

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: ANUHCR 2019/0061

BETWEEN:

THE KING

and

GLENTIS DAVIS
STEPHAN BANNIS

Appearances:

Mr Sean Nelson, Counsel for the Crown
Mr Michael Archibald, Counsel for the First Defendant
Mr Dane Hamilton Jr, Counsel for the Second Defendant

2022: September 29th, 30th
October 3rd, 24th

JUDGMENT

- [1] **WILLIAMS J:** At the close of the Crown’s case against the two defendants, Mr. Glentis Vernon Davis and Mr. Stephan Bannis, their counsel submitted that the defendants had ‘no case to answer’.
- [2] Mr. Davis and Mr. Bannis were jointly charged with the offence of shooting with intent, contrary to section 20 of the **Offences Against the Person Act**, Cap 300 of the Laws of Antigua and Barbuda, Revised Edition 1992.
- [3] According to the ‘Particulars of Offence’, “Glentis Vernon Davis and Stephan Bannis on the 4th day of July, 2018, at Gray’s Farm in the Parish of Saint John in Antigua and Barbuda, unlawfully and maliciously shot at Bobby Thomas with intent to do him grievous bodily harm.”
- [4] The relevant parts of section 20 as it concerns this offence, state:

“Whosoever unlawfully and maliciously shoots at any person (or by drawing a trigger), with intent to maim, disfigure or disable any person, is guilty of [a] felony.”

[5] The elements that the Crown needed to prove were that:

- I. The defendants shot at the virtual complainant Mr. Bobby Thomas.
- II. At the time of the shooting the defendants had the intent to maim, disfigure or disable Mr. Thomas.
- III. The defendants acted maliciously towards Mr. Thomas.
- IV. The defendants had no lawful excuse for shooting at Mr. Thomas.

[6] It was the Crown's case that this was a matter of joint enterprise. The Crown's evidence is that

- i. It was only one person – the Second named defendant, Mr. Bannis – who shot at Mr. Thomas.
- ii. The role of the First named defendant, Mr. Davis, was that he counseled, encouraged or procured the Second defendant to do the shooting.

Jurisdiction

[7] Pursuant to the **Criminal Proceeding (Trial by Judge Alone) Act**, No 8 of 2021, which entered into force on the 7th of June 2021, this matter came on for trial by a single judge, sitting without a separate jury. The schedule of offences which must be tried by a judge alone includes section 20 of the **Offences Against the Person Act**.

[8] At this 'direction stage' in a Judge alone trial where there is a submission of 'no case to answer', the judge, even though sitting as both the forum of law and forum of fact, is being called upon to make a legal assessment of the case – as the forum of law. Issues such as the credibility and reliability of witnesses, or what weight is to be given to a witness's testimony and the drawing of inferences ought to be left for the next stage - when the judge functions as the forum of fact.

No-Case Submission

[9] When a defendant contends that he or she has 'no case to answer,' it is well settled that the test to be applied is found in the judgment of Lord Lane CJ in **R v Galbraith**, [1981] 1 WLR 1039, 73 Cr App R 124 (CA) at 127:

"(1) If there is no evidence that the 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 other evidence.

"(a) Where the judge concludes 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.

“(b) Where however the prosecution’s 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 on which the 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, always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

The learning which emerges from cases in Northern Ireland is instructive as to how submissions of ‘no case to answer’ should be addressed in Judge alone trials. In Northern Ireland there have been trials by a Judge sitting without a jury for a number of years.

[10] There are repeated references in the decisions from Northern Ireland to the judgment of Lord Lowry CJ in R v Hassan and others [1973] NIJB.

[11] In Chief Constable of Police Service of Northern Ireland v Lo [2002] NICA 3, [2006] WL 3610012, Lord Kerr CJ cited with approval the decision in Hassan. Lord Kerr reiterated that the only basis for stopping a case at the close of the prosecution’s case was based on the principles in Galbraith. The Lord Chief Justice said there was no third basis in Judge alone trials. He said at [13]:

“In our judgment the exercise on which a magistrate or judge sitting without a jury must embark in order to decide that the case should not be allowed to proceed involves precisely the same type of approach as that suggested by Lord Lane in the second limb of Galbraith but with the modification that the judge is not required to assess whether a properly directed jury could not properly convict on the evidence as it stood at the time that an application for a direction was made to him because, being in effect the jury, the judge can address that issue in terms of whether he could ever be convinced of the accused’s guilt. Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in Hassan, that there was no possibility of his being convinced to the requisite standard by the evidence given by the prosecution.”

[12] Kerr LCJ continued at paragraph [14]:

“The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important that the judge should not ask himself the question, at the close of the prosecution case, ‘do I have a reasonable doubt?’ The question that he

should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict.”

