COMMONWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **CRI/VBI/150/7**

CRIMINAL DIVISION

BETWEEN

BERNARD KNOWLES

APPLICANT

-V-

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

(ARMED ROBBERY AND RECEIVING- CONTRARY TO SECTION 339(2) and 358 OF THE PENAL CODE, CHAPTER 84)

Before: **The Honourable Madam Justice Mrs. Cheryl Grant-Thompson**

Appearance: **Mr. B'jorn Ferguson Counsel for the Applicant Bernard Knowles**

Mr. Terry Archer along with Ms. Destiny McKinney, Counsel for the Director of Public Prosecutions

Hearing Dates: **3 December, 2020.**

RULING ON 'NO CASE' SUBMISSION-

Armed Robbery-Circumstantial Evidence/Possession of Recently Stolen Goods, Eye Witness Testimony, Intention-R v Galbraith, Kevin McKenzie v R SCCrApp No. 285 of 2016; Dion Bethel v R SCCrApp No. 75 of 2017; R v Newry [2002] BHH J. No. 25; No. 15 of 2001; DPP v Selena Varlack PC No. 23 of 2007; Crossdale v R (1995) 46 WIR 281; Taibo v The Queen (1996) 48 WIR 74.

GRANT-THOMPSON J

Brief Facts:

(1) Our Defendant twenty-three (23) year old Bernard Knowles was charged with Armed Robbery and Receiving of the property of Ms. Pamela Rolle, contrary to sections 339(2) and 358 of the Penal Code, Chapter 84 respectively.

On 30th November, 2020 a jury was empanelled to hear the evidence in the trial. The Prosecution's case relied heavily on the Doctrine of Recent Possession, coupled with circumstantial evidence and the evidence of an eye-witness who did not actually see who robbed her at gun point.

RULING

I am of the view that there is a prima facie case made out by the Department of Public Prosecutions against Bernard Knowles who is charged with Armed Robbery and in the alternative, Receiving of the property of Pamela Rolle.

(2) 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 C.J. 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".

(3) <u>THE CROWN'S CASE</u>

The Defendant, Bernard Knowles is charged with one (1) count of Armed Robbery, contrary to section 339(2) of the Penal Code, Chapter 84.
Particulars of the offence read that the Defendant whilst armed with a firearm robbed Pamela Rolle of her black 2018 Honda CRV, valued at $46,000.00, one Apple iPhone 10 valued $1,000.00, one handbag containing $350.00 cash and other personal items. In the alternative the Defendant was charged with one (1) count of Receiving contrary to section 358 of the Penal Code, Chapter 84. Particulars were that sometime between Thursday 7th March, 2019 and Tuesday 12th March, 2019 at New Providence, Bernard Knowles dishonestly received one 2018 black Honda CRV, belonging to

Pamela Rolle knowing the same to have been appropriated by the offence of Armed Robbery.

4. On the 1st December, 2020 the Crown opened its case to the six (6) woman three (3) man jury and called three (3) witnesses. Namely, the scenes of crime officer, D/C 923 Belle, the virtual complainant, Pamela Rolle, and the officer who was present for the arrest of the Defendant and who allegedly found the stolen vehicle at the defendant alleged residence, Cpl. 3357 Farrington. On the 2nd December, 2020 the Crown called two (2) witnesses, W/Sgt. 2918 McPhee (who downloaded the record of interview of the accused) and D/Sgt. 3216 Patton (the investigating officer). The Crown then sought leave to close its case without calling the witness D/Cpl. 3478 Rolle who had been listed on the back of the Indictment. Leave was granted and the Crown closed its case without calling this witness. Counsel for the Defendant, Bjorn Ferguson then made a submission of No Case To Answer.

