COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Division

Cri/vbi/201/9/2018

Between:

REGINA

VS

FRANKLYN DEAN

BEFORE: The Honourable Mr. Justice Gregory Hilton

APPEARANCE: Angelo Whitfield for the Applicant

Alex Morley for the Respondent

Hearing Dates: 11th December 2019

RULING – on NO CASE SUBMISSION

[Criminal Law – No Case Submission – Attempted Murder Identification Evidence – Whether quality of identification sufficient to leave case to jury]

1. The Accused is charged (being concerned with another) with two counts of Attempted Murder contrary to section 292 of the Penal Code Chapter 84 the particulars allege:

> "That you Franklyn Dean, on Saturday 2nd June 2018, at New Providence being concerned with another, attempted to murder Kingsley Cleare and Philip Saunders."

2. The Accused pleaded not guilty on his arraignment and the prosecution commenced the trial on 2nd December 2019. At the close of the prosecution's case counsel for the Accused made a submission of No Case To Answer.

3. Counsel for the Accused submitted that the case should be withdrawn from the jury because the quality of the Identification evidence was poor and was a Dock Identification which should not be left to the jury under Turnbull principles (Supra).

4. Counsel for the prosecution submitted that the quality of the identification evidence was not poor and the case should be left for the jury to determine if it was accurate or reliable and that the prosecution evidence falls within part (b) of the second limb of Galbraith (Supra) in that its strengths or weakness depends on the view to be taken of a witnesses credibility which is generally within the province of the jury.

THE LAW

5. The ordinary guiding principles when the court is presented with a submission of "No Case To Answer' at the close of the prosecution's case are set out in R.v. Galbriath [1981] 1 W.L.R. 1039 at 1042 B-D Lord Lane C.J. stated:

> "How then should a judge approach a submission of No Case?

(1) If there is no evidence that the crime alleged has been committed by the defendants there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

a) Where the judge comes to the conclusion that the prosecution's evidence taken at its highest is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

b) Where, however, the Crown's evidence is such that its strengths 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 on which a jury could properly come to the conclusion that the Defendant is guilty, then the judge should allow the matter to be tried by the jury. There will of course, as always in this branch of the Law, be borderline cases. They can safely be left to the discretion of the judge."

6. While the principles outlined in Galbraith indicate that issues of credibility and reliability are generally matters for the jury; In relation to identification cases, the following principle was laid down in R.v. Turnbull [1977] QB 224 where at 229 Lord Widgery CJ instructed as follows:

> "In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, neighbour, a close friend, a workmate

> and the like, the jury can safety be left to assess the value of the identifying evidence even through there is no other evidence to support it.....When in the judgement of the judge, the quality of the identifyingevidene is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdrawn the case from the jury and direct an acquittal unless there was other evidence which went to support the correctness of the identification."

7. Instruction on how to deal with these two seeming contesting principles (on a No Case Submission application) is given in the Bahamas Court of Appeal case of Leavon Williamson v. R. No. 34 of 1995 where the court stated at page 4 as follows:

> "The appellant was not represented by counsel at the trial. The learned trial judge was therefore denied the benefit of submissions at the end of the case for the prosecution, seeking the withdrawal of the case from the jury, and was left unassisted to make the proper choice between implementing the guidelines in R.v. Galbraith and an important principle in R.v. Turnbull. Galbraith precludes a judge from encroaching upon the province of the jury and withdrawing the case from them based on his own assessment that the prosecution evidence is unworthy of credit. Turnbull requires withdrawal of a case where identification is the decisive issue and the quality of the identifying evidence is poor. In applying this limb of the Turnbull principles in a fit case, the trial judge in fact imposes on the identification evidence, his own assessment of its quality.

8. Similar instructions were offerred in Brown and McCallum v. R. (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal, Nos 92 and 93/2006 at para: 35 where Morrison JA stated:

> "[35] So that the critical factor on the no case submission in an identification case, where the real issue is whether, in the circumstances, the eye witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the "ghastly risk" (as Lord Widgery CJ put it in R.v. Oakwell [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual functions of the jury, in keeping with Galbriath, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like."

9. An additional feature in this case is that No Identification Parade was held, even though the Accused in his record of Interview said he was willing to participate in an Identification Parade; and no explanation was given by the crown as to why no identification parade was held even though the Investigating Officer testified that she had requested one to be done. The result being that, in the trial the principle identification witness identified the Accused by the way of a "Dock Identification."

10. With respect as to whether the Dock Identification in this case is reliable or not and whether the case should be left to the jury on that evidence guidance is giving by the Privy Council in John v.

State of Trinidad and Tobago [2009] U.K. P.C. 12 at para: 14-18.

