COMMONWEALTH OF THE BAHAMAS **VBI. NO. 229/10/2018**

IN THE SUPREME COURT

Criminal Side

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION

AND

AKEEM MONTELL

Before:	**The Honourable Mr Justice Andrew Forbes**
Appearances:	**Ms. Erica Kemp c/o Director of Public Prosecutions**
	Mr. Wendell Smith c/o Akeem Montell
Hearing Dates:	**2 July 2021 - 14 July 2021**

Criminal Law, No Case Submission, Murder, Adverse Witness & Circumstantial Evidence

DECISION

1. The facts of this case are tragic but unremarkable. On the 1st January 2018 sometime around 11 p.m. in the evening, the deceased Mr. Joel Augustin was shot multiple times about the body resulting in his eventual demise.

FORBES J

2. That prior to his death his stepdaughter and brother-in-law heard him. His last words as, "they shoot me". Emergency personnel arrived at the scene along with Police Officials. Mr. Augustin was pronounced deceased and the Police commenced their investigations.
That multiple shell casting of fired rounds of ammunition was recovered along with the Vehicles which were later processed for fingerprints.

3. At some time around 9 a.m. on the morning of 5th January 2018 Officers acting on Information went to the residence of the defendant where he along with his brother and another male was arrested.
And during a search of the residence, Officers recovered a firearm.
At the time it was suspected that this firearm was used in the Murder of Mr. Augustin and it was sent for analysis.

4. Additionally Officers saw and spoke with an individual named Trevor Reckley, who had given them information regarding a firearm he had reportly sold to a person he named as "Kemmy".
The defendant who was a Juvenile at the time was interviewed along with his sister as Guardian, indicated he was unaware of the killing and had nothing to do with it.
He does acknowledge being aware of the firearm and suggested it was his friend, the male arrested at his residence that very same day as himself. A Dumont Carroll who himself was a Juvenile.
During the course of the trial, the evidence emerged along the lines of the facts highlighted above. There was a divergence and that is with

the testimony of Trevor Reckley who when initially questioned by the Crown asserted that he didn't voluntarily give the statements, that were recorded by the Police, but rather was forced into doing so.

The Crown made an application pursuant to Section 151 of the Evidence Act which says as follows:

> ***"151. (1) A witness may not be cross-examined by the party calling him unless in the opinion of the court he proves to be an adverse witness. (2) In this Act — "adverse witness" means a witness who appears to desire to avoid testifying about the facts in issue or to give only such testimony about the facts in issue as will harm the party calling him or will be of help to the adversary."***[1]

5. The Court acceded to the Application of the Crown and he was crossed by the Crown and his statements were in essence put to him.

When questioned by Defense Counsel, he repudiated those statements and suggested that he was brutalized to make those statements to assist the Police. Thus the credibility of Mr. Reckley was seriously doubted at this point.

6. The Court notes the case of Regina v. Golder et-al[2] where the Court said the following:

> ***"In the Judgment of this Court when a witness is shown to have made previous statements inconsistent with evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act."***

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[1] Evidence Act Chapter 65 of Statute Laws of The Commonwealth of The Bahamas

[2] {1960} 1 W.L.R. 1169

It should be noted that this case was relied upon by then Acting Justice Hilton in Regina v. Johnson and others[3] where he said,

> ***"As a consequences I find that the legal position in the Bahamas is still governed by the principles of law set out in Golder,"*** following this direction, the statements of Reckley are not reliable and thus not admissible in these proceedings, therefore there is no evidence which links Montell with the firearm before the 3rd January, 2018.

7. [4]The Pathologist confirmed the manner and cause of death of Mr. Augustin which were multiple gunshots to his body.

The Court heard from the Investigator in this matter, Sgt. McKenzie who indicated that he interviewed the Defendant along with his sister and the defendant acknowledged knowing of the firearm and also taking pictures with the same firearm.

He denied shooting anyone or conspiring in the murder of anyone.

The Prosecution then called Officer Rahming who would have extracted the images from the cell phone of the accused. Thereafter the Prosecution closed its case and the Defence had signaled an intention to make a No Case Submission.

