

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
OVERSEAS TERRITORY OF MONTSERRAT

CLAIM NO: MNIHCR2024/0103

BETWEEN:

[1] THE KING

Crown

and

[2] ADRIAN LLEWELYN CARTY

Defendant

BEFORE: Hon. Madam Justice M E Birnie Stephenson (Ag)

Appearances:

Ms. Allana Cumberbatch Crown Counsel for the Prosecution

Ms. Chivone Gerald with Mr. Kenroy Hyman for the Defendant

2025: October 31

November 3

RULING

- [1] **STEPHENSON J. (Ag):** In a criminal high Court trial, the judge and jury have separate yet complimentary functions. The presiding judge has the supervisory role in that the judge is required to carry out a filtering process to decide what evidence goes to the jury. The judge is on occasion is called on to consider whether the prosecution has adduced sufficient evidence to justify sending the case to the jury.

[2] The accused person is before this Court charged on a four count indictment for the offences of indecent assault. The Crown alleges that the accused at the Brades Fire Station on four different occasions indecently assaulted Alysha Simon, that on:

- a. The 30th day of May 2024 he pushed his hand into her shirt and grabbed hold of her right breast without her consent to do so;
- b. The 27th day of June 2024 he wilfully touched her on her buttocks without her consenting for him to do so;
- c. The 14th August 2025 he pushed his hand into her shirt and grabbed hold of her breast without her consenting for him to do so and he pushed the same hand through the waist of her pants and touched her vagina and also that he pulled her upper body across his lap with the intention of her touching his penis; and
- d. The 10th day of September 2024 he pulled her onto his lap causing her to sit on his penis.

[3] The defendant pleaded not guilty to the offences as charged and a jury was empanelled to try the case. At the trial of the matter, the Crown presented its evidence in support of the charges on the indictment. This Court heard viva voce evidence from the Virtual Complainant, two witnesses and the three police officers who were involved in the investigation of the matter. The Crown has closed its case.

[4] At the close of the prosecution's case the defence made a submission that there is no case for the defendant to answer. The Court heard from Counsel for the defence in support of his application as well as Counsel for the Crown in response to the application made.

Defence Submissions

[5] Counsel for the defendant in the case at bar has submitted that based on the inconsistencies and discrepancies in the evidence of the virtual complainant both in her testimony and when compared with the testimony of other prosecution witnesses, is so weak and improbable that any reasonable tribunal would be forced to come to the conclusion that the witness is untruthful and it would not be proper for the case to proceed on her evidence alone and the case should be withdrawn from the jury.

- [6] Counsel Mr Hyman in making his submission cited and placed great reliance on the Regina -v- John Ernest Shire¹ (Shire) case, to submit that the prosecution ought to have called a witness or witnesses to give independent evidence as to what may have happened in the fire station to support the evidence from Miss Simon. Counsel cited and relied on paragraphs 26 to 31 of the **Shire** judgment.

The Shire Case

- [7] The defendant in the **Shire** Case was charged with causing death by dangerous driving. Briefly the facts of the case were that the defendant whilst driving a bus in an area where there were many pedestrians drove his vehicle in such a manner that he ran over the deceased causing his death. The prosecution called a number of eyewitnesses including the group of persons which included the brother of the deceased in whose company the deceased was, evidence also came from other eyewitnesses who were on the scene of the accident but not part of the group which the deceased and his brother were part of. ('the group').
- [8] The evidence which came from the two distinct sets of eyewitnesses were at variance on crucial aspects as to how the accident happened. The witnesses from the group put themselves in close proximity of the front of bus and they stated that the defendant was driving behind them and that he pushed the group forward with the bus causing the deceased to fall under the bus resulting in his fatal injuries. Whereas the other eyewitnesses put the group and the deceased closer to the front of the bus, and they stated that that the group's actions in bringing them closer to the front of the bus had been deliberate on their part. Essentially saying that the accident was caused by the group's actions and not the actions of the defendant.
- [9] It was noted by the Court of Appeal, that the evidence given by the group, comprising the deceased and his friends was not supported the evidence of the eyewitnesses who were bystanders. The evidence as to how the accident occurred was at great variance.
- [10] Counsel for the defence in **Shire**, submitted to the Court, that in all the circumstances of the case that the evidence of the prosecution's witnesses, comprising the group, should have been approached with caution as their evidence could not, as against the evidence adduced by the

¹ [2001] EWCA 2800

independent witnesses, be said to be of proper value, based on the fact that the evidence of all the prosecution witnesses together, was at great variance.

