

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Division

Cri/vbi/93/4/2017

Between

TREVOR COOPER

AND

THE ATTORNEY GENERAL

Before: The Hon. Mr. Justice Gregory Hilton

**Appearances: Anishka Pennerman along with
 Jaqueline Burrows for Crown
 Wayne Munroe Q.C. along with
 Razard Humes for Accused**

Hearing Dates: 6th and 7th March 2019

Ruling on No Case Submission

**[Criminal Law- No Case Submission – Murder – Evidence –
Duty of prosecution to identify body of the deceased as
person on whom Accused inflicted harm-]**

1. The Accused is charged with Murder contrary to section 291 (1) (b) of the Penal Code Chapter 84. The particulars allege:

“That Trevor Cooper, on Monday 13th February, 2017, at New Providence, did murder Frederick Ferguson.”
2. The Accused pleaded not guilty on his arraignment and the prosecution commenced the trial on 4th March 2019. At the close of the prosecution’s case counsel for the Accused made a submission of NO CASE TO ANSWER pursuant to section 170 (1) of the Criminal Procedure Code.
3. Counsel for the Accused has submitted that an essential element in the charge of murder was not proven: That is, that there was no nexus-established by the evidence made between the person shot by the Accused in the early morning of 13th February 2017 at the parking lot of the Office Lounge on West Bay Street and the deceased examined by Dr. Caryn Sands and identified by Keiovanna Ferguson at the Princess Margaret Hospital on the 14th February 2017.
4. Counsel for the Accused has submitted that, consequently, there is no evidence that the Accused caused the death of the deceased and the Accused should not be called upon to give a defence in accordance with the first limb of the test set out in R.v. Galbraith (1981) 1 W.L.R. 1039.
5. Counsel for the Prosecution is of the view that the evidence adduced by the crown is sufficient to support the charge that the Accused murdered the deceased Frederick Ferguson and that the evidence from the witnesses falls within the second limb (part b)) of the guidelines set out in R.v. Galbraith.
6. Counsel for the crown submits that where there are any queries regarding the identity of Frederick Ferguson, these are matters that the judge/court should leave for the jury, who are the judges of the facts.

THE LAW

7. The 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. Galbraith [1981] 1WLR 1039 at page 1042 B-D where 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 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’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.”
8. In DPP v. Varlack [2008] UKPC 56, a case emanating from the British Virgin Islands, the Privy Council, in the judgment delivered by Lord Carswell succinctly restated the Galbraith principles as follows at paragraph 21:

“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 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, at 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 inferences.”

9. In Blackstone’s Criminal Practice 2010 at D15.56 the following principles were advanced as representing the position that has now been reached on determining submissions of no case to answer:
- “(a) If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.
 - (b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.
 - (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 courts 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.”

10. In *Crosdale v. R* [1995] UKPC 1, a decision of the Privy Council emanating from Jamaica, Lord Steyn, in considering the question: whether, where the defence applies to make a no case submission in the absence of the jury, it is right for a Judge to refuse the application and to hear the submission in the presence of the jury? Lord Steyn stated at paragraph 20:

“20. A judge and a jury have separate but complementary 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 jury. 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 question 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 to make the verdict.”

11. When reviewing the above authorities it is clear that a judge should be careful not to usurp the role of the jury who are the judges of the facts. However, a judge is duty bound to ensure that accused persons are safeguarded from conviction on facts which are insufficient or precarious and so that injustice would not result.

THE FACTS

12. The Prosecution called six witnesses in support of the charge. The pertinent testimony is set out below.
13. Mrs. Keiovanna Ferguson testified that she was the wife of the deceased Frederick Jeron Ferguson and that they were married on 10th June 2006. She said that she saw him on 12th February 2017 at around 5:30 p.m. when he picked her up from work. She testified that she saw him again at the theatre at the hospital on the 13th February 2017 and on the 14th February

2017 she identified his body at the Morgue to Dr. Caryn Sands. She said she did not know him to have any illness.

