COMMONWEALTH OF THE BAHAMAS **CRI/VBI/24/1/2019**

IN THE SUPREME COURT

Criminal Division

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

FRANKLYN EDGECOMBE aka "Chili"

Before: The Honourable Mr. Justice Franklyn K M Williams KC

Appearances: Timothy Bailey with him Tamika Roberts for the Director of Public Prosecutions

Ms. Marianne Cadet for Edgecombe

Hearing Dates: 7 July 2023

Murder – Identification evidence – No case to answer submission – Turnbull – Galbraith - Whether case should be withdrawn from jury

The defendant was identified as the person who shot and killed Rico Archer on the evening of 11 December 2018 by Valentino Williams, who, at the time of trial was deceased.

The defendant submits that the evidence of the prosecution is so tenuous that it should not be left to the jury relying on limb 2(a) of *Galbraith*

The defendant further submits that the identification evidence is of poor quality relying on *Turnbull*

Held, the prosecution having established a *prima facie* case against the defendant, he is called upon to answer the charge.

R v Galbraith [1981] 1 WLR 1039

R v Turnbull [1977] QB 224

Giovanni Ivan Clarke SCCrApp & CAIS No. 156 of 2017 applied

Garvin Adderley v R SCCrApp. No. 250 of 2017 distinguished

Charlvin Laramore v AG SCCrApp. No. 200 of 2018 distinguished

Williams J

1. I remind myself of the guidelines to be observed where identification is in issue in *R v Turnbull* [1977] QB 224

> "3. First, whenever the case against the accused depends wholely or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the

identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one...

4. Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance. ...Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
5. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made
6. All these matters go to the quality of the identification evidence. ...; but the poorer the quality, the greater the danger.
7. 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, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution."

Submission of No Case

2. Ms. Cadet relies on *Turnbull* and submits that the statement of Valentino Williams yields identification of such poor quality that the case should be withdrawn from the jury; that there is no other evidence to support the identification; that it was night and it was dark; that there is no indication of distance from which, and length of time, the observation was made. Finally, Ms. Cadet submits that the evidence of Inspector Mckinney, Sergeant Miller and Sergeant Valcin and the reference to the crime scene photos prove that the witness Williams could `not have seen what he said he saw.

3. Neither the photographic evidence nor the referral of the officers to them either buttresses or impugns the Williams evidence. When asked several questions by Ms. Cadet on estimation of distance. Inspector Mckinney responded "I could only assume, ma'am.". Similarly, Sergeant Miller, when asked answered "As I indicated I visited the scene, but as to speak to where the witness was and to what area he was pointing to, I can't speak to that."

4. Valentino Williams states:

"On Tuesday 11 December, 2018 sometime after 7:30 pm, I was in the area of North Street, Fort Fincastle. I was headed to Carline

hamburger shop on prison lane to purchase a chicken burger. While walking pass the Haitian food store on the eastern part of North Street, I **noticed** a male wearing dark clothing and a **Rasta colored tam** walked out of the corner next to the Haitian shop. This male walked onto North Street and he was **walking fast holding a dark colored handgun in his hand**. As the male **walked under one of the lamp – pole lights**, I was able to **see his face clear and I recognized this male immediately**. It was an old male with a gray dingy beard I know as "Chilly" from Mason Addition. "Chilly" grew up in Mason addition, and I know him from hanging through McCollough corner. as "Chilly" walked east on North Street, I suddenly heard a loud bang noise. It sounded like a gunshot and I saw that "Chilly" was running behind another person who had on a gray coloured jacket. I could hear the sounds of more gunshots as Chilly was running and I could see smoke rising over his body. The male in the hoody jacket dropped down to the ground through the little alley road between the Francis and Burnside's home. I ran to the corner just east of the Francis home staying hard to the southern side of the road to avoid being seen. I watched as "Chilly" stood over where I saw the person drop, and I watched as he pointed the black handgun to the ground and fired the gun three times, I could see fire come from the barrel. I then watched "Chilly" run south through that alley out of my sight."

5. The statement if accepted by the jury shows a lengthy observation by a witness who recognized someone, not only known to him for some length of time, but some of whose social habits he was familiar with viz, "It was an old male with a gray dingy beard **I know** as 'Chilly' **from Mason**

Addition. 'Chilly **grew up in** Mason addition and **I know him from hanging** through McCullough Corner."
That recognition was illuminated by light from lamp pole.

6. Mr. Donald Palmer, sometime employer of the defendant confirms that the defendant is "Chilly" and that he has only known him by that name , apparently for forty years. The defence has not disputed that the defendant is otherwise known as "Chilly".

