COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL DIVISION

CRI/VBI/68/3/2018

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

-V-

DERVINIQUE EDWARDS

MURDER

(CONTRARY TO SECTION 291(1)(b) OF THE PENAL CODE, CHAPTER 84)

Before:	**The Honourable Madam Justice Cheryl Grant-Thompson**
Appearance:	**Ms. Cassie Bethel for the Prosecution - Director of Public Prosecutions**
	Ms. Eleanor Albury for Dervinique Edwards and Mr. Devard Francis for Zaria Burrows
Hearing Dates:	**21 January, 2020 & 29 January 2020**

RULING ON 'NO CASE' SUBMISSION

Murder- Joint Enterprise; Confession/Mixed Statement; Direct Evidence, Intention -R v Galbraith

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Regina v Dervinique Edwards and Zaria Burrows
Indictment No. 68/3/2018

Supreme Court
Grant-Thompson J

Brief Facts:

The Defendants Dervinique Edwards and Zaria Burrows were charged with the Murder of 19 year old Breanna Mackey, contrary to section 291(1)(b) of the Penal Code, Ch. 84.

Issues

The issues are:

(i) Does Dervinique Edwards have a case to answer?

(ii) How do we treat the secondary party who alleged they were merely present?

(iii) When the former co-accused who is the Principal to the offence is convicted is it an abuse of process to put the secondary party to trial.

Held:

(i) The Defendant Dervinique Edwards does have a case to answer the court finds that it falls under limb 2(b) of the Galbraith test laid down by LCJ Lane and the triable issues are a question of fact for the jury;

(ii) The evidence for the prosecution will be grounded in a mixed statement contained in the unchallenged Record of Interview of Dervinique Edwards and the direct evidence of two witnesses Gordnal McKenzie and Nafatera Brown;

(iii) the issue of intention is relevant and the court has determined that manslaughter will also be left to the jury.

Cases Referred to in the Judgment:

(R v Galbraith [1981] 1 W.L.R. 1039; Clayton Cox v Reginal, Criminal Appeal No. 70 of 1198; Taylor et al v R (1928) Crim App. R 20; Daley v R [1993] 4 All ER 86,PC; Taibo v the Queen (1996) 48 WIR 74 page 83(f-g); Crossdale v R (1995) 46 WIR 281 page 285; Director of Public Prosecutions v Selena Varlack [2008] UKPC 56 paragraph 21; Regina v Coutts [2006] 1 WLR 2154; Terrell Neilly v The Queen PC App. No 0112 of 2010 (Bahamas) paragraph 38; Hunte and Khan v The State, [2015] KPC 33 Privy Council Appeal No.0088 of 2012)

Grant Thompson J:

(1) I reminded myself that the general approach to be followed where a submission of 'no case to answer' has been made was described by Lord Lane in **R v Galbraith [1981] 1.W.L.R. 1039** where he said:-

> *"(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 nature 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'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 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. There will of course, as always in this branch of the law be borderline cases. They can safely be left to the discretion to the judge".*

(2) I am of the view that this case falls within limb 2(b) of the test laid down by Lord CJ in Galbraith. On one view of the facts at a prima facie level the jury could find:

(i) That there was a joint enterprise to attack Brianna whenever she was seen - evidenced by the actions in following her, cornering her, stabbing and beating her and

leaving her thereafter without calling for or rendering medical assistance;

(ii) That Dervinique was a part of this joint design - to ride with the girls - they are alleged to have come out of the car and beat the deceased whilst she was also being stabbed by the principal;

(iii) That she left with the co-accused;

(iv) That she was arrested hiding out with them all huddled together in a bathroom;

(v) That it could be found that these were all factors indicating an intention to kill - that is 5 regular size women to beat an stab one - the reasonable and probable consequence would be death;

(v) That it could also be found that she did not believe her actions would result in death and that she had no specific intention to kill - and so would only be responsible for Manslaughter;

(vi) That she expressly did not withdraw from the joint enterprise by her actions;

(vii) That in her words the jury could consider if she meant to withdraw and to consider if she was merely present; and

(viii) That all of these are questions of fact and are for the jury and I will not usurp their function.

