** that that evidence ought not to have even gone to the jury. However, it would

[2] SLUCRD2010/0518

be difficult to place much reliance on that case without full knowledge of what other evidence may have been available as compared to the circumstances of the present case. What is important to note however, is the inherent danger on relying on a witness statement in circumstances where the witness has recanted the most significant aspects of that statement whilst under oath.

27. In giving consideration to this issue I draw my mind to the decision of the Caribbean Court of Justice in the case of ***Jephat Bennet v. the Queen***[3]***.*** Whilst this case may not necessarily be binding on me I do find myself in agreement with the approach adopted by the majority of the judges of the panel. The circumstances of that case are similar to the present. The witness in question had given a statement to the police identifying the defendant as having committed the offence. He resiled from that position under oath and was deemed hostile. He was convicted of the offence despite the fact that this identifying witness was the only evidence linking him to the crime. His appeal was denied by the court of appeal of Belize but upheld at the CCJ. In its disposition of the matter the CCJ noted the following:

> ***A court should not allow a trial to proceed on the untested previous statement of a witness who abandons all material parts of it, where it is the sole evidence of identification, there is no other evidence to support the statement, it has not been shown by the circumstances or other factors to be reliable, and there is no other evidence against the accused. In such a situation it is unfair to admit the statement and the judge should halt the trial.***

28. This disposition was contained in the judgment of JCCJ Barrow. However a perusal of the published judgment in its entirety would reveal that the judges of the CCJ held different views as to the manner in which this type of evidence is to be treated. The majority held that the evidence was too unreliable to have been left to the jury. However, Justice Barrow was of the view that the evidence ought not to have been admitted in the first place, whilst Justices Witt, Hayton and Anderson held the view that the judge acted properly in admitting the previous statement, but ought to have upheld the no case submission made by counsel at the end of the prosecution's case. Mme Justice Rajnauth-Lee dissented altogether and was of the view that the conviction was safe.

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3 [2018] CCJ 29 (AJ)

29. Given that this court had already taken the view that the evidence was to be admitted after giving due consideration to the provisions of section 38, 42 and 58 of the New Evidence Act, consideration must now be given to the rational for the decision of the majority in the case of ***Jephat v. R*** which was delivered by JCCJ Witt. The starting point is for the court to remind itself of the functions of the judge and the jury in a criminal trial. As JCCJ Witt noted ***"the jury is the trier of the facts, not the judge."*** In cases such as the present, where a crucial witness for the prosecution resiled from a previous statement given to the police, the witness becomes inherently unreliable. The question for consideration is whether his previous statement can be relied on in determining the guilt or innocence of the defendant. However, ***"it is the jury that decides what weight should be given to the evidence, which includes an assessment of its reliability."***

30. However, JCCJ Witt was also careful to point out that ***"procedural fairness is an overriding objective of the trial."*** He also goes on to note that "***verdict accuracy … is equally important and must also be considered."*** Insofar as that was the case, Justice Witt held that view that "***a procedurally fair process leading to an obviously inaccurate result can hardly be called fair, especially if the verdict is a conviction of a possibly innocent person. It is therefore obvious that the judge's duty to ensure a fair trial must also include safeguards against reaching an inaccurate or wrong conviction."***

31. I understand JCCJ Witt to be making the point that the constitutional principles of fairness are overarching and the judge must bear that in mind, notwithstanding the fact that he is not the trier of fact. Insofar as that is the case, he must ensure that the process does not lead to an inaccurate result, whether or not the procedure adopted during the course of the trial was improper. A trial which results in a potentially inaccurate verdict is not rendered fair merely because proper procedure was followed. It is perhaps for this reason the court had always retained "***the power to filter out (exclude) the evidence to be placed before the jury; and the power, upon a no case submission by the defence at the close of the prosecution's case, to uphold that submission, stop the trial and direct the jury to acquit."***[4] Despite legislative intervention over the years, this common law principle has stood the test of time. JCCJ Witt therefore concluded that

[4] See ***Jephat v. The Queen***, paragraph 7

"***the second limb of Galbraith allows the judge, to a great extent, room to achieve procedural fairness and to safeguard a sufficient level of verdict accuracy."***

