

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

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C31/2021

THE KING

v.

KAREEM HARVEY

BEFORE: The Hon. Mr. Justice Nigel Pilgrim

APPEARANCES: Ms. Romey Wade for the Crown

Accused appears self-represented

DATES OF HEARING: 14th and 15th June 2023; 6th July 2023

DATE OF DELIVERY: 6th July 2023

JUDGE ALONE TRIAL

DECISION

1. Kareem Harvey (hereinafter “the Accused”) was indicted for the offence of attempt to murder, contrary to section 18 read along with section 117 of the *Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020*, (“hereinafter the Code”) arising out of a shooting involving Jordan Murillo (hereinafter “the Virtual Complainant or VC”) on 3rd June 2019. The trial began with the arraignment of the Accused on 14th June 2023 before this Court by judge alone pursuant to section 65A(2)(b) of the *Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020*.
2. The Accused at arraignment was unrepresented. The Court before arraignment had outlined the history of the matter to the Accused, namely, that he had appeared before my sister, Lamb J., on 30th March 2022 and asked for time to obtain counsel; and that he had appeared before this Court, who

had advised him of the desirability of having counsel, on 27th February 2023 and 24th April 2023 with similar applications, which were granted. The Court further advised the Accused that the matter would be proceeded with on 14th June 2023 and to prepare himself for trial making whatever arrangements he deemed appropriate. The Accused accepted the history outlined. The Accused indicated that he was prepared to do the matter for himself. He pleaded not guilty.

3. The Court explained to the Accused in the simplest terms the elements of the charge, advised him to pay close attention to the *Turnbull* identification factors, and explained to him the processes of examination-in-chief, cross-examination and re-examination. The Accused was given pen and paper and advised to contact the Court's Marshal if he encountered any difficulties.

THE EVIDENCE

The Crown's case.

4. The Crown's case, in a nutshell, is that the VC was shot at some time after 8:30 p.m. by a person he purported to recognize as the Accused.
5. The Crown called the evidence of 5 witnesses. The Crown first called William Wade, a crime scene technician. He testified in evidence in chief that on Monday 3rd June 2019 at about 9:15 p.m. he received a call from then Police Constable Joseph Pook (hereinafter "the Investigator") and then made his way to Mile 16 ½ on the Phillip Goldson Highway. Upon arrival there at 9:45 p.m. he met with the Investigator who relayed some information to him. The Investigator then showed him an area and he visually inspected the area and observed it was "night". He also observed a lamppost about 30-40 feet away from where the area was, on the corner of the yard next to a dirt road. Mr. Wade then visually inspected the area and observed a black bicycle, blood, and expended casings. He processed the scene and took photographs. Those photographs were tendered in evidence. Mr. Wade indicated that he fumigated those expended casings, that is, he conducted a process where he applied heat to superglue creating a fume which adheres to the biological substance of fingerprints. He observed no fingerprints on the casings. He indicated that he sent the physical objects retrieved from the scene to the National Forensics Science Services Laboratory. The results of these analyses, if any were done, were not led at trial.

6. Mr. Wade continued in his evidence in chief by identifying “orbs” in the photographs, WW 1 and WW 2, which were lampposts which he said, “partially” lit up the dirt road.
7. Mr. Wade was cross-examined by the Accused. He accepted that the area shown to him was dark, and that he had said in his statement that the lighting was “poor” in that area. Mr. Wade testified under cross-examination that he had used flash on his camera to take out the photographs. He also testified that he did not believe that lights from vehicles were used to illuminate the area.
8. The VC was the Crown’s next witness. He testified in evidence in chief that he had known the Accused for about three months before 3rd June 2019 and that he would see him about 3 times for the week. He had last seen the Accused on the day before the shooting at 8:30 a.m. buying tacos.
9. The VC gave further evidence in chief that on 3rd June 2019, at about 8:30 p.m., he was leaving his house at Sandhill 16 miles, Belize District Rural North, riding to go to the shop. Whilst doing so he came across a tall dark male person. The person came out from under a bus shed and was standing in front of the VC for about 5-10 seconds. The person pulled what appeared to be a firearm and fired a first shot in his direction. The VC managed to escape and then he fell. The person came over the VC and fired three shots at his head. The VC then again escaped, and the person continued to fire shots. The VC said that he was “struck one time in my right arm”. The VC ran for help and his mother and brother assisted him by rushing him to the Karl Heusner Memorial Hospital (hereinafter “KHMH”).
10. The VC continued testifying in chief that the person was 5-10 feet away from him when he fired the first shot. The VC said that at that time it was dark but the lamppost light, which was 35 feet away, had a “glare” that is how he was able to recognize that it was the Accused. He said that there was nothing stopping him from seeing the Accused and that he was able to see his body structure, shoulder, and his face. The VC testified that the Accused walked with a peculiar limp. The VC said that he was laying down with his head sideways for the next shot and the shots passed to the side of his head. He said the Accused was over him at that time and there was a glare from the lamppost. He said that this “was like 10 seconds” that he had the Accused in his view. The VC testified that nothing was stopping him from seeing the face of the Accused. The VC testified that for the entire incident he saw the face of the Accused for “about 15 seconds the most”.

