IN THE HIGH COURT OF BELIZE, A.D 2023

(CRIMINAL JURISDICTION)

CENTRAL DIVISION

INDICTMENT C49/2020

THE KING

v.

KENTROY MCKOY

-

MURDER

Appearances:

Mrs. Portia Staine-Ferguson, Crown Counsel for the Crown

Mr. Oscar Selgado, Counsel for the Accused

Hearing Date: 2023: June 26;

Delivery Date: 2023 June 26.

Indictment read to Accused

Accused Plead Not Guilty

JUDGMENT

[1]. SANDCROFT, J.: Application made pursuant to part 10 of the Criminal Procedure Act for agreed evidence to be read into the records:

(1) Statement of Carmelito Cawich, Inspector of Police, dated 23rd of June 2023 read into evidence as agreed by both the Crown and the Defence.

(2) Statement of Keith Clarke, Inspector of Police, dated 23rd of June 2023 read into evidence as agreed by both the Crown and the Defence.

(3) Statement of Sehon Richards, First Class Clerk, dated 23rd of June 2023 read into evidence as agreed by both the Crown and the Defence.

(4) Statement of Allim Lopez, Corporal of Police, dated 21st of June 2023 read into evidence as agreed by both the Crown and the Defence.

(5) Statement of Doni Buddan, Corporal of Police, dated 22nd of June 2023 read into evidence as agreed by both the Crown and the Defence.

(6) Statement of Andrew Godfrey, Justice of the Peace, dated 22nd of June 2023 read into evidence as agreed by both the Crown and the Defence.

CROWN'S APPLICATION:

[2]. Crown makes an application pursuant to **section 105 (1) (2) (C) and 3 of the Evidence Act**, the Crown grounds its application that all the prerequisites of the mentioned section have been satisfied, namely:

(1) The Crown has adduced evidence to prove that all reasonable steps have been taken to find Mr. Lauriano but that he cannot be found; by way of the

witnesses Carmelito Cawich, Inspector of Police, all that he did to try and locate this witness but to no avail and Inspector Keith Clarke who said he made checks at Hopkins Village recently and the witness cannot be found. Mr. Sehon Richards who is the personnel from the DPP's office who is in charge of getting into contact with the news outlets, who stated that ads were placed on three major news outlets, the Court is being asked to make an inference that the ads were being shown on the 3 media outlets: Channel 7, Channel 5 and Love FM. Mr. Richards further stated that as of Friday that the Office had not received any information as to the whereabouts of Wilfred Lauriano.

(2) Subsection 3 of section 105 of the Evidence Act. Evidence of Corporals Buddan and Allim speak to the prerequisites of sub-section 3 of section 105 of the Evidence Act. Crown submits that the prerequisites of section 105 have been met and pray that the statements of Wilfred Lauriano be admitted into evidence.

[3]. <u>DEFENCE'S SUBMISSION IN OBJECTION</u>:

(1) All reasonable steps have not been taken per section 105 of the Evidence Act.

(2) Section 47 of the Indictable Procedure Act

(3) Section 80 of the Indictable Procedure Act; writ of subpoena for witness

(4) Section 105 of the Evidence Act, sub-section 4.

RULING:

[4]. Despite the legislative provision the admissibility of a statement is first determined by the trial judge who must decide whether in all the circumstances it is fair that this statement should be admitted. I would have concluded therefore that the pre-condition of reliance as to admissibility on the failure to find Mr. Lauriano that "all reasonable steps have been taken to find him" had been satisfied. I would also have had to consider that this evidence, that is the contents of the statement, was the only evidence which connected the appellant to the commission of the crime.

[5]. It is well established that the strong general rule is that whenever the prosecution make applications of this nature the standard of proof is proof beyond reasonable doubt. This is so even though the words of the statute are 'proved to the satisfaction of the court.' The understanding in this jurisdiction is that this means the criminal standard in respect of the prosecution and the civil standard in respect of the defence. The section can be utilized by both the prosecution and the defence although more often than not it will be the prosecution who will be seeking to rely on it.

[6]. This provision was introduced into Belize by an amendment to the **Evidence Act in 2011** because there was and still is a serious problem in Belize with witness intimidation and, unfortunately, the murder of witnesses.

