IN THE HIGH COURT OF BELIZE, A.D. 2023

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C55/2020

THE KING

v.

DELSON PAGUADA

TIONNE PAGUADA

TIMOTHY CARCAMO

BEFORE: **The Hon. Mr. Justice Nigel Pilgrim**

APPEARANCES: **Ms. Romey Wade for the Crown**

Mr. Leeroy Banner for the Defence

DATES OF HEARING: 6th, 7th, 8th and 9th June, 2023

DATE OF DELIVERY: 13th June, 2023

RULING ON NO CASE SUBMISSION

1. Delson Paguada, Tionne Paguada and Timothy Carcamo (hereinafter "Accused #1, #2 and #3 respectively") were indicted for the offence of murder, contrary to section 117 read along with section 106(1) of the ***Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020***, ("hereinafter the Code") arising out of the death of Jimell Jex (hereinafter "the deceased") on the 23rd day of January 2018.

2. The Crown's case is that the deceased was killed in San Pedro Town as a result of gunshot wounds inflicted by Accused #2 and #3 with the encouragement and/or assistance of Accused #1. Dr. Loyden Ken opined that the cause of death of the deceased was acute cranioencephalic traumatic injuries due to multiple perforating gunshot wounds to the head.

3. Mr. Banner, for the three Accused, has submitted that there is no case to answer against any of the three Accused. He relies on the second limb of the test in the case of ***R v Galbraith (1981) 1 WLR 1039***, namely, that the case is so weak because of its inconsistencies or vagueness that no reasonable tribunal of fact could convict on that evidence.

4. This submission that the case against the Accused was irredeemably weak was made on the following bases: (i) the discrepancies in the description of the assailants and the shooting itself between Dion Neal, Adriana Barreto and Phillipa Pamela Zetina ("Ms. Zetina"); (ii) inconsistencies within the evidence of Ms. Zetina relating to the description of the Accused and the shooting; (iii) the use of photographs in the identification of Accused #3 in what the Defence contends was an irregular manner; and (iv) there was a failure to properly investigate Accused #3's alibi.

5. Ms. Wade, for the Crown, has submitted in response in summary (i) that the Crown's case must be taken at its highest; (ii) that the discrepancies between the witnesses can be resolved by a reasonable tribunal of fact on the evidence; (iii) that Accused #3 proffered no real alibi to investigate; and (iv) the identification by photograph was permitted. The Crown submitted that the conditions for making a good identification were present at the time of the identification and in that regard any issue of the reliability of the sole identifying witness is a matter for the Court's fact finding function and that the case should not be stopped against any of the Accused at this stage.

6. The Court now considers the legal rules governing this application relevant to the circumstances of this case.

THE LAW

7. The case of murder against the three Accused stands or falls on the recognition and identification evidence of Ms. Zetina. The Court has obtained great assistance from a decision of our Court of Appeal, ***Nelson Gibson v R, Crim. App. 10/12*** on the consideration of a submission of no case to answer in the context of identification evidence. In that case the trial judge was faced with a no case submission on the basis of an inconsistent eye witness, Horacio, per Mendes JA:

> *"[30]* ***The no case submission made on behalf of the appellant required the trial judge to straddle two complementary***

principles relevant to the consideration of a case which is said not to be fit to be put before a jury. *The first is that represented by cases such as Pop, endorsing the approach suggested by the English Court of Appeal in R v Turnbull [1977] Q.B. 224.* ***It involves an assessment of the strength of the identification evidence taken at its highest****.* ***The second is that originating from the decision of the English Court of Appeal in R v Galbraith (1981) 1 WLR 1039, and adopted and applied by this Court in cases too numerous to mention****. The well-known passage from the judgment of Lord Lane CJ (at p 1042) is once again deserving of quotation in full: "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.* ***(2) The difficulty 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****.* ***(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 its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking 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.*** *. . . There will of course, as always in this branch of the law, be* ***borderline cases. They can safely be left to the discretion of the judge****."*

[31] ***The Turnbull approach to identification evidence is an example of the category 2(a) type case referred to by Lord Lane****.*

