IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL JURISDICTION)

INDICTMENT NO: C1/2020

THE KING

and

MARLON EVERETT

Accused

Before: **The Honourable Madame Justice Candace Nanton**

Appearances: **Ms. Sheiniza Smith, Senior Crown Counsel for the Crown.**
Mr. Bryan Neal for the Accused.

Date of Delivery: **16th October 2023**

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Oral Ruling of the Court on the admissibility of the group identification

Introduction

1. NANTON J.: Marlon Everett (hereinafter referred to as "the Accused") was 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 a shooting involving the death of Albert Johnson (hereinafter "the deceased") on 20th April 2018. The trial by judge alone began with the arraignment of the Accused on 11th October 2023 before this Court pursuant to section 65 A (2) (a) of the ***Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020.***

2. The Crown has called its first witness Jaden August in its case against the Accused. During the course of his testimony a successful application was made by the Crown to have the witness deemed hostile or adverse pursuant to section 71(2) of the **Evidence Act Cap 95**. During the evidence in chief of the Crown's witness Jaden August, which is being conducted in the manner of cross examination, Learned Counsel on behalf of the defence raised an objection to the Crown's attempt

to lead evidence from its witness relevant to a group identification which is purported to have taken place on July 11th 2019.

3. The basis of Defence Counsel's objection is that the evidence of the group identification is inadmissible as it was conducted in circumstances where the Accused had refused an identification parade and thereafter was not informed of the intention of the police to conduct a group identification nor was he given an option to accept or refuse to participate. The thrust of learned Counsel's objection is that the identification procedure embarked upon on July 11th 2019 was unconstitutional and illegal and the evidence flowing therefrom is inadmissible. Defence relied on the High Court ruling of **Leon Gomez** (unreported) delivered by Lucas J on the 29th November 2012 in support of its objection.

4. The Crown responded that the authority of **Leon Gomez** did not support the defence's position. The Crown advanced that what the case of Leon Gomez stated was that the police cannot force an accused to participate in an identification parade. The Crown advanced that in that case the accused was put in an identification parade room with the intention of conducting the parade and when he refused the police removed the numbers but still essentially conducted an id parade without the consent of the Accused. According to the Crown the correct statement of the law is that what the police must do is conduct a covert identification process in situations where an accused person refuses to attend an id parade.

5. The Crown also argued that the objection made by defence counsel was premature since no actual evidence has yet been led relative to the identification procedure actually adopted. The Crown submitted to the Court that it ought first to hear the evidence advanced by the Crown relative to the identification procedure and thereafter make a ruling on its admissibility.

Analysis

Timing of the objection – when should an objection such as the present one be made?

6. The overriding objective of the **Criminal Procedure Rules 2016** (hereinafter "the CPR") is that criminal cases be dealt with justly and expeditiously. Under the rubric case management it is stated:

> *4.1- the Court shall actively manage cases in pursuit of delivering justice and ensuring that the delivery of justice is fair, timely and efficient including by the early identification of the issues- ensuring that the evidence is disclosed as speedily as possible and is presented in the most concise and comprehensive manner.*

7. It is in furtherance of the overriding objective that this Court embarked on case management of this matter prior to it being scheduled for trial. At the case management hearing dated 5th October 2023 the Court enquired from the parties an identification of the issues that are live for this trial. The Court

reviewed the Case Management Forms Part 1 and 2 filed respectively by the Crown and Defence and sought to ascertain which issues were triable in this case. Learned Defence counsel was questioned specifically on this issue of the admissibility of the group identification as he had raised same in his Part 2. He was asked whether he would be challenging same as it seemed to the Court to be an issue relative to weight rather than admissibility. Learned defence agreed that it was not an admissibility issue.

8. Had Counsel for the defence persisted in his objection to admissibility at that time the Court would have been able either prior to or at the commencement of the trial to deal with the preliminary issue of the admissibility of the group identification evidence rather than have the evidence of the witness interrupted to deal with same.

9. It is to be noted that the Court is empowered by the **CPR** to make directions as to when issues are dealt with and in what order. The Court is specifically empowered to schedule pre-trial hearings to determine legal arguments including those relevant to the admissibility of evidence at trial (part 4,2 of the **CPR**)

10. The parties are reminded of the overriding objective and their corresponding duty to ensure that in their dealings they seek to advance this objective. The duties of parties are outlined in part 4.6 of the **CPR**.

Whether the Court is able to determine admissibility on the basis of the deposition evidence and without having heard the live evidence from the witnesses.

11. As this is a trial by Judge only it must be remembered that the Court wears two hats as the Judge in a judge only trial is the trier of both fact and law. As arbiter of the law the Court maintains its gate keeping function to ensure that the Accused has a fair trial on the basis of legally admissible evidence.

