COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Side

VBI NO.155/8/2019

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

AND

JEFFREY MUSGROVE

&

DELVANDRE BUTLER

Appearances: Mrs. Ashley Carroll on behalf of the Director of Public Prosecutions

Mr. Carlson Shurland QC on behalf of Jeffery Musgrove

Mrs. Jethlyn Burrows & Miss Tashae Grant on behalf of Delvandre Butler

Hearing Date: 16th & 18th May 2022

DECISION

FORBES, J

BACKGROUND

1. This application arises as a consequence of an ongoing Attempted Murder trial where the Defendants are alleged to have attempted to murder John Lightbourne on or about the 25th May 2019. The Prosecution has called John Lightbourne to give evidence and he has been questioned by the Prosecution as to events which occurred at an establishment known as Honeycomb Bar located Lewis Yard community in the western area of Grand Bahama.

2. Mr. Lightbourne's evidence is that a person he knows as Jeffery attends the same establishment, known as Honeycomb Bar in Lewis Yard and that he and this person have known each other for a long time and that he also worked on a job site previously where he and Jeffery would come within one (1) to three (3) feet each day while they worked on this job site. He also stated that he would observe this individual throughout the community and observed that he had a scar beneath each on both cheeks on his face. This description apparently was also provided to the Police.

3. While proceeding to elicit evidence from Mr. Lightbourne the Prosecution then made an application seeking to have the witness give dock identification as to whether he saw the person he knew as Jeffery in the Court. The jury was subsequently excused and the Court heard arguments from the Prosecution and Counsel for the 1st Defendant, Jefferey Musgrove, Mr. Carlson Shurland, QC on the 18th May 2022. Counsel for the 2nd Defendant, Mrs. Jethlyn Burrows indicated to the Court that a similar application was anticipated to be made at the appropriate moment in Mr. Lightbourne's testimony.

4. The Court cautions that the Court's time is valuable and as such all parties must exercise regard in its use and engage in more efficient time management.

LAW

5. The Prosecution framed their application pursuant to section 4 (f) of the Evidence Act which reads as follows: *"4. In any proceeding evidence may be given of facts relevant to any fact in issue, including — (f) any fact or thing tending to identify any person or thing whose identity is a fact in issue…"*

6. The Prosecution also sought to rely on the authorities of Maxo Tido v. The Queen (2011) UKPC 16, a Privy Council arising from the Bahamas; Terrell Neill v The

Queen (2012) UKPC 12, another Privy Council case arising from the Bahamas; John v. State of Trinidad and Tobago (2009)UKPC 12 a Privy Council case arising from Trinidad; and the Lynden Prosper v. Regina SccrApp. No. 66 of 2017,in support of its submissions. . It was their submission that the central point articulated in all of the cited cases is the use of dock identification.

7. Mr. Shurland, QC on behalf of the 1st Defendant, Jeffrey Musgrove, argued that section178 (1) of the Evidence Act ought to apply. Section 178(1) reads as follows: "*178. (1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*" Further Mr. Shurland QC argued that the Court ought to be cautious as to permitting dock identification and suggested that the Crown had failed to lay sufficient evidence before the Court so as to allow it to make a cogent decision. Moreover, he contended that, if the Court was minded to allow the dock identification it will be put to the task in having to give a stern warning and caution to the jury. As he suggested the Crown has not offered an explanation as to why an identification parade was not conducted insofar as his client was concerned.

8. In response, the Prosecution contends that there was familiarity between Mr. Lightbourne and the 1st Defendant and hence the reliance on an identification parade would have been practically useless.

9. The Court refers to the parties' relevant submissions in the paragraphs below.

DISCUSSION & ANYALSIS

10. In Maxo Tido the Board said the following at paragraph17:

> *"Dock identifications are not, of themselves and automatically, inadmissible. In Aurelio Pop v The Queen [2003] UKPC 40 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence – see paras 9 et seq. In particular, the Board considered in that case that the failure to adhere to what was the normal practice in Belize of holding an identification parade should have led the judge to warn the jury of the dangers of identification without a parade. Delivering the advice of the Board, Lord Rodger of Earlsferry said at para 9:*
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> > *"[The judge] should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to*

approach it with great care: R v Graham [1994] Crim LR 212 and Williams (Noel) v The Queen [1997] 1 WLR 548."

11. Additionally at paragraph 21 the Board said the following:

"The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused. Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialized, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged."

