**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**CRIMINAL DIVISION**

**CRI/VBI/249/10/2016**

**REGINA**

**AND**

**SHANNON WILSON**

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| **Before:** | **The Honourable Mr. Justice Gregory Hilton** |
| **Appearances:** | **Jacqueline Burrows from Crown** |
| | **David Cash for Accused** |
| **Hearing Date:** | **10th May 2019** |

# Ruling on No Case Submission

[Criminal Law – No Case Submission – Attempted Murder – Evidence (Sufficiency) – Whether alternate offence can be left to jury]

1. The Accused is charged with Attempted Murder contrary to section 292 of the Penal Code Chapter 84. The particulars allege:

> "That Shannon Wilson A.K.A. Ramon Wilson on Friday 10th June 2016 at New Providence, did attempt to murder Detective Constable 3569 Brown."

2. The Accused pleaded not guilty on his arraignment and the prosecution commenced the trial on 23rd April 2019. At the close of the prosecution's case counsel for the Accused made a submissions of NO CASE TO ANSWER pursuant to section 170 (1) of the Criminal Procedure Code.

3. Counsel for the Accused has submitted that no sufficient evidence has been led by the prosecution to establish a Prima Facie case of Attempted Murder as the actions of the Accused as detailed in the witnesses evidence do not amount to Attempted Murder as no "intent to kill" has been proven.

4. Additionally counsel for the Accused submitted that the evidence led is of a tennous character having regard to inconsistencies in the prosecution evidence and it would be unsafe to leave the case to the jury and based on part A of the 2nd limb of R.v. Galbraith [1981] 1 WLR 1039 on the evidence when taken at its highest a jury when properly directed could not properly convict the Accused.

5. Counsel for the Prosecution is of the view that the evidence adduced by the Crown is sufficient to support the charge of Attempted Murder and submits that it falls within part B of the second limb of the guidelines set out in R.v. Galbraith (supra). Counsel for the Prosecution submits that (notwithstanding there may be some inconsistencies) there is evidence on which a jury could properly come to the conclusion that the Accused is guilty of Attempted Murder and the case should remain before the jury for their determination.

6. Counsel for the Prosecution has also submitted that, should the court find the evidence insufficient to establish Attempted Murder, that the court should direct the jury on one of the offences under section 33 of the firearms Act (Possession of a firearm with intent to endanger life or prevent lawful arrest) which she submits is allowable under the provisions of section 129 of the Penal Code.

**THE LAW**

7. The 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. Galbraith [1981] 1WLR 1039 at page 1042 B-D where 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 defendant there is no difficulty. The judge will of course stop the case.

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

(a) Where the judge comes to the conclusion that the prosecution'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."

8. In DPP v. Varlack [2008] UKPC 56, a case emanating from the British Virgin Islands, the Privy Council, in the judgment delivered by Lord Carswell succinctly restated the Galbraith principles as follows at paragraph 21:

> "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 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] 1WLR 1039, at 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 inferences."

9. In Blackstone's Criminal Practice 2010 at D15.56 the following principles were advanced as representing the position that has now been reached on determining submissions of no case to answer:

> "(a) If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.
>
> (b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.

(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value.

(d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey [1988] Crim LR 767) where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone."

10. In Crosdale v. R [1995] UKPC 1, a decision of the Privy Council emanating from Jamaica, Lord Steyn, in considering the question: whether, where the defence applies to make a no case submission in the absence of the jury, it is right for a Judge to refuse the application and to hear the submission in the presence of the jury? Lord Steyn stated at paragraph 20:

> "20. A judge and a jury have separate but complementary 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 jury. 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 question 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. Thus logic and common sense are put together to make the verdict."

11. When reviewing the above authorities it is clear that a judge should be careful not to usurp the role of the jury who are the judges of the facts. However, a judge is duty bound to ensure that accused persons are safeguarded from conviction on facts which are insufficient or precarious and so that injustice would not result.

**THE FACTS**

12. The Prosecution called eight witnesses in support of the charge. The pertinent testimony is set out below.

13. W.D.Cpl. 2897 Nicole Knowles testified that on 10th June 2016 she was attached to the Crime Scene Investigation (C.S.I.) unit of Criminal Records Office (C.R.O.)and that at 11:30 p.m. she received information regarding a police involved shooting. She along with a Sargeant Darrell went to Guava Street Pinewood Gardens and on arrival spoke to a police constable Brown who gave her information and pointed out certain things. She testified that while wearing gloves she collected one spent 9mm casing from the ground and a 9mm silver and black pistol from a bushy area just west of the casing and later handed over the casing, and pistol to the forensic lab for testing and analysis. Under cross-examination she testified that she only collected one firearm and that she did not collect constable Brown's firearm. That the firearm she collected was processed for fingerprints by her and two latent marks were located. She testified that those marks were handed over to a Cpl. Sawyer for comparative testing in the police force AFIS system and the results were negative.