Submission of No Case to answer

(3) Ms. Albury at first did not rely on Galbraith nor 170(1) of the CPC but her written submissions were made pursuant to **Section 170(1)** of **the Criminal Procedure Code,** the Second-named Defendant, Dervinique Edwards, has no case to answer as the prosecution did not establish a cogent prima facie case nor did they adduce sufficient credible evidence that a prima facie case had been made out against her client, to show that she was being concerned with others, and did murder Breanna Macke and had no case to answer.

(4) Ms. Albury further submitted that her submissions were two-fold and based on the abuse of process of the court when applying the principles set out in the cases of **R v Jogee (2016) UKSC and Ruddick v The Queen 2016 UKSC 7** and a no case submission in accordance with the guidelines as set out in the celebrated case of **R v Galbraith.**

Abuse of Process of The Court

(5) It was submitted that it would be an abuse of the process of the court to allow the case to continue against Dervinique Edwards as the prosecution have already secured four convictions of the six females charged coupled with the evidence of the pathologist whose evidence was that several stab wounds caused the death of the accused. (see **Justis Raham Smith v The Queen (Bermuda) (2000) UKPC 6 (28th February, 2000).** There was evidence before the court that Thea Williams was the principle in the commission of the offence of Murder and was the principal person who inflicted several stab wounds upon the deceased which caused her death.

(6) It was further stated that it was an abuse of process, and that there is insufficient evidence before me that Edwards has the required intent or mens rea needed along with the necessary actus reus to convict her on the Offence of murder under **Section 291 (1) (b) of the Penal Code** notwithstanding that the prosecution's case is based on the common law common design/being concerned together or joint enterprise criminality. By the present Voluntary Bill of Indictment, Dervinique Edwards has been charged along with Zaria Burrows, The First-named Defendant with the offence of Murder in execution of a joint enterprise. From the outset, the court was invited to observe that the statutory offence of Murder contains an ingredient of mens rea.

(7) With regards to the ingredients of the offence of murder Ms. Albury submitted that there is dearth of evidence adduced by the prosecution from which the jury, when properly directed, may properly come to the conclusion that Dervinique Edwards inflicted harm to the deceased on the mentioned date. The evidence is that Thea Williams, who did not give evidence, inflicted harm with a knife. Such evidence was

corroborated by the pathologist who told the court that several stab wounds caused the death of the deceased.

(8) It is therefore submitted that the prosecution does not have a prima facie case made out against Dervinique Edwards to require her to make a defence.

Standard of Proof (No Case Submission)

(9) On a submissions of 'no case to answer' the judge must be satisfied that a prima facie case has been made out against each defendant. The judge does not have to find at this stage that the prosecution has established the ingredients of the offence beyond a reasonable doubt. To establish a prima facie case, the prosecution should offer credible evidence in support of each element of the crime.

Being Concerned Together

(10) The learned authors of **Halsbury Laws of England (3rd Ed) page 750, para 1370** on the question of common design states:

> **"Where several persons are engaged in a common design and another person is killed, whether intentionally or unintentionally, by an act of one of them done in prosecution of the common design, the other persons present are guilty of murder, if the common design was to commit murder, or to inflict felonious violence, or to commit any breach of the peace and violently to resist all opposers."**

(11) It was submitted that the evidence produced by the prosecution is insufficient to support the charge set out in the indictment, and that the jury, when properly directed, could not properly arrive at a conclusion that Dervinique Edwards is guilty of the charge of murder being concerned together as set out in the indictment. Dervinique Edwards could not have been concerned with the First-named Defendant to cause the death of the deceased.