SUMMARY OF EVIDENCE

D/C 923 Belle

5. D/C 923 Belle stated that on Tuesday, 12th March, 2019 sometime around 1:00pm, whilst on duty he went to Center Drive, Miller's Heights off Carmichael Road. He photographed two (2) images: one was of a house later identified to be the home or one of the homes of the Defendant; and secondly a photograph of a black four (4) Door Honda CRV Jeep parked on the southern side of the house behind a wall. He later uploaded these photos and created a CD. From the CD he created photo albums. His evidence produced two (2) exhibits:

A. Exhibit "***B.K.-1"*** – the CD

B. Exhibit "***B.K.-2"*** – the photo albums

This witness accepted during cross-examination that he did not dust the vehicle for fingerprints.

Pamela Rolle

6. Pamela Rolle testified that on Thursday, 7th March, 2019 sometime at around 8:50pm she had just arrived at her mother's house on Marshall Road. She was driving her relatively new 2018 Honda CRV jeep which was a black vehicle, valued at $46,000. Ms. Rolle pulled in next to the driveway, she testified that it was dark but the light was on. She turned off the vehicle, opened the door and the trunk. She retrieved two (2) bags from the back trunk which she put on her hand, along with her handbag and closed the trunk. She then walked to the driver's side and heard a noise behind her and saw a dark-skinned male wearing a grey hoodie. As he got closer, he pulled the hoodie over his head and thus, she was unable to make out his face. He said "gimme the key, gimme the key".

7. Ms. Rolle gave evidence that she didn't have the key in her hand, (her car was touch start), and the key was in her handbag. She testified that she did not give the armed robber the key as quickly as he wanted; he produced a black handgun and put it to her side. She felt the gun on her side; she was very afraid and dropped her handbag.

8. The unknown assailant picked up her handbag, jumped into her jeep, and she ran inside and called the police, she watched him pull off in her car. She

stated that in her bag was her driver's license, NIB card, Passport, sunglasses, prescription glasses, $350 in cash, iPhone 10 valued $1,000.00, cheque book and keys. She did not give him permission to take the items. She also stated that he was very close to her and that the gun was about six (6) inches long. Ms. Rolle described the distance for the jury. She could not positively identified the assailant.

9. On Friday, 8th March, 2019 around 10:00am she got a call from Officer Walkes and she went to CID. Whilst there she was taken to the back and shown an iPhone 10 in a pink case. She used facial recognition to unlock the phone. She was able to identify the phone as hers by that means and family photos. The phone was subsequently returned to her after several weeks.

10. On Tuesday, 12th March, 2019 she again went to CID to meet Officer Taylor who showed her a black Honda CRV jeep. There was a scratch on the bumper and she was able to start the vehicle with the spare key. She also testified that the insurance papers and the chassis numbers matched. The vehicle was not in the same condition as before the armed robber left, it now had scratches on the back-passenger side and the disc and license plates in the front and back of the vehicle were missing. She was shown Exhibit ***BK-2***, photo #2 and identified the vehicle in the photo by the silver luggage rack on top which was a special feature she added to the car as being similar to her vehicle. She also stated that the similarities were the vehicle was the same colour, make, model and distinguishing silver luggage rack on top. She stated that all the Honda's on the lot at Nassau Motor Company ("***NMC***") did not have that silver rack on top, it was customized – an extra feature you can purchase as an accessory to the vehicle. She added that after the incident

the vehicle was returned to her, it was taken to Nassau Motor Company ("***NMC***"), where it stayed there for several weeks to be checked and the scratches removed. When it was returned to her it still had the very same luggage rack. She did not get back the money, ID cards, passport, driver's license, RBC card, Scotia debit, Scotia gold card back or her handbag.

11. During cross-examination she stated that the incident lasted less than a minute and that she could not identify the face of the person who robbed her at gunpoint. She also described that the armed robber's fingers as being long and that he had a low haircut. She also stated that she saw veins in his hands. She stated that the police arrived within less than 15 minutes and asked her to go to the station and there she provided the report. She gave evidence that she was asked to view an ID lineup on Saturday 9th March, 2020 and that she did not pick anyone, she didn't see their hands, but did listen to the voice. She testified that she gave three (3) statements. The first statement was given on the night of the incident, the second statement, after the identification of the phone and the third statement was provided when the vehicle was returned.