14. Tiffany Culmer testified that she worked at scientific support services of the police force and that on 11th June 2016 she received from W/Cpl. Nicole Knowles one 9mm casing a 9mm pistol S.N. 345687 and a magazine with 7 unfired bullets.

She testified that on 22nd May 2018 she handed these items over to Charles Bain of the Armoury for testing and examination.

15. Charles Bain testified that he is a firearms examiner and was deemed an expert in Firearm examination by the court.

He testified that the firearm he received from Tiffany Culmer S.N. 345687 was tested by him and was in good working order and when fired was capable of inflicting injury or death. He testified that the submitted spent casing was not fired from the submitted pistol; and that he received no other firearm for testing.

16. D./Sgt. 205 Mario Darell was attached to the Crime Scene Investigative Unit of the police force and testified that on 10th June 2016 around 11:30 p.m. he received information and he along with W D Cpl Nicole Knowles went to #26 Guava Avenue in Pinewood Gardens and he received information from a constable Brown who pointed out to him a fired cartridge casing and further west in a bushy area a black and silver handgun. He took photographs of the area (the road, front section of #26) and also of the spent casing and the firearm. He testified that he saw W/Cpl Knowles collect the casing and the firearm and that the firearm had 7 rounds – 6 in the magazine clip and one in the chamber.

He compiled a photo album which was exhibited in the trial and explained each photograph.

17. D.C. 3569 Kendrick Brown testified that he was attached to Criminal Detective Units (C.D.U.) and on the 10th June 2016 sometime after 11 p.m. he was on mobile patrol along with Sgt. 2218 Ferguson and received information whereupon they proceeded to Pinewood Gardens #26 Cottonwood Street and Guava Avenue. He said on arrival there he saw a dark male in short pants (fitting the description of the information he received) along with another male. He said this dark male appeared to look in their direction and ran on the side of the building which was brightly lit. He testified that he exited the police vehicle and chased the man shouting 'Police stop' and that this man reached into his waist took out a handgun and turned slightly while running and pointed the gun in his direction. He testified that he became in fear and discharged his gun at the man who he saw stumble and fall and the handgun flew out of his hands into a bushy area. He testified that the man said "Officer I have been shot." He testified that Sgt. Ferguson called C.S.I. and E.M.S. who came to the scene. C.S.I. processed the scene and took photographs and collected the firearm collected from the bush and a spent casing. He identified the firearm collected by W/Cpl Knowles by its Serial Number and he identified the Accused as the person he saw

run from him and pull out the handgun and pointed it in his direction before he shot him. Under cross-examination he said he did not know where the other man ran and that the Accused did not wear gloves. He said he handed in his police issued firearm to Internal Security Division (I.S.D.) along with a form for it to be tested.

18. Inspector Addison Ferguson testified that on 10th June 2016 he was then a Sgt. 2218 and was on patrol with D.C.3569 Brown and other officers. He testified that after receiving information from police control he drove with D.C. Brown in the passenger seat to the area of #26 Wild Guava Avenue. When they arrived he saw a man looking in his direction and start to run alongside the house. He said he and Brown gave chase. Brown was ahead of him. He testified that the man produced a silver and black handgun and he said he shouted "Police."

    He testified that D.C. Brown then discharged a shot and the man fell and dropped the gun and Brown contacted police control. W/Cpl Knowles and other Officers from C.S.I. came and processed the scene and collected the firearm which was pointed out to her by D.C. Brown.

19. D.C. 2970 Johnson was unavailable to appear and his short statements was read in court without objection and by agreed stipulation. His evidence was that on 1st July 2016 while at Princess Margaret Hospital he arrested the Accused with reference to Possession of an unlicensed firearm with intents to endanger life and possession of ammunition. That he was Booked into the central police station and for the matter to be further investigated at C.D.U.

20. The final witness called was Sgt. 2248 Scott Smith who gave evidence by live television link as he was out of the jurisdiction. He testified that in 2016 he was attached to C.D.U. and on 3rd July 2016 was assigned the matter where officer Brown was the complainant and Shannon Wilson was the suspect. He said he interviewed the Accused who refused to answer his questions

in the absence of a lawyer and that he subsequently charged the Accused. Under Cross – examination he said he could not recall if he received the results of fingerprint analysis requested by Nicole Knowles not whether he received any results from Officer Brown's firearm. He testified that it is proper police procedure and is expected that an officer's gun be tested where a police officer shoots a civilian. He also testified that when a person is arrested and charged that that person is fingerprinted and the prints are put in the AFIS system.