11. The VC was cross-examined by the Accused. The VC testified that he gave his statement at the hospital on 4th June 2019, and that he had only given one statement. He further testified that at the time of the shooting he had no problems with the Accused. The VC accepted that he said in his statement that he was riding a grey in colour bicycle. He also accepted that he said in his statement that there was no light but there was glare from the lamppost. The VC testified that he knew the Accused by name from when he first moved to Sandhill. He said the Accused was “a nice guy” and came into the area doing agriculture. The VC testified that that was how he came to the shop and spoke to the Accused, “about seeds and thing”. The VC said he spoke to the Accused one or two times before. The VC testified when speaking about the Accused, “there wasn’t any reason for remembering him I just went to the store, and I saw him.”
12. The Accused suggested to the VC that he was brown-skinned and not dark skinned. The VC rejected that suggestion. The Accused suggested that the VC was mistaken because he, the Accused, was at home at the time of the shooting. The VC rejected that suggestion.
13. The VC was re-examined and said that he could not really recall the colour of the bicycle.
14. Sergeant Orlando Bowen (hereinafter “Sgt. Bowen”) testified that on 29th July 2019, sometime after 10:25 a.m. he detained the Accused by a shed at 16 Mile Sandhill Village at the Maxboro junction for a report of attempted murder. Sgt. Bowen stated that he cautioned the Accused and told him of his constitutional rights. He later conveyed the Accused to the Ladyville Police Station.
15. The Accused cross-examined Sgt. Bowen. Sgt. Bowen accepted that he had recorded the statement of the VC and that it was recorded at 10:42 a.m. on 6th June 2019 at KMH. Sgt. Bowen accepted an inconsistency by omission in his statement in that he testified in the trial that he tried to find the home of the Accused before taking him to the Ladyville Police Station but did not mention in his statement that he tried to find the home of the Accused. Sgt. Bowen accepted that the shed that he would usually see the Accused at is not the shed where the shooting took place.
16. Sgt. Lavern Arzu was the Crown’s next witness. She testified that she saw the VC at KMH on the night of the shooting at 9:30 p.m. suffering from an injury. She issued him a medicolegal form. No medical evidence was led to indicate

what injuries, if any, the VC was suffering in the aftermath of the shooting. Sgt. Arzu was not cross examined.

17. The Investigator was the Crown's last witness. He testified in chief that on 3rd June 2019 he received a report of a shooting sometime around 7-7:30 p.m. and then went to Sandhill Village with a team of police officers. He observed a black bicycle by a bus stop and received certain information. He subsequently then contacted Mr. Wade to process the scene. The Investigator later went to KMHM and at around midnight on 4th June 2019 he spoke to the VC who gave him certain information. That same day the Investigator went in search of the Accused, and later detained him on the next day, the 5th. The Accused was told of his rights and cautioned. The Investigator testified that he interviewed the Accused and released him pending further enquiries.
18. The Investigator further testified in chief that the VC had come to the Ladyville Police Station on 6th June 2019 to give a statement. On 29th July 2019, while the Accused was detained, the Investigator conducted an interview with the Accused which was wholly exculpatory. The Investigator later charged the Accused. The Investigator said that he went to the Michael Finnegan Market to locate Ms. Nathalie Vernon (hereinafter "Ms. Vernon") and that he went to her home on one day in the morning and afternoon to locate her without success.
19. The Investigator was cross-examined by the Accused. The Investigator accepted that he did not do an acknowledgement form for the Accused on the first day he was interviewed. Though the Investigator initially maintained that the VC gave his report at the station he later accepted that he was not there when the VC gave his statement and that he said so based on what was told to him.
20. The Investigator accepted that he received the report of the shooting around 7:30 p.m. yet he contacted Mr. Wade to process the scene after 9 p.m. He accounted for the delay in contacting Mr. Wade on the basis that he had to confirm that there was a shooting first. The Investigator testified that he reached the scene at after 8 p.m. and that it took him about an hour to confirm that a shooting took place. The Investigator testified that in the midnight conversation the morning after the shooting with the VC that the VC said it was the Accused who shot him. The Investigator said that he made no contemporaneous note of this conversation. The Accused suggested to the Investigator that this conversation never took place and that he was detained on the 5th without a single piece of concrete evidence, which the latter denied.