[7]. These provisions are statutory exceptions to the common law rule that 'the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence' (**R v Davis** [2008] 1 AC 1128 [5]). Since there is a departure from the general rule there would need to be adequate safeguards for the rights of the defence. One of those 'is the requirement that all reasonable steps must have been

taken to secure the attendance of the witness' (**Grant (Steven) v R** (2006) 68 WIR 354 [21] (1)).

[8]. From this the Board recognised that despite the statutory provision permitting to be admitted what would have been excluded, that possibility should not obscure the fact that the admission of statements under the section is not ideal, and any evidence so admitted is not regarded as the best evidence.

[9]. Their Lordships also held at [21] (3):

> **"In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself."**

[10]. What this means is that the trial judge may yet exclude a statement even if the statutory basis of admissibility has been met by the prosecution. In other words, the fact that the prosecution have proved beyond reasonable doubt that all reasonable steps have been taken to find a witness does not mean that the statement automatically comes in. Not only is there a discretion at common law but the EA under section 105 confers on the trial a statutory discretion to exclude the statements if the prejudicial effect is greater than or so out of proportion to the point that the evidence was used to prove that it would be unfair to the defendant if the statement were to be admitted.

[11]. The Privy Council expressly referred to the Court of Appeal's decision in **R v Michael Barrett** in two respects. First, the Board accepted that the Court of Appeal was correct to

stress that the statute requires all reasonable steps to be taken to find the witness. Second, their Lordships agreed with the Court of Appeal's recognition of the discretion of the judge's power to exclude evidence if it will put the defendant 'at an unfair disadvantage or deprive him unfairly of the ability to defend himself.' I will now turn to the relevant decisions of the Court of Appeal of Jamaica on this provision.

[12]. I am therefore concerned in these circumstances with whether the evidence given as to efforts to find Mr. Lauriano were sufficiently cogent to satisfy me that they were reasonable.

[13]. The first case in which a written judgment was produced by the Court of Appeal on the section is that of **Michael Barrett** (1998) 35 JLR 468. In that case Rattray P stated that '[d]espite the legislative provision the admissibility of a statement is first determined by the trial judge who must decide whether in all the circumstances it is fair that [the] statement should be admitted' (470A) His Lordship indicated that 'the requirement of all … reasonable steps being taken to find the maker of the statements' is the important pre-condition for admissibility' (470C) (emphasis in original). This statement of principle has not been modified down or departed from by any subsequent decision of the court. The Privy Council, in **Grant**, agreed with this approach.

[14]. In the case of **R v O'neil Smith** SCCA No 113/2003 (unreported) (delivered December 20, 2004). The Court of Appeal stated that under section 31D (d) the prosecution must prove (a) the witness cannot be found; and (b) that all reasonable steps have been taken to find the witness. Smith JA, who delivered the judgment of the court, held if the prosecution 'can satisfy the court that the deponent cannot be found after all reasonable steps have been taken to find [him], the court has a discretion to admit the deposition. That is to say, a

statement may be excluded even if the prosecution meets the statutory test. An important feature of the case is that Smith JA held that 'whether all reasonable steps have been taken must be assessed on the particular circumstances of each case' (slip op 11).

[15]. Smith JA was emphasizing that it is really a case-by-case analysis, meaning that what may be reasonable in one case may well be inadequate in another if there are circumstances that suggest more ought to have been done before it can be said that all reasonable steps have been taken to find the witness.

[16]. The next case of significance is that of **Brian Rankin and Carl McHargh v Regina** SCCA Nos 72 & 73/2004 (unreported) (delivered July 28, 2006). Panton JA stated because 'the witness is not available for visual assessment by the jury, it has to be stressed that great care has to be taken to ensure that the requirements of the legislation are met before permission is sought or granted for the documents to be read into evidence' [18A]. His Lordship stated:

> **"In respect of paragraph (d) of section 31D of the Evidence Act, it is imperative that all reasonable steps be taken to find the witness. … The taking of all reasonable steps does not mean that every hospital and lockup in the country should be checked. What it means is that checks should be made at the places with which the witness has a contemporary connection, and contact made with known relative or friends with whom he would have been reasonably expected to be in touch." (emphasis in original)**

[17]. The legal position is quite clear. All reasonable steps must be taken to find the witness. What is reasonable is to be assessed in the context of the particular case. What is

reasonable in one case may well fall short in another. Applications under section 150 are intensely fact sensitive and so the resolution of such an application in one case cannot establish any general principle so far as the analysis of facts is concerned. Nonetheless, it is expected that enquiries would be made at places where the witness has a contemporary connection and with persons who could reasonably be expected to be in contact with the witness. The trial judge has a discretion to exclude the statement even if the statement is admissible under section 150 (4) if it would be unfair to admit it into evidence. The statute also confers a statutory discretion under section **XX** to exclude statements if the prejudicial effect is greater that its probative value.