14. D/Sgt. 86 Anthony McCartney was unavailable to appear due to pre-arranged travel and his statement was read in court, without objection, and by agreed stipulation. His evidence is that he compiled a 12 man photo gallery line up to persons (all with Rasta dreadlocks) including the Accused and that W.P.C. 3709 Tessa Gibbs viewed the photo gallery and circled the photograph of the Accused as being the person she saw firing shots at West Bay Street on 13th February 2017 and who she arrested.
15. D/C. 1800 Nevar Neely was attached to the Crime Scene Investigations Unit (CSI) and he testified that around 2:30 a.m. on the 13th February 2017 he went to West Bay Street just west of Kentucky Fried chicken and he took photographs of the area of the Office Lounge Plaza and also collected 10 spent casings which he later delivered to the Police forensic lab for ballistic analysis. He also took photos of the spent casings and the photoalbum he compiled was tendered as an exhibit in the trial.
16. WPC 3709 Tessa Gibbs testified that she along with officers Campbell and Smith were on mobile patrol in the West Bay Street area in the early morning hours of 13th February 2017. She testified that she observed the Office Lounge club was still open after operating hours and that she and her fellow officers stopped to shut it down. She said as patrons began to leave she saw a Blue Honda pull out of a parking space and stop in the middle of the Plaza and 4 males exited the Honda (one of whom had on a black hoody) and at that time she saw two other males and a female approach the 4 males and began to fight.

She said she and officer Campbell approached them to break up the fight but before she reached them 3 of the males got back into the Honda and sped off heading west on West Bay Street. The male in the hoody then drew a handgun and

begun to fire shots wildly and then he ran East towards Kentucky and Pizza Hut parking lot. She testified that she and officer Campbell gave chase after this man and she saw when he threw the handgun in the back of Kentucky over the fence.

She said she and officer Campbell subdued and arrested the male and she then went to where she had seen him throw the hand gun which she recovered.

She said she went back to the area of the Office Lounge Plaza and saw a male lying on the ground who told her his name was Frederick Ferguson of Pinewood Gardens, a taxi driver and he told her that the male who she and her partner were chasing had shot him.

She testified that she called 919 and requested them to send E.M.S. and that CSI came to the scene and she handed the hand gun to an officer from CSI. She said that on 15th February 2017 she viewed a 12 man photo gallery and circled the picture of the person whom she had chased and arrested on 13th February 2017 in the area of the Office Lounge Plaza. She identified the Accused in court as the person she arrested.

17. Dr. Caryn Sands testified that she performed an autopsy on a male named Frederick Ferguson to determine his cause of death. She said she made notes of her examination contemporaneously and determined the cause death, signed a death certificate and prepared a report which was exhibited in the trial. She stated that the date of death was the 13th February 2017 and that the body of the deceased was identified to her by Kieovanna Ferguson on 14th February 2017 on the presence of DC 3130 Thomas. She testified that the cause of death was a gunshot wound to the right arm and chest; And that a bullet was recovered from the chest of the deceased.
18. The final witness was D/Sgt. 2539 Sonny Miller. He was the investigating officer and stated that he interviewed the Accused who declined to answer the questions put to him. He said he showed the Accused the firearm and clip and the Accused denied that they were his or had been in his possession.

He testified that he submitted the firearm for analysis and testing but never received a report back from the forensic lab. He testified finally that he charged the Accused with Murder.

19. At paragraph 9 of the Crown's written submissions, the Prosecution's position is succinctly stated as follows:

"It is clear that there is evidence that on 13th February, 2017 a male identified himself to Officer Tessa Gibbs as Frederick Ferguson and stated that he had been shot. Officer Tessa Gibbs confirmed that she called an ambulance for the male. Keiovanna Ferguson indicated that she saw her husband Frederick Ferguson at the theatre at Princess Margaret Hospital that night and that she identified his body at the morgue the next day (14th February, 2017). Dr. Caryn Sands corroborates that on 14th February, 2017, a person named Keiovanna Ferguson identified the body of a male she performed an autopsy on as Frederick Ferguson. She also corroborates the evidence of Officer Tessa Gibbs by stating that the individual that she performed an autopsy on died from gunshot wounds. There is overwhelming evidence on which a reasonable jury could conclude that the Frederick Ferguson who was shot at the Office Lounge on West Bay Street was transported by an ambulance to the theatre at Princess Margaret Hospital, later died of his gunshot wounds, and is the same Frederick Ferguson that Keiovanna Ferguson identified as her husband and on whom Dr. Caryn Sands performed an autopsy.