To this end, Attorney Smith forwarded submissions which the court will enclosed in its entirety.

"INTRODUCTION

1. This is an application brought by the Defendant pursuant to Section 170 (1) of the Criminal Procedure Code Chapter 91 and/or pursuant to the inherent jurisdiction of the court, that the court find that there is no evidence that the Defendant committed the charge of Murder contrary to Section 291(1)(b) of the Penal Code Chapter 84, and should subsequently record a

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[3] Case No. 145/5/2014

[4] Supra

finding of not guilty in favor of the Second Defendant. The no case submission

2. It is trite law that the governing principles on a submission of 'no case' to answer are set out in the English Court of Appeal case of R v Galbraith [1981] 1 WLR 1039.

3. As stated by Lord Lane CJ in Galbraith: "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 arise 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 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" [Emphasis added].

4. The learned authors of Blackstone Criminal Practice 2016 at D16.59 advanced the following propositions as representing the position 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 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 it being a type which the accumulated experience of the courts has shown to be of doubtful value. [Our emphasis]

5. These principles are well established, and have been accepted by the Judicial Committee of the Privy Council as authoritative. In Daley v R [1993] 4 All ER 86 PC, the Privy Council acknowledged 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".

6. In Crosdale v R (1995) 46 WIR 281, a decision of the Privy Council from Jamaica, Lord Steyn at page 285 stated that: "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 the 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." [Emphasis added]. The elements of the offence

7. Section 290 of the Penal Chapter 84 states that whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of some extreme provocation, or other matter of partial excuse.

8. Section 12 (1) of the Penal Code Chapter 84 states with respect to intention that if a person does an act for the purpose of thereby causing or

contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.

9. Halsbury Laws of England Criminal Law Volume 25, 2010 paragraph 7 states with respect to causation that, "To give rise to criminal liability in a crime whose actus reus specifies a consequence, it is not enough that the defendant had a culpable state of mind: it must be proved that the consequence was caused by some conduct on his part". Paragraph 98 of the same Volume states that. "To establish a case of murder the prosecution must prove: (1) that the unlawful death of the victim was caused by an act or omission of the defendant; and (2) that the defendant did that act or omitted to act with malice aforethought, express or implied". [Our emphasis]

10. It is therefore submitted that a critical element of the aforementioned offence is proving that an act or omission of the Defendant caus[illegible]

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Queen (1996) 48 WIR 74 [supra] t
by the Judge, is whether there is material on which
without irrationality, be satisfied of guilt. If there is,
allow the trial to proceed. In that regard, the judge
prima facie case has been established by the ev
prosecution. Evidential Value of Previous Inc
Hostile/Adverse Witness

12. The learned authors of Blackstone Criminal Prac
the following with respect to previous inconsiste
witnesses: "If a hostile witness, on being cross e
inconsistent statement adopts and confirms some
statement, then what he says becomes part of his
the jury assessing his credibility, it is capable of b
the evidence is what he says in the witness box,
court..... If a hostile witness, on being cross e
unsworn statement which is inconsistent with his p
having made the previous statement but denies the
statement is admissible to impugn the credit of
evidence of the truth of the facts stated therein.
such previous unsworn assertions is permitted,
substituting them for the witness's sworn testimo
sworn testimony, in light of the unsworn assertions

being of importance..... Thus in Golder [1960] 1 W.L.R. 1169, where the judge had indicated to the jury that it was open to them to act upon the evidence contained in the previous statement, which was the witness's deposition before the committing magistrates, the Court held that it had no alternative but to quash the conviction. Lord Parker C J said (at pp.1172-3): "When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act. Moreover since the previous statement's is only relevant to the witness's credit, copies of it should not be put before the jury." [Our emphasis]

13. The case of Golder was cited with approval in the case of Regina v Johnson and other [2015] 2 BHS J. No. 120 by Justice Gregory Hilton at paragraph 22 where he states inter alia "As a consequence I find that the legal position in the Bahamas is still governed by the principles of law set out in Golder and not only is the testimony of the witness Shaquille Thompson unreliable or unworthy of credit but his previous out of court statement is not evidence upon which the judge or jury can act". [Our emphasis] Circumstantial Evidence