[32] In this case, however, ***the strength or weakness of the identification evidence tendered depended largely upon the reliability of Horacio's account of the circumstances in which he said he recognised the appellant as the gunman wearing the red rag which slipped down enough for him to be recognised, who shot at him outside the back door of the shop and who he later saw fleeing the scene after he heard gunshot from within.*** *If the jury believed that he knew the appellant for 10 - 15 years, that the rag slipped down his face far enough for him to be recognised, that the light was 'good enough' and that Horacio had him under observation for five minutes, they could properly come to the view that the appellant was the shooter.* ***Even though the trial judge may have had concerns about Horacio's credibility, it was for the jury to assess the reliability of his evidence and, having done so, to then determine, properly directed, whether the identification evidence was such that they were sure that it was the appellant who shot Mirna.*** ***This being a case which ultimately turned on Horacio's creditworthiness in relation to the strength of the identification evidence, the judge was correct not to take it away from the jury****. It would have been different if, taken at its highest, the identification evidence was poor and not supported by other evidence*

led by the prosecution. That is the classic Turnbull type case. As Lord Mustill pointed out in Daley v R [1994] 1 AC 117, 129:
"... in the kind of identification case dealt with by Reg. v. Turnbull [1977] Q.B. 224 ***the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction****: and indeed, as Reg. v. Turnbull itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice." (emphasis added)*

8. The Court derives the following propositions from *Gibson*:
   i. When considering this submission, the Court must take the Crown's identification evidence at its highest.
   ii. The Court, in its first stage of identification evidence assessment, must examine the evidence to determine if the base of the witness's identification is so slender that this case should not pass to be considered in its fact-finding function.
   iii. The Court, in its second stage of *Galbraith* quality assessment of the evidence, must assess whether the case is so weak because of inconsistencies and/or vagueness that no reasonable tribunal of fact could, though not must, convict. In that regard the Court reminds itself of the law as set out in the Belizean Privy Council decision of ***Ellis Taibo v R 48 WIR 74,*** a case the Board itself found was weak and confusing, per Lord Mustill, at page 83:

*"**All in all, although the case against the appellant was thin, and perhaps very thin, if the jury found the evidence of Jane Cruz, Cons Guzman and Francisco Valerio to be truthful and reliable there was material on which a jury could, without irrationality, be satisfied of guilt. This being so, the judge was not only entitled but required to let the trial proceed**" (emphasis added)*

9. The Court also notes the decision of the Privy Council in ***Larry Jones v R, 47 WIR 1*** that even if an identification is made in less than ideal circumstances, the reliability of the evidence of the identifying witness is generally a matter for the tribunal of fact, per Lord Slynn of Hadley:

"The real attack on Mrs Taylor's evidence in this case was principally that it was not sufficiently reliable to found a conviction and therefore should not have been left to the jury.

> ***Their lordships consider that the trial judge, in ruling that even if the circumstances were not ideal the case should be left to the jury on the question of identification, was entitled to take the course he took. Whether Mrs Taylor recognised the accused man in all the circumstances was essentially a question for the jury rather than for the judge to decide****. The jury would be very familiar with the degree of light available at that time and they had had the opportunity of seeing Mrs Taylor and would have the opportunity of seeing and perhaps hearing the accused.* ***Even if there were some discrepancies in the evidence and even if the quality of identification was not of the best, it cannot be said that no reasonable jury could convict. Their lordships accordingly reject the argument that the judge erred in not ruling that there was no case to answer****." (emphasis added)*

10. The Court is also of the view that the test for a no-case submission is no different in a judge-alone trial than the *Galbraith* test that would be applied in a trial with a jury. In support of that proposition the Court relies on the decision of the Northern Ireland Court of Appeal in ***Chief Constable v Lo [2006] NICA 3***, which was referred to with approval by the editors of the ***Criminal Bench Book for Barbados, Belize and Guyana***, per Kerr LCJ:

> *"[14]* ***The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in Galbraith****. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact.* ***It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict****. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict." (emphasis added)*

ANALYSIS

Accused #1 and #2

11. The only evidence against Accused #1 is that of Ms. Zetina that she recognized him as one of the persons with the principals, Accused #2 and #3, who actually shot the deceased. There is evidence that he came with the shooters and left with them, and evidence emerged in cross-examination that he further assisted the principals by pulling the deceased off his bike, the clear inference being that this was before he was shot. In the Court's view a reasonable tribunal of

fact can conclude that Accused #1 was part of a joint enterprise with Accused #2 and #3 to kill the deceased. The Court relies on the recent decision of our Court of Appeal in ***Eli Avila Lopez and Anor. v R, Crim. App. 22-23/18*** as authority, at paragraphs 36-51.