32. The issue in the present case is that once the witness had recanted his previous statement he became an unreliable witness. He clearly has not told the truth at one point or another. Whether it is a deliberate lie or a lack of memory is not the issue. In order for the prosecution to be successful in securing a conviction, the jury must find some basis upon which to conclude that his previous statement to the police is reliable to the extent that they feel sure that the defendant was seen by him on the night and in the manner so described to the police. All of this must be done despite his evidence on oath, both at the preliminary inquiry and at trial, that he simply did not witness the defendant commit the offence. As it relates to the manner in which the court ought to treat this issue JCCJ Witt noted the following in his judgment:

> ***We are therefore of the view that the proper approach for Belize would not be to require the judge to make a finding on the reliability of the hearsay evidence (prohibited by Galbraith) but to limit himself to the question whether the hearsay evidence could safely be held to be reliable. That test does not go to the reliability of the evidence as such, which would be for the jury to assess, but to the pre-condition of the quality of the evidence, more or less in the same way as in Turnbull where the judge must exclude inherently weak identification evidence.***

33. During the course of argument on the issue of whether the witness should be deemed a hostile witness, I raised a concern with counsel for the prosecution on the question of whether it would in fact be safe to allow a jury to possibly convict the defendant on the previous statement of a witness in these circumstances. It is no doubt the only evidence of identification and it can hardly be said that it is reliable evidence, coming from a witness of Mr. Claxton's disposition. I took the decision however, to allow the application on the basis that the prosecution had not closed its case and that perhaps some evidence may be led, especially by the investigating officer, which may provide some basis upon which the jury may be able to test the reliability of the witness' previous statement. I find support for that approach in the judgment of JCCJ Witt where he states that ***"in the course of the trial evidence may be adduced which will strengthen (or weaken) the***

hearsay, this being good reason why it would be prudent and in the interest of justice to allow the adducing of further evidence." Justice Witt goes on to state the following:

> ***"In our view, the judge should therefore in principle admit (admissible) hearsay evidence when it is introduced if there is at least a reasonable possibility that eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence could in the end safely be held to be reliable."***

34. It appears that various courts across the commonwealth have grappled with different ways in which to entreat an issue of this nature. JCCJ Witt highlighted the fundamental issues which the trial judge must consider as established in the English authority of ***Riat et al v. The Queen***[5]***,*** where it was noted that the judge should consider:

    (a) the strengths and weaknesses of the evidence;

    (b) the tools available to the jury for testing it, and

    (c) the importance of the evidence to the case as a whole.

35. Justice Witt also considered the authority of ***R v. Friel***[6]***,*** where the English court of appeal suggested that the judge should consider (1) the importance of the evidence, (2) the risks of unreliability and (3) the extent to which the reliability of the evidence can safely be tested and assessed by the jury.

36. It is on this third limb in ***Friel*** that I found myself somewhat troubled at the point at which the prosecution sought to deem this witness hostile. As indicated earlier, I enquired of counsel for the crown as to whether a conviction based purely on the previous statement given by the witness could be deemed to be safe. Counsel was firm in that position. However, in ***Japhet Bennet*** Barrow J was of the view that where a witness had resiled form his previous statement in such an instance he had become unreliable and if the judge came to that conclusion it ***"would have obliged [him]***

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[5] [2013] 1 All ER 349
[6] [2012] EWCA Crim 2871

to decide, as a threshold question if the admission of the statement had been challenged, what evidence existed that could allow him to find Middleton nonetheless a reliable witness, and make it fair to admit his statement and put it before a jury for them to believe or not."

37. That approach would have required a determination of whether, objectively, the statement of Mr. Claxton to the police could amount to reliable evidence of his identification of the defendant as the shooter. If it could not then the statement ought not to be admitted in the first place. However, I do prefer the approach of the majority of the CCJ in that decision. Ultimately the prosecution had not called all of its witnesses and it may very well have been open for the prosecution to satisfy me that the test had been met after calling the investigating officer who would have been able to shed some light on the circumstances of how this statement came to be taken. I would only add that, having deemed the witness hostile, it would have been for the prosecution to lay the proper foundation with Mr. Claxton prior to being able to lead the investigating officer down that road in his own evidence. The witness must have been given an opportunity to address the circumstances under which this statement was taken before the investigating officer could address it in his own evidence. In the end I would refer to the penultimate paragraph of the judgment of JCCJ Witt where he states the following:

> ***Where at the close of the prosecution case a no case submission is made, which, one can assume, will be standard in cases like these, the final test is whether the evidence thus far produced could safely be held to be reliable "as it is for the jury to decide whether in fact the evidence is reliable or not." This is what in the Canadian terminology could be called the "threshold reliability" (although it is there applied to the admissibility issue). If that test is met, the judge will leave the evidence for the jury, after having given them the necessary directions, to consider its "ultimate reliability." If it is not met, the judge should conclude that the evidence is inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge will uphold the submission and direct the jury to acquit the accused.***

38. I find this to be the proper approach to take in cases such as these. From the onset it must be said that it would be difficult for the court not to accept that the evidence of Mr. Claxton is, in general,

inherently unreliable. The question therefore, having heard the evidence in its totality at this stage, is whether there is any evidence which has emerged which could assist in determining the reliability of the hearsay evidence. The witness clearly has not told the truth at some point. However, I do note that from the preliminary inquiry stage he has been consistent in denying that he identified the defendant as pointing anything in the direction of the deceased on that night. Even if I were to take the statement given to the police at its highest, I find the circumstances under which he claimed to have made the identification to be weak. This case is somewhat worse than a fleeting glance case. He was adamant that the flash which allowed him to identify the defendant was quick and he appears to be the only witness who claims to have been able to see faces in what was described as a dark dance floor on that evening.

39. The investigating officer simply acknowledged that the statement was typed by him at the Cotton Ground Police Station where the witness was present. He states that the witness requested that the statement be taken down but does not give much more detail about the circumstances. Even during the examination of the witness, Mr. Claxton, not much was put to him regarding the circumstances under which he came to give the statement taken by PC Mills. He acknowledged giving a statement at the Cotton Ground Police Station but consistently denied the most critical parts of that statement.

40. I am also mindful of the fact that there were two statements allegedly taken from this witness. The officer who took the second statement did not give any evidence. In fact it is clear that this officer was engaged in a conversation with the witness in the course of an interval during which the witness was still under oath. I find this it to be highly prejudicial, given the fact that this issue emerged initially in the presence of the jury. Be that as it may, the witness corroborated much of what he had to say about the setting on that evening during the course of his evidence in court. That much was consistent with both statements. What he denies is ever stating to the police that he witnessed a flash coming from the defendant's hand and that he had anything in his hand pointing in the direction of the deceased. What then are the tools which the jury would be able to use to determine the reliability of the statements initially given to the police?

41. Mr. Vasquez for the crown argues that there are tools available to the jury. He submits for example that the pathologist testified that the shooter must have been about four to five feet from the

deceased. In the witness statement given the police Mr. Claxton states that he observed the flash coming from the defendant's hand and that the defendant was about 12 feet away from him at the time. He also states that the deceased was standing 8 feet away from him. Mr. Vazques therefore argues that this corroborates the doctor's evidence in that the jury is able to find that the defendant was in fact about four feet from the deceased given what this witness had said in his witness statement. This, according to Mr. Vasquez, made the statement more reliable than what the witness stated in evidence at trial and the preliminary inquiry.

42. For my part, I do not agree with that submission and find force in the argument put forward by Mr. Nisbett for the defence. Even if one were to exclude the fact that the witness had resiled from his statement, I find that evidence to be below the threshold which would have been required to assist the jury in determining the issue of reliability. Firstly, this is a witness who claims to have been consuming alcohol for at least two and a half hours before the shooting. Every other witness who appeared for the prosecution indicated that the dance floor was too dark to see any faces. Yet this witness claims to have been able to see faces even before the flash allegedly went off. Ultimately, the issue for consideration is whether there is any other evidence which the jury can rely on to test the reliability of what is essentially hearsay evidence from a witness who is clearly unreliable. There is something to be said about the nature of the investigation and its ability to speak to that issue.