Cpl. 3557 Farrington

12. Cpl. 3557 Farrington gave evidence and stated that on Tuesday, 12th March, 2019 he was attached to the flying squad at CID. On that date around 12:34pm he was present on Williams Drive, off Cowpen Road when the Defendant was arrested around 12:34pm. The Defendant told them that he resided on **Hospital Lane,** he was then booked into the Carmichael Police Station and then taken to his residence on Center Drive. Around 1:35pm he along with a team of officers arrived at the residence of the defendant at

Center Drive off Carmichael Road with a search warrant. He showed the search warrant to the Defendant and his brother Bernarvio Knowles. While conducting a search of the yard he discovered on the southern side a black 2018 Honda CRV with no license plate or disc attached. The vehicle was parked at the rear and close to the wall of the home. He stated that he questioned the Defendant and his brother about the vehicle and Bernarvio stated that he woke up that morning and met the jeep parked on the side of the yard but he did not know who it belonged to and that he suspected that his brother Bernard "B.J" may have some knowledge of it. He stated that the Defendant then told him that he was keeping the jeep for his friend "Sheron" and that he did not know where "Sheron" got it from. He stated that a tow truck came and towed the vehicle. He was shown ***"BK-2"*** and the witness identified photo #1 as the residence of the Defendant, which was allegedly confirmed to the officer by his mother and brother who both said that the Defendant lived there. He identified photo #2 as the vehicle he saw at the rear of the home. He also identified the Defendant in Court as the person he had been referring to.

13. During cross-examination he revealed that while at the residence he conducted a search of the interior and exterior of the residence and did not find any of the stolen items. He accepted that he did not search the interior of the vehicle and the CSI did not dust for finger prints in his presence. He also stated that he did not search the vehicle as CSI had not processed it as yet. He testified that he did not go to Hospital Lane and that the Defendant's correct address was Center Drive. He stated that "Sheron" was in police custody and that he did not find a gray hoodie jacket or firearm at the defendant's residence. He did not find anything illegal but found a black

jeep. He confirmed that Bernard Knowles was not the only person in custody for this matter.

D/Sgt. 2918 McPhee

14. She gave evidence on 2nd December, 2020 and exhibited the CD of the recording of the Record of Interview of the Defendant, which was conducted by Cpl. 3216 Patton in the presence of D/CPL 3478 Rolle. The CD was exhibited as Exhibit "***B.K.-3***".

D/Sgt 3216 Patton

15. He gave evidence on 2nd December, 2020 and played "***B.K.-3"*** for the jury. He identified himself on the screen and also D/Cpl. 3478 Rolle and the Defendant who were present during the Record of Interview. He stated that on Tuesday, 12th March, 2019 he was present at the home of the Defendant on Center Drive along with Cpl. 3557 Farrington when he noticed a black Honda CRV jeep parked on the southern side of the building behind a picket fence. The witness directed D/C 923 Belle to photograph the residence and the vehicle. That the vehicle was later towed to CDU and processed by D/Cpl. Orall. He returned the vehicle to the virtual complainant after she had properly identified the vehicle and which she started with a spare key.

16. On Wednesday, 13th March, 2019 sometime at around 10:00am whilst at CDU, he allowed the Defendant to speak to his Attorney B'jorn Ferguson. The Defendant was properly advised by his Attorney. Sometime around 10:35am he conducted a Record of Interview of the Defendant in the presence of D/Cpl. 3478 Rolle and informed him of the complaint made against him. During the interview the Defendant stated that a male name

"Leon" brought the 2018 Honda CRV jeep to his residence. The Defendant also told him that Leon brought the vehicle there "on Saturday night what just gone", which would have been the 9th March 2019. He testified that Leon was nothing to him and that he is a "friend of a friend". He said that "Leon" put the vehicle in question in his yard as a surprise for his wife. He did not know where 'Leon" live; he said that Leon was a boat captain and he was not sure what boat he drives. He had no phone contact for Leon. Upon completion of the interview the Defendant signed the interview. He also pointed out the Defendant in court as the person whom he interviewed and later charged with the present offences.