20. Counsel for the Accused in his written submissions has cited the case of *Robinson v. R.* SCCr App and CAIS No. 93 of 2013 at page 3 para: 15 which states:

"But on a charge of Murder or manslaughter, needless to say, it is important to establish that the deceased met his death by some unlawful harm at the hands of the

accused; See s. 289 and 290 of the Penal Code Chap. 84 of the Statue Laws of the Bahamas.”

Counsel for the Accused has submitted that there was no nexus made between the person shot at the Office Lounge on West Bay Street and the deceased examined by Dr. Caryn Sands and identified by Keiovanna Ferguson at the Morgue at Princess Margaret Hospital. His brief submission on this issue is as follows:

“We submit that the only witness capable of identifying Mr. Ferguson as the person that was shot at the Office Lounge West Bay Street by the defendant and subsequently expired as a result of those injuries is WPC 3709 Gibbs. Officer Gibbs was not shown any post mortem photos of the deceased to identify him as the person she saw laying on the ground complaining of gunshot wound. Furthermore, there was no evidence provided by Gibbs regarding any wounds Frederick Ferguson suffered when she saw him laying on the ground. Her evidence is simply that Frederick Ferguson, a taxi driver, of Pinewood Gardens complained of being shot by a male she was chasing. Officer Gibbs then states that she called for EMS but does not state whether Frederick Ferguson left by ambulance or died at the scene. In fact, there is no evidence that the person shot at West Bat Street observed by Officer Gibbs died.

What is more.Keiovanna Ferguson identified Frederick Deron Ferguson at the morgue as her husband. She did not state his occupation nor his address in her, evidence and she was not present when the man she identified was shot.

Thus, the Crown has failed to prove that the man shot at the office Lounge is the deceased who was examined by Dr. Caryn Sands and identified by Keiovanna Ferguson. **Robinson v Regina Supra** makes it clear that the crown must prove that the deceased died at the hands of the accused.

For the Defendant to be called upon to answer, the prosecution must establish a prima facie case against him. In the circumstances, we submit that the defendant should not be called on to give a defence in accordance with the first limb of the test in **Regina vs. Galbraith (1981) 73 Cr. App. R. 124, C.A.**”

21. The Court has had opportunity to consider two Court of Appeal decisions out of Jamaica, which it finds relevant on this issue.
22. Firstly the case of Brown and Lawrence v. R. SCCr App Nos. 12 and 13 of 2012 [2017] JMCA Crim 20. Where the court at paras: 61-66 stated as follows:

“ (ii) **Proof of identity of the deceased**

[61] The second aspect of the ground of appeal that the no case submission should have been upheld because the prosecution had failed to prove an essential elements of the offence of murder was also considered and rejected. It is trite that the prosecution must prove on a charge of murder that the person named in the indictment, as the one murdered by the accused is, in fact, dead and had died from injuries caused to him by the accused. The necessity of establishing the nexus between a deceased and the person the accused is alleged to have murdered was well demonstrated in the decision of this court in **R v Florence Bish(1978)** 16 JLR 106.

- [62] In connecting the person named in the indictment as the person whose body was seen at 18 Monk

Street, and on whom the post-mortem examination was conducted, the prosecution, at the trial, relied on the evidence of Sabene Forrest and Detective Corporal Kirk Roache.