[18]. It is crucial to observe that the statute does not say all possible steps but all reasonable steps. The issue is not whether the proponent of the evidence could have done more but rather whether what was done was reasonable in all the circumstances. It is important to bear this in mind because it is tempting to think, with the benefit of hindsight and an active imagination, to come up with other steps that may have been taken. The statute does not require perfection but reasonableness.

[19]. The case of **Sebert Morris and others v Regina** SCCA Nos 80, 81 & 82/2001 (unreported) (delivered December 20, 2007) Panton JA made an important statement regarding proof of all reasonable steps to find a witness at page 10. His Lordship was responding to the submission that the statute refers to admission of first-hand hearsay and therefore only first-hand hearsay was admissible. His Lordship refuted this when he said:

> **"There can be no argument, for example that an investigator who visits places such as hospitals searching for a witness may give evidence that he**

> **made such visits and came away empty-handed. Such evidence implies at least that he was told (by hospital administrators, for example) that the witness being sought was not at that location. Criminal trials that are facilitated by the use of section 31D of the Act would become impossible if it were required that all persons consulted in the search for witnesses had to attend in person, in order that the judge may have first-hand evidence from them to decide whether the evidence of the missing witness may be read. Further, as in this case, it would not be possible for a statement made by the missing witness to be adduced through the very person to whom the statement was made. Clearly, the Court (sic) cannot, if the Act is to function effectively, be placed in a straight-jacket when a voir dire is being conducted for the purposes of the Act."**

[20]. There were statements from two witnesses that the prosecution sought to admit. There was absent the usual trilogy of checks with morgues, prisons and hospitals (mph) and publication in the newspapers. It is not proposed to recount all the evidence but to focus on the reasonable steps that were not taken in relation to the witness.

[21]. There is a further point to be made with respect to the witness. The police made the unfortunate decision not to have any contact with the witness. This meant that for over one year the prosecuting authorities did not know anything about the witness. In fact, no attempt was made to find the witness until after a firm trial date was embarked upon in June 2023. With the voir dire commencing on June 26, 2023, it was always going to be an uphill task to show that all reasonable steps were taken to find the witness when no one sought to contact

him for over one year. In this regard it would be helpful if the prosecuting authorities were to bear in mind the words of Hugh LJ in **R v Adams** [2008] 1 Cr App R 35 at [13]:

> **"All the experience of the criminal courts demonstrates that witnesses are not invariably organised people with settled addresses who respond promptly to letters and telephone calls and who manage their calendars with precision. They often do not much want to come to court. If they are willing they may not accord the appointment the high priority that it needs. Even if they do both of those things, it is only too foreseeable that something may intervene either to push the matter out of their minds or to cause a clash of commitments. Holidays, work, move of house, illness of self or relative and commitments within the family are just simple examples of the kind of considerations which day in, day out, lead to witnesses not according to the obligation to appear at court the priority that they ought to do. We are told that in the present case it turned out that Mr Chambers had taken his wife to hospital. If he had to do that, and it may be he did, that should have been found out at the very least the previous week and then consideration could have been given to whether the trial had to go back or whether alternative arrangements could be made to get the lady to hospital, or whether the trial could start a little later in the day, or some other adjustment made to enable the process of justice to take place. All of that was simply rendered impossible by the wholly inadequate approach of those whose duty it was to keep in touch with the witness. It may very well be that, however regrettably, the police are no longer able themselves to undertake the care of prospective witnesses. That is not a matter on which it is right for us to express any view. But whoever it is who does undertake it, the**

> **need to keep in touch, to be alive to the witness's needs and commitments is not less now than it ever was; if anything, it is rather greater now than it used to be. Leaving contact with a witness such as this until the last working day before the trial is not good enough and it certainly is not such steps as it is reasonably practicable to take to find him. In addition to that, once the message was not known to have been received on the Friday and there was doubt about it, we agree with Mr Lynn that reasonably practicable steps which ought to have been taken included a visit to his address and/or to his place of work or agency, or at least contact with those places, perhaps by telephone."**