7. I do not accept that the identification evidence is poor and unsupported *Deangelo Johnson v R* SCCrApp No. 111 of 2017. If, as complained the statement of identification is weak for want of evidence of length of time of observation, distance and lighting, these, nevertheless are issues to be addressed by myself in directions to the jury. In my judgement, the statement of Valentino Williams is **not** so weak that in the absence of corroboration, that the case must be withdrawn from the jury *Giovanni Ivan Clarke v The Attorney General* SCCrApp & CAIS No.156 of 2017

8. I remind myself of the guidelines to be observed when a no case submission is being considered *R v Galbraith* [1981] 1 WLR 1039:

> " (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 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 prosecution 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 province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion

is guilty, then the judge should allow the matter to be tried by the jury. It follows that ...the second of the two schools of thought is to be preferred.

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."

9. In my judgement the evidence is neither tenuous nor is this a borderline case. Some corroboration of the statement of Valentino Williams is to be found in the evidence of Nekis Smith. Williams states:

> "On Tuesday 11th December, 2018 sometime after 7:30 pm, I was in the area of North Street, Fort Fincastle..."
> I watched as "Chilly" stood over where I saw the person drop, and I watched as he pointed the black handgun to the ground and fired **the gun three times**, I could see the fire come from the barrel. I then watched "Chilly" run south through that alley out of my sight. I stayed put until **I saw person start coming out of their homes and I heard someone shout out "oh my God that's Rico**".When I heard that, I ran to that alley and I saw that a man I know as Rico was on the ground bloody".

and Nekis Smith:

> " I remember, December 11th ...
> It could have been after 8:00... .He (Rico) went to the shop.... It could have been 30 minutes he didn't come home. Couple seconds **I heard gunshots**. ...**I heard the neighbours them out there**. ...**I heard gunshots, and I heard talking**.[Emphasis added]

10. The words boldly highlighted (above) in the respective evidences of Valentino Williams and Nekis Smith are, in my judgement, capable, in measure, of corroborating each the other.

11. The evidence of Dr. Caryn Sands, *in summa*, is that the cause of death of Rico Archer was gunshot wounds to the head, torso and extremities. All but the gunshot to the head were back to front wounds, thereby corroborating in part the statement of Valentino Williams that the

defendant (whom he said he knew and recognized) "...was **running behind** another person..." and that he(Williams) "...could hear the sounds of **more gunshots** as Chilly was running and I could see smoke rising over his body."

12. The body of the deceased according to crime scene photo was depicted in face up position and of whom Valentino Williams stated " **The male** in the hoody jacket **dropped down to the ground through the little alley** road..." and "...I ran to that alley and I saw that a male I know as Rico was on the ground bloody."

13. The gunshot wound to the head, described by Dr. Sands as "Direction: front to back to the back and downward." is consistent with the depiction of the deceased's body face up upon discovery. This in my judgement, corroborates in part the statement of the witness Williams- when he states, "I watched as 'Chilly' stood over where I saw the person drop and fired the gun three times,...".

14. I am affirmed in my view by the evidence of Dr. Sands:

"A. ...Most of the time, if you have a gunshot wound to the top of the head, its either **the projectile is coming from above**... . In other words, the head is lower, so the subject is down to have that trajectory.
So, if someone is standing, it's unusual, so the head was likely lower."

and:

"Q. Okay, if someone has fallen on their back, and they are being shot, would you expect the entrance wound to be from the front?

A. If –they would be shot in the areas that are exposed. If they are lying on their back, the entrance would not be in their back, because that is the part that is not exposed to the projectile."

15. Whilst none of the above is direct evidence against the defendant, it corroborates, in part and *scientific notatio*, what the witness Williams alleges.

16. Ms. Cadet supported her submissions by reference to the decisions of *Garvin Adderley v Regina* SCCrApp. No. 250 of 2017 and *Charlvyn Laramore v The Attorney General* SCCrApp. No. 200 of 2018 both of which are distinguished upon the peculiar facts of each.

17. In *Adderley,* the appellate court found, after a review of the evidence, that the deceased "...could have had no more than a fleeting glance of the man with the handgun; and that the man would have been masked." In his statement there, the deceased did not say that he actually saw the man with the gun shoot him, only that that man whom he knew approached him with a gun in hand, as he lay on the ground, **after having already been shot**.

18. In *Laramore,* the appellate court found that the learned trial judge failed to resolve the inconsistencies between the evidence of the girlfriend of the deceased, witnessed the shooting of the deceased whilst he attempted entry of a van, and that of the arresting officer who purported to have seen the appellant with handgun shooting at a man trying to enter that van. The girlfriend described the gunman's complexion as "dark", wearing a baby blue shirt, whilst the police officer described the shooter as "bright skinned" , wearing "a yellow shirt and khaki pants" .The court found that the evidence of each was "...in direct conflict."

19. I find that the evidence put on behalf of the Director of Public Prosecution satisfies the requirements of both *Turnbull* and *Galbraith* such that the case should go to the jury, of whom, on one possible view of the facts, could properly come to the conclusion that the defendant is guilty.

20. In the premises, the no case submission does not succeed; the defendant is called upon to answer the charge.

Franklyn K M Williams, KC

Justice

10 July 2023