21. The Investigator in cross-examination rejected the suggestion that he was not one of the officers that had detained the Accused on 5th June 2019. The investigator accepted that his casefile was returned to him on February, 2020 to locate Ms. Vernon to investigate his alibi. The Investigator rejected the submission that he did not properly investigate the alibi of the Accused. He also rejected the suggestion that Ms. Vernon came to station to make a report regarding the alibi of the Accused and was turned away.
22. The Crown thereafter closed its case, and upon being advised of his right to make a no-case submission, the Accused made one. The submission was that owing to the poor lighting, and discrepancies in the evidence of the witnesses, he should not be called upon to answer the charge. The Court overruled the submission, relying on the authority of the Belizean Court of Appeal decisions of *Nelson Gibson v R, Crim. App. 10/12*, at paragraphs 29-31 and *Allen James v R Crim. App. 7/09* at paragraph 14; and the Bahamian Privy Council decision of *Larry Jones v R, 47 WIR 1*.
23. The Court was of the view that the base of this identification evidence was not so slender that the case should be stopped on that basis. The Court believed that a reasonable tribunal of fact could find, taking the evidence at its highest, that a 15 second unimpeded observation from 10 feet and closer, though the lighting was not ideal, from a person known to the Accused for 3 months whom he saw several times a week are circumstances that could lend itself to a proper identification by a reasonable tribunal of fact.
24. In discharging its *Galbraith* assessment, the Court noted that there were seeming discrepancies in the police evidence and there may be issues with the investigation of the alibi. However, in the Court's view those were matters which did not rise to the level that would make it impossible for a reasonable tribunal of fact to convict. The Court overruled the no-case submission.
25. The Accused, after being advised of his 3 options, chose to give evidence on oath and called one witness, Ms. Vernon.
26. The Accused testified in examination in chief that he was at home at the time of the shooting with Ms. Vernon and had no knowledge of the shooting. He testified that on the night of 3rd June 2019 he and Ms. Vernon went to buy soft drink and mosquito coil and went back home.

27. In cross-examination the Accused accepted he spoke to the VC, but only one time, and that he had only seen the VC once. The Accused rejected the suggestion that he shot the VC.
28. Ms. Vernon, in her evidence in chief, corroborated the account given by the Accused, and further testified that she had tried to make a report about the alibi of the Accused. In cross-examination she testified that though she and the Accused had separated by time of trial they were still friends. Ms. Vernon rejected suggestions that she was lying for her friend and that she was lying about attempting to make a report.
29. The Accused made a closing statement submitting that the identification evidence was so poor that the Court should not convict and that there were material discrepancies which should cause reasonable doubt.

THE LAW

30. The Court is assisted in establishing the elements of the offence of attempt to murder by a decision of our Court of Appeal in ***Peter Augustine v R, Crim App 8/01***, per Carey JA:

“11. *Murder is defined in the Criminal Code as intentionally causing the death of another without justification or provocation (section 117 Cap. 101). It was essential to emphasize to the jury that the specific intent which the prosecution must establish on the charge against him was an intent to kill.*

...

13...*The jury, would we think, have been better assisted to discharge their duty, in regard to attempted murder, if they were told something along the following lines:-*

An attempt to commit a crime is itself a crime. Before the accused can be convicted of this offence, it must be proved;

(a) *that he had the intention to commit the full offence and that in order to carry out that intention, he*

(b) *did an act or acts which is/are step(s) towards the commission of the specific crime, which*

(c) *is/are directly or immediately and not merely remotely connected with the commission of it, and*

(d) *the doing of which, cannot be reasonably regarded as having any other purpose than the commission of the specific crime.*

All the above must co-exist. Intention alone is not sufficient - it is no offence merely to intend to commit a crime. Doing of the acts alone without intention is not sufficient. Act(s) done must

be something more than mere preparation for the commission of the offence.” (emphasis added)

31. The Court, in its interpretation of *Augustine*, must be satisfied so that it is sure, in the context of the evidence in this case that:
- (i) The Accused was the shooter.
 - (ii) The Accused specifically intended to kill the VC, without justification or provocation.
 - (iii) The Accused took steps that were more than preparatory, and could only have had as its purpose, to commit the offence of murder.