21. The Crown closed its case and the Court ordered that Officer Sawyer be called, at the instance of the court, as he was the officer whom W/Cpl. Nicole Knowles testified (under cross – examination) that she handed the two latent fingerprints she obtained from the firearm to to be analysed. Cpl. Sawyer testified that he received two latent prints in an envelope from W/Cpl. Knowles on 11th June 2016 and on 13th June 2016 he conducted a comparison of them along with known rolled prints on file at C.R.O. in the AFIS system. He testified that he found no prints matching the lifts that he received from W/Cpl. Knowles.

**WHAT IS EVIDENCE NECESSARY TO ESTABLISH ATTEMPTED MURDER**

22. In Volume 11 of Halbury's laws of England Fourth Edition at paras: 64 and 65 it is stated:

> "An attempt is any overt act immediately connected with the commission of an offence and forming part of a series of acts which, if not interrupted or frustrated or abandoned, would result in the commission of the completed offences. Acts remotely leading towards the commission of an offence cannot constitute an attempt; the acts must be immediately connected with the offence. An act done preparatory to the commission of an offence is not sufficiently proximate and it is not an attempt

merely to procure materials with which to commit the offence. Whether an act is sufficiently proximate to be capable of amounting to an attempt is a question of Law; Whether the act amounts in the circumstances to an attempt is a matter of fact for the jury.....

In order to support a charge of attempting to commit a crime, it must be shown that the Defendant intended to commit the completed crime to which it relates. Notwithstanding that the completed crime might be established by proof of recklessness, an attempt to commit it requires a specific intention....."

23. In the case of DAVEY and Others v. LEE Volume 51 1967 Crim A.R. 303, the Lord Chief Justice Parker with whom Lord Justice Diplock and Mr. Justice Ashworth agreed stated at page 305:

"What amounts to an attempt has been described variously in the authorities, and for my part I prefer to adopt the definition given in Stephen's Digest of Criminal Law (5th Ed.) Art. 50: 'An attempts to commit a crime is an act done with intent to commit that crime, and forming part of a serious of acts which would constitute its actual commission if it were not interrupted. As a general statement, that seems to me to be right, though it does not help to define the point of time at which the series of acts begin. That, as Stephen said, depended upon the facts of each case.

A helpful definition is given in paragraph 4104 in the 36th edition of Archbold's Criminal Pleading, etc., Where it is stated: 'it is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is

immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specified crime."

24. What is clear on a submission of 'No Case To Answer" is that the question to be answered by the judge is whether a jury properly directed could convict on the evidence adduced by the prosecution at the close of its case.

25. On the evidence in this case as detailed earlier I am of the view that the actusreus of Attempted Murder has not been established as the act of the Accused running away from the police and producing a handgun to point at them, without firing, while he is running away from them, can reasonably be regarded as possessing the firearm with intent to evade lawful arrest or endanger life and not Attempted Murder. The intent which the Accused must be shown to have on the charge of Attempted Murder in this case is a specific intent to kill Officer Brown and the actions of the Accused do not in my view establish that intent to the extent that a reasonable jury properly directed could return a verdict of guilty beyond a reasonable doubt.

26. In my view having reviewed the evidence as outlined above and after considering the law and legal guidelines set out earlier I find that there is no sufficient evidence adduced by the prosecution to establish the offence of Attempted Murder.

27. The Prosecution have also submitted that should the court so find Attempted Murder not made out that the court, under the provision of section 129 of the Penal Code, leave to the jury the charge of Possession of an unlicensed firearm with one of the intents specified in section 33 of the Firearms Act.

Section 129 (3) of the Penal Code specifies:

> "If, when a person is charged with an offence part only of such charge is proved, which part amounts to an offence other than that charged and being, in the opinion of the court, an offence committed in execution of the same design as in the specified charge, he shall be punishable in respect of the offence which he is proved to have committed, although he was not charged with it, or he may be punishable for an attempt to commit the offence charged, although not charged with the attempt.'

28. Counsel for the Accused in reply has submitted that the court cannot substitute an alternate charge of possession of a firearm with intent as it is not a lesser charge to Attempted Murder but a separate and distinct charge under a different Act from the Penal Code.

29. The Court is of the view that on a proper reading of section 129 (3) of the Penal Code effect must be given to the words 'an offence committed in execution of the same design as in the specified charge" in order to allow substitution of an alternate charge where the charge in the Information is not proven or made out.

Offences under the Firearms Act could have been proffered against the Accused ab initio but I do not consider that any of those offences in section 33 of the Firearms Act can be termed to be committed in execution of Attempted Murder on the facts of this case.

30. As a consequence the case against the Accused will be withdrawn from the jury and the jury will be directed to return a verdict of not guilty of the charge of Attempted Murder in the Information.

Dated this 13th day of May A.D. 2019

The Hon. Mr. Justice Gregory Hilton