Crown’s Case

[13] The virtual complainant, Mr. Bobby Thomas, is a taxi driver. He knows both defendants. He knows the First defendant, Mr. Davis, as ‘Bem’. Prior to 2018 Mr. Thomas was friends with Bem for 30 years. He was friends with the Second defendant, whom he calls Bannis, for ten years. The two defendants reside at Christian Street.

[14] On the 4th of July 2018, at about 8.00 pm, Mr. Thomas, got into an altercation with a man in front of a superette on Christian Street in Saint John’s, Antigua and Barbuda. He sustained an injury to his left eye in the area of his cheek bone and to his hand. That person proceeded on to Gordon Street. That person was a friend of the two defendants.

[15] The testimony of Mr. Thomas was that after the altercation, he got into his car and sat for a while; then the second defendant came up to him saying “what you all get around here, you all go tek.” And: “You all not supposed to be around ya... ah we gun bigger dan fe ah yo... Bobby, your time go come soon.” Based on Mr. Thomas’ evidence in chief, he said nothing at all to Mr. Bannis.

[16] Mr. Thomas drove off and made a circle, approaching Christian Street from Gordon Street, in the opposite direction than that which the person he was involved in the altercation went earlier. He said that he intended to return to the superette as he had forgotten something there.

[17] According to Mr. Thomas, when he reached the junction of Gordon and Christian Streets, he looked left and looked to the right before proceeding. He saw a crowd of people to his right on Christian Street. The only two persons he could recognize were the two defendants. He heard someone say: “Look he dey.” He then saw Mr. Bannis running towards him “with an object in his hand looking like a gun. Bem was behind Bannis.” Mr. Thomas said he turned left and accelerated. “After I pressed out, smashed the gas, I heard Ben voice say ‘buss the gun nah boy, buss de gun’.”

[18] There were two to three explosions and Mr. Thomas felt like the car got hit. He brought the vehicle to a stop and came out of it. He saw Bannis standing on an empty lot to the “East of the supermarket” and he was “still pointing his hands with the object in his hand. It looked like a gun.”

[19] Mr. Thomas got back into his vehicle and headed home. After he parked the vehicle, he observed a hole in the trunk of the vehicle. Mr. Thomas went into his house and locked up. About 15 to 20 minutes later there was a knock on his door. It was the police. Mr. Thomas went with the police to the Gray’s Farm Police Station. The police also removed his vehicle from his house. Mr. Thomas gave a written statement about the incident to the police at the Gray’s Farm Police Station the following day – the 5th of July 2018.

[20] Police Corporal No 606 Raphique Haywood is a Crime Scene Investigator. He went on duty after 8:00 pm on the night in question to Christian Street along with officers from the Gray's Farm Police Station. He did a "walk through" of the scene. He observed two spent shells and what appeared to be two live rounds of ammunition on the street. He put identification markers at the various items that he observed and took photographs. He then packaged and labeled each item. Corporal Thomas then went to Mr. Bobby Thomas' residence at Gray's Hill with other police officers. Corporal Thomas observed a black van parked in the virtual complainant's yard. He observed what appeared to be a bullet hole in the tail gate (rear door) of the vehicle. With the aid of a tow truck, the vehicle was taken to the Police Headquarters. The following day, the 5th of July 2018, Corporal Thomas extracted some metal fragments from the door of Mr. Thomas' vehicle.

Cross Examination

[21] The virtual complainant in response to Mr. Michael Archibald, Counsel for the First defendant, said that Bem "has a little lazy speaking voice. He speaks in a very soft tone of voice." Mr. Thomas however maintained that he heard Mr. Davis' voice.

[22] The virtual complainant was also shown the photographs tendered by the Crown and asked to point out the location of several landmarks that he referred to in his evidence.

[23] Mr. Thomas said that on the same night of the incident, he told the police officers who came to his home about the defendants. However he did not see the officers making any note of what he said to them.

[24] During cross examination was the first time that Mr. Thomas was asked about distances. He testified that when he saw Bem, the First defendant was about 40 feet away; Mr. Thomas pointed out that the distance from the witness box to the back of the court room approximated 40 feet. He said that while he told the police the Defendants were by Natalie's house when he looked right at the junction of Gordon and Christian Streets, they were in fact further away than that, about twice that distance away. The defendants were among a crowd of people, but he could not recognize anyone else. He could not recall what Bem was wearing but "Bannis had on a white T-shirt."

[25] The virtual complainant did not see who fired the shots. Mr. Thomas was shown a photograph of Christian Street in which five lamp posts could be seen. He said the first shot was fired when he was between the first and second lamp post; he came to a stop by the third lamp post: "I stop because the vehicle got hit."