- [11] It was counsel for the defendant in this case (**Shire**) submission that the judge at first instance should have upheld the no case submission and not send the case to the jury on the ground that given the discrepancies and the fact that the evidence in support of the prosecution's case was at such great variance that *"... it could not, as against the independent evidence, be said to have any proper value even if the jury were properly warned by the judge as to the dangers of relying upon that evidence"*.

- [12] Counsel on behalf of the Prosecution submitted in response to defence counsel's submission that the trial judge was correct in sending the case to the jury as the evidence was capable of being believed by the jury providing the trial judge gave the jury the appropriate warnings.

- [13] The Court of Appeal opined that the **Shire** case *"was a classic example of a case where the inherent risk of unreliability of evidence given by that group was such that when considered in the light of the discrepancies in the evidence, that it would be necessary, before leaving it to the jury, to have some evidence independent of that evidence which could justify the jury concluding that it could be reliable evidence. ... "The circumstances described by the witnesses was completely different from the circumstances described by the deceased's brother and his friends."*²

- [14] Lord Justice Latham delivering the decision of the Court of Appeal went on to say
*"It follows that this, in our judgment, was a case where the evidence to support the first scenario, as it was described, namely that the accident occurred as a result of the appellant pushing the group with his bus, used it as an instrument, was one which could not properly have been left to the jury and should have been withdrawn from the jury at that stage."*³

- [15] In the **Shire** case it was held by the Court of Appeal that
*"... in our judgment, it was not in our opinion open to the Recorder (the judge) at that stage to permit the matter to go before the jury on the basis of the single count that then existed namely causing death by dangerous driving. He should have withdrawn that Court from the jury."*⁴

² Ibid at para 28 of the judgment in *Shire*

³ Ibid at paragraph 29

⁴ Ibid at paragraph 31

- [16] Counsel Hyman submitted that likewise the evidence adduced by the prosecution in the case at bar from the prosecution witnesses were different and noted that the prosecution failed to call any independent witnesses to support the evidence of Miss Simon. Counsel referred to the names of the other members of the Montserrat Fire Service whose names were mentioned in the evidence of the prosecution's witnesses, who, in his view could have been called but were not called.
- [17] In seeking to assail the Crown's case, Mr. Hyman went to make submissions regarding the issue of the role of the judge in assessing reliability and Counsel cited and relied on the learning available in Blackstone's ⁵ and stated that *"the Court still has the roll to assess the reliability of the evidence because to do otherwise would be to strip the judge of that residual role and that the Court ought to in the case at bar assess the reliability of the prosecution's evidence in deciding whether to grant the application."*
- [18] In conclusion, the defence submitted that the case ought not to be put to the jury as the virtual complainant's evidence is of a tenuous character due to the vagueness and is inconsistent with other evidence as adduced by prosecution.
- [19] It is to be noted that Counsel Hyman did not cite any further cases or authorities in support of his submissions.

Crown's Submissions

- [20] Crown counsel for the prosecution submitted that while there may be some discrepancies and inconsistencies in the evidence all the essential ingredients of the offences have been prima facie established, and it should be left to the jury to determine whether the Accused is guilty or not guilty after considering the evidence.
- [21] Crown Counsel Miss Cumberbatch submitted that the case did not fall to be considered under either of the limbs in **Galbraith** because, that in the case at bar, there is enough evidence on each

⁵ Blackstone 2001 Para 3:1327 @ page 1429 penultimate paragraph

of the counts to prove that Mr Carty indecently assaulted Miss Simon on four separate occasions. Further, that the evidence is not of a tenuous nature as submitted by Mr Hyman for the defence.