12. The only evidence against Accused #2 is that she recognized him as one of the two principals who shot the deceased.

13. Ms. Zetina gave evidence:

    (i) that the area where she observed Accused #1 and #2 was very bright, as it was 5:30 p.m. and the sun was out. The Court is of the view that a reasonable tribunal may find that this contention is supported by the photographs contained in J.S. 2;
    (ii) that she was 30 feet away from Accused #1 and #2, and that absolutely nothing prevented her from seeing them and that she saw their whole body including their faces. Though she accepted that it is contained in her statement that she did not see their full body as they were more to the side of the street. She explained that apparent inconsistency by saying that she may have been referring in the statement to the scenario before the deceased fell of his bike but, "I did see their whole body as the guy dropped from the bike." Ms. Zetina also mentioned persons passing in the area but did not accept that anyone passed in between her and Accused #1 and #2 obscuring her view;
    (iii) that she had Accused #1 and #2 "in my sight for about 40-50 seconds."; and
    (iv) that she knew Accused #1 and #2 for 15 years since they were children. The witness did in fact accept that it was contained in her statement that she said she knew Accused #1 and #2 for 20 years and they were not yet 20 years old at the time. Ms. Zetina said she would see them almost every day because they used to live in town. She had seen them two weeks before the incident and had spoken to them.

14. The Court is of the view that the base of this identification evidence is not so slender that the case should be stopped on that basis. The Court believes that a reasonable tribunal of fact can find, taking the evidence at its highest, that a 50 second unimpeded observation from 30 feet in sunshine from a person known to the both Accused for 15 years are circumstances that could lend itself to a proper identification.

15. By contrast, our Court of Appeal in ***Allen James v R Crim. App. 7/09,*** at paragraph 14, held that a 3-4 second face to face recognition was not so poor that the case should be withdrawn from the tribunal of fact. The frightening circumstances of the identification was also a matter considered to be appropriate for evaluation by the tribunal of fact in *James,* at paragraph 13.

16. Mr. Banner complained that no physical description was given of Accused #1 and #2. The Court notes firstly, though it was suggested to Ms. Zetina that she did not know the two Accused as well as she said she did, it was never suggested that she did not know Accused #1 and #2 at all. It was not suggested that her evidence that Accused #2 attended school with her daughter was untrue. It was not suggested that the evidence Ms. Zetina gave about speaking to Accused #1 and #2 two weeks before the incident was untrue. In these circumstances the Court finds that a reasonable tribunal of fact can conclude that this is indeed a true case of recognition as it relates to Accused #1 and #2.

17. Secondly, the Privy Council, in a case out of Jamaica, ***Rose v R (1994) 46 WIR 213***, held that in that matter where there was no physical description at all given by an identifying witness in their statement that this did not prevent the case from going to the tribunal of fact, per Lord Lloyd of Berwick at page 215:

> *"Mr Hooper made a number of powerful points on behalf of the appellant .... (2) The evidence relating to the two previous occasions when the witness had seen the appellant in the square was, to say the least, unsatisfactory. There was no evidence in- chief that the witness knew the appellant to speak to, and in cross-examination he agreed that he had not spoken to him on the two occasions in question. He merely passed him in the street. In those circumstances one is left to wonder what, if any, reason he had for remembering him.* ***(3) There were material discrepancies between the evidence which the witness gave at the trial and the evidence which he had given at the previous trial. (4) The witness must have been in a state of considerable alarm. Mr. Hooper relied in that connection on certain observations of the Board in Bernard v R (1994) 45 WIR 296. (5) The witness does not appear to have given a description of the appellant in his statement to the police, if indeed he gave a statement. And (6) finally, Mr. Hooper pointed to the prolonged and unexplained delay in holding the identification parade.***
>
> ***Their lordships have given anxious consideration to this case, depending as it does on the uncorroborated evidence of a single eye-witness. Nevertheless, they are not persuaded that the case ought to have been stopped by the trial judge."*** *(emphasis added)*

18. In discharging its *Galbraith* assessment, the Court notes that there are discrepancies between the evidence of Ms. Zetina, Neal and Barreto with regard to how the incident occurred and its perpetrators, as well as internal

inconsistencies in the evidence of Ms. Zetina. However, in the Court's view these are matters which do not rise to the level that would make it impossible for a reasonable tribunal to convict. In making this finding the Court notes the words of the Court of Appeal in *Gibson*, on the facts of that case, again per Mendes JA:

> *"29…**True it is that there was concern that he may not have recognised the appellant at all, which would have explained why he did not finger the appellant in the first statement he gave to the police**. True it is, as well, **that his description of the clothes the gunman was wearing was different from the description given by his wife of the man who shot their daughter. His evidence that the lighting conditions were good enough, on one view of the evidence, was contradicted by the Crime Scene Technician, but to be fair, corroborated by Sergeant Westby at least in part**. And **he gave an inconsistent account of the existence of the facial hair he saw on the gunman's face.** There were also instances where **he gave inconsistent evidence not directly relating to the conditions under which he was able to identify the appellant. But it appears to us that these were matters for the jury to resolve. The fact that it might have appeared that his evidence had been discredited did not gainsay that, on one view of the evidence, the conditions under which the appellant was identified could not be described as poor, thereby warranting the withdrawal of the case from the jury**." (emphasis added)*