14. In Director of Public Prosecutions v. Varlack (British Virgin Islands) [2008] UKPC 56 the Privy Council with respect to circumstantial evidence referred to the judgement of King CJ in the Supreme Court of Australia in "Questions of Law Reserved on acquittal (No.2 of 1993) [1993] 61 SASR 1, 5 where he said inter alia: "....that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such inferences which are reasonably open, as are most favorable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypothesis consistent with innocence are reasonably open on the evidence. .....He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence."

[Our emphasis] Prosecution Evidence Detective Inspector Martin Roberts

A. Yes, that is correct.

Enuel Ductant

19. During Enuel Ductant' cross examination he stated beginning at page 63 of the transcript dated 2nd July, 2021 beginning at Line 18:

Q. Did you see anyone shoot a firearm on the 1st January, 2018?

A. No, sir.

Q. And I would be correct in saying that you did not tell the police that you saw anyone shoot Joel Augustin?

A. Yes sir.

Trevor Reckley

20. During Mr. Reckley's cross examination (by Defense Counsel) he stated beginning at page 25 of the transcript dated 5th July, 2021 beginning at Line 17:

Q. So again, Mr. Reckley, you would agree with me that, that firearm was not in your possession on the 1st January, 2018?

A. No sir. I have no knowledge of that firearm and I have no knowledge of Akeem. Line 31

Q. And you would also agree with me that you never saw Mr. Montell on the 1st of January, 2018. A. No, sir. I never saw that young man. I don't even know him.

Edward Miller

21. During Edward Miller's cross examination he stated beginning at page 42 of the transcript dated 8th July, 2021 beginning at Line 4:

Q. From 1st January, 2018 to 5th January, 2018 you never slept at No. 43 Morning Glory Close in the back of town, at Vincent Bowe's house again during that period is that correct?

A. Yes sir.

Q. During that period, 1st January, 2018 to 5th January, 2018 you cannot say who slept in that bedroom, correct? A. No, I cannot. Page 44 Line 2

Q. And you cannot say who put or took anything in or out of the cooler from the 1st of January, 2018 to the 5th January, 2018 is that correct?

A. No, I cannot.

Detective Sergeant 2867 McKenzie

22. During Sgt. 2867 McKenzie's cross examination he stated inter alia; that to the best of his knowledge there was no analysis available on any of the potential evidence in this matter, and that he had no information that placed the Defendant on the scene of this offence. Moreover that he did not conduct a formal interview with any of the occupants of No. 43 Morning Glory Close outside of the Record of Interview of Vincent Bowe, and that he could not recall asking any of them if the Defendant was home at the time of the murder. Sgt. McKenzie also stated that he did not check with Jalen Hall to confirm if the Defendant was with him at the time of the Murder.

23. It is submitted, in light of the above that firstly there is no evidence direct or otherwise that an act of the Defendant caused the death of Mr. Augustin. In the alternative, secondly the circumstantial evidence is so weak that no reasonable jury properly directed could convict on it, as the evidence is inherently weak, and the written statements of the Crown's key witness Trevor Reckley as stated in Golder are not evidence at all.

24. It is further submitted that in the present case the evidence adduced from which inferences can be drawn that the Defendant is guilty of the murder of the deceased are the following:

> ***(i) On the 1st January, 2018 two witnesses testified to hearing gunshots at 146A Gladstone Terrace;***
>
> ***(ii) Shell Casings were recovered from the scene;***
>
> ***(iii) On the 5th January, 2018 a firearm was recovered from the home that the Defendant resided in;***
>
> ***(iv) The shell casings were linked to the firearm recovered.***

25. As submitted earlier the test to be applied by the trial judge is whether there is material by which a jury could be satisfied of guilt. We humbly submit that the evidence adduced, falls woefully short of this criterion.