[22]. The message is there for all to read. Last-minute efforts to locate a witness who had promised to be at trial were found to be inadequate. Here, no promise was made by the witness to attend trial, which contacted him all the more important, or at the very least, the effort to find him should have begun in earnest much earlier. It is true that the police officer testified that during the week of the voir dire he heard from the witness by telephone after an advertisement was placed in the newspaper. However, despite the best effort of the police, the witness indicated he would not attend until Thursday, July 18. He did not attend. But when the search went to his last known address (the apartment complex) the effort to see if he was really there or whether anyone could provide information about him fell short of what was required.

[23]. In **Henriques and Carr** v R [1991] 31 W.I.R. 253 the question being considered by the Judicial Committee of the Privy Council was the admissibility of deposition evidence given

at the preliminary enquiry by a witness absent from the Island at the time of trial. Lord Jauncey of Tulichettle stated at page 258:

> **"A judge, faced with an application to admit the deposition of an absent witness, should weigh up all the factors relevant to its grant and refusal before reaching a decision, which should seek as far as possible to do justice between the parties and ensure a fair trial. The importance of the evidence to be given and the availability within a reasonable time of the witness to give it are clearly relevant factors ..."**

Further,

> **"In his summing-up the judge directed the jury that they could disregard the evidence of the doctor if they did not think that it sounded right. However, he did not warn the jury that deposition evidence was not necessarily of the same weight as evidence which they had heard tested before them by cross-examination. Their Lordships consider that this was a regrettable omission. When a judge allows deposition evidence to be admitted he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they must take this into consideration when evaluating the reliability of his evidence."**

[24]. Therefore, in determining the admissibility of the statement was required to consider:

(1) that it is the only material which identifies the accused as being the perpetrator of the crime or even being present on the occasion of the crime;

(2) that the jury would not have had the opportunity of determining the credibility of the maker of the statement, not only in respect what he stated but also by an assessment of his demeanor;

(3) that the witness would not be available for cross-examination;

(4) that the efforts stated in terms of attempts to locate him were not concrete enough or detailed enough to satisfy a judge that "all reasonable steps" had been taken in this regard, bearing in mind that a consequence of a failure of these efforts would be an ingredient upon which it could be determined that this crucial evidence would be admissible in a paper document, and would indeed be , if admitted the only evidence of identification in the case.

[25]. The fact that Parliament has passed a law permitting a written statement to be admitted in evidence if certain pre-conditions are met does not remove from the trial judge his duty to ensure fairness in the conduct of the trial. The danger of identification evidence has been highlighted by the Judicial Committee of the Privy Council in many cases from our jurisdiction. In charges similar to the present, it is difficult to see how a recitation of these warnings could have any meaningful impact on a jury when the only evidence of identification is a statement taken by the police from a person who has not given evidence at the trial.

[26]. Our Evidence Law provides a potentially far-reaching set of provisions permitting the introduction of a witness statement in a criminal trial in circumstances where the witness is unavailable for cross-examination. The fact that the section is not invoked often should not be allowed to obscure its scope, which is very broad. The fact that the witness did not give evidence or undergo cross-examination at the preliminary inquiry is not a bar to the admission of the evidence. Indeed, this consideration is not referred to at all in **s.105**.

[27]. The leading authority on the topic is the decision of the Privy Council in **Scott v. R.** (4). Lord Griffiths gave the unanimous decision of the Privy Council in a case where at trial in Jamaica sworn depositions of witnesses given at the preliminary inquiry were admitted in evidence over the objection of the defence. This, of course, is not on all fours with the present case because the witnesses in question in **Scott** had been cross-examined at the preliminary inquiry. His Lordship concluded his analysis of the existing case law and legislation in this manner ([1989] A.C. at 1258–1259):

> **"In the light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules**

can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will in addition be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.

Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case, and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing

up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."

[28]. There are good reasons, of course, why it is preferable to have witnesses attend court rather than merely have their cold, written statements admitted in evidence. The veracity of the information can be tested in cross-examination and their demeanour observed by judges and jurors. But as Belizean and other statute and case law accepts, it is not always practicable to have witnesses attend court, and hearsay, even when it is the decisive evidence for the prosecution, is not always prejudicial to the defendant.