[26] In response to Mr. Dane Hamilton Junior, Counsel for the Second defendant, the virtual complainant agreed that the superette that he spoke of in his evidence in chief that he was returning to, where he had forgotten something, was on the left, when he exited Gordon Street on to Christian Street. Mr. Thomas agreed that he had no business checking to the right for anything except traffic.

[27] Mr. Thomas confirmed that: “The gunshots I heard occurred after I turned on to Christian Street and facing south” – in other words, the shooter was positioned behind or to the back of the virtual complainant.

Is Identification (Recognition) an Issue?

[28] The fact that the virtual complainant said that he knew one defendant for three decades and the other for ten years, and that prior to the incident they were friends, makes this a recognition case, rather than one in which the virtual complaint is being called upon to identify someone he had not previously known.

[29] Even though it is a matter of recognition, several things have to be considered. [See **Beckford and Shaw v The Queen** (1993) 42 WIR 291 (PC); Privy Council Appeal No, 23 of 1992 delivered on the 1st of April 1993].

[30] Among the questions to be asked are: In what circumstances was the observation made? How long did the virtual complainant have the defendants under observation? What was the distance between Mr. Thomas and the defendants? What was the quality of the lighting? Was Mr. Thomas’ vision and observation impeded in any way, indeed was Mr. Thomas distracted in any way? How was the virtual complainant able to recognize either of the defendants? How often would he see the Defendants? Prior to the incident, when was the last time the virtual complainant saw the defendants?

[31] The virtual complainant was driving his taxi on his way to collect something he had forgotten at the superette. Although Mr. Thomas had an injury to his face – in the area of his left eye – and his hand from a recently concluded altercation, he was still able to drive. He was going to turn left on to Christian Street. As a reasonable prudent driver he would have to look to his right at the junction to see that the road was clear. Even though it was night, there were various sources of light on Christian Street. There was a crowd of people towards his right side 40 feet away (but much further when asked to point out the distance he considered to be 40 feet). In a few seconds, he only recognized the two defendants. There is no indication as to when last prior to the incident he saw the defendants or if he would see his friends at night.

[32] While the defendants live on Christian Street, there was no evidence from any source other than the virtual complainant placing the defendants at that area on Christian Street at the time the shooting occurred.

[33] The reliability of fleeting glances is often a cause for concern. It is also known that even in recognition cases that involve close friends and relatives, mistakes have occurred.

[34] Their Lordships in **Daley v The Queen**, (1993) 43 WIR 325 (PC), distinguished between the roles of judges when in their view the prosecution’s evidence is unworthy of belief and cases where the identification evidence is poor. The first set of cases are to be determined by the principles in **Galbraith**. But where the identification evidence was poor, their Lordships held:

“By contrast, in the kind of identification case dealt with by The Queen v Turnbull, the case is withdrawn from the jury not because the judge considers the witness is lying, but because the evidence, even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found the conviction.”

[35] Lord Mustill, who delivered the judgment of the Board, stated:

“[A]s The Queen v Turnbull itself emphasized, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the quality of the evidence, under the Turnbull doctrine the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice.”

[36] The Belize Court of Appeal in Leroy Gomez v The Queen, Criminal Appeal No 17 of 2012, considered the issue of “*the sufficiency and the quality of the identification evidence.*” Justice of Appeal Awich in delivering the appellate court’s judgment said:

“[24] The duty to withdraw a case when there has been no evidence of identification, or when the quality of the evidence of identification is poor is wider than the usual duty to dismiss a case at the close of the prosecution’s case....

“[25] The law regarding the duty of the trial judge to withdraw a case from the jury because of poor identification evidence is that when in the judgment of the trial judge the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.”

[37] At paragraph [27] of the Leroy Gomez judgment, Awich JA referred to the decision of the English Court of Appeal in R v Ivan Fergus (1994) 98 Cr App R 313, “*a decision that illustrated the duty of the trial judge to withdraw a case from the jury because of weaknesses in the evidence of identification.*”

Bem’s Voice?

[38] The First defendant is joined in this indictment with Mr. Bannis on the basis of words he allegedly said to the Second defendant: “Buss the gun nah boy, buss de gun.”

[39] Several considerations arise in regard to this. First, at the time the words were allegedly spoken, the evidence from the virtual complainant was that having seen Mr. Bannis with an object resembling a gun, he turned left on to Christian Street and “I pressed out, smashed the gas.” He accelerated. Secondly, Mr. Thomas stated that the First defendant “has a little lazy speaking voice. He speaks in a very soft tone of voice.” Thirdly, the virtual complainant pointed to a distance before he accelerated

that he estimated as 40 feet from which he had seen Bem. Fourthly, the virtual complainant accepted that he never saw the First Defendant's lips move as if speaking.