Approach To No Case Submissions

(12) Ms. Albury submitted that Section 203 of the Criminal Procedure Code Act ("the CPC") states:

> "At the close of the evidence in support of the charge, the court shall consider whether or not a sufficient case is made out against the Accused person to require him to make a defence, and if the court considers that such a case is not made out the charge shall be dismissed and the Accused forthwith and discharged."

(13) Ms. Albury submitted that the principles in Galbraith were considered in the Court of Appeal case No. 133 of 2012 **Jamal Glinton v Regina** where John JA referred to the case of **D.P.P v. Selena Varlack**, Privy Council Appeal No. 23 of 2007 an appeal from the Court of Appeal of the British Virgin Islands where at paragraph 21 of the judgment Law Lord Carswell 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."*** *[Emphasis added]*

(16) The submissions according to Ms. Albury fell primarily within both limbs of Galbraith's principles. Accordingly, the court was humbly asked that the case brought by the prosecution against Dervinique Edwards at this stage be withdrawn from the jury as to allow it to go to the jury would be for the jury to usurp the

function of the Learned Trial Judge in the exercise of her discretion relative to to the law pertaining to this case.

(17) It was further submitted that there is no credible evidence before the court that the essential elements or essential ingredients of the offence of murder or the joint enterprise (being concerned together or common design) liability have been offered or proffered by the prosecution.

(18) In this regard, however, in considering the approach which the judge should follow when faced with a submission of no case to answer, the learned authors of **Blackstone's Criminal Practise 2010 at D15.56** proposed this:

> **"(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 court 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."**

Inconsistencies of Evidence of Brown & Woodside

(19) With reference to the inconsistencies in of the evidence of the sisters of the deceased Ms. Albury submitted that the sisters throughout often indicated that what they told the police was not incorporated in their statement to the police notwithstanding that they all had read over their statements and ultimately signed same as to the truth of the contents of the statements.

(20) In the Court of Appeal case of **Black (Albert) v R.** (unreported) the issue of inconsistent statements made by witnesses was addressed at page 5. It stated:

> "***In support of the no-case submission based on inconsistencies, it was argued at the trial (and the argument repeated on appeal) that there was a duty on the trial judge, as a matter of law, to direct the jury that the evidence of each of the three witnesses was unreliable and that they were the only witnesses who gave evidence of the deceased being struck on the head by the appellant the judge was obliged to withdraw the case from the jury." Reliance for the submission was placed on the following extract from the judgment of the court in R v Golder (1960) 3 All Er 457 at page 459:***
>
> ***"In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statement, whether sworn or unsworn, do not constitute evidence on which they can act."***

Witnesses of The Prosecution

(21) It was also submitted that the evidence of Nafatera Brown and Latisha Woodside is so discredited by previous statements as to render their testimony inherently weak and further that, Sargeant Markell Pinder, who was the investigating officer, and who prepared the Records of Interview which were read into the record of the court cannot assert that Dervinique Edwards planned, encouraged, assisted or took part in the actual attack upon the deceased the principle in the killing of the deceased pursuant to the principle of the cases of **R v Jogee (2016) UKSC and Ruddick v The Queen (2016) UKPC.**

(22) As to satisfying the joint enterprise criminal liability the salient points coming out of the investigating officer's evidence under cross-examination were as follows:-

(a) Dervinique Edwards did not know that Thea Williams (who admitted to the stabbing and currently serving a sentence on a plea agreement) had a knife. Moreover, the defendant's Record of Interview stated that she told Zaria after seeing the knife…"let's get from round here", The reasonable inference is that Dervinique Edwards had no idea that Thea had a knife or that she would stab the deceased with that knife;

(b) Dervinique Edwards had nothing to do with stabbing – she did not stab Breanna;

(c) In reference to the question as to whether Edwards planned/agreed to inflict harm on the deceased, it was suggested that she wished she had never gotten into the car (with the other females), Pinder's evidence was "she said that when we went back to the scene. On the scene whatever she would have said on the scene was not recorded.