[29]. Indeed, that point was settled persuasively for Jamaica in **Regina v Horncastle** when England's Supreme Court upheld the conviction of Michael Horncastle for causing grievous bodily harm primarily on the witness statement of the victim who died from drink before the case. That principle was upheld by the European Court of Justice, which reserved itself in the Imad al-Khawaja case that convictions in which written statements were decisive and defendants had no opportunity to cross-examine the witnesses were never allowable.

[30]. In my view the requirement of all (emphasis mine) reasonable steps being taken to find the maker of the statement as a pre-condition to its admissibility were not met in the perfunctory evidence of such efforts given by the Crown witness and without any indication of what information could have led the police to carry out the search in the areas which they indicated and from what sources the information was obtained.

[31]. The prosecution did not prove beyond reasonable doubt that all reasonable steps were taken, in the context of this case, to find the witness and therefore, the statements were not admitted into evidence.

DEFENCE:

[32]. Submission in law. No case to answer pursuant to the enunciations of Chief Justice Lord Lane in **Galbraith**.

[33]. I reminded myself that the general approach to be followed where a submission of 'no case to answer' has been made was described by Lord Lane in **R v Galbraith** [1981] 1.W.L.R. 1039 where he said: -

> (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 nature for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (3). Where the judge concludes 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.
>
> (4). 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 conclude 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 to the judge".

[34]. The proper approach to take is discussed in the **R v. Galbraith**, 1981, at page 1039, or I W.I.R 1039 at page 1060. The ratio in 2 All ER 1060 may be stated simply under two headings:

> (1). "If there is no evidence that a crime alleged has been committed by the Defendant, there is no difficulty. The Judge will 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 some other evidence. (2)(a)goes on to state, where the Judge concluded that the Prosecution's evidence, taken at its highest, is such that a Jury, properly directed, could not properly convict on it, it is his duty, on a submission being made, to stop the case.

[35]. Where, however, the Prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are, generally speaking, within the Jury's province, and where on one possible view of the facts, there is evidence on which the Jury could properly conclude 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".

[36]. This principle had been further applied in the case of **Doney v. The Queen**, 1990, 171 Commonwealth Law Reports at page 207, or '96 Australian Law Reports at page 539, where the High Court said, at page 214 to 215:

> **"It follows that if there is evidence, even if tenuous or inherently weak or vague, which can be taken into account by the Jury in its deliberations, and that evidence is capable of**

supporting a verdict of guilty, the matter must be left to the Jury for its decision."

[37]. Or to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence, such that taken at its highest, it will not sustain a verdict of guilty.

[38]. The Court also found reliance on the case as to its approach, on the case of **The Queen v. Morris**, 1997, 98 Australian Criminal Reports, at page 408, where Justice Ipp, in delivering the leading judgment, said at pages 416 to 417. He said:

"When a no-case submission is made at the end of the Crown case, the test is not whether upon the whole of the evidence it will be open to the Jury to be satisfied beyond reasonable doubt that the accused was guilty. The test, as I have pointed out, is whether the Defendants could lawfully be convicted and the trial Judge at that stage is required to consider all inferences, most favourable to the Prosecution, which could reasonably be drawn from the primary facts."

[39]. So that was the quote from the case of **The Queen v. Morris**, and I said, that was giving the principal guidance that I got there, is that where the Defendant could lawfully be convicted, and a trial Judge is required to consider all inferences most favourable to the Prosecution which could reasonably be drawn from the primary facts.

[40]. In the case of **D.P.P v. Selena Varlack**, Privy Council Appeal No. 23 of 2007 an appeal from the Court of Appeal of the British Virgin Islands where at paragraph 21 of the judgment Law Lord Carswell said:

> **"The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in R v Galbraith [1981] 2 All ER 1060, [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inference."** [Emphasis added]

[41]. In **Crossdale v R** (1995) 46 WIR 281, a decision of the Privy Council from Jamaica, Lord Justice Steyn at page 285 stated that:

> **"A judge and a jury have separate but complimentary functions in a jury trial. The judge has a supervisory role. Thus, the judge carries out a filtering process to decide what evidence is to be placed before the jury. Pertinent to the present appeal is another aspect of the judge's supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury. (ii) Lord Devlin in Trial by Jury, The Hamlyn Lectures, (1956, republished in 1988) aptly illustrated the separate roles of the judge and jury. He said (at page 64):- "…there is in truth a fundamental difference**

between the questions whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is…The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve men is the better instrument for arriving at a just verdict."