12. As attractive as the argument may seem to allow all evidence in and determine issues of admissibility at the end of the case this may *at times* be a dangerous road to traverse. The judge as a legally trained fact finder is of course able to distinguish between admissible and inadmissible evidence and direct itself on the weight to be attached to different types of evidence however that ability does not detract from the duty of the Judge as arbiter of the law to ensure that only evidence that is relevant and admissible is adduced. In its gatekeeping function the Trial Judge must guard heavily against letting in evidence that has no place in a fair trial against an accused. If there is an objection to evidence being adduced on the basis that the evidence is either inadmissible at the outset or while admissible ought not to be admitted on the basis that its probative value is outweighed by its prejudicial effect then the Court must consider that objection and the preferable opportunity to so do would be before the evidence is led. This would be a simple task when the matter is not centered on disputed facts. Where facts are disputed a voir dire may be held- a clear example would be as it relates to caution statements that are alleged to have been given involuntarily and as such inadmissible.

Whether a voir dire should be held to determine admissibility of the group identification procedure.

13. The Crown submitted that the Court would not be in a position to rule on the admissibility of the group identification as that evidence has not yet been led and that the Crown could not submit on the basis of depositions. There was also some suggestion by Defence counsel that a voir dire would be appropriate to deal with matters such as the present case.

14. It is the Court's view that a voir dire would be inappropriate to determine the admissibility of the group identification in this case. There is some merit in the suggestion that the Court should wait to hear all the evidence on the identification procedures adopted before making its ruling on the admissibility of the group identification. However, where as in this case the particular facts relative to that procedure are not being disputed the Court can make a preliminary ruling on the basis of depositions.

15. I find support for this in the seminal case on identification **R v Turnbull** [1977] QB 224 (CA), Woolf L.J. said, at pages 36-37:

> *"In the normal way the trial judge will make his assessment whether he needs to take the action referred to by the Lord Chief Justice (withdrawing the case from the jury) either at the end of the case for the prosecution or after all the evidence in the case has been called. There may be exceptional cases where the position is so clear on the depositions that he can give a ruling at an earlier stage. However, the trial judge should not decide the matter by holding a preliminary trial, as in this case, before the evidence for the prosecution has been placed before the jury. It is, of course, true that the trial judge has a residual discretion to exclude evidence which is strictly admissible if he comes to the conclusion that its probative value is outweighed by its prejudicial effect, so that its admission would be unfair to the defendant. However, this residual discretion cannot justify the holding of trials within a trial as occurred here.* ***Issues of this sort can be satisfactorily dealt with by the judge perusing the depositions, together with any facts that are common ground between the prosecution and the defence****." (emphasis mine)*

16. In the UK case of **Thomas Henry Beveridge** (1987) 85 Cr App R the Court of Appeal held, that pursuant to section 78(1) of the **Police and Criminal Evidence Act 1984** a trial judge must consider the depositions and statements and the submissions of counsel when a point was taken on an identification parade. The Court held that there might be occasion when the trial judge would think it desirable to hold a trial within a trial; but such occasions would be rare and the instant case was not one of them

17. In **David Baptiste** Cr App 23 of 2016 - the Trinidad and Tobago Court of Appeal had to answer the question of whether a Trial Judge erred by not holding a voir dire to determine the admissibility of a

confrontation exercise where the Appellant refused to attend an id parade. The Court of Appeal stated :

> *Upon consideration of the aforementioned authorities, we do not agree with the submission of Mr. Selvon that the judge was required to conduct a voir dire to determine the admissibility of the confrontation evidence. The judge, in deciding on this issue, was neither performing a gatekeeping role nor a function which required him to filter a category of evidence which fell outside the scope of minimum reliability. A voir dire to determine disputed issues of fact is traditionally only required with respect to categories of evidence which, in the long experience of the courts, have proven to be fraught with potential difficulties and which may, on one view, be described as presumptively unreliable. In that limited category of cases, it is critical that the judge perform a factual screening exercise to determine whether the evidence rises to the relevant level, in accordance with the prescribed test of admissibility, in order for it to be placed before the jury. The classic case in which a voir dire is necessary is where the judge is required to decide disputed issues of fact on the voluntariness of an admission. The issue relating to the confrontation did not fall into this limited category of cases of evidence which might be described as presumptively unreliable and therefore the judge was not obligated to determine its admissibility by holding a voir dire. The judge was simply required to hear the arguments in the absence of the jury and scrutinize the depositions in order to give his ruling.*
>
> *It is sufficient for a judge, after ruling on an issue such as the one in question (in the absence of the jury) to fully allow both the prosecution and defence versions to be canvassed before the jury for their determination. The judge in his summing up must then isolate the issue, put it in its proper evidential and legal framework and give adequate directions and guidance to the jury on it.*

Whether the group identification is admissible evidence:

18. In **David Baptiste v the State** (supra) the Court of Appeal TT held that based on the evidence of the prosecution witnesses, namely, that the appellant refused to participate in an identification parade, the confrontation exercise was an entirely justifiable and permissible mode of identification. The confrontation exercise was held to have been properly conducted by the police officers and there was no resultant unfairness to the appellant.