(d) As to whether Dervinique Edwards encouraged Thea Williams in the attack on the deceased Pinder said "no she didn't" (based on her answer to the questions Pinder posed);

(e) It was also in Pinder's testimony that Dervinique Edwards never took part in the actual attack. (According to her evidence in the CDU interview);

(f) The evidence was that Dervinique Edwards according to the record of Interview as that she never got out of the car and was merely a back seat passenger who had tried to prevent Thea from exiting the car via Dervinique Edward's door as Thea's door next to her could not open;

(g) The record of interview was taken some three days after Dervinique Edwards was arrested; and that

(h) Dervinique Edward's record of interview clearly showed by questions asked of her by Pinder there was no joint enterprise by her in accordance with the principles enunciated in Jogee and Ruddick's cases where mere presence was not enough.

(23) Ms. Albury further submitted that the evidence did not support the essential offence of murder that Edwards being concerned with others murdered the deceased. It was strongly submitted that the prosecution's evidence, taken at its highest, is such that the jury, when properly directed, could not properly convict upon it.

(24) Ms Albury reminded the court that Brown when cross-examined did not tell the police nor was in her statement that she named Dervinique Edwards as one of the persons who attacked the deceased. It was submitted that Brown's evidence was at best "namby, pamby, weak, inconsistent and silly" in most instances. The same description I was invited to find and apply can be applied to Woodside's testimony. I was invited not to ignore the circumstances in which their evidence was adduced and there witnesses' relationship to the deceased.

(25) It was submitted that I should not ignore the most significant evidence of the minor Godnal McKenzie, who was fourteen years of age and who did not identify Dervinique Edwards as one of the person who attacked the deceased nor did he point her out in court that she was one of the attackers. He specifically testified that there were four females who he more or less knew or recognized, none of whom was Dervinique Edwards.

(26) Ms. Albury submitted that Brown and Woodside were sisters of the deceased and have some cause to be untruthful to the court so as to ensure that the two defendants before the court are convicted for the death of their sister.

Issues of Law-Not For Tribunal of Facts-Not credible in Support of Charge

(27) It is submitted that the issue of the charge of murder requiring specific intent and the law relative to joint enterprise are not credible evidence of the prosecution, and therefore are issues as a matter of law. There is no evidence that Dervinique Edwards inflicted harm on the deceased which caused her death, and to allow this case to proceed to the jury would be a classic case of travesty of justice unrepentant of the laws of the Commonwealth of The Bahamas, and ultimately falls within the category of abuse of the process of the court as hereinbefore discussed.

(28) The offence of murder is defined by Section 290 of the Penal Code as:

> ***"Whoever intentionally causes the death of another person by unlawful harm is guilty of murder, unless the crime is reduced to manslaughter by reason of such extreme provocation…"***

(29) The evidence of intention may be direct or it may be inferred from the circumstances presented by way of evidence. It was submitted that there is no evidence with regard to Dervinique Edwards at the time when she was a mere passenger in the car. Nor was there any evidence upon which murder could be inferred.

Applying Second Limb of Guidelines Galbraith

(30) As to credibility and inconsistencies of witnesses, a statement of the principle in relation to inconsistencies in evidence given at the trial is set out in the case of **R v Barker(1974) 65 Cr.App.R.287,287, 288** where Lord Widgery C.J. said:

"It is not the judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks the witness is lying."

(31) The facts of the case also fall within the second limb of Galbraith. Although it is accepted that the issues of whether the witnesses are being truthful ought to be taken into consideration when the question of innocence or guilt is being determined by the jury. It was submitted that although the court is guided by the guidelines in the second limb in the case of Galbraith and R v Barker witnesses credibility and inconsistencies of same is for the jury only if evidence adduced prima facie that the offence of murder has occurred.