[40] Mr. Davis, who lives on Christian Street, does not deny going to the area where the shooting may have taken place. Five days after the incident he gave a detailed interview to the police regarding his whereabouts between 6:00 pm and 8:00 pm. He stated where he was when he heard the gunshots, what he did afterwards and identified several persons he was in contact with during the time specified by the police.

Other Concerns

[41] Counsel for the defendants raised some matters which related more to the quality of the investigation. They did so since those matters impacted on the cogency of the evidence.

[42] Among the matters raised were:

- The fact that Mr. Thomas after the shooting went home and reported the matter only after the police contacted him at his home;
- Mr. Thomas said he told the police on the very night whom he saw with an item resembling a fire arm and whom he thought discharged the firearm; he then gave a written statement the following day, however it took the police five days to detain the defendants;
- The failure of the police to act expeditiously was puzzling in counsel's view given the proximity of Christian Street not only to Mr. Thomas' residence, but to the Gray's Farm Police Station and that the officers had to pass the area to get to and from work;
- The failure to secure a search warrant for the defendant's premises to see if any relevant items were located there, even though the police agreed that firearm offences are quite serious;
- The failure to locate any witness about the incident even though the virtual complainant spoke of "a crowd" being on Christian Street at the time of the incident;
- The failure to follow up after the First defendant gave a number of names of people and places where he was during the time period the police questioned him about, and even failing to clarify with the defendant the correct names and address of those persons whose aliases he mentioned.

[43] The cumulative effect of those short comings in counsel's view meant that "there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness."

Further Reflection

[44] There are a number of questions that linger.

[45] Mr. Thomas' narrative is that his vehicle was shot at. He immediately stopped his vehicle and came out. According to Mr. Thomas, he again saw the Second defendant with an extended arm standing in a vacant lot, with something resembling a gun. Even though Mr. Thomas is now outside of the vehicle, the Second defendant does not shoot at Mr. Thomas. Was there any "intent to maim, disfigure or disable" Mr. Thomas? The fact that a bullet may have entered the back of the complainant's vehicle is not conclusive evidence that whomsoever the shooter was, intended to hurt Mr. Thomas personally. Shooting at the vehicle and not shooting at Mr. Thomas when he was a free and open target outside of the vehicle raises significant doubt as to the intent of the shooter. Was it merely to scare, chase, intimidate, provoke, or cause property damage? None of those intents could properly ground a charge under section 20 which requires that the shooting must be at the person with "intent to maim, disfigure or disable."

[46] The evidence from the virtual complainant is that the Second defendant had an object that resembled a gun. The virtual complainant did not testify of seeing anyone else with a gun. It must be kept in mind that the virtual complainant never saw who fired any shot. He can only say infer - if what he saw in Mr. Bannis' hand was indeed a gun and soon afterwards, someone discharged a shot - that it ought to be Mr. Bannis who fired the shot. However, there was a crowd of persons it is just as likely anyone of them could have fired the shot. Also, it must be remembered that the same person that Mr. Thomas had the altercation, minutes before the shooting, was last seen by the virtual complainant entering Gordon Street, which is the same street that Mr. Thomas exited from shortly before the shooting.

[47] The evidence from the virtual complainant that (a) Mr. Bannis was the shooter and (b) that Mr. Davis counseled the Second defendant to shoot, is not compelling.

Conclusion

[48] One can do no more than adopt the words of Lord Chief Justice Lowry in Hassan (cited by Kerr LCJ in CCPSI v Lo paragraph [12] and the 7th Supplement of Archbold 40th edition 575a:

"[I]f I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution, there can be no justification for allowing the trial to continue."

[49] The only amendment to Lord Lowry's words that could be made is to substitute the words "so that I am sure" for the words "beyond reasonable doubt." That alteration goes only to how it is expressed and does not change in any way the substance of the test.

[50] With regard to the indictment that "Glentis Vernon Davis and Stephan Bannis on the 4th day of July 2018 at Gray's Farm in the Parish of Saint John in Antigua and Barbuda, unlawfully and maliciously shot Bobby Thomas with intent to do him grievous bodily harm," neither Defendant has a case to answer. Mr. Glentis Davis and Mr. Stephan Bannis are therefore discharged.

Post Script

[51] On Monday the 3rd of October 2022, following the submissions on behalf of the two Defendants and the response by the Crown, an oral order was given, directing that neither Mr. Glentis Vernon Davis nor Mr. Stephan Bannis had a case to answer. They were accordingly discharged of the offence of shooting Mr. Bobby Thomas on the 4th of July 2018.

[52] This written decision is provided pursuant to section 8 (1) of the **Criminal Proceedings (Trial by Judge Alone) Act No: 8 of 2021**, which mandates that written reasons be provided upon conviction or acquittal.

Colin Williams
High Court Judge

By the Court

Registrar