- [63] Sabene Forrest knew the deceased by the name Errol Miller (as well as by his alias) prior to the incident. She saw the applicant pointing his gun in the direction of the deceased, while the deceased was running, and he heard explosions sounding like gunshots. She ran away from the scene. Shortly after, she returned to where she had last seen the deceased and the applicant and there she saw the deceased's body lying in a pool of blood. She said that by that time, the police were already there.
- [64] Detective Corporal Roache's evidence was that he was a member of the police party that went to the same premises after the shooting, where he saw the body of a man lying in a pool of blood with wounds. He said that on seeing the body, he spoke with Keron Miller, the son of the man whose body he saw, and Nicola Laing, the man's common law wife. They both identified the body he saw lying in the pool of blood to be that of Errol Miller.
- [65] We accept that what the officer was told by Keron Miller and Nicole Laing (who were not called as witnesses at the trial) as to the identity of the body of the deceased would have been hearsay and, therefore, inadmissible for the truth of the fact that the body was, indeed, that of Errol Miller. However, Detective Corporal Roache attended the post-

mortem examination on 9 August 2005, where he saw the same body that he saw at 18 Monk Street on the day of the incident. This, indisputably, was the scene of the shooting described by Sabene Forrest where she had seen both the deceased and the applicant at the material time. On the evidence of Sabene Forrest, it was Errol Miller who was shot at that scene. So both witnesses saw the body of one person at those premises following the shooting incident allegedly involving the applicant.

[66] There was sufficiently cogent evidence before the jury, once they accepted it, that the body that was seen by Detective Corporal Roache, both at the scene of the crime and at the post-mortem examination, and which was identified to the pathologist by Nicola Laing, was one and the same. That body was Errol Miller as established on the evidence of Sabene Forrest. That body was examined by the pathologist who found that the cause of death was due to multiple gunshot wounds. There was enough evidence placed before the jury, from which they could have drawn a reasonable and inescapable inference and therefore ultimately found, as a fact, that the body of the person on whom the post-mortem examination was conducted, and who was declared to have died from gunshot injuries, was Errol Miller, the person named in the indictment. The nexus was properly established to prove that Errol Miller died at the hands of the applicant. We found no merit in this aspect of the ground of appeal that an essential element of the charge of murder was not made out.”

23. What is clear from this case is that a police officer saw the body of the man who was shot at the scene and was present at the

Morgue when the same body was identified to the pathologist who did the post mortem and pronounced the cause of death.

24. The second case I wish to refer to is R.v. Florence Bish (1978) 16 JLR 106 (CA) where the head note states as follows:

“The appellant was convicted in the Home Circuit Court for the offence of Murder. Evidence by two prosecution witnesses at the trial was that they saw a man walking with the appellant on the sidewalk; That the appellant was addressing the man in a boisterous manner and that as soon as the appellant finished speaking she (the appellant) brought out an object from her bosom and stabbed the man in his chest and then threw the object under a parked car nearby; that the man fell to the ground and was removed from the scene in an ambulance. The appellant in her defence at the trial testified that she was set upon by three men who attempted to rob her; and that in the process, she (the appellant) chucked the man away with her hand and was unable to say if by accident the Kitchen Knife caught him. There was evidence that a policeman retrieved the knife from under the car after the incident and went to see the deceased at the hospital but he was not called at the trial to give evidence as to the identification of the body on which the post-mortem examination was performed at the hospital. Notwithstanding the jury returned a verdict of guilty of murder. On appeal, the court found from the record, that there was no evidence at the trial to link the man that was stabbed and the man upon whose body the post-mortem examination was performed; and that if the trial judge had correctly appreciated the evidence he would have withdrawn the case from the jury.

HELD:

(1) In a charge of murder, in order to support the charge, the prosecution has a duty to prove that the body of the deceased was the person actually murdered by the accused person. In the instant case, the court found that the body of the deceased on whom the post-mortem examination was done was not identified as the person on whom the appellant inflicted the stab wound.”

25. Rowe JA (Ag): who delivered the judgement commented as follows on page 108: after outing the facts:

“This appeal does not turn on any of the facts outlined above. There was admittedly an encounter between the applicant and a man but in order to support the charge of murder the prosecution had a duty to prove that the men whom the applicant wounded died as a result of those injuries. The learned Chief Justice saw this issue clearly and directed the jury that:

“There is no really direct evidence connecting the man who get the stab there at Barry Street, with Norman Watson, none whatever.....Nobody who saw the men there at Barry Street have come to say it is the same man, Mr. Norman Watson, on whom Dr. Depass performed the operation. So of course, the prosecution has to prove the death of the particular person there and prove that the accused is the person who killed him.”

