

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**CRIMINAL DIVISION
CRI/VBI/184/10/2020**

BETWEEN

REGINA

-vs-

MARCELLO McKENZIE

Before: The Honourable Madam Justice Renae McKay

Appearances: Mrs. Erica Ingraham appearing along with Ms. Makeda Stubbs for
the Prosecution

Mr. David Cash for the Defendant

Hearing Date: 10th May, 2023

Ruling Date: 12th May, 2023

RULING ON NO CASE SUBMISSION

MCKAY J.,

1. The accused is charged with one (1) count of Murder contrary to section **291 (1) (b) of the Penal Code**, Chapter 84. The particulars allege:-

“That you, Marcello McKenzie on Sunday 28th June 2020 at New Providence while being concerned with another did murder Godfrey Sawyer Gideon.”

2. The accused maintained his innocence upon being formally charged and his trial commenced on 6th April 2023. The Prosecution called 14 witnesses and tendered 12 pieces of evidence. At the close of the Prosecution’s case, Counsel for the Accused indicated his intention to make submissions in support of a No Case to Answer application.

3. In support of his application Mr. Cash relied on **Section 170(1) of the Criminal Procedure Code** which provides that:-

“When the evidence of the witness for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing any arguments which the counsel for the prosecution or the Defence may desire to submit, record a finding of not guilty.”

4. He submitted that the question becomes how the Court treats the no case submission. The role of the trial judge when dealing with the no case submission is well established and set out in the case of **R v Galbraith [1981] 1 Weekly Law Reports 1039**, where Lord Lane said:-

“How then should the 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 evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his (or her) duty, upon a submission being made, to stop the case.”

5. Counsel submitted that according to Limb 1 of the authority there is a requirement that there be some evidence against the Defendant, even in an instance where he is being charged with another. However Counsel said, in this case there is no evidence that the Defendant Marcello McKenzie committed the offence of murder. While Counsel admits that the Prosecution has introduced a series of facts these he say are not capable of raising a suspicion that amounts to circumstantial evidence upon which a reasonable jury properly directed could convict. Defense Counsel submits that there is nothing more than a number of facts which raise suspicion. An example of a fact that raises suspicion is a call from Marcello McKenzie to his god brother which lasted only 2 minutes and then another call lasting 4 minutes and 8 seconds, the contents of the conversation cannot be determined.
6. He further placed reliance on the authority of **DPP v Varlack [2008] PC 56 at paragraph 21**, where the Board discussed the approach to circumstantial evidence from deciding a no case submission. Therein Lord Carswell stated:-

“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 direct could on that evidence find the charge in question proved beyond reasonable doubt.”

7. Continuing he quoted paragraph 22 of Varlack which states:-
 **“The principle was summarized in such a case in the judgement of King Chief Justice in the Supreme Court of South Australia in Questions of Law Reserved of on Acquittal (No. 2 of 1993) in a passage which their Lordships regard as an accurate statement of law:
 “It follows from the principles as formulated in Bilick in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favorable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence.... He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence....”**

 “I would reinstate the principles, in summary form, as follows. 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. 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.”
8. Mr. Cash is seeking to persuade the Court that if the evidence of the phone calls is disregarded then the only evidence for consideration would be the fact that the deceased Jamal Armbrister and Marcello McKenzie were together in Nassau Village around 10:40. The shooting then happened at around 12:05, and there is only evidence of Jamal Armbrister being present at that time and not Marcello McKenzie.
9. Continuing, Mr. Cash submitted that additionally for the Court’s consideration is the question of whether by virtue of the existence of two sets of circumstances, firstly the presence at the party and secondly the arrest of the Defendant in the area of Mount Tabor after 12:05am, whether alone or those taken together is capable of a reasonable jury finding beyond reasonable doubt, some guilt. And also, whether they are capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable. Mr. Cash submitted that there is absolutely no way a jury, based on the evidence before the Court, can exclude that hypothesis.
10. Counsel then relied on the facts of a case, Jerome Butler v. Regina SCCrApp.No.167 of 2017, in which he claims a reasonable jury could draw no other reasonable inference than that Jerome Butler killed Princess Butler. This case differs from the matter

concerning Marcello McKenzie because there is no circumstantial evidence to a nature that can conclude that at some point Marcello McKenzie committed the crime.

11. Mr. Cash placed further reliance on the case of **Armando Sargent v Director of Public Prosecutions SCCrApp No. 76 of 2019** where at page 18 paragraph 29 it states:-

“It is clear that there was no direct evidence that Sargent was aware of the existence of a gun prior to the shooting taking place. The trial judge, however, based his decision on the view that based on the circumstances of the evidence provided the jury could draw a reasonable inference that Sargent knew of the gun and that the plan was to use it if necessary.