ANALYSIS

32. The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy it so that it is sure of the guilt of the Accused, and if there is any reasonable doubt the Court is duty bound to acquit the Accused.
33. The Court has considered all the evidence with the intention of reaching a fair and dispassionate assessment of the evidence. The Court does not have to accept everything that a witness says or reject everything that a witness says. The Court is entitled to accept and reject parts of what a witness said in their evidence. In considering the evidence of each of the witnesses the Court has considered the plausibility and coherence of the evidence of each witness. The Court has also considered the inconsistencies and discrepancies in the evidence of the witnesses, whether they are major or peripheral, and if there is any explanation for them.
34. The Court begins firstly with analyzing the evidence on the Crown’s case and **if** the evidence seems strong enough to consider a conviction it would consider the case for the Accused, as is the required reasoning process noted by our apex court, the Caribbean Court of Justice (hereinafter “the CCJ”), in **Dioncicio Salazar v R, [2019] CCJ 15 (AJ)**¹.

- (i) *Evidence that the Accused was the shooter.*

¹ Para. 35

35. The only evidence that the Accused was the shooter comes from the VC. To answer the question posed under this rubric requires a careful analysis of his evidence.
36. The first step of this analysis requires the Court to determine whether the VC is an honest witness, on the authority of the Jamaican Privy Council decision of ***Beckford and Anor. v R (1993) 42 WIR 291***².
37. The Court finds the VC to be an honest, though unreliable, witness. His evidence was plausible and coherent. There are two discrepancies in his evidence. The first is the colour of his bicycle, in his statement he said it was grey while Mr. Wade and the photographs show it was black. The explanation for the discrepancy was given by the witness in re-examination that he could not recall the colour of his bike. The Court accepts the answer of the VC as truthful and is probably the result of the witness not paying attention to what he would consider to be a minor detail. However, this was viewed by the Court, in conjunction with other evidence, as a sign of the unreliability of the evidence of the VC.
38. The second discrepancy is the date of his statement. The witness said he gave his statement on 4th June 2019, and he gave only one. The witness Sgt. Bowen testified, after refreshing his memory, that the statement he recorded from the VC was on 6th June 2019 at 10:42 a.m. at KMH. This discrepancy is wholly unexplained in the evidence. The Court is however not minded to view this evidence as a sign of the untruthfulness of the VC but rather another sign of his potential unreliability.
39. This next step of this analysis requires the Court to examine closely the circumstances in which the identification by the VC was made and consider its specific weaknesses³.
40. The Court first reminds itself of the need for caution in accepting identification evidence because mistaken identification has led to miscarriages of justice in the past. Indeed, the Court specifically reminds itself of the fact that the CCJ has opined recently in the Barbadian decision of ***R v Hall (2020) 95 WIR 201***, that, per Jamadar JCCJ, “this special need for caution is corroborated by current cognitive scientific research on the subject, which compellingly

² P. 298

³ ***Jermaine Pascascio v R, Crim. App. 12/06 (BZ)*** at paras. 6-10

demonstrates the potentially perilous unreliability of such singular reliance on visual identification as the basis for conviction.”⁴

41. The Court notes that an honest witness may be mistaken, in that the VC may have conscientiously convinced himself that the “tall dark male person” he saw was the Accused without intending to make a mistaken identification but is in fact in error. The Court reminds itself that an honest, mistaken witness may be a convincing one. The Court also notes that though recognition evidence may be more reliable than mistakes can be made by witnesses who are well known to a suspect, even in the case of relatives or close friends.
42. The specific weaknesses in the identification, in the Court’s view, are as follows:
 - i. **Lighting:** The Court looks at the photographs WW 1 and WW 3 and observes that the nearest streetlight to where the bike was, and presumed where the shooting was, appeared to be some distance away. The lamppost lights or “orbs” as Mr. Wade testified to, appeared minute in those two photos. Though there is a glare seen higher up the road in WW 3 from the lampposts, no such glare is seen around the bike. The evidence given by Mr. Wade in his earliest record, namely his statement, was that the lighting in the area was poor. The Court was not impressed by Mr. Wade’s attempt to whitewash this description by testifying in chief that the area was “night”, and the use of the word “poor” being wrung out of the witness by the skillful cross examination by the Accused. The VC himself accepted that the area was dark and spoke to a source of lighting, not bright moonlight, but a streetlight, in his estimate, 35 feet away. The Court is very troubled by the paucity of the evidence of lighting, and whether the circumstances provided sufficient illumination for the VC to properly observe his attacker.
 - ii. **Recognition and description:** The Court considers the description given by the VC as very bare, namely, “a tall, dark male person”, with a limp. There is no description of the facial features given by the witness of the person he saw on the night of the shooting. This may point to him not having a proper opportunity to observe the face of his attacker. The Court having seen the Accused in the trial has not observed the Accused having a noticeable limp, and the Court notes the great significance that this witness placed on the issue of the limp, in cross-examination:

“I know it was Kareem Harvey because of the way he walked. He has a limp in his walking.”