43. I note, for example, that the crime scene officer arrived on the scene at about 3:00am. From the evidence this would have been less than half an hour after the shooting had taken place. He observed the blood droplets as well as a spent shell embedded in a fridge. He was able to give an oral description of the scene and took the shell casing into police custody. Yet he appeared to have taken no photographs or any measurements which may have been relevant to the issue. He was not even aware of where the spent shell ended up and did not present it in evidence. In addition, if Mr. Claxton had voluntarily called on the police station to give a witness statement as claimed by the investigating officer, it would have been more than prudent to have visited the scene with him in order to ascertain precisely what he was pointing out. The investigation did rather little to reconstruct the scene and sought to rely almost entirely on the eyewitness testimony of a witness who admitted in evidence that although he was not highly intoxicated, he did suffer some of the effects of alcohol on that evening.

44. To my mind, the evidence of the blood may have been relevant in assisting in determining where this deceased was shot in the dance floor. The spent shell would have assisted in determining the caliber of weapon used and the mechanics of that weapon. Given the nature of the witness' statement, which speaks to approximate distances and the flash from the discharge of the firearm, this evidence may very well have assisted in testing the veracity of what he had to say to the police. It is not that the court wishes to be overly pedantic. It must however be observed that this defendant is brought before the court on a murder charge and it is incumbent on the prosecution to present evidence upon which a jury, properly directed, would be able to determine beyond reasonable doubt that the defendant is guilty. To rely on hearsay evidence, which is itself tenuous, from a witness who has resiled from the most critical aspect of his testimony, would render a possible verdict of guilty, highly unsafe. This does not satisfy the requirement of the court ensuring that the verdict is safe and it would be remiss of me, as the presiding judge, to allow this trial to proceed any further.

45. I note that Mr. Vasquez for the crown also submitted that the fact that the witness gave this statement on the very day of the incident is further evidence which the jury can consider in determining its reliability. In ***Jephat v. R*** the CCJ did note that the witness in that case gave his witness statement two days later. It was held that this made the identification more unreliable. It was further observed that a witness who gives a statement immediately after the incident is more likely to have been seized with genuine emotion. This raises the level of reliability of the statement.

46. However, I do not agree with the submissions of the crown. The statement was given at the police station between the hours of 3:00pm and 5:00pm on 16th April, 2016. The shooting took place at approximately minutes to three in the morning. There were a number of police officers at the scene even at the time of the incident. Two of them escorted the deceased to the hospital while the other secured the scene. The crime scene officer had arrived by 3:00 am and so did the investigating officer. The witness states that he heard that the gunshots and initially hid behind a speaker for two minutes. Before leaving the scene however he observed that his cousin Vincie was shot. He shined his light on Vincie's face and observed his body. He states that "I realized by cousin was lying on the ground with blood coming from his body." Despite this, he left the scene and said nothing of what he had observed to any of the police officers or anyone else at the scene. This is his cousin

and he, according to the statement, had a clear view of who had shot him. Yet he went home and kept that information to himself. To my mind, this does not seem to fall within the circumstances described by the judges of the CCJ which can amount to evidence of a witness so overcome by emotion so as to render his witness statement given to the police any more reliable. It is further compounded by the fact that sufficient evidence had not been led as to how the witness came to be in the police station in the first place.

47. I am mindful of the fact that there is a significant increase of gang related violence in these Caribbean islands. Parliament, as well as the courts, has recognized that persons who give previous evidence to the police may later resile from their statements purely out of intimidation and threats. It is for this reason that parliament has intervened and allowed the courts to tender previous statements to be considered by the jury. However, as noted by JCCJ Barrow, there must be some evidence on which to the jury can rely to conclude that there was any intimidation of a witness. In circumstances of gang related violence there may also be an incentive for persons to give false information to the police. It is therefore the case that relying on hearsay evidence in such circumstances remains a troublesome issue. It is evidence not taken under oath during which time the jury would be unable to observe the demeanor of the witness. There must therefore be adequate tools to enable the jury to test the reliability of the evidence. These may include other evidence which may corroborate what was said by the witness in the written statement or which may allow a jury to conclude that it was unlikely that the witness had fabricated what he had said to the police prior to his recantation in court.

48. In the circumstances of this case, I am not satisfied that the jury would have had sufficient tools to give adequate consideration to the statement given by Mr. Claxton to the police. A conviction on the basis of the evidence presented in this trial would have been unsafe. I therefore upheld the submissions of counsel for the defendant that there was no case to answer and directed the jury to return a verdict of not guilty.

Ermin Moise
High Court Judge

By the Court

Registrar