The Director of Public Prosecutions submitted that this case falls within the second limb of Galbraith.

<u>DOCTRINE OF RECENT POSSESSION</u>

17. The Crown relied strongly on the doctrine of **Recent Possession** as per Section 91 of the Evidence Act, Chapter 65 which states:

> *"Where a person is found in the possession of property proved to have been recently stolen, he shall be presumed to have stolen it, or to have received it knowing it to have been stolen according to the circumstances of the case,* ***unless he shall give some <u>satisfactory explanation</u> of the manner in which it came into*** *his possession."*

The question that arises for the consideration of the Court then is:

i. Was the accussed on possession;

ii. Did he steal it or receive it; and

iii. Did he provide a satisfactory explanation for how it came in to his possession?

In my view all of these are jury questions.

18. The DPP submitted that the accused man provided two (2) conflicting accounts of how the vehicle came into his possession. He told officer Farrington that he was holding the vehicle for his friend 'Sheron' and yet when interviewed he told officer Patton that he received the vehicle from a man name 'Leon' who was a 'friend of a friend', which is it- a dispute on the facts is a jury question. They submitted that when arrested he tried to lead the officers away from his true home to Hospital Lane because he knew that the stolen vehicle was at his residence. The Crown claimed that it was clear that he was in possession of the vehicle on his own admission from Saturday 9th March 2019, about two (2) days after the Armed Robbery.

19. I considered the dicta contained in the decision of ***Warren Newry v Regina SCCrApp No. 15 of 2001.*** The Appellant Warren Newry was convicted for the offence of receiving a motor car license No. 76115, valued at $15,800 sometime between Sunday, the 15th September, 1996 and Wednesday the 16th of October, 1996 at New Providence, the property of Sherrilee Strachan, knowing the same to have been obtained by an offence, namely, armed Robbery. The facts are relevant and similar to the instant case.

20. The facts of that case were that at about 8:00 pm on the 15th September, 1996, Sherrilee Strachan, the owner of a 1996 Nissan Sentra motor car parked her car at Superwash Laundromat situated on Blue Hill Road and Carmichael Road. She went into the Laundromat and returned to her vehicle a short time later. She was robbed of her vehicle by a person who was armed with a gun. The person who held her up drove off in her vehicle. The theft of the vehicle was reported to the police.

21. On the 16th of October, 1996, about one month thereafter, police officers acting on information saw a grey 1996 Nissan Sentra parked, the Appellant who was in the driver's seat ran from the vehicle and was arrested and charged. The owner of the vehicle Mrs. Strachan identified the vehicle as her vehicle which was taken during the robbery. The Appellant denied being in possession of the vehicle or being in the vehicle.

22. The Prosecution case was based on the Doctrine of Recent Possession, possession of property recently stolen and no satisfactory explanation of the manner in which it came into his possession and fingerprint of the appellant which was alleged to have been found outside of the drivers' door.

23. The Appellant appealed his conviction and at paragraph 10 his second ground of appeal was that the Learned Trial Judge erred in law when she called upon the appellant to answer a case. Counsel had submitted that the mere fact that the appellant was seen sitting in the driver's seat and his fingerprint was found on the outside of the car where not sufficient to established possession of the car in him to call upon him for his defence…

24. The Appellant Court provided at paragraph 11 and I quote:

> ***"It was quite clear that the prosecution's case depended upon the doctrine of recent possession and secondly the fingerprints of the appellant that were found on the car itself. That evidence led was substantial, indeed, as it created at least a prima facie case against the appellant for which the trial judge, in our law, properly called upon the appellant to answer the charge of receiving…In our view, the evidence was of such a nature that the trial judge had no option but to call upon the appellant for his defence."***

I see no difficulty with the Receiving count- it is clearly a jury question as to whether the Appellant did receive the vehicle knowing same to have been stolen. The Doctrine of Recent Possession would have allowed the Jury to consider if he stole it and whether his explanation to the contrary is satisfactory. To my mind he did in fact stole or receive the vehicle is in fact a Jury question.