Conclusion-

26. In the premises and considering the tenuous nature of the evidence of main prosecution witnesses Trevor Reckley, and that the evidence is uncorroborated by any forensic evidence with regard to the Defendant being anywhere near the Murder scene. The Defendant invites the court to exercise its discretion pursuant to Section 170 (1) of the Criminal Procedure Code

Chapter 91, and that the charges of Murder contrary to Section 291(1) (b) of the Penal Code Chapter 84 be dismissed and that the court record a finding of not guilty in favor of the Defendant. Dated this 13th day of July, A.D., 2021 Respectfully Submitted Wendell A. Smith Law Chambers Suite B Corp-Law Court No. 2 Cedar Street Freeport, Grand Bahama The Bahamas Attorneys for the Defendant."[5]

8. Defence Counsel quoted the provision of the Criminal Procedure Code as Section 170(1) which reads as follows: "170. (1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing any arguments which the counsel for the prosecution or the defence may desire to submit, record a finding of not guilty....."

Counsel also relies on the English Authority of R. v. Galbraith[6] where Lord Lane Chief Justice said as follows: - "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 arise 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

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[5] Submissions of Attorney Wendell Smith

[6] (1981) 2 AER 1060

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" [Emphasis added].

4. The learned authors of Blackstone Criminal Practice 2016 at D16.59 advanced the following propositions as representing the position 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 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 it being a type which the accumulated experience of the courts has shown to be of doubtful value..."[7]

9. Defence Counsel further argues that the Prosecution has not established an essential element to this crime. That being that the accused Akeem Montell committed the offense of Murder. In the alternative the Defense argues that this is a circumstantial case and is so weak that no reasonably jury properly directed could convict on it.

10. Prosecuting Counsel asserts that this case is wholly a circumstantial case and that reasonable inferences can be drawn noting that the defendant

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[7] Supra

during his interview on the 8th January, 2018 with Sargent McKenzie admitted to having seen the firearm.

Also that the accused lied when he said he had been to Junkanoo with his cousin Edward Miller on 1st January, 2018 around 6:30 or 7 p.m. and returned home with his cousin around the 11 or 11:30 p.m.

That Edward Miller under oath denied going back home with the defendant and in fact wasn't sure where the defendant was up to 12 Midnight.

Also Edward Miller noted that he never placed the firearm in the cooler, that it was his cooler and he only had his medication and NIB card in the cooler.

The Crown further asserts that there were extracted photos taken from the defendants' cell phone which he acknowledged and assisted Sargent McKenzie in accessing where he was observed holding a firearm. That it suggested by the Crown that these photos were taken on the 3rd January 2018 and the 4th January 2018 in evidence led by Sargent Rahming.

The Crown asserts further that it can be extrapolated that if the defendant is said to have the firearm on the 3rd January 2018 that it can be reasonable be inferred that accused had the firearm on the 1st January 2018 and shot and killed Mr. Augustin.

That this was a reasonable inference which should be allowed to go to the Jury and cited McGreevy v. Director of Public Prosecutions[8] where the headnote reads: In a criminal trial it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the

[8] (1973) All England Law Reports 503

case that they must not convict unless they are satisfied beyond a reasonable doubt of the guilt of the accused.

That there is no rule that where the Prosecution case is based on circumstantial evidence the judge must as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion."[9]

The Crown also argued that the defendant gave a mixed statement and as such it ought to rightly go before the jury and Crown again cites R v. Sharp[10] and again reading from the headnote "Where a statement made out of court by a defendant in criminal Proceedings is in part an admission and in part self-exculpatory, the whole of the statement constitutes evidence of the truth of the facts it asserts and the Judge should direct the jury that both the incriminating parts and the excuses or explanation must be considered in determining where the truth lies although where appropriate, as it usually will be the judge may and should point out that the incriminating parts are likely true whereas the excuses do not carry the same weight."[11]

The Crown is strongly urging that the Lie told by the accused and that he was in possession of the firearm used in the Murder should be a reasonable inference in which a jury properly directed can arrive at a just verdict.