12. Mr. Shurland, QC grounded his objection to the dock identification on the principle articulated in the case of Holland v. HM Advocate (2005) UKPC D1 and in particular the observation of the Board at paragraph 47:
    a. *"In the hearing before the Board the Advocate Depute, Mr Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate Depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticized in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."*

13. He further argued that the 1st Defendant was never offered an opportunity to participate in an identification parade and as such it was prejudicial to the interest of his client's case.

14. The Prosecution in response noted what their Lordships in Holland said regarding the Appellant at paragraph 20 and rejected the 1st Defendant's submission that Holland was applicable as that case was as restrictive as suggested by Mr. Shurland, QC. Further, it was submitted by the Prosecution that in Holland v HM Advocate it was not suggested that dock identifications were only to be permitted in the most exceptional of circumstances., on the contrary Lord Rodger (at para 57) stated that there was no reason that dock identifications should be regarded "except perhaps in an extreme case" as inadmissible per se either under domestic law or the European Convention on Human Rights and Fundamental Freedoms. Lord Rodger again returned to the theme of the importance of the directions that the trial judge gives to the jury about the possible dangers of dock identifications. He was at pains to point out that these dangers were not sufficiently conveyed to the jury by the rehearsal of standard directions as to the risks associated with eye-witness evidence generally. The Prosecution also contended that participating in an identification parade in some circumstances would serve no useful purpose. Citing Goldston and McGlashan v. R (2000) UKPC 9, a Privy Council arising from Jamaica in support of its submission, the Prosecution highlighted what the Board said at paragraphs 13 and 14:

"13. There is no dispute that if an identifying witness has not made a previous identification of the accused, a dock identification is unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade. On the other hand, Mr. Thornton accepts that if the accused is well known to the witness, an identification parade is unnecessary and could, for the reasons already given, be positively misleading. In the present case, however, the question of whether the identification fell into the one class or the other was itself a question in dispute. Mr. Thornton says, rightly, that an identification parade would have helped to resolve this dispute. It does not however follow that the absence of a parade has resulted in a serious failure of justice so as to require the intervention of the Privy Council.

14. The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of Claudette Bernard's assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still

have been mistaken in identifying them as the gunmen. But, as Lord Devlin remarked in his Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (26th April 1976) (at page 99 para. 4.96), that is "not a claim that could be tested by a parade".

15. Therefore, the question to be determined in on this application is whether the Court ought to allow the witness John Lightbourne to give dock identification?

EVIDENCE

16. The Court notes in the evidence of Mr. Lightbourne he provides a description of the 1st Defendant and spoke of two (2) scar or burn marks on each cheek. The question and answer is reproduced below:

21. "Q. Are you able to describe Jeffrey to us?

22 A. Short, slim built guy, walks with a limp, have

23 two burns on his cheeks off the sides."

17. The Court refers to paragraphs 14 to 20 in the Privy Council case of John v. The State of Trinidad and Tobago and sets them out here in their entirety:

14. "*As a basic rule, an identification parade should be held whenever it would serve a useful purpose. This principle was initially stated by Hobhouse LJ in R v Popat [1998] 2 Cr App R208, BAILII: [1998] EWCA Crim 1035, 215 and endorsed by Lord Hoffmann giving the judgment of the Board in Goldson & McGlashan v R (2000) 56 WIR 444, [2000] UKPC 9 Plainly an identification parade serves a useful purpose whenever the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so, for example en route to a robbery). Often, indeed usually, that is the position and, when it is, an identification parade is not merely useful but, assuming it is practicable to hold one, well-nigh imperative before the witness could properly give identifying evidence. In such a case, Lord Hoffmann said in Goldson, "a dock identification is unsatisfactory and ought not to be allowed," although he added: "Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade."*

15. At the opposite extreme lies a case where the suspect and the witness are well known to each other and neither of them disputes this. It may be, of course, that on the critical occasion when the witness saw the crime being committed (or, for example, the person concerned en route), he thought it was the person he knew but was mistaken as to this. An identification parade obviously cannot help in this situation. Indeed, as Lord Hoffmann pointed out in Goldson, a parade then would be not merely unnecessary but could be "positively misleading":

> *"The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact, the evidence of the*

parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime.