[14]. As a basic rule, an identification parade should be held whenever it would serve a useful purpose. The principle was initially stated by Hobhouse LJ in R v. *Popat*[1998] 162 JP 369, 2 Cr App Rep 208, 215, [1998] Crim LR 825 and endorsed by Lord Hoffman giving the judgement of the Board in *Goldson& McGlashan v* R (2000) 56 WIR 444. Plainly an identification parade serves a useful purpose whenever the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so, for example en route to a robbery). Often, indeed usually, that is the position and, when it is, an identification parade is not merely useful but, assuming it is practicable to hold one, well – nigh imperative before the witness could properly give identifying evidence. In such a case, Lord Hoffman said in *Goldson,* "a dock identification is unsatisfactory and ought not to be allowed," although he added:

> "Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade."

[15]. At the opposite extreme lies a case where the suspect and the witness are well known to each other and neither of them disputes this. It may be, of course, that on the critical occasion when the witness saw the crime being committed (or, for example, the person concerned en route), he

thought it was the person he knew but was mistaken as to this. An identification parade obviously cannot help in this situation. Indeed, as Lord Hoffman pointed out in *Goldson,* a parade then would be not merely unnecessary but could be "positively misleading":

> "The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime."

[16]. A third situation arises when the witness claims to know the suspect but the suspect denies this. This indeed was the situation in *Goldson*itself, certainly so far as one of the two accused was concerned. The witness, Claudette Bernard, herself shot in the face by one of the gunmen (who then shot dead her boyfriend lying next to her), subsequently identified them simply as men known to her by their street names. One of the two accepted that she knew him and the question in his case was simply whether she had recognised him on the occasion of the shooting (essentially, therefore, the second of the situations considered above): the other, however, whom he said she had seen two or three times a week on the street for three years but had spoken to only once and who had a girlfriend called Ginger, disputed that she knew him at all, said that he had no such girlfriend, and gave evidence to that effect.

[17]. The advantage of holding an identification parade in such circumstances was, as counsel pointed out:

> "If Claudette had failed to pick out the accused on the parade, her assertion that the accused were known to her would have been shown to be false. By not holding identification parades, the police had denied the accused an opportunity to demonstrate conclusively that she was not telling the truth."

[18]. The Board referred to two English cases where there was "a dispute over whether the accused was in fact a person known, or sufficiently known, to the witness" and where the convictions had been set aside an unsafe because, in the absence of a parade, the evidence of identification (in each case by way of dock identification) was regarded as too weak to support the conviction. In R *v Conway* (1990) 91 Cr App Rep 143, [1990] Crim LR 402 the witness said that she knew the accused, had seen him in public house and entertained him to dinner, but did not know his name, where he lived, or anything of importance about him. No identification parade had been held despite the accused having denied that the witness knew him having expressly requested a parade. In R *v Fergus* [1992] Crim LR 363, where the witness had claimed only to have seen the accused once and to have heard his name from someone else, the court observed "The case where the Complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition."

11. In this case the Accused never questioned or refuted that Philip Cleare did not know him well.

12. On the evidence presented in this case there is no dispute that the offence of Attempted Murder was committed. The issue to be determined is whether the Dock Identification of the Accused by the principle identifying witness is sufficient to establish a prima facie case and should be left to the jury.

13. In the trial the principle identifying witness was Philip Cleare. He testified that the Accused was well known to him for about 3 years and was his neighbour who lived one corner away from his home. That he and the Accused hung out together regularly playing dominoes at his home on many occasions and went out partying together dating girls and having drinks and he had dropped the Accused home on several occasions after they had gone out and had considered him to be a friend.

14. With respect to the incident Philip Cleare testified that at around 12 noon on Saturday the 2nd June 2018 he was in the front of his yard washing his motorbike when he saw the Accused (who he called Frankie) Franklyn Dean exit a parked silver Passo vehicle along with another man with Rasta Dreadlocks who he did not know.

He testified that this car parked on the park next to his house and when the Accused exited the car the Accused had a conversation with one Van Forbes for about a minute or two. He testified that the Accused was about 15 to 20 feet away from him at this time and that it was a sunny day and nothing obstructed his view of the accused.

He testified that he saw the Accused and the other unknown man get back into the Silver Passo that the Accused got in the Driver's seat and then this car drove slowly to the front of his house and the front passenger window came down and multiple gunshots were fired from the car toward his house resulting in his brother Kingsley Cleare receiving gunshot injury to his hip and Philip Saunders receiving multiple gunshot injuries all over his body. He said after the shooting the Silver Passo sped off and while the shooting was occurring he ran for his life and was not injured.

15. In my view the quality of the identification evidence in this case is not poor; but rather falls within the characteristics listed in Turnbull (ante) as good. That is to say the identifying witness was both a neighbour and friend of the Accused and the circumstances of the identification were that he was a short distance 15-20 feet away from the Accused for 1-2 minutes on a Sunny day with nothing obstructing his view.

16. The difficulties disadvantages or dangers sometimes occurring in a failure to hold an Identification Parade and relying on a Dock Identification in my view, in the circumstances of this case, can be met with proper and adequate directions to the jury.

17. I find that the identification evidence led is sufficient to be left before the jury to weigh whether it is credible or reliable and as a result the submission of No Case To Answer is dismissed and the matter will proceed for a determination by the jury.

Dated this 12th day of December 2019

The Hon. Mr. Justice Gregory Hilton