11. In rebuttal Defence Counsel noted that there is absolutely no evidence that was lead which showed that the accused had possession of this firearm

[9] Supra
[10] (1988) 1 All England Law Reports 65
[11] Supra

on the 1st January 2018 and what the Crown is asking the jury to engage in is speculation.

12. At this No case stage the question for this court is to determine if the evidence adduced it is open to a reasonable jury to draw inferences from which they could properly conclude that the accused Akeem Montell murdered Joel Augustin. In DPP v Varlack [12]the Privy Council referred to the judgement of King CJ in the Supreme Court of Australia in "Questions of Law Reserved on acquittal (No.2 of 1993) [1993] 61 SASR 1, 5 where he said:

> ***"....that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such inferences which are reasonably open, as are most favorable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypothesis consistent with innocence are reasonably open on the evidence. .....He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence..."***[13]

13. The Court has reviewed the Cases supplied both by Counsel for the Defendant and Prosecuting Counsel and have commence by noting the Defendant Akeem Montell is Charged with Murder contrary to section 290[14] [14]which read as follow:-

> ***"290. Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as in this Title hereafter mentioned."***

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[12] Privy Council Appeal No. 23 of 2007

[13] (1993) 61 SASR 1 at p.5

[14] Penal Code Chapter 84 of the Statute Laws of The Bahamas

14. The elements for which the Prosecution must establish are

(a) That Mr. Augustin is dead and died within a year and a day of the infliction of harm,

(b) That the death of Mr. Augustin was caused by unlawful harm,

(c) That the unlawful harm was inflicted by the defendant with intention to kill Mr. Augustin,

(d) And that there was extreme provocation or other matter of partial excuse to reduce the crime from murder to Manslaughter.

On a Submission of a no case to answer the Judge has only to be satisfied that a prima facie case has been made out against the defendant. The Judge does not have to find at this stage that the Prosecution has established the ingredients of the Offence beyond a reasonable doubt.

15. In so far as the evidence being considered the Prosecution has shown that Mr. Augustin died within a year and a day. Evidence was led by Amanda Gardiner the stepdaughter of the deceased whose evidence was that on 1st January 2018 around 11 p.m. she heard gunshots and went to outside and saw her stepfather on the ground and he spoke to her saying, "they shoot me".

There was the evidence of a friend Dennis Knowles who testified that on the 1st January 2018 where the deceased had picked him up from the barber shop and given him a ride home that he appeared not jovial because he was concerned about his mother but appeared otherwise like himself.

Court also heard from Enuel Ductant the brother-in-law of the deceased who also said on the 1st January 2018 he was living at the residence of the

deceased when he heard gunshots and ran outside and saw his brother-in-law lying on the ground saying, "they shoot me."

At this point it should be observed that Mr. Augustin never indicated who shot him to either Ms. Gardiner or Mr. Ductant.

The Court then heard from Mrs. Ulean Augustin, the wife of the deceased who advise that they were married ten (10) years and that on 2nd January 2018 she was called to identify her husband's body at the Rand Memorial Hospital Morgue.

She further states that on the 1 January 2018 at around 5 p.m. he was taking her son and nephew to Junkanoo and that he appeared okay before he left home. There is the medical evidence of Doctor Pedican, the Pathologist whose evidence was that she conducted an autopsy of Mr. Joel Augustin identified by his wife and observed multiple gunshot wounds at least two (2) of which caused his death.

16. Unlawful harm is defined by section 23 & 24[15] which reads as follows:-

> ***"23. (1) In this Code — "harm" means any bodily hurt, disease or disorder, whether permanent or temporary; "grievous harm" means any harm which amounts to a maim or dangerous harm as hereinafter defined, or which seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement or to any external or internal organ, member or sense; "dangerous harm" means harm endangering life. (2) Where death, caused by harm, takes place within a year and a day of the harm being caused, the special provisions, relating to homicide, under Title xx. of this Code may become applicable.***
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> ***24. Harm is unlawful which is intentionally or negligently caused without any of the justifications mentioned in Title vii. of this Code."***

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[15] Supra

17. There has been no evidence that the harm inflicted upon Mr. Augustin was justified at least the defendant is not asserting that. In his Official Records of interviews given to Sargent McKenzie, he denies any knowledge of the Killing of Mr. Augustin or himself killing Mr. Augustin.