The Learned Chief Justice correctly reminded the jury that there was no evidence that the man wounded at the corner of Barry Street and Princess Street was taken to the Kingston Public Hospital.....Mr. Edwards in a clear and concise argument demonstrated how essential it is for the prosecution to prove the actus reus in a criminal case. With a modicum of effort the police could have ensured that special constable Scarlett be present at the post-mortem examination.”

26. On page 109 Rowe JA concluded:

“Throughout his summing up the learned Chief Justice repeatedly drew the jury’s attention to the necessity to be satisfied that the man on whom the doctor performed the post-mortem examination was the man who received the stab at Barry Street. We are clearly of the opinion that had the learned Chief Justice correctly appreciated the evidence of Louis Lloyd he would have withdrawn the case from the jury. For the guidance of prosecutors we can do no better than to quote a passage from the 3rd Edition of Wilkenson’s Road Traffic Offences at p. 114:

“The prosecution should be careful to see that there is evidence of the death of the actual victim; i.e. it may not suffice for a police witness to say that John Smith was knocked down by a car on a Sunday and removed to Hospital and then for a doctor to say that John Smith died there on Monday. There must be evidence to show that the two John Smiths are the same person.”

We considered that in this case the interests of justice dictated that a new trial be not ordered as without the introduction of new and additional evidence any further trial would be bound to fail.”

27. The facts and decision in the Bish case are strikingly similar to the present case.
28. What is clear on a submission of “No Case To Answer” is that the question to be answered by the judge is whether a jury properly directed could convict on the evidence adduced by the prosecution at the close of their case.
29. In the present case the only evidence the prosecution has adduced to show that the deceased Frederick Ferguson on whom the Doctor Caryn Sands performed the post-mortem examination is the same person who W.P.C. Gibbs says she saw injured on West Bay Street, is the statement of W.P.C.

Gibbs that a man who was shot at the scene told her his name was Frederick Ferguson.

29. The short question for me to determine is whether this is sufficient to establish the requisite nexus.
30. The name Frederick Ferguson is not an uncommon name in The Bahamas. There is no need to have a jury speculate as to whether the man shot on West Bay Street in the wee hours of 13th February 2017 is the same man on whom the pathologist Dr. Sands performed the post-mortem examination and who was identified by Keiovanna Ferguson to the Dr. on 14th February 2017; Which I would be leaving for them to speculate (if I do not stop the case) on the state of the evidence adduced.
31. The prosecution including the police could have provided evidence of the appropriate nexus in any number of ways which were available to them:
 - a) The two police officers who were on the scene when the man was shot (or any one of them) could have easily gone to the hospital and be present when Keiovanna Ferguson identified her husband to the doctor at the morgue and verify that this was the same person who they saw suffering from gunshot wounds at the scene on West bay Street.
 - b) The C.S.I. personal could have easily taken photo's of the deceased at the Hospital or Morgue and the police witnesses and all other prosecution witnesses would be in a position to give evidence that the man shot on the scene was the same man depicted in the photographs taken at the Morgue on whom the Doctor performed the post mortem.

- c) The Forensic ballistic evidence was never produced. Dr. Caryn Sands recovered a fired bullet from the body of the deceased. Officer Gibbs testified that she recovered the firearm the Accused was seen firing. Yet no evidence was adduced to link the bullet recovered by Dr. Sands and the gun recovered by Officer Gibbs which would have provided the requisite nexus.
- 32. In my view having reviewed the evidence as outlined above and after considering the Law and legal guidelines set out earlier I find that there is no sufficient evidence adduced by the prosecution to establish a nexus between the person shot at the Office Lounge on West bay Street and the deceased examined by Dr. Caryn Sands and identified by Kieovanna Ferguson at the Princess Margaret Hospital.
- 33. As a consequence the case against the Accused will be withdrawn from the jury and the jury will be directed to return a verdict of not guilty on the charge of murder in the Information.

Dated this 11th day of March 2019

The Hon. Justice Gregory Hilton