- [22] Crown counsel sought to distinguish **Shire** and she submitted that the circumstances and the state of the evidence in **Shire** was totally different from the evidence in the case at bar and it was because of the level of unreliability and inconsistencies that was inherent in the evidence of the prosecution's witnesses in **Shire** that led the Court of Appeal to that decision in that case.
- [23] Crown counsel went on to urge this Court to look at each of the counts on the indictment and submitted that sufficient evidence was adduced to satisfy the Court in proof of each count and that the evidence the Crown is asking the jury to consider is not tenuous or inherently weak as submitted by the defence.
- [24] Counsel went on to submit that when the Court considers the prosecution's case, the Court is required to consider the case at its highest and that Ms Simon evidence taken at its highest is sufficient to hold Mr Carty guilty on all the counts.
- [25] Crown counsel noted the defence's attempt to pre-empt her submissions regarding the issue of the reliability of the witness and submitted that the law provides that when the question of the reliability of the evidence is to be considered that is a question for the jury to decide on.
- [26] Counsel reiterated that in **Shire** the inconsistencies were glaring on the individual and collective evidence which is not the same in the case at bar.
- [27] In rebuttal to Counsel for the defendant's submission about the need for independent evidence, Crown counsel submitted that corroboration is not a requirement in sexual offences and what the Court has to consider is based on the evidence which has been led in the trial at this stage whether independent evidence should have been brought. Counsel emphasised that there is no need for corroboration by way of independent evidence.
- [28] Counsel Ms Cumberbatch then reviewed the evidence and in brief submitted that:
- a. Regarding **Count 1**, the prosecution's evidence taken at the highest is that the defendant touched the virtual complainant's breast and she did not consent. Counsel submitted that

the Court must ask whether that is enough evidence for a jury to return a verdict of guilty. It is submitted that the prosecution is saying of course there is.

Counsel further submitted that what was stated as inconsistencies by the defence are to be considered as omissions. Further, that the evidence which was given in her evidence and not contained in her statement to the investigating officers in her interview was to be considered as omissions and not inconsistencies and in any event those omissions are not central to the elements to be proven in the case at bar.

- b. Regarding **Count 2** Crown counsel submitted that there is enough evidence to convict. That the evidence was clear and the evidence of the prosecution's witness was supportive of the virtual complainant's evidence. Counsel reminded the Court that the witness Ms Thompson said she observed the defendant's hand in the area of Miss Simon's waist and hip which counsel submitted is not far from the buttocks. Counsel submitted had the witness said that she saw the Mr Carty's hand on Miss Simon's say shoulder then her evidence would have varied from the evidence of Ms Simon and this was not so.
- c. As it regards **Count 3**: that the fact that Ms Simon gave a definitive description of the pants she was wearing as to the colour and the fact that it was an elastic waist jeans as opposed to she was wearing jeans pants was not an inconsistency. Further that the evidence of Ms Thompson was that Miss Simon wore jeans and usually a blue jeans. Crown counsel submitted that taken at its highest there is enough evidence to convict on Count 3

Regarding whether Ms Simon's knuckles grazed the defendant's penis Counsel submitted is a question of reliability for the jury to decide whether she was speaking the truth.

- d. As it regards **Count 4** Crown counsel submitted that this incident happened and that Ms Simon's evidence was clear.

[29] As it regards the question of independent evidence Crown counsel submitted that the whole submission on the need for independent evidence should hold no weight in this Court's mind. Counsel submitted further that that the evidence that the jury must consider and is what was said by the witness, not speculation, not what could have been said.

- [30] Crown counsel went on to submit that in every criminal trial there are inconsistencies because you are dealing with humans. That the evidence that the prosecution relies on to prove the counts on the indictment in the case at bar is not of a tenuous or inherently weak nature which is what is required if the Court to find that there is no case to answer. The evidence has to be of a tenuous nature.
- [31] Counsel submitted that the evidence led in **Shire** was tenuous and that there was a myriad of inconsistencies that went to the heart of the prosecutions case. In the case at bar when you look at the central issues to prove indecent assault there is no inconsistency which goes to the heart of the prosecution's case.
- [32] Crown counsel Cumberbatch submitted that there is sufficient evidence more than enough evidence to prove the crown's case. Counsel noted that the virtual complainant was tested under cross examination and stands uncontroverted. Counsel also noted the usual direction that the Court's gives about the question of report in sexual assault. Counsel further submitted that the consideration for the jury is going to be whether or not they believe for Ms Simon and taken at its highest if they believe Ms Simon there is enough evidence on that belief to return verdicts on all counts.
- [33] Crown counsel did not file or reply on any cases or authorities in her submissions. The Crown in closing submitted that the submission should not be upheld.

Defence Reply

- [34] In reply to the submissions in response by the prosecution Counsel Mr Hyman on behalf of the defendant submitted again that the prosecution's case was filled with inconsistencies and that when there are glaring inconsistencies' it is safe to have independent evidence to support the prosecutions case regarding the matter of unreliability. Counsel went on to say that the defence is saying that there are no omissions but that there are inconsistencies
- [35] Counsel for the defendant in his submissions emphasised that there were so many glaring inconsistencies in the evidence of the witnesses for the prosecution that made the evidence so tenuous and full of inherent weaknesses that it would be unsafe to leave it to the jury and in all the circumstances of this case the case must be withdrawn from the jury.
- [36] Counsel repeated his submission that the prosecution failed to adduce any independent evidence in the case to support or corroborate the evidence of the virtual complainant. That the only evidence

that there is against the accused basically comes from the virtual complainant whose evidence is riddled with inconsistencies that it is not reliable as it relates to any of the four counts.