18. Where there is a challenge is in the element as to whether the Crown has shown that the defendant inflicted the harm? The Crown is relying upon inferences being drawn, namely that the Defendant was captured on a cell phone, and pictured holding a firearm believed to be similar to the firearm recovered from his residence on the 5th January 2018 after Officers searched his residence and discovered a firearm with an extended magazine clip and five (5) rounds of live ammunition.

That this firearm was sent off for analysis and Mr. Charles Bain the Firearm Examiner testified that the firearm was the same firearm which fired four (4) of the spent shells recovered from the murder scene of Mr. Augustin, however noted that one (1) of the Spent shell casting was likely fired from a different firearm raising the likelihood of a second firearm and the possibility of two (2) shooters.

This amounts to a circumstantial case and the Court of Appeal in Daniel Coakley[16] Justice Isaac writing for the Majority authored the following: -

> ***"The Crown's case is based on circumstantial evidence. Circumstantial evidence "is more likely the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit***

[16] SccrApp. No 15 of 2017

of". The prosecution presented a strong circumstantial case against the appellant through their witnesses. The authorities do not denigrate circumstantial evidence as being worthless. Rather, they describe it as oftentimes being cogent evidence of an accused person's guilt."[17] It ought to be noted that the Court relied on the Privy Council case of D.P.P. v. Varlack[18]

19. The issue in this case is what are the strands of Rope when woven together that a jury properly directed can reasonable infer that the accused murdered Mr. Augustin on the 1st January 2018?

The Crown wants to suggest that the statements given by the accused in which he appears to lie about going home with his cousin after Junkanoo on 1st January 2018 and the photos of him holding the gun which was later recovered from his residence and later identified by the accused as the firearm he was photographed holding and forensically determined to be the firearm which was used in the killing of Mr. Augustin is a sufficient strand which should be left to the Jury.

The Defence argues that there is no evidence that the accused had any firearm on the 1st January 2018 nor is there any eye witness evidence that observed him in the area of the killing nor is there any forensic evidence although much of it was taken and submitted none has been forthcoming during these proceedings which was acknowledged by Sargent McKenzie the lead investigator.

Also noted is that Dumont Carroll was also discovered hiding in the room where the firearm was recovered at the accused's residence on 5th January 2018.

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[17] Supra

[18] Privy Council Appeal No. 23 of 2007

It should be noted in the Court of Appeal case of Jamal Glinton v.Regina[19] the Court was commenting on the summation given by the Judge in the Trial on the issue of circumstantial evidence and this court will highlight it,

> ***"Where the court notes that the evidence must lead in one direction and one direction only circumstances may point in one conclusion, but if one circumstance is not consistent with the guilt it breaks the whole thing down. You may have all the circumstances consistent with guilt but equally consistent with something else too. This is not good enough what you want is an array of circumstances which point in only one conclusion and to all reasonable minds only one conclusion is the guilt of the accused."[20]***

The Court cited this direction as acceptable and noted it would have added the direction of Teper v. R[21]

> ***"It is also necessary before drawing inferences of the accused guilt from circumstantial evidence to be sure that there is no coexisting circumstances which would weaken or destroy the inferences."[22]***

20. It would therefore at a minimum require that this court if giving that direction it can articulate evidence which this jury can draw one reasonable conclusion. The Court questions why was there a rush to charge an individual with a crime until all of the evidence was obtained, there remains several forensic results outstanding in this case which if they had been handled timely there might provide more strands in that circumstantial thread namely, evidence such as those latent prints still unaccounted for.

21. In regard to the accused Akeem Montell I find that there is no evidence to connect him to the crime of Murder and the charge will be withdrawn and

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[19] SccrimApp. No. 113 of 2012
[20] Supra
[21] (1952) A.C. 480
[22] Supra

jury directed to return a not guilty verdict on the charge of murder on the information as filed.

Dated the 16 day of July A. D. 2021

Andrew Forbes
Justice