19. The decision in **Boyce v R** BB 1985 CA 16 (Barbados) was relied on in support of the proposition that, where a proper basis has been laid for an informal exercise such as a confrontation, for example, where the suspect has refused to participate in an identification parade, then evidence of what transpired at the informal exercise would be relevant and therefore admissible

20. In **Springer v R** (2002) 63 WIR 20 a decision of the Court of Appeal of Barbados, three days after an incident in which the victim was robbed and gang raped, the appellant was taken into custody and was found to be wearing a gold chain and pendant which had been taken from the victim at the time of the offence. The appellant, having refused to participate in an identification parade, was identified by the victim in an informal identification exercise. The appellant was charged with the offences of robbery and rape. At his trial, there was a dock identification by a witness. In dismissing the appeal against conviction, the Court held that the evidence of a dock identification was neither inappropriate nor improper once evidence had been led of an out of court identification which had been relied on as the primary evidence of identification at the trial. Sir David Simmonds CJ said at paras 45 and 46

> *It must not be forgotten that in the same way that the holding of an identification parade is not mandatory, so too it is not compulsory for a suspect to go on such a parade. In our opinion, where an identification parade is refused by a suspect, an informal exercise may well be a proper procedure by which to test a witness's ability to identify a suspect. And although it is important that the prosecution should lead evidence of a suspect's refusal to go on parade, care must be taken about the nature and extent of such evidence because evidence of certain types of refusal might conceivably be prejudicial.*

21. It has been held that the provisions of the **UK Police and Criminal Evidence Act 1984** are applicable to the Belize Police in the conduct of their investigations: According to Code B Annex C. Group identification may take place either with the suspect's consent and cooperation or covertly without their consent.

22. In **Francis (Waldron et al)** Cr App 36 of 2002 a Jamaican Court of Appeal case it was submitted by the Appellant that the informal procedure used to identify the appellant was woefully bad. The Court held that the reason a suspect gives for refusing a formal id parade is of no moment. The police may adopt any satisfactory identification procedure in respect of a refractory suspect. One such procedure is group identification held covertly without the suspect's consent. This procedure is often referred to as an informal parade. In that case it was stated that care should be taken so that the conditions are fair to the suspect in the way they test the witness' ability to make an identification.

23. Rule 154 and 156 of the **Police Standing Orders of Belize** states that if a suspect refuses or having agreed fails to attend an identification parade or the holding of an identification parade is impracticable arrangements should be made if practicable to allow the witnesses an opportunity of seeing him in a group of peoples. Rule 156 states that the suspect should be asked for his consent to a group identification. Where the suspect refuses the officer in charge of the identification has the discretion to proceed with a group identification if it is practicable to do so.

24. I turn now to the local first instance decision in **Leon Gomez** (unreported). The Trial Judge exercised his discretion not to admit identification by photographs shown to the witness by the police. In that case a group identification was held after the witness had already identified the accused by means

of photographs and after the accused refused to partake in a formal identification parade. On that basis alone that case is therefore distinguishable from the present case.

25. Furthermore, upon reading the entire ruling it is clear that the Trial Judge actually agreed (on page 14 of his ruling) that where a suspect is unwilling to partake in a formal identification parade a covert group identification ought to be held. That is exactly what took place in the case at bar. The Learned Trial Judge then referred to **Annex C of PACE 1984 Code D** which that Court held to be applicable authority in Belize.

> *The place where the group identification is held should be one where other people are either passing by or waiting around informally, in groups such that the suspect is able to join them and be capable of being seen by the witness at the same time as others in the group, for example pedestrians leaving in an escalator, pedestrians walking through a shopping centre, passengers on railway and bus stations, waiting in queues or groups or where people are standing or sitting in groups in other public places.*

26. The Trial judge further stated that a group identification without the consent of the accused cannot readily be held at a police station. It may be held in the police compound when all arrested persons are taken out of the police station to go to court. That is what was done in this case based on the evidence intended to be advanced by the Crown.

27. In the context of **Leon Gomez** the group identification which was held in the police station and after photographs had already been shown to the accused was held to have been irregular and unfair. The present case is therefore obviously distinguishable and in any event **Leon Gomez** is not authority for the proposition advanced by defence counsel.

Disposition

In the circumstances the Court overrules the objection of the Defence and holds that the evidence of the group identification is prima facie admissible evidence.

CANDACE NANTON
HIGH COURT JUDGE
BELIZE CENTRAL DISTRICT
SENIOR COURTS OF BELIZE