(32) I was invited to direct the jury to return a verdict of not guilty with respect to Dervinique Edwards on the charge set out in the information before the court. Section 170 (1) of the CPCA which states:

> "170 (1) When the evidence of the witnesses for the prosecution has been concluded, and the statement of 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 sever 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.

(33) These principles are well-established and have been accepted by the Judicial Committee of the Privy Council as authoritative. The principles have been applied in many cases throughout the English-speaking Commonwealth. In **Daley v R [1993] 4 All ER 86, PC,** an appeal from Jamaica, the Privy Council acknowledged (at p 90) that for many years, it has been recognized that ***"the trial judge has power to withdraw the issue of guilt from the jury if he considers that the evidence is insufficient to sustain a conviction."*** The Board recognized that while the judge had the power to intervene on his own motion, more commonly a formal

submission on this basis is made by counsel for the defence at the close of the prosecution case; as occurred in the case at bar. In **Larry Raymond Jones-The Privy Council**, affirmed the applicability of Galbraith in The Bahamas.

(34) In **Taibo v the Queen (1996) 48 WIR 74**, 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.

(35) In **Crossdale v R (1995) 46 WIR 281**, a decision of the Privy Council from Jamaica, Lord Justice Steyn at page 285 stated that:

> *"**A judge and a jury have separate but complimentary 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 the jury.***

(ii) **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 questions 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."***

(36) In **Director of Public Prosecutions v Selena Varlack [2008] UKPC 56**, 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." *[Emphasis added]*

The Crown's Case

(37) (i) The Crown submitted that this case clearly fell under the limb of part B of the test in Galbraith. As it related to the elements of the offence of murder, the Crown submitted that each and every element was established. The first three elements listed below were undisputed:

(a) the victim is dead – Evidence of Dr. Caryn Sands. The deceased died in the Emergency Room at the Princess Margaret Hospital.

(b) she died as a result of the infliction of unlawful harm – Dr. Sands stated she died as a result of stab wounds to the back and that there were signs of blunt force trauma which occurred at or around the same time of the infliction of the stab wounds.

(c) she died within a year and a day of the infliction of the harm – the deceased was stabbed on Thursday, 25th January, 2018 and died on the same day.

(ii) The Crown, in attempting to establish the culpability of both the accused persons, but more specifically the defendant Dervinique Edwards and also to establish that at the time of the infliction of the unlawful harm there was a shared intention to cause the death of the deceased person, relied on the principles of joint enterprise, the record of interview and video of inquiries of Dervinique Edwards (mixed statements) and the evidence of the prosecution's witnesses, who gave a background to the attack and also witnessed the same.

(3) It was submitted that central to the determination of these issues is the question of whether Dervinique Edwards was a participant in a joint enterprise or whether she was a mere bystander (mere presence).

Joint Enterprise Re: Dervinique Edwards

(4) The Crown indicated that the elements in dispute are whether Dervinique Edwards was one of the persons who contributed to cause the death of the deceased and if so, whether her actions were done with the intention to kill.

(5) It was submitted that a fundamental principle of joint enterprise is that the act of one is the act of the other and a person who assists or encourages another to commit a crime is an accessory or secondary party, while the actual perpetrator is the principal. In short, it must be shown that each accused shared a common intention to commit the offence and played her part in this no matter how big or how small that part was, in order to achieve that objective.

(6) The Crown referred to the case of **Shadrach Gibson vs. Regina SCCrApp No. 204 of 2016 at paragraph 106** which states that:

> *"the law on joint enterprise in The Bahamas was established in* ***Philip Farquharson v Regina [1973] AC 786*** *and in essence, states that knowledge that one's associates had a weapon and foresight that the common plan entailed the use of whatever force was necessary to achieve the object of that plan and, if fatal results ensued from the use of such force in executing that plan, that was evidence from which it may be inferred that the appellant intended those results in common with the shooter".*

(7) The Crown submitted that by its very nature, it is unlikely that persons who agree to commit serious crimes will publish their intention beforehand. That is why, for example**, section 89(1) of the Penal Code Ch 84** states:

> "*If two or more persons agree or act together with a common purpose in committing or abetting an offence whether with or without any previous concert*

or deliberation, each of them is guilty of conspiracy to commit or abet that offence as the case may be".

