

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Division

Cri/vbi/275/10/2014

Between:

REGINA

VS

RUDOLPH ROBERTS JR.

BEFORE: The Honourable Mr. Justice Gregory Hilton

APPEARANCE: Timothy Bailey for the Applicant

Uel Johnson for the Respondent

Hearing Dates: 4th October 2019

RULING – on NO CASE SUBMISSION

**[Criminal Law – No Case Submission – Possession of
Firearm with intent to endanger life – Identification Evidence
– Whether quality of identification sufficient
to leave case to jury]**

1. The accused is charged with one count of Possession of a firearm with intent to endanger Life contrary to section 33 of the Firearms Act chapter 213. The particulars allege:

“That you Rudolph Brian Roberts Jr., on Thursday, 10th July 2014 at New Providence, did have in your possession a firearm, with intent, by means thereof to endanger the life of another.”

2. The accused pleaded not guilty on his arraignment and the prosecution commenced the trial on 2nd October 2019. At the close of the prosecution’s case counsel for the accused made a submission of No Case To Answer.
3. Counsel for the accused submitted that the case should be withdrawn from the jury because the identification evidence was poor, of a fleeting glance type, and not of a quality that should be left to the jury under the principles of Turnbull (Infra).
4. Counsel for the prosecution submitted that the quality of the identification evidence was not poor and should be left for the jury to determine if it was accurate or not and that the prosecution evidence falls within part (b) of the second limb of Galbraith (Infra).

THE LAW

5. The ordinary guiding principles when the court is presented with a submission of ‘No Case To Answer’ at the close of the prosecution’s case are set out in R.v. Galbriath [1981] 1 W.L.R. 1039 at 1042 B-D Lord Lane C.J. stated:

“How then should a judge approach a submission of No Case?”

- (1) If there is no evidence that the crime alleged has been committed by the defendants there is no difficulty. The judge will of course stop the case.

- (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
 - a) Where the judge comes to the conclusion that the prosecution's evidence taken at its highest is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
 - b) Where, however, the Crown's evidence is such that its strengths or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the Defendant is guilty, then the judge should allow the matter to be tried by the jury. There will of course, as always in this branch of the Law, be borderline cases. They can safely be left to the discretion of the judge."
6. While the principles outlined in Galbraith indicate that issues of credibility and reliability are generally matters for the jury; In relation to identification cases, the following principle was laid down in R.v. Turnbull [1977] QB 224 where at 229 Lord Widgery CJ instructed as follows:

"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, neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even through there is no other evidence to support it.....When in the judgement of the 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 situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there was other evidence which went to support the correctness of the identification.”

7. Instruction on how to deal with these two seeming contesting principles (on a No Case Submission application) is given in the Bahamas Court of Appeal case of *Leavon Williamson v. R.* No. 34 of 1995 where the court stated at page 4 as follows:

“The appellant was not represented by counsel at the trial. The learned trial judge was therefore denied the benefit of submissions at the end of the case for the prosecution, seeking the withdrawal of the case from the jury, and was left unassisted to make the proper choice between implementing the guidelines in *R.v. Galbraith* and an important principle in *R.v. Turnbull*. *Galbraith* precludes a judge from encroaching upon the province of the jury and withdrawing the case from them based on his own assessment that the prosecution evidence is unworthy of credit. *Turnbull* requires withdrawal of a case where identification is the decisive issue and the quality of the identifying evidence is poor. In applying this limb of the *Turnbull* principles in a fit case, the trial judge in fact imposes on the identification evidence, his own assessment of its quality.”

8. Similar instructions were offered in *Brown and McCallum v. R.* (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal, Nos 92 and 93/2006 at para: 35 where Morrison JA stated:

“[35] So that the critical factor on the no case submission in an identification case, where the real issue is whether, in the circumstances, the eye witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the “ghastly risk” (as Lord Widgery CJ put it in R.v. Oakwell [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual functions of the jury, in keeping with Galbriath, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like.”