⁴ Para. 149

This answer again, in the Court's view is telling in that it appears to highlight the fact that this purported identification may not have been based on a proper view of the attacker's face. The Court marries this with what is, in its view, mild recognition evidence. The VC testified that he "knew" the Accused for 3 months by seeing him about 3 times a week. The VC said he spoke to him "one or two times". The VC literally said, in chief, that he had no special reason for remembering the Accused, which begs the question as to whether he would have been able to make a sufficient study of his features by those previous interactions to be able to correctly identify him on a dark road in difficult circumstances.

- iii. **The period of observation:** The Court considers the period of observation, namely 15 seconds, in this matter in the context of mild recognition evidence and poor light to be short to make a proper identification. The Court is of the view from the tenor of the VC's evidence that the events took place quickly, and in terrifying circumstances where a gun was pointed at the VC's head. These are matters that had the potential to warp the identification process.

43. The Court must consider the **cumulative effect** of those specific weaknesses and not look at them in isolation as noted in the English Court of Appeal decision of **R v Fergus (1994) 98 Cr.App.R. 313⁵**.

44. The Court considers the strengths of the identification evidence:

- i. **Obstruction:** The witness testified, and was unshaken on this point, that there was nothing blocking his view of the attacker.
- ii. **Distance:** The VC testified that his attacker was between 5-10 feet from him around the time of the first shot and was standing directly over him and firing 3 shots at his head. The Court is troubled by that last bit of evidence. The Court finds that it is implausible that the shooter could be standing over his quarry that he had laid in wait for and fire three shots at the VC's head and miss with all three. The Court is of the view that either the VC's evidence on that score is unreliable or it raises very real doubts about whether the shooter's intention on that night was in fact to kill, or merely to scare the VC.
- iii. **Identification to the police:** On the evidence of the Investigator, in cross-examination, the VC told him on 4th June 2019 that it was the Accused. The Investigator made no contemporaneous record of this evidence, in seeming violation of the **Police Standing Orders, Crime and Criminal Investigation CH. 55** Orders 61-64. Also, the VC gave no evidence of speaking to the Investigator on the 4th. In this regard the

⁵ P. 320

Court views the purported identification by the VC to the Investigator with skepticism. There is also the discrepancy between the VC and Bowen about the date of the former's statement, however even if the correct date is the 6th of June 2019, three days is still a relatively short time to have named his attacker, having regard to the fact that he was hospitalized for some days after the shooting.

45. The Court finds that after a cumulative consideration of the specific weaknesses of the identification evidence, they far outweigh its strengths. In those premises the Court is not satisfied so that it is sure that the circumstances of this identification are such that the VC has correctly identified the Accused. The evidence of the VC is completely unsupported. In those circumstances the Crown's case fails at the first hurdle, and there is then no need to consider the other elements of the offence, nor consider the case of the Accused. The duty of the Court is at this stage to acquit the Accused.
46. The Court must however take a moment to express its concern at the way this investigation was conducted, before leaving it. There was evidence, which emerged through the skillful cross-examination by the Accused and otherwise, of the failure by the Investigator to make contemporaneous notes of significant steps taken such as interviewing the VC on the morning after the shooting. There is evidence that the Investigator was advised by the Accused of his alibi and given the alibi witness's name pre-charge. The steps taken to investigate it by the Investigator seemed so paltry that he was directed to make further attempts to locate and interview the alibi witness after the Accused had already been charged. The Court is of the view that to charge an Accused who has given an alibi without proper investigation of that alibi is not only bad practice but may raise the issue of whether the Accused is being maliciously prosecuted. In support of the last proposition the Court relies on a decision of the Court of Appeal of Trinidad and Tobago in ***AG v Joel Roop, Civ. App. No. P182 of 2015*** dealing with the elements of malice in the tort of malicious prosecution, per Mendonca JA:

*"[80]...**We are prepared to accept that the failure to investigate obviously significant and material matters may in some circumstances provide evidence of an improper motive.**"*
(emphasis added)

47. If it needs stating, the Court is of the view that there is nothing impermissible in the police requesting to interview a witness in support of an alibi, on the authority of the English Court of Appeal decision of ***R v Rossborough (1985) 81 Cr. App. R. 139.***

DISPOSITION

48. The Court finds the Accused not guilty of the charge of attempt to murder in the indictment. The Accused is discharged.

DATED 6th JULY 2023

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