(8) It should be noted that there is no formal requirement for the words of the plan or agreement and that it may arise on the spur of the moment. In fact, nothing needs to be said and it can also be inferred from the behavior of the parties.

(9) In examining the behavior of Dervinique Edwards, the Crown relied on exhibit "BE8", "BE11", the evidence of Latisha Woodside, Nafatera Brown, Godnal McKenzie and PC 3353 Phillippian Brown.

Confession/Mixed Statement

(10) The Crown, in relation to the record of interview of Dervinique Edwards and the video of inquiries (exhibits "BE8" and BE11"), submitted that section 20(5) of the Evidence Act defines a confession as including, any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise…"

(11) They further submitted that, the defendant in both of the above stated exhibits, admit to being present in the car, observing her former co-accused stab and fight the deceased, and leaving the scene with them. She also admitted to remaining with them even after this incident, staying with the group after the stabber ("Thea") said that she could not remain where the defendant Zaria Burrows initially took them because "the man" may have come there looking for her.

(12) The evidence contained in the exhibits together, the Crown submitted, are partly adverse to Dervinique Edwards and this was the basis for which the crown sought to have these items exhibited As these pieces of evidence contained both inculpatory parts (being present during the commission of the offence and not withdrawing from the group) and exculpatory parts (alleging that she had no involvement in the altercation resulting in the death of the deceased) it was therefore a mixed statement.

(13) In looking at how mixed statements are to be treated, the case of **R v Sharp [1988] 1 All ER 65** is instructive on this point. In this case, the defendant was convicted of burglary in circumstances where he did not give evidence at the trial, but during his interview with the police, he admitted to being in the area at the material time, hearing the burglar alarm, but gave an innocent explanation for being there. At his trial, the judge during his summation, directed the jury that the defendants statement was a mixed statement and that they ought to regard the defendant's account of being present at the scene at the time of the burglary as an admission and therefore evidence of the fact that he was there, but that the other parts of the statement explaining his reason for being there were not evidence of the facts.

(14) It was on this misdirection that the conviction was quashed and the proper position of the law as enunciated by Lord Lane CJ in the case of **R v Duncan 73 Cr App R 359 at page 365** stated:

> "***Where a mixed statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and therefore the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations must be considered by them in deciding where the truth lies. It is, to say the least not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?) whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."***

(15) In addition to the confession/mixed statement of Dervinique Edwards, the Crown relied on the evidence of Latisha Woodside who provided a motive in that she mentioned a number of previous occasions in which both defendants and their former co-accuseds, appeared at her residence in search of the deceased, and that on one of those occasions, the defendants produced knives and screwdrivers.

Direct Evidence

(16) The evidence of Godnal McKenzie, an eye witness to the killing of the deceased, was that at the relevant date and time, he observed a car chasing after the deceased who was walking with her sister, Nafatera Brown. The car which almost hit him, as he too was in the road on his bicycle heading home slammed brakes and pulled in across in front of an area where the deceased ran where there is only one way in and one way out.

(17) He further indicated that he observed the occupants exit the vehicle, while a person he recognized as “Thea” stabbed the deceased multiple times and the others attacked the deceased with rocks and bottles, before they all ran back into the vehicle which was waiting for them. In further reexamination, this witness, when asked how long after Thea attacked Bree did it take for the others to reach Bree”? He responded that all of them jumped on her at the same time.

(18) This indicates that if the jury accepts the evidence of Godnal McKenzie, the production of the knife, the stabbing and other attacks on the deceased occurred simultaneously.