16. A third situation arises when the witness claims to know the suspect but the suspect denies this. This indeed was the situation in Goldson itself, certainly so far as one of the two accused was concerned. The witness, Claudette Bernard, herself shot in the face by one of the gunmen (who then shot dead her boyfriend lying next to her), subsequently identified them simply as men known to her by their street names. One of the two accepted that she knew him and the question in his case was simply whether she had recognized him on the occasion of the shooting (essentially, therefore, the second of the situations considered above); the other, however, whom she said she had seen two or three times a week on the street for three years but had spoken to only once and who had a girlfriend called Ginger, disputed that she knew him at all, said that he had no such girlfriend, and gave evidence to that effect.

17. The advantage of holding an identification parade in such circumstances was, as counsel pointed out:

"If Claudette had failed to pick out the accused on the parade, her assertion that the accused were known to her would have been shown to be false. By not holding identification parades, the police had denied the accused an opportunity to demonstrate conclusively that she was not telling the truth."

18. The Board referred to two English cases where there was "a dispute over whether the accused was in fact a person known, or sufficiently known, to the witness" and where the convictions had been set aside as unsafe because, in the absence of a parade, the evidence of identification (in each case by way of dock identification) was regarded as too weak to support the conviction. In R v Conway (1990) 91 Cr App R 143 the witness said that she knew the accused, had seen him in a public house and entertained him to dinner, but did not know his name, where he lived, or anything of importance about him. No identification parade had been held despite the accused having denied that the witness knew him and having expressly requested a parade. In R v Fergus [1992] Crim. L.R. 363, where the witness had claimed only to have seen the accused once and to have heard his name from someone else, the Court observed:

"The case where the complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition".

19. The Board in Goldson, having concluded that it would have been good practice for the police there to have held an identification parade, had then to address the question whether the failure to do so had in fact caused a serious miscarriage of justice as in Conway and Fergus. Concluding not, the Board contrasted Fergus, where "the claimed previous knowledge was very slight indeed", and Conway, where the accused had expressly requested an identification parade and been refused one, with Goldson where neither accused had requested a parade and where there had been no objection to the dock identification at the preliminary inquiry. The Board then continued:

"The position is therefore that although one may speculate about the possibility that a parade would have destroyed the prosecution's case . . . it is not possible to say that the absence of a parade made the trial unfair. The judge was entitled to leave the question of credibility to the jury on the evidence before them. And once she was accepted as a credible witness, no criticism was or could be made of the judge's directions that the jury were to be careful about accepting her evidence that they were the gunmen.

[Counsel] submitted that the judge should have given the jury a specific direction about the absence of an identification parade and the dangers of a dock identification. But their Lordships consider that in the present case such directions were unnecessary. The judge told the jury that they should first consider whether Claudette Bernard was a credible witness. If they thought she was lying, the accused had to be acquitted. This appears to their Lordships to be sufficient, because if she was not lying, it would follow that there had been no need for an identification parade and the dock identification would have been the purely formal confirmation that the men she knew were the men in the dock."

20. The Board has had occasion to deal with failures to hold identification parades in a number of subsequent cases. Amongst them are Aurelio Pop v The Queen [2003] UKPC 40 and Pipersburgh and Robateau v The Queen [2008] UKPC 11, each an appeal from the Court of Appeal of Belize, both resulting in the quashing of the appellant's convictions, and in both of which Lord Rodger of Earlsferry delivered the judgment of the Board. It is unnecessary to rehearse here the detailed facts of either case. Both, however, in their different ways involved unsatisfactory recognition evidence and dock identifications only. In Pop, the witness Adolphus who identified the accused as the gunman, only made the link between the man he knew simply as R and the accused as the result of an improper leading question by prosecuting counsel (see paras 7 and 10 of the judgment). That, coupled with the failure to hold an identification parade which should have been held under Belize law (see para 9 of the judgment) required that the judge should have "warn[ed] the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care" (para 9) and he should have "pointed out to the jury that [because of counsel's leading question] they required to take even greater care in assessing Adolphus's evidence that it was the appellant who had shot the deceased" (para 10)."

18. In light of the above dicta it is clear in instances where a more robust identification or essentially recognition is involved that the requirements for dock identification are not strictly required although a very cautious warning as to the dangers is required.

DISPOSITION

19. Therefore, considering the submissions of Counsel and the authorities before the Court, it is reasonably satisfied that the witness, Mr. Lightbourne has a familiarity with the 1st Defendant Musgrove and as such finds that the dock identification as it relates to the 1st Defendant is permissible. The Court also reminds itself that a very detailed and cautious warning will be required to be given to the jury if and when the case is turned over for their consideration.

Andrew Forbes
Justice
Dated 23rd May, 2022