25. See also the case of in ***Kevin McKenzie and Regina SCCrApp No. 75 of 2017***, a case concerning the Murder of a police officer. It was alleged that the cell phone which was taken during the Robbery and Murder of the officer was sold by the Defendant McKenzie to another.
Sir Michael Barnett dissenting commented as follows:

> ***"It may well be that the trial judge should have acceded to the no case submission as held by Justice Evans. I am not***

prepared to go that far and do not think it is necessary for me to do. I am mindful of the observation made by Skarica J in R v Morgan [2013] ONSC 1522 about the doctrine of recent possession. He said: The doctrine, in a nutshell, allows the trier of fact, in appropriate circumstances, to draw an inference or guilt of theft or other crimes linked to the theft (possibly all the way up to murder), if it is shown that the accused is in the unexplained recent possession of stolen property. The inference may be made even when there is no other evidence of guilt." **(Pages 48 paragraph 147-148).**

"It appears to me that in any particular case the answer as to what is the appropriate inference to be drawn from recent possession is a matter for the jury. For that reason, I am not prepared to allow the appeal simply on the basis that the trial judge erred in not acceding to the no case submission. But the judge is obliged to give proper direction on inferences and the failure to do so is an error on the part of the judge."

In the same judgment, The Honourable Sir Hartman Longley, P stated:

"To my mind there was evidence at the close of the case for the prosecution to call upon the appellant to make a defence (see also Galbraith). Whether he was the thief, or receiver or just an innocent handler was a question for the jury." (paragraph 165, page 152; pages 55-57; paragraph 198).

CONCLUSION

26. The Crown invited me to dismiss the application for a No Case To Answer and to leave the matter for the jury's consideration.

THE LAW

27. **Larry Raymond Jones v R** **SCCr. App. No. of 1988** refers and adopts **R v Turnbull and Others** in this jurisdiction, therein the Court opined that:

> ***"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends solely on a fleeting glance or on a longer observation, made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."***

The "Turnbull" questions are:

- how long did the witness have the accused under observation?
- at what distance?
- in what light?
- was the observation impaired in any way?
- had the witness ever seen the accused before?
- how long elapsed between the original observation and the subsequent identification to the police?
- and was there any material discrepancy between the description of the accused given to the police by the witness and his actual appearance?

The witness Pamela Rolle seeks to describe the armed robbery but not who robbed her. In my view **Turnball** does not assist me. Therefore, I will not direct the jury on this aspect of the quality of the identification, save and except insofar as the same purports to identify the hands of the robber and this goes to the quality of the investigation relative to whether the police officers did a good job in following this aspect up.

CIRCUMSTANTIAL EVIDENCE

28. The Crown's case against the Defendant included circumstantial evidence. In **R v Jabbor [2006] EWCA Crim 2694** Moses LJ stated at paragraph 21as follows:

> ***"We reject that as an approach to be taken by the Judge at the close of the prosecution case, even where the evidence is only circumstantial. The correct approach is to ask whether a reasonable jury, properly directed would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with the innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."***

29. **In Cox v R [1999] BHS J. No. 107** Gonzales-Sabola P. referencing the case of **Taylor et al v. R. (1928) 21 Crim. App. R. 20 at 21**, Hewart L.C.J, in the course of his judgment commented as follows:

> ***"It has been said that evidence against the applicants is circumstantial; so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances, which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation to say that it is circumstantial."***

30. I reminded myself that **in the case of Director of Public Prosecutions v Varlack (British Virgin Islands) [2008] UKPC 56 (1 December 2008)**,the Court said at paragraph 13 decided that:

> ***"There was no evidence that the respondent was present when Todman was killed. The case against her was that she was part of a joint enterprise to which the other three Defendants were parties, that she would be lured to the meeting place, where it was contemplated that he would or might be killed. This was evidenced, the prosecution argued, by the pattern of the telephone calls, allied to her behavior after the murder. It was submitted that the evidence was sufficient to establish that she knew of the plan for a meeting between Todman and one or more of the respondent's co-defendants and, further, that she knew and accepted that a possibly lethal attack might be mounted on him there…"***

"68… the concept of joint unlawful enterprises is such that once there is evidence that Varlack participated in a joint unlawful enterprise which contemplated the death of or which resulted in the death of the victim and the death was an event which she could have foreseen as a probable consequence of the unlawful enterprise then she is deemed to have committed the offence. <u>Section 20 of the Criminal Code and Archbold op. cit. para 18-15.</u>

69. True, each act attributed to Varlack on its own proves nothing by itself but when taken together and viewed within the framework of the Crown's case, I have no doubt that the Crown has established a compelling prima facie case against her based on circumstantial evidence. The questions raised by her Counsel on the reliability or otherwise of the Crown's evidence and the inferences to be drawn from it and the weight to be given to it are all matters for the jury.

The evidence, albeit circumstantial, is not so tenuous neither has it been so discredited as to warrant the case being taken from the jury. The evidence is such that a reasonable jury properly directed might on one view of the evidence convict. The no case submission accordingly fails."

<u>CIRCUMSTANTIAL EVIDENCE</u>

31. The circumstances relied upon are:

I. the proximity of time in the discovery of the vehicle at the residence of the Accused, if the jury accept that was

his residence and the date and time of the Armed Robbery;

II. that the towed vehicle was later proven to be the vehicle of the complainant if the police are to be believed by the jury, that this is the very same vehicle Ms. Pamela Rolle identified at C.I.D;

III. that the explanation proffered by the accussed was not satisfactory but rather was both vague and a changing story, that is at first he said it was "Sheron's" and that he did not know where Sheron got it from and then later said it belonged to "Leon" as a surprise for his wife- without particularizing who is "Leon" no last name was in fact given;

IV. that the vehicle was intimately parked and only a home owner could have placed it there and all members of the household pointed to the accused according to the police.

STANDARD OF PROOF (NO CASE SUBMISSION)

32. On a submissions of 'No Case To Answer' I reminded myself that the Learned Trial Judge must be satisfied that a prima facie case has been made out against the Defendant. It is not for me 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. In my view they have done so.

APPROACH TO NO CASE SUBMISSIONS

33. 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 discharged."***

THE DEFENCE CASE

34. I also considered the applicability of the principles in Galbraith, which was 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, <u>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</u>, is equally applicable in cases such as the present, concerned with the drawing of inference.”***

35. When considering the approach which the Learned Trial Judge should follow when faced with a submission of No Case To Answer, the learned authors of **<u>Blackstone’s Criminal Practise 2010 at D15.56</u>** 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 (<u>such as Shippey [1988] Crim LR 767)</u> 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.”***

<u>APPLYING SECOND LIMB OF GUIDELINES GALBRAITH</u>

36. 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 the bar. In **Larry Raymond Jones - The Privy Council**, affirmed the applicability of Galbraith in The Bahamas.

37. 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.

38. 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.

39. 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."

This was the law which I found relevant in my decision. The evidence relative to the first count is not as strong as the relative to the second. However, in my view whether this Defendant is the receiver or thief according to the Doctrine of Recent Possession or nothing at all is ultimately in my view a question for the jury.