(19) While Godnal McKenzie was not able to identify any of the assailants, as he stated that he had never seen them before and did not recognize anyone other than Thea whom he knew and was familiar with, he indicated that everyone exited the vehicle except the driver, whom he described as appearing “tomboyish”.

(20) On cross-examination by Ms. Albury, he indicated that he did not see anyone remained seated in the back seat of the car and that the one person who remained in the car was the driver.

(21) He maintained this position and explained this while at the locus in quo, that the one person who remained in the vehicle was the driver

(22) The eye witness, Nafatera Brown, the sister of the deceased who was walking along with the deceased when she was chased and attacked at the relevant date and time, explained that she was along with her sister Bree, in the area of Key West Street when she observed a car pull up with a group of girls who came running towards them.

(23) The car sped behind the deceased, “swerve up side her” and that’s when the deceased fell and was attacked by the group of girls who were the occupants of that vehicle.

(24) This witness identified Dervinique Edwards as being one of the persons who exited the vehicle and was involved in the attack on the deceased. She indicated that she had seen these persons including Dervinique Edwards on various occasions and knew her to be a friend of the deceased.

(25) The Crown submitted that the evidence of these two witnesses bolster the Crown’s case, especially in circumstances where, as indicated in **Sharp**, relying on **Duncan,** that the Court should direct the jury to the difference in weight to be given to inculpatory versus exculpatory parts of the defendants statement.

(26) Therefore, whether or not the jury accepts the evidence of Brown and McKenzie is a question of fact and reliability and in relation to “BE8” and “BE11” this is a question of weight, which the Court can give directions on and is for the jury to consider as well.

(27) If the evidence outlined above is accepted, Dervinique Edwards would have been a participant in the attack which led to the death of the deceased in which a knife was used as the attack continued, and would be caught by the principle of joint enterprise, though she was not the person who stabbed the deceased, as this is not required, given that joint enterprise applies no matter how big or small one’s role was.

Intention

(28) The element of intention required for murder is a specific intent to kill and the law on intention is found at section 12(3) of the Penal Code Chapter 84, which states:

> ***"If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that even, until it is shown that he believed that the act would probably not cause or contribute to cause the event".***

(29) In the Court of Appeal decision of **Ormond Leon SCCrApp No. 51 of 2016**, their Lordships at paragraph 26 of the judgment reference the Learned Judge's summing up in reference to the intention (which they found was adequate) and stated in part that,

> "…***Now, intention is a difficult element to prove as it is difficult to prove what is in a person's mind at that particular time. This is so because we cannot see taste or smell intention and rarely do people take action after explaining what they are going to do…"***

Withdrawal from Joint Enterprise

(30) The Crown further submitted that having embarked on this joint criminal enterprise, a positive act of withdrawal is required, which Dervinique Edwards did not do. In **R v. Robinson [2000] EWCA Crim 8(CA)**, the defendant was one of a group involved in an unplanned attack. He struck the first blow but thereafter took little part, ultimately intervening to protect the victim. The issue was whether this amounted to withdrawal. The Court stated that a defendant who initiated an attack would only be able to withdraw in exceptional circumstances and must give unequivocal communication to others that he was withdrawing.

(31) There was no evidence of anything done by Dervinique Edwards to show that she was caught by surprise and therefore sought to distance

herself. In fact, the evidence of **PC 3353 Phillipian Brown** Was that on 25th January 2018 sometime around 8:00pm (hours after the incident) he proceeded to a motel, Morris Guest House, where he effected the arrest of Dervinique Edwards who was found along with her former co-accused. This was done by breaching a bathroom door (kicking it down), where they were discovered standing in the tub just tightly clutched together.

(32) The Crown submitted that there was no act capable of amounting to a withdrawal from this joint enterprise to cause the death of the deceased and that Dervinique Edwards, with all of the knowledge of what transpired, being present and participating in the attack, remained with her cohorts even to the point of arrest with the knowledge that "the man" which the Crown submitted is Bahamian vernacular for the police, would be looking for them, having regard to what had transpired earlier that evening.