THE EVIDENCE

9. On the evidence presented in this case there is no real dispute that the offence of Possession of a Firearm with intent to endanger life was committed; That a man was seen firing a gun into a crowd on George Street shortly after 4 a.m. on 10th July 2014. The issue to be determined is whether the identification of the accused as the shooter is prima facie established and should be left to the jury.
10. The relevant evidence is summarised as follows:
 - a) Sgt. 2562 Gino Stubbs testified that he was attached to the Police Force garage and he along with Officer Lutus and others were deployed to the Bay Street George Street area with reference to the

Independence Junkanoo Rush out on the early morning of 10th July 2014. That at about 4:30 a.m. he observed a dark male dressed in a grey shirt and grey hat and at that time shots were fired. That he observed the male in that vicinity. He testified that the same male passed him a very short time later running toward him and as the male passed him the male was putting a dark object which appeared to be a firearm in his side, tucked in his pants. He said he chased the male who ran in the area of the dock and eventually caught up to the male and held him and handcuffed him. This male was eventually taken away by a Police car. He said on the following day he was called to view an I.D. parade but was unable to identify anyone on the parade. He said that there were a lot of people out there as it was Junkanoo. He said the area was well lit and he could see. He could not recall where the light was on George Street and that he only lost sight of the male he chased for a second or two as it was a hot pursuit. He said after he caught the male he searched him but did not find any weapon.

- b) Cpl. 3211 Kenny Lutus testified that on 10th July 2014 in early morning he was assigned to Crowd Control in the area of Bay Street and George Street. That around 4:00 a.m. he heard a loud bang while he was standing in the area of Pompey Square and saw a lot of people running. He said he looked through the crowd. That this male ran north on Bay Street in the area of the exit that leads to the straw market. He said he along with other officers went in area of the rear of the straw market and he noticed the male in a grey jacket and grey cap standing at the rear of the straw market. He said Officers Edgecombe and Stubbs cautioned and arrested this male. He said he attended an I.D.

parade on 12th July 2014 and was not able to identify anyone on the parade. He testified under cross examination that he saw a male firing shots and he was about 30 yards away from him. He said a lot of people were running but he kept his eye on the man in a grey jacket and grey cap.

He said his only means of identifying the suspect was by his clothes (a grey jacket and grey cap). That other persons who were running had on caps. He said he was present when the person arrested was searched but no weapon was found. And that the area of the wharf and straw market was searched but no weapon was found.

- c) Sgt. 50 Edward Neymour testified that on the morning of incident he along with Cpl. Ramsey and other officers were posted to the George Street and King Street area to work at the Junkanoo Rush out. That around 4:30 a.m. while on patrol he heard what sounded like fire crackers and when he looked in northern direction he saw a male about 5'5" tall dark complexion wearing a grey T-Shirt, grey cap and blank jeans who had a firearm firing into the crowd. That the crowd dispersed and the male along with a group of men ran north toward Bay Street. He said he pursued this male but was unable to engage him and other officers overtook him including officer Ramsey and he shouted out a description to the man "grey T-Shirt, grey cap." He ceased his pursuit and tried to secure the scene. That on the following day he attended an I.D. parade and picked out the accused as the person he said he saw firing shots into the crowd.

He testified that the lighting condition was good at the time but while the men ran away the street lights went out. He testified that he was about 14-16 feet away from the man when the shots were

fired. That from where he was standing there was a crowd of people in front of the man and he was behind that crowd of people. Under cross – examination he testified “That first shot I heard I thought it was fire crackers. When I looked in that direction that’s when I saw the second shot, That’s what got my attention and then why I end up pulling out my revolver as I was about to engage the crowd got into it and that is when I was trying to clear the way.”

He testified that he could not say if this man was the only person with a grey T-Shirt on or a cap; And that during his pursuit the man was running along with a group of men and he didn’t see him throw anything away.

- d) Sgt. 2239 Wendell Ramsey testified that around 4:45 a.m. while he was on duty in the George Street and King Street area working the Independence People’s Junkanoo Rush he saw a male pull what appeared to be a weapon from his waist and fire shots at persons in the vicinity. The crowd dispersed and ran in all directions. He said he and Cpl.Neymour gave chase behind the suspect who turned in their direction and ran north towards Bay Street. After this man ran across Bay Street through Pompay Square he gave up pursuit as other officers started to chase the man. He testified that he attended an I.D. Parade the following day and identified the accused as the man he saw firing shots at the crowd. He testified that the lightning in the area was good as there were big lights put out during the Junkanoo; and from where he stood he could see the person who fired the shots.

Under cross-examination he said he was about 25-30 feet away from where the shots were fired. He said he could not say if there was only one street light on George street and during the chase

no lights went out. He testified that the crowd was in between Bay Street and him and that there were a lot of people out there including junkanoo participants and other civilians. That the person who was shooting was in amongst the crowd.