[42]. In **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56, a case emanating from the British Virgin Islands, the Privy Council succinctly restated the Galbraith principles. At paragraph 21, Lord Carswell, in reading the judgment of the Court said:

"The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical

> **statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in R v Galbraith [1981] 2 All ER 1060, [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inference."** [Emphasis added]

[43]. In **Taibo v the Queen** (1996) 48 WIR 74, a case from Belize, the Privy Council found that there were serious weaknesses in the case for the prosecution, but they were not necessarily fatal: page 83 (f-g). They also found that although the case against the appellant "was thin and perhaps very thin", if the jury found the evidence of [JC, CG and FV] 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.

[44]. Lord Sankey views in **Woolmington vs. Director of Public Prosecution** [1935] AC 462, as follows:

> **"It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case."**

[45]. In another case, **Chauya and Another v The Republic**, Criminal Appeal No. 9 of 2007, the Honourable Chipeta J (as he was then) stressed that:

> **"In Criminal law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul."**

[46]. The common thread running through these cases is that the task of a judge in considering a submission of 'no case' is the balancing one. On the one hand, a judge should be careful not to usurp the purview of the jury who are the judges of the facts. On the other hand, the judge is duty bound to safeguard accused persons from conviction on facts which are so precarious, unsafe or insufficient that injustice would result.

[47]. On a submission of 'no case' to answer, the question to be decided by the trial judge is whether a properly directed jury could convict on the evidence adduced by the prosecution at the close of their case. The judge does not have to find at this stage that the prosecution have established the ingredients of the offence beyond a reasonable doubt. This is never a determination for a judge to make on an indictable trial. To do so will amount to a usurpation of the jury's function. As stated in **Taibo [supra]**, the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt, if there is, the judge is required to allow the trial to proceed. In other words, the judge is merely to consider whether a prima facie case has been established by the evidence adduced by the prosecution.

[48]. The commonwealth legal colloquialism 'no case to answer' is aptly descriptive of the matter. The matter is whether the case for the Prosecution at its closing has been so deficient in the evidence as to make it virtually vexatious, inappropriate, inefficient and/or pointless to

prolong the proceedings into the case for the Defence. The essence of the motion, then, is that the evidence tendered in the prosecution case has not raised any serious question of guilt that the Defence should be put to the trouble of answering. Hence, it is said, the case for the Prosecution has raised 'no case' for the Defence 'to answer'. In the result, the motion urges the Court to enter a directed judgment of acquittal, at the close of the case for the Prosecution, without the Defence being or feeling called upon to commence their case.

[49]. It thus affords a stronger reason to say that a 'no case to answer' motion must necessarily fail when the case for the Prosecution is found to have established the prospect of guilt at the civil standard of proof. For, that is a level higher than the parity of likelihoods of guilt and innocence since the prospect of guilt (at that level) appears to be 'more likely than not.'

[50]. It may be noted, of course, that the standard of proof that has established guilt at only the level of 'more likely than not' will be inadequate for a criminal conviction. In order to convict an accused of a crime, the tribunal of fact needs to be satisfied beyond reasonable doubt as to the guilt of the accused. But, strictly speaking, that is an irrelevant consideration for purposes of motions of 'no case to answer'. This is because the question of conviction of the accused is not engaged immediately upon the closing of the case for the Prosecution (when the motion of 'no case to answer' is made) before the conclusion of the case for the Defence. It is therefore correct to observe that the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial.

[51]. The question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands, whether, that is to say, there is with

respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt. See **May v O'Sullivan** [1955] HCA 38; (1955) 92 CLR 654. The ultimate question of fact must be decided on the whole of the evidence.

[52]. The indicated standard, rather, is proof on a balance of probabilities. Indeed, that proposition was so clearly stated in **Wilson v Buttery**:

> **"The expression used by Blackburn J., in R v Smith, (1865) 34 L.J. M.C. 153, with reference to a criminal case, is that which would be used in a civil case, namely, that "there must be more than a mere scintilla of evidence before the case is submitted to the jury." At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? but this, do they establish a substantial balance of probability in favour of the inference which the prosecution seeks to draw?"**[1]

[53]. There is indeed a storied value to the pronouncement that 'there must be more than a mere scintilla of evidence before the case is submitted to the jury.' Its value resounds in the very definition of di prima facie case, at every stage where that concept is in play.