(33) They further submitted that the events of Thursday, 25th January, 2019 was a build-up of tension culminating in violence rather than a truly spontaneous attack.

Conclusion

(34) The Crown submitted that the evidence of the Prosecution witnesses and their credibility as witnesses is a matter within the province of the jury and depending on one possible view of the facts there is evidence upon which this jury could find Dervinique Edwards guilty.

(35) In other words where the prosecution evidence is such that is strength or weakness depends on the view to be taken from the witness's reliability then the judge should allow the matter to be tried by the jury as these are issues for the jury.

Inconsistencies

(36) As it related to inconsistencies relative to any of the Crown's witnesses it was submitted that such inconsistencies if any were irrelevant to the issue before the Court as none of the witnesses save and except for Nafertera Brown identified the defendants as being a part of the persons responsible for the death of Breanna Mackey

(37) In all of these circumstances the Crown submitted that the application of Dervinique Edwards ought to fail and the case ought to properly put to the jury,

Law

(20). **Murder** contrary to section 291 of the Penal Code, which states

> **291. Whoever commits murder shall be liable to suffer death: Provided that sentence of death shall not be pronounced on or recorded against a person who, in the opinion of the court, was at the time when the murder was committed under eighteen years of age; but, in lieu of such punishment, the court shall sentence such person to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Code or the provisions of any other Act, be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody**.

GENERAL COMMENTARY

(38). The common thread running through these cases is that the task of a judge in considering a submission of 'no case' is the balancing one. On the one hand, a judge should be careful not to usurp the purview of the jury who are the judges of the facts. On the other hand, the judge is duty bound to safeguard accused persons from conviction, on facts which are so precarious, unsafe or insufficient that injustice would result.

The Standard of Proof

(39). On a submission of 'no case' to answer, the question to be decided by the trial judge is whether a properly directed jury could convict on the evidence adduced by the prosecution at the close of their case. The judge does not have to find at this stage that the prosecution have established the

ingredients of the offence beyond a reasonable doubt. This is never a determination for a judge to make on an indictable trial. To do so will amount to a usurpation of the jury's function. As stated in Taibo [supra], the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt, if there is, the judge is required to allow the trial to proceed. In other words, the judge is merely to consider whether a prima facie case has been established by the evidence adduced by the prosecution.

THE STANDARD OF PROOF

ANALYSIS OF PROSECUTION EVIDENCE

(40). What is clear from the authorities is that the judge at this stage must only be satisfied that there is a *prima facie* case for Ms. Dervinique Edwards to answer. Applying the principles enunciated in Galbraith and having considered the prosecution evidence in its totality, it is correct to say that there is no evidence to ground that count changed. However I find that the direct evidence coupled with the mixed statement outlined above in my view grounds the conclusion of this Honourable Court that this defendant has a case to answer to the charges of Murder and the lesser charge of Manslaughter. In the event the Jury finds one view of the facts that this Defendant had no intention to kill.

(41). As to Guidance 2 (a), I am of the view that the evidence adduced by the Prosecution is not so inherently weak as to justify the case to be taken away from the jury. Instead, the Prosecution has established a prima facie case on the count of Murder and the lesser subsumed count of Manslaughter. They will both be left for the juries consideration. Discrepancies (if any) in the prosecution evidence are matters for the jury as judges of the facts.

(42). In my opinion, a properly directed jury might on one view of the facts, come to the conclusion that the defendant may be guilty on either the charge of Murder or Manslaughter in the alternative. In the result, the submission of “no case to answer” in respect of this defendant Dervinique Edwards must fail and I will overrule it.

(43). I promised to put my reasons in writing and this I now do.

Dated the 3 Day of April 2020

The Honourable Justice Madam
Cheryl Grant-Thompson