[37] Counsel on behalf of the defendant took the Court through the evidence adduced on all four counts on the indictment.

[38] Counsel invited the Court to review the evidence of the virtual complainant as a whole and submitted that her evidence contains "a raft of inconsistencies"⁶.

[39] Counsel also invited the Court to consider that the virtual complainant's statement to the police which was recorded on video which was later transcribed and reviewed by the officer (Sgt Charles) to ensure that it was an accurate reflection of what was said in the interview. Counsel submitted that there are things that the Virtual Complainant said in her viva voce evidence which she did not say to the officers. Counsel sought to have the Court consider what in his view are significant facts:

- That the evidence of the VC is inconsistent with the evidence of the other prosecution witnesses
- In her viva voce evidence as it regards the allegation in Count number 1, the virtual complainant said that after the accused put his hand in her shirt and onto her breast she froze and that Officer Mulcaire came into the room and when he did she handed him the child that was in her hand and went to the wash room. This information was not in her interview to the police neither did the prosecution call Officer Mulcaire to give evidence to support this.
- Counsel also pointed out that the prosecution failed to call Officers White and Hobson to state that they left the virtual complainant and the accused in the fire station alone on the date and time in question.

[40] The Court is of the view that here Counsel for the defendant was seeking to draw the Court into considering what ifs and to consider what evidence the prosecution could have called to buttress their case. Clearly such considerations do not fall into the test to be applied by the Court in considering an application for no case to answer.

⁶ Counsel Hyman's oral submissions

[41] Along the same line Counsel sought have the Court consider the question of the possible witnesses that could have been called. Counsel also raised the question as to the fact that the prosecution could have adduced evidence from Station's movements book/log.

No Case Submissions – The Law

[42] The principles which govern the determination of this application are well established and can be found in ***The Queen –v- Galbraith***⁷, where Lord Lane CJ stated ⁸

“How then should the judge approach a submission of ‘no case’? –

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

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.–

(a) Where the judge comes to the conclusion that the Crown’s evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case;

(b) Where however the Crown’s 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 on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

It is to be noted that the Lord Chief Justice added:

“There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

[43] The ***Galbraith*** approach has been adopted and applied consistently by the Eastern Caribbean Courts.

[44] The leading case on no case submissions out of our Courts is ***DPP v. Varlack***⁹, a case emanating from the British Virgin Islands. The Privy Council’s opinion was delivered by Lord Carswell, and the Galbraith principles was succinctly restated as follows

⁷ [1981] 2 All ER 1060

⁸ at 1602

⁹ [2008] UKPC 56

"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 the evidence find the charge in question proved beyond reasonable doubt.

The Canonical Statement of Law, as quoted above is to be found in the judgement of **Lord Lane CJ in R. v. Galbraith [1981] 1WLR 1039, at 1042**. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the Judge, is equally applicable in cases such as the present, concerned with the drawing of inferences."¹⁰

[45] In **Brian Penn -v- The Commissioner of Police**¹¹ it was held that a no case submission may be advanced and sustained on one of two limbs, firstly that there is no evidence to prove that the accused committed the offence with which he is charged or that the evidence presented by the Crown is of such a tenuous nature it is manifestly unreliable or has been so badly discredited that taken at its highest no reasonable trier of the facts could properly convict on such evidence.

[46] In **Blackstone's** ¹²the following principles were advanced as representing the position that has now been reached on determining submission of no case to answer:

- "(a) If there is no evidence to prove as essential element of the offence, a submission must obviously succeed.
- (b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.
- (c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the Courts has shown to be of doubtful value.
- (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (**such as Shippey [1988] Crim LR 767**) where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone."