19. The Court in those premises overrules the no-case submission in respect of Accused #1 and #2.

Accused #3

20. The case against Accused #3 stands or falls on the pure identification evidence of Ms. Zetina that she saw him as one of the two principal shooters who shot at the head of the deceased. Though there was reference in the evidence to a group identification, that evidence was not fulsomely led and in that regard the Court treats the identification by Ms. Zetina as a dock identification. The Court admitted that evidence in its discretion owing to the refusal of Accused #3 of an identification parade which was agreed evidence between the parties. The Court relied on the Bahamian Privy Council decision of ***Tido v R (2011) 79 WIR 1*** where Lord Kerr opined:

> *"[21] **The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded***

> ***as permissible in only the most exceptional circumstances****. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused.* ***Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity****.*
>
> *…*
>
> *[22]…If there was no good reason not to hold the parade this will militate against the admission of the evidence.* ***Conversely, if the defendant resolutely resists participation in an identification parade, this may be a good reason for admitting the evidence****." (emphasis added)*

21. The identification evidence of Ms. Zetina as it related to Accused #3 was as follows:
    (i) the area was bright, and there are, again, the photographs in J.S. 2 which a reasonable tribunal of fact may find supportive.
    (ii) she was, taken at its highest, 20 feet from him during the incident.
    (iii) she had him in her view for 2 minutes and she had an unobstructed view of his body and face.
    (iv) there were inconsistencies as to the height of Accused #3, his clothing in that whether he was wearing a khaki or jeans pants, and his hairstyle; and
    (v) she testified in cross examination that she was aided in her identification by being shown photographs in a rogue's gallery, after she had given her statement.

22. The Court is of the view on the authority of *Gibson*, *James* and *Jones* that the conditions in which this identification was made are not such that no reasonable tribunal of fact could convict or is so poor that it should be withdrawn.

23. The Court is of the view that the use of photographs and the impact that that had on Ms. Zetina's identification of Accused #3 is a question of the fairness of the identification procedure, which is a matter for the Court's fact-finding function. The Court relies, in this regard, on the authority of a decision of our Court of Appeal in ***Wayne Martinez v R Crim. App. 9/07***, per Sosa JA:

> *"[14]…****It is, however, in the opinion of the Court, well established that the question whether an identification parade was fair is***

> ***one of fact which, rather than deciding himself, the trial judge is bound to leave to the jury."*** *(emphasis added)*

24. In that regard the Court also notes the dicta of the Privy Council in ***Ken Charles v R (2007) 70 WIR 158***, a decision from St. Vincent and the Grenadines, on the issue of photographs. In that case Lord Carswell opined:

> *"[12]…**As the authors point out, when the police are looking for a culprit, the showing of photographs to witnesses may be essential; indeed, it may be the only way in which the culprit can be identified. Once he has been picked out and is available to take part in an identification parade, photographs should not be shown to witnesses. They should instead be asked to attend an identification parade, as should also the witness or witnesses who picked the suspect out from photographs**." (emphasis added)*

25. This legal position is seemingly reflected in Belize in the ***Police Standing Orders, Crime and Criminal Investigation Ch. 55 Standing Order 119***:

> *"119. **Witnesses may be shown the Witness Albums of photographs to assist in identifying a suspect who is not known to the witness**. Under no circumstances will officers use these photographs for the purpose of establishing the identity of a known suspected criminal whom the witness(es) state they can identify. Identification in such cases must be by formal identification parade." (emphasis added)*

26. Mr. Banner also complained that the Crown had not negatived the alibi of Accused #3. The Court is of the view that if the tribunal of fact accepts the evidence of Ms. Zetina that is evidence that is disprobative of the alibi on the authority of a decision of our Court of Appeal in ***Apolonio Kiow v R Crim. App. 10/20*** at paragraph 52.

27. The Court is of the view that in the *Galbraith* quality assessment that though there are discrepancies as identified above, some similar to the case of *Gibson*, as well as issues regarding the purported failure to properly investigate the alibi, these issues do not rise to the level of making the case irredeemably weak.

28. The Court in those circumstances overrules the no-case submission on behalf of Accused #3

Dated 13th June, 2023

NIGEL C. PILGRIM
JUDGE OF THE HIGH COURT OF BELIZE
CENTRAL DISTRICT