THE DEFENCE CASE

40. Accordingly, I will leave the case to them. I considered the submissions of Counsel for the Defence. Defence Counsel submitted that:

> ***"Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it, or to have received it knowing it to have been stolen according to the circumstances of the case, unless he shall give some satisfactory explanation of the manner in which it came into his possession."***

Count 1 – Armed Robbery. The Defence relied on limb one of Galbraith. They submitted that there was absolutely no iota of evidence that Bernard Knowles was the lone male armed with a black handgun on the 7th March, 2019, who took Pamela Rolle's black 2018 Honda CRV vehicle valued at Forty-Six Thousand Dollars ($46,000) and/or any of the items particularized in the charge. Ms. Pamela Rolle viewed an identification lineup that Bernard Knowles participated in and did not identify him. Secondly, they reminded

that one Ms. Pamela Rolle described the lone gunman's hand as being veiny and having slim fingers. Bernard Knowles has neither of these characteristics it was urged upon me. Turnbull is of no assistance because no identification took place. They relied on the Privy Council decision of **Terrell Neilly**. There is no evidence before the Court on one count (Armed Robbery) it was submitted. I agree the evidence is weaker on count one (1).

However, I have examined the circumstances of the case. I was invited to consider the circumstances of this case before the Court, is that on the 7th March, 2012 at 8:50 p.m., Pamela Rolle was robbed of her Black 2018 Honda CRV jeep. I was reminded that she was unable to identify the lone gunman who robbed her. The jeep was recovered from Center Drive Carmichael Road at a residence connected with Bernard Knowles. The jeep was recovered on the 12th March, 2019. Bernard Knowles when interviewed on the 13th March, 2019 by Officer Patton, told him that the jeep was brought to his home by Leon, who happened to be a friend of his friend, Sheron. And he also stated that the jeep was brought to his residence on Saturday, 9th March, 2019. This would mean that the jeep was brought to his home two days after the actual Armed Robbery. It was submitted to me that Bernard Knowles also stated that when the jeep was brought to him to hold he was asked to hold it because Leon wanted to surprise his wife. No keys were left with him, he never entered the vehicle, he never inspected the vehicle and therefore never had control of vehicle or an intention to possess vehicle. He never received monies for the vehicle and he never paid monies for the vehicle. Therefore, it cannot be said that he had stolen or received stolen property which we submit is the true purpose, meaning and intention of the section. He relied on the authority of Kevin McKenzie at the Court of

Appeal. Additionally, the Defence relied on the Scottish case of **Fox v Patterson [1948] JC 104**. In that case it gives the three (3) conditions that must concur before the presumption that recent possession imports is applied.

Those three conditions are:

> (a) that the stolen goods should be found in the possession of the accused;
>
> (b) that the interval between the theft of the goods and their discovery in the accused's possession should be short; and
>
> (c) that there should be other criminative circumstances over and above the bare fact of possession. If all of these conditions are not present then the presumption cannot be applied. They submitted that three conditions are not present.

In particular, the interval between the theft of the car and the discovery, the Armed Robbery took place on the 7th March, 2019 and the jeep was discovered on the 12th March, 2019.

Did Bernard Knowles in fact have possession of the Black Honda CRV jeep?

41. Defence Counsel submitted that the jeep was not found in possession of Bernard Knowles. The legal definition of possession was discussed in **Warner v Metropolitan Police Commissioner (1969) 1 AC 256**. Counsel relied on that authority.

The statutory definition of possession was extensively and comprehensively addressed by the **House of Lords in Warner v Metropolitan Police Commissioner (1969) 1 AC 256**. In that case, their Lordships engaged an exhaustive review of a line of authorities of the subject of "possession", in which it was repeatedly, emphasized that:

"A person cannot have possession without knowledge."

In his ruling Lord Guest concluded at page 299 that:

> " In the Dictionary of English Law (Earl Jowitt) (1959), at p. 1367, 'possession' is defined as follows: the visible possibility of exercising physical control over a thing coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession.
>
> • First, there must be actual or potential physical control.
>
> • Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it.
>
> • Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed....."

42. Continuing further on the same page, Lord Guest quoted from Lord Parker in the case Lockyer v Gibb (1967) 2 QB 243, where he stated:

> ***"In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realize is, for example, is in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something was slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it."***

"Possession" was also considered in the case R v Ashton-Rickardt (1978) 1 All ER 176, in which Lord Roskill said:

> ***"There could not be possession of a controlled drug unless the accused person knew that the thing which was alleged to contain the controlled drug is in his possession, that knowledge of the presence of the thing in question was an essential prerequisite to possession and that therefore the Crown had to prove, as part of its proof of possession of the controlled drug, knowledge that the thing (which was in fact a controlled drug) was there."***

These excerpts were cited with approval to me.