[54]. The assessment to be undertaken is made more difficult by the circumstantial nature of the prosecution case. As will become apparent, whether the facts can prove the

[1] Wilson V Buttery, supra, p 154.

circumstance of murder involves issues of degree upon which reasonable minds may differ. This highlights the importance of not drifting unwittingly into the role of the jury, or the judge in a judge-alone trial, as the ultimate arbiter of fact.

[55]. The well-known test to be applied to a no case to answer submission was described in **Doney v The Queen** (1990) 171 CLR 207 at 214–215 as follows:

> **"…[i]f there is evidence (even if tenuous or inherently weak or vague) which can be considered by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."**

[56]. In "Acquittals by Direction" (1986) 2 Australian Bar Review 11 at 12, namely:

> **"…The trial judge never asks himself the question whether the facts and inferences which the Crown evidence is sufficient to establish are reasonably open to an explanation consistent with innocence ... Whether the Crown has excluded every reasonable hypothesis consistent with innocence is a question not for the judge, but for the jury."**

[57]. The same conclusion was reached by the Full Court of the Supreme Court of Victoria in **Attorney-General's Reference (No 1 of 1983)** [1983] 2 VR 410 at 415. That decision was approved by the High Court in **Doney v The Queen** (1990) 171 CLR 207. Indeed, King

CJ in *Questions of Law Reserved on Acquittal (No 2 of 1993)* referred to that decision with evident approval earlier on the very page containing the passage I have quoted.

[58]. The principles, in summary form, are as follows:

(1) If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be.

(2) If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer.

(3) There is no case to answer only if the evidence is not capable in law of supporting a conviction.

(4) In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt.

[59]. In the decision of the Queensland Court of Criminal Appeal *in* **R v Stewart; ex parte Attorney-General** [1989] 1 Qd R 590 McPherson J, as he then was, with whom Andrews CJ and Demack J agreed, said at 592:

> **"…Only if the evidence had been such that an inference to that effect was incapable of being drawn beyond reasonable doubt could it be said that there was in law no material on which a**

> **verdict of guilty might be found; that there might remain a possible inference consistent with innocence did not serve to remove the question from the province of the jury."**

[60]. There is a host of decisions, which I am citing hereunder, where Courts have pronounced themselves on the issue of the burden and standard of proof required to establish the guilt of an accused person. I will only minimally seize the benefit of these authorities to guide me on the matter of burden and standard of proof; and, thus, enable me to reach a just decision in the instant matter before me.

[61]. Regarding the standard of proof, the Prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt**. See: Woolmington v DPP** *[1935] AC 462***.** However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the Accused, it should be resolved in the favour of the Accused persons. Therefore, the Accused persons must not be convicted because they have put a weak defence but rather that Prosecution case strongly incriminates them and that there is no other reasonable hypothesis than the fact that the Accused persons committed the alleged crime.

[62]. The standard of proof is beyond reasonable doubt as discussed in the case of **Miller Vs. Minister of Pensions** (1947) 2 All ER 372 at 373**;**wherein Lord Denning stated as follows**:**

> **"That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a**

remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice".

[63]. Similarly in **Uganda vs. Dick Ojok** (1992-93) HCB 54**:** it was held that in all criminal cases, the duty of proving the guilt of the Accused always lies on the Prosecution and that duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

[64]. With respect to the nature of evidence required, the Accused persons can only be convicted on the basis of evidence adduced before Court, such evidence must be credible and not tainted by any lies or hearsay, and otherwise it will be rejected by the Court for being false.

[65]. Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of **Uganda vs. Bosco Okello** [1992-93] HCB 68 **, Uganda vs. Muzamiru Bakubye & Anor High Court Criminal Session No.399/2010,**where it was held that Prosecution must prove the following ingredients beyond reasonable doubt:-

(1) That the deceased is dead;
(2) That the death was caused unlawfully;
(3) That there was malice aforethought; and
(4) That the Accused person directly or indirectly participated in the commission of the alleged Offence.

DETERMINATION

[66]. I accordingly **ACQUIT** you **KENTROY MCKOY** of the Offence of Murder that you are charged with and set you free unless there are other Charges against you.

Dated the 26th day of June 2023

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RICARDO O. SANDCROFT

Justice of the High Court