That as far as the clothes of this man all he could make out was that he had on a grey shirt and a cap. He could not recall the colour of the cap. A relevant portion of the cross-examination from page 8 and 9 of the transcript was as follows:

Q. And when you were giving pursuit of this individual which direction did he run; did he run towards you or away from you?

A. He ran away from me.

Q. So, in essence his back was to you?

A. After he started to run, yes.

Q. You mentioned that he turned back according to your report, you said this individual looked back in your direction quickly?

A. Yes, when we began to pursue him, he looked at us.

Q. And how quick was the look back?

A. Not very long, it was.....

Q. Fraction of a second?

A. Yes, he didn't stand there and study us.

Q. And did you have an observation of the individual's face after that?

A. After that, no.

- e) A.S.P. Frederick Taylor conducted the I.D. parade and testified that 4 witnesses viewed the I.D. parade. Officers Stubbs and Lutus did not pick out anyone Officers Neymour and Ramsey picked out the accused.
- f) Officer Alfreda Bastian attached to Crime Scene Investigation testified that on 10th July 2014 around 5:30 a.m. she visited George Street and in area of Mareva House collected 5 spent 9mm cartridge casings which were turned over to the Forensic Lab.

ANALYSIS

- 11. In accordance with guidelines outlined in Turnbull (supra) when identity is an issue the Judge should direct the jury (and, I would add, on a No Case Submission, the judge should consider) closely the circumstances in which the 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 e.g. by passing traffic or a press of people? Had the witness ever 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?
- 12. On the evidence adduced in this case a number of facts stand out as relevant:

- a) The two police witnesses who did not pick out the accused on the I.D. parade were in close contact with the accused on the morning of the incident; Stubbs actually held on to the accused and searched him and Lutus was present when the accused was questioned on the scene of his arrest mere minutes after the shooting and ensuing chase.
- b) The two officers who picked out the accused on the I.D. Parade gave no identifying facial features of the accused save the type of clothing the accused wore. And in this they differed in that Neymour said the person had on a grey T-Shirt while Ramsey said the person had on a grey jacket.
- c) There was no evidence that either Neymour or Ramsey had ever seen the accused before. He was a stranger to them.
- d) The time frame in which the two eye-witnesses saw the person they say is the accused was very brief. Hearing gunshots, seeing a man in a crowd with a gun firing, beginning to chase the man and eventually giving up the chase from George Street to Bay Street a distance of several hundred feet.
- e) Officer Ramsey's testimony is that the man firing he gun looked in thier direction for a split second before turning and running away. Clearly a fleeting glance.
- f) Officer Neymour and Ramsey only seeing the back of the man as he ran away.
- g) While the evidence is that the lighting was good, with large bright lights in place for the Junkanoo

parade officer Neymour's evidence is that the lights went out as he began to chase the suspect.

- h) There is no other evidence to support the identification. No weapon was found on the accused and no evidence of gun shot residue was sought by the police after the arrest of the accused mere minutes after the shooting.
 - i) The evidence of the eye-witnesses is that the person doing the shooting was in a crowd of persons some 25-30 feet away from the officers.
13. In my view it is to be left to the jury to determine if a witness is lying; while it is for me to determine whether or not the identification has a base which is so slender as to make it unreliable and therefore withdraw it from the jury.

AS was stated by the Privy Counsel in Daley v. R. [1993] 4All ER 86.

"...the case is withdrawn from the jury not because the judge considers that 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 a conviction.....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."

CONCLUSION

14. Having regard to all of the circumstances of this case, as outlined above, and the guidelines set out in Galbraith and Turnbull and the observations in Williamson and Daley; I am of the view that the quality of the identification evidence is poor. It

is of a tenuous nature - a fleeting facial glance amongst a press/crowd of people, with no special or peculiar facial features – and weak.

Even if it is viewed by the jury as being honest it has a base that is so slender that it is unreliable. I find that the prosecution's evidence, taken at its highest, is such that a jury on being properly directed could not properly convict on it.

Since there is no other evidence to support the correctness of the identification evidence the case will be withdrawn from the jury and the jury will be directed to return a verdict of not guilty against the accused on the charge in the Information.

Dated this 10th day of October 2019

The Hon. Mr. Justice Gregory Hilton