¹⁰ Ibid at paragraph 21

¹¹ BVIHCRAP2018/0003

¹² Criminal Practice 2010 at D15.56

It is noted that in considering a no case submission, ultimately the judge is constrained not to usurp the role of the jury who are judges of the facts. It is also noted that a judge is duty bound to ensure that the defendant in a criminal trial is always safeguarded from conviction on the facts which are insufficient or precarious and so that injustice would not result. (emphasis added)

Court's Consideration

- [47] In the **Shire** Case the Court of Appeal overruled the Recorder's decision to put the case to the jury in a causing death by dangerous driving. The Recorder and jury in that case heard from a significant amount of eye see witnesses to a motor vehicle accident that resulted in the death of one of the pedestrians who were traversing the road that faithful night.
- [48] The witnesses could have essentially been divided into two groups. Firstly the group of persons in whose company the deceased was and then the by standers who observed the accident. The evidence as to how the accident occurred, how the bus was being driven, and the position and action of the deceased and his group of friends were at great variance, in that, there was no clear evidence as to how the defendant was driving the vehicle to support the charge before the Court.
- [49] At first instance the learned Recorder concluded that the evidence should have been left to the jury on the basis that the evidence was capable of being believed provided the jury were given the appropriate warnings.
- [50] The Court of Appeal having considered the evidence which comprised "eye witness evidence" was of the view that the various versions of how the accident occurred amounted to a great variance and that the variance amounted to a classical example of a case where there was an inherent risk of unreliability of the evidence that it would be necessary before leaving the matter to the jury to have some independent evidence which would justify the jury concluding that it could be reliable evidence.
- [51] This Court notes that **Shire** seems to establish that it is permissible for a trial judge to uphold a no case to answer submission on the basis that the prosecution evidence is in a crucial aspect of the case inherently unreliable or self-contradictory and inconsistent. It is noted however that the evidence which is unreliable must be in a material way be inherently unreliable. (emphasis added).
- [52] This Court is of the view that the case of **Shire** as relied on by the defence in support of their application regarding the discerned discrepancies in the witness statement is to be distinguished from

the case at bar and is in fact not applicable. In this Court's view upon a re reading of the **Shire** case, the law as applied was fact specific, in that the charge before the Court was causing death by dangerous driving and discrepancies in the various eyewitness testimonies as to how the accident occurred. It was in the face of the discrepancies in the eyewitness testimonies that the Court of Appeal was of the view that it was dangerous to put the case before the jury. That is certainly not the issue in the case at bar.

[53] What is clear on the submission of "*No Case To Answer*" is that the question which this Court has to answer is whether a jury, properly directed, could convict on the evidence adduced by the Prosecution at the close of their case. It is trite that the Court does not have to find at this stage that the Prosecution has established their case beyond a reasonable doubt.

[54] The Privy Council in the case of **Taibo -v- The Queen**¹³ found that there were serious weaknesses in the case for the prosecution but held that the weaknesses were not fatal and that the criterion to be applied by the trial judge in considering a no case submission is whether there was material on which a jury could, without irrationality be satisfied of guilt; and that if there is then the judge is required to allow the trial to proceed.

[55] In the case of **Anand Mohan Kisson and Rohan Singh -v- The State**¹⁴ where it was held *inter alia* that "*The fact that inconsistencies in a witness's evidence may have weakened the prosecution case against an accused is no ground for the trial judge withdrawing the case from the jury; a case should only be so withdrawn in the extreme circumstances that the prosecution witnesses are totally discredited.*"

[56] In **R v Barker**¹⁵ as cited by Chancellor George in the **Kissoon & Singh**¹⁶ decision Lord Widgery CJ had this to say:

'Even if the judge has taken the view that the evidence could not support a conviction because of inconsistencies, he should nonetheless have left the case to the jury. It cannot be too clearly stated that the judge's obligation to stop a case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury ...'.

¹³ (1996) 4 WIR 74

¹⁴ (1994) 50 WIR 266

¹⁵ (1975) 65 Cr App Rep 287

¹⁶ Op cit

- [57] The jury may find that the virtual complainant may be lying about what she said this accused man indecently assaulted her. That is for the jury to decide.
- [58] What is clear from the authorities cited and reviewed by this Court, is that, at this stage of the case, the judge is to be satisfied as to whether or not there is a prima facie case for Mr Carty to answer. Having reviewed all of the evidence adduced and applying the principles as enunciated in **Galbraith** and the other cases as cited above, the law and legal guidelines as this Court understands it, this Court finds despite the inconsistencies in the evidence adduced by the prosecution, the case is not tenuous or inherently weak and that on one possible view of the facts the jury on being properly directed could properly convict on it.
- [59] The prosecution has led sufficient evidence for the case to be left before the jury to weigh whether it is credible or reliable, as a result the application for the case not to be sent to the jury on the ground that there is no case to answer is dismissed and the matter will proceed for a determination by the jury.

M E Birnie Stephenson
High Court Judge (Ag)

By the Court

Registrar