The drawing of inferences in criminal trials is the process by which a jury can find, from evidence led which they regard as reliable, that they are driven to a further conclusion of fact. However, they have to be careful to ensure that the evidence really does lead to the conclusion the prosecution invites them to reach. However, it is well accepted that the standard direction which a trial judge gives to a jury is to advise that they are entitled to draw reasonable inferences, that is, to come to common sense conclusions based on the evidence which they accept, but they may not speculate about what evidence there might have been or allow themselves to be drawn into speculation. If there is more than one reasonable inference to be drawn from any findings of fact, they must draw the one most favorable to the defendant. In other words, they must give the benefit of the doubt to the defendant.”

12. Counsel submitted that based on the evidence one cannot draw the conclusion that Marcello McKenzie was involved in the shooting of Godfrey Sawyer.
13. Counsel also ask the Court to take judicial notice of the lockdown and curfew at the time.

Counsel for the Prosecution

14. Mrs. Ingraham in response highlighted the test to be applied when determining whether there is a case for the accused to answer as set out in **R v Galbraith**. She placed reliance on limb 2(b) of that case which states:-

“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 that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

15. The Prosecutor acknowledged that the evidence as presented before this Court is circumstantial in nature, however, she submitted, when taken as a whole, there is a prima

facie case against the Defendant as a reasonable inference can be drawn from all circumstances.

16. She referred the Court to the case of R v Exall, which was quoted from the case of Milargo Humes v Regina SCCrApp No. 92 of 2018, where at paragraph 19, it is stated:-

“What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them and whether they believe the account given by the prisoner is under the circumstances reasonable and probable or otherwise. Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link is broken, the chain would fall. It is more likely the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt.”

17. Continuing her submissions, Counsel said that the Prosecution in this case called a total of 15 witnesses, and when their evidence is taken in totality a reasonable jury could consider and draw a reasonable inference. She noted that one of the key witnesses admitted that he did not see the face of the second male, but was able to describe him, what he was wearing and the vehicle which he left the scene in. Counsel submitted that the shooting incident happened sometime after 11:00 and the Defendant along with the now deceased Jamal Armbrister were arrested shortly after 12:00am. Both occurrences were close in time and proximity. Further Counsel submitted that while the Defendant denied having any knowledge of a firearm being in the vehicle he never denied that he was the owner of the vehicle.

18. Counsel reiterated paragraph 22 of DPP v Varlack, stating that there is no competing hypothesis. Counsel went further to note the case of Jabber which provided that:-

“The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude.”

19. The Prosecution submits that the case, as brought before the jury, taken as a whole is circumstantial in nature. However they say that the evidence therein is very strong and

cogent and is sufficient for the triers of fact to draw the conclusion that this Defendant Marcello McKenzie was present with the now deceased Jamal Armbrister. They say that the firearm found in the vehicle ballistically matched the casings found at the scene of the murder and the vehicle and men as described leaving the scene matched the vehicle and occupants apprehended by Officers.

20. Counsel directed the Court to **Milargo Humes**, at para 22, which states:-

“In particular, the evidence of a residue on his hand the jury could on one view of the evidence convict.”

21. The Prosecution’s submission regarding the no case, is that the case is circumstantial in nature. There is no break in connection between the witnesses’ evidence. Reasonable inferences can be drawn once the Court takes the witnesses’ evidence and put the chain together. They say that they have established a prima facie case which can be put to jury the triers of fact.

Discussion/Ruling

22. I have considered the submissions of Mr. Cash and Mrs. Ingraham and their authorities in their totality. I am grateful to both Counsel for the comprehensive manner in which they dealt with the matter. I have also considered the law and the authorities provided. I have had particular regard to the authorities of **Taibo v the Queen (1996) 48 WIR 74**, and **Director of Public Prosecutions v Selena Varlack [2008] UKPC 56**.

23. In **Taibo v the Queen** 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.

24. In **Director of Public Prosecutions v Selena Varlack**, 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.”

25. As I previously stated, the Prosecution only need establish that there is a prima facie case against the Accused.

26. I am persuaded by the submissions of Mrs. Ingraham. I agree that the case as against the Defendant Marcello McKenzie is circumstantial in nature. I am also of the view that it is a question of fact for the jury to determine if they accept or reject the evidence as led by the Prosecution herein.

Conclusion

27. Accordingly, I do not accede to the submissions on behalf of the Accused man that he does not have a case to answer herein and as such I shall call upon him to answer the charges.

Dated this 12th day of May A.D. 2023

Hon. Madam Justice Renae McKay