43. The Ashton-Rickardt case was followed by Chief Justice James Smith in the Bahamian case Curry v Commissioner of Police (1977-78) 1 LRB 626, in which His Lordship stated that:

> ***"It is accepted that proof of possession contains an element of knowledge which it is for the prosecution to establish."***

44. Defence Counsel also submitted that in the Curry case, Justice Smith referred to **Knoll v Comr of Police (1965-70) 2 LRB 479,** in which Bryce C.J also considered the meaning of **"possession"** as it relates to dangerous drugs, when he said:

> ***"In my opinion possession here denotes control of a substance either actual or potential coupled with knowledge of the existence of that substance. If that be accepted it will be seen that s 25(5) describes categories of persons all of whom may incur liability through connection with a drug, by including the person in whose custody or control, actual or potential, the drug is found, i.e. the person in whose possession it is found, the person who is the owner or occupier of the premises in which it is kept, irrespective of whether he has in fact possession as above interpreted, and the person who is the owner of the drug or responsible for it being kept, again irrespective of whether he is or is not in such possession. The owner or occupier of the premise has a good defence under the subsection if he can prove lack of knowledge or consent."***

45. It is clear, then, based on quoted authorities that possession of an item cannot take place without the necessary mens rea. It was submitted by Defence to me that the authorities would seem to indicate that the level, to which the term possession in law must ascend, obliges four very essential and indispensable components:

(a) Knowledge, (b) Custody (c) Control and (d) Intention to possess.

46. It is the respectful submission of the Defence that the evidence that has been led before this Honorable Court, either under direct testimony or cross-

examination, has not established that the Defendant did in fact possess the car. Therefore before the Doctrine of Recent Possession can be relied upon possession must be proven. It has not been proven before this Honorable court and therefore the Defendant should not be called upon to answer to the charges, Defence Counsel submitted.

47. In light of the foregoing, therefore, it cannot be said, and has not been proven that Bernard Knowles had possession of the jeep Defence Counsel submitted. As the Authorities have established, in order for there to be a case for him to answer there must be evidence to connecting him to the Armed Robbery and also the elements of the Doctrine of Recent Possession as espoused in the case of **Kevin McKenzie** must be present. All of the factors/elements for the presumption of recent possession to be invoked are not present in this matter Defence Counsel submitted. Therefore, Bernard Knowles should not be call upon to answer to the charges and the Court should accede to our submission of No Case Mr. Ferguson urged the Court.

RULING

ANALYSIS OF PROSECUTION EVIDENCE

48. What is clear from the authorities is that the judge at this stage must only be satisfied that there is a prima facie case made out against Mr. Bernard Knowles to call upon him to answer. Applying the principles enunciated in **Galbraith** and having considered the prosecution evidence in its totality, it cannot be correct to say that there is no evidence to ground the two counts charged. However, I find that Doctrine of Recent Possession coupled with the circumstantial evidence and with the limited eye witness

account outlined above, in my view, grounds the conclusion of This Honourable Court that this Defendant has a Case To Answer To on both charges of Armed Robbery and Receiving. I find there is sufficient evidence for the jury to find that he was both in possession, custody and control of the vehicle.

49. 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 both charges of Armed Robbery and Receiving. Discrepancies (if any) in the Prosecution evidence are matters for the jury as judges of the facts.

50. In my opinion, a properly directed jury might on one view of the facts, come to the conclusion that the Defendant is guilty on the charges of either Armed Robbery or in the alternative Receiving. In the result, the submission of "No Case To Answer" in respect of this Defendant Bernard Knowles must fail and I will overrule it.

51. I promised to put my reasons in writing and this I now do.

Dated this 4th day of December A.D., 2020.

The Honourable Justice Cheryl Grant- Thompson
Justice of the Supreme Court