

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CASE NO. ANUHCR2020/0012

BETWEEN:

THE KING

-And-

SAMUEL LIVINGSTONE

Appearances:

Ms. Rasheeda Jonas for the Crown
Mr. Andrew O’Kola for the Defendant

2025: January 31;
February 17.

RULING ON NO CASE SUBMISSION

- [1] **BAKRE, J.:** This is a ruling on the application of the Defendant on the ground that the prosecution has not made out a case against him to warrant a call for him to enter defence.
- [2] The defendant is standing trial for a single count offence of shooting with intent contrary to Section 20 of the offences against the Person Act Cap. 300 of the Revised Edition (1992) of the Laws of Antigua and Barbuda.
- [3] The particulars of the offence reads;-

“SAMUEL LIVINGSTONE on the 7th day of February 2019, at Potters in the Parish of saint John in Antigua and Barbuda, unlawfully and maliciously shot at Geneal Francis with intent to do him grievous bodily harm.”

- [4] At the hearing of this case, the prosecution called several witnesses including the virtual complainant Geneal Francis (referred to as VC hereafter), his uncle and his partner and various police officers.
- [5] The elements of the offence are as follows:-
- a. The defendant shot at the virtual complainant.
 - b. The shooting was done with intent was done to maim, disfigure or disable.
 - c. The defendant acted maliciously.
 - d. The defendant had no lawful excuse for shooting at the virtual complainant.

SUMMARY OF FACTS OF THE CASE

- [6] The VC gave evidence of how he had seen the accused earlier in the day while he walked his dog and the accused had tried to harass him by trying to take all the money on him. He said he tried to brush off the accused who threatened him thereafter by saying "You no know what me capable of doing".
- [7] The VC said about an hour later, the accused called out his name while he was in the house and he went to the window at the front of the house and lifted the curtain to see who was calling out his name.
- [8] He said he saw the accused in front of his house pointing a gun in his direction saying "dead you fi dead" and fired two shots in his direction. He said he ran from there to the room where he had a clearer view of the window and he saw the accused ran off towards his left from his view point.
- [9] According to the virtual complainant, it was at this point he ran to his uncle's house to make a call to the police.
- [10] At the end of the prosecution's case, the counsel to the accused, Mr. Andrew O'Kola made an application to say the prosecution had not made out a prima facie case against the accused to warrant his being called to make a defence.

NO CASE SUBMISSION

- [11] The principle upon which the court will rely in determining whether it should acquit a defendant in a no case submission is found in the *locus classicus* case of **R v. Galbraith 1981 2 All ER 1060**. In the Course of the judgment in **Galbraith (supra)**, Lord Lane stated:-

“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 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 ...”

- [12] There will of course, as always in this branch of the law, be borderline cases and in such instances, they can safely be left to the discretion of the judge.

- [13] This is the position of the court in **R v. Baker (1977) 65 Cr App 287, R v. Ralph Sonny Samedi CR13/2015.**

- [14] A submission of no case to answer is usually upheld in the circumstances where there has been no evidence to prove an essential element in the offence alleged, the evidence adduced by the prosecution has been discredited as a result of cross examination; or where the evidence is so manifestly unreliable that no reasonable tribunal could safely convict on it.

- [15] A prima facie case must first be established by the prosecution before the accused may be called upon to defend the case against him and it is not the duty of the court to determine whether it will convict or acquit on the evidence adduced at this stage but whether a prima facie case is made, and whether a reasonable tribunal might convict on the evidence already led.

- [16] It is clear that the first limb of the principle established in Galbraith is not usually an issue as it is clear and straight forward. It is the consideration of the second limb that actually creates what may be regarded as a borderline situation. While the court should avoid the determination of credibility of evidence at this stage, it is however to determine whether the bundle of evidence is of a tenuous nature based on its inherent weakness and inconsistencies with other evidence.

[17] Counsel to the Defendant/Applicant relied on the case of **Shippey (1988) Crim. L R 767** and urged the court not to rely only on the supposed strength of the evidence of the prosecution's case alone but also to consider its weaknesses to determine if there is a need to move the case beyond this stage.

[18] In the text **Blackstone Criminal Practice 2025** at paragraphs 16.56 – 16.58 the author stated:-

*“Under the Second Limb it is often central to the application of the test in **Galbraith [1981] 2 All ER 1060** to undertake an assessment of the reliability of the evidence adduced by the prosecution. This was illustrated in **Shippey [1988] Crim LR 767**, where the trial judge (Turner J) found there was evidence to support the prosecution's assertions, but that the evidence as a whole contained 'really significant inherent inconsistencies'. On a literal view of **Galbraith and Barker (1975) 65 Cr App R 287**, the case should therefore have gone to the jury for them to weigh the inconsistencies, but Turner J took a more robust view. He said that 'taking the prosecution case at its highest' did not mean 'taking out the plums and leaving the duff behind'. It was for the judge to assess the evidence and, if it was 'self-contradictory and out of reason and all common sense', then the judge could properly conclude that it was 'inherently weak and tenuous' within the meaning of the second limb of the Galbraith test.”*

[19] Reading the preposition above in **Shippey**, it seems to me that the decision seems to have taken the general principle in Galbraith a notch further. Acknowledging the danger here, the learned author made the following observation:-

*“However, it has since been emphasized, in **Pryer [2004] EWCA Crim 1163**, **Silcock [2007] EWCA Crim 2176**, and most comprehensively in **Christou [2012] EWCA Crim 450**, that **Shippey** should not be elevated from a decision on specific facts into a legal principle. The proper test to be applied remains that enunciated in **Galbraith**, and the decision in **Shippey** merely illustrates the requirement that the court consider the evidence as a whole, including both its weaknesses and strengths”.*

[20] The learned author concludes that the proper approach to a Submission of No Case to Answer are the following propositions:-

(a) *“If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.*

(b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.

(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases).

(d) The question of whether a witness is lying is nearly always one for the jury, save where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that it would not be proper for the case to proceed on the evidence of that witness alone."

CONSIDERATION OF THE PRINCIPLE IN RELATION TO THIS CASE

- [21] Now in my view, the case at hand falls into the borderline situation as stated above. I have looked at the case set out by the prosecution and I have no hesitation to hold that it would be difficult to suggest that there is no case to answer under the first leg of the principle set out in the case of *Galbraith* (supra).
- [22] The consideration of whether the case would meet the second leg is however important in the face of the number of inconsistencies and contradictions that arose from the prosecution's case. Whether these are potent enough to weaken the case now remains to be considered.
- [23] These inconsistencies are many and they vary in degrees. It started like what one would consider a very simple issue that bothers on contradiction in the evidence of Iroy James who gave evidence that he had met the defendant shortly before he allegedly shot the gun. He said he saw the accused fired his first shot into the sky while he was beside the virtual complainant's house on the left side and that the second shot was fired in front of the house but he only heard that. This is totally in contrast to the testimony of other witnesses who all said both shots were fired from the front of the house and directly into the house.
- [24] Assuming that this evidence could be ignored, there were also the complete contradictions about the actual date of the incident. The testimony of the virtual complainant was that the incident happened on the 10th of February 2019 even though the particulars of offence states that it was on the 7th of February 2019. This

could easily have been regarded as an error in his mind but for the manner in which he answered under cross examination. He was asked if he was sure the incident happened on the 10th of February and he said he could not forget that date because that was his grandmother's birthday and he was very sure.

- [25] This position of the virtual complainant was not the problem that affected my mind despite the error. Another issue of the date came from the complete contradictions made by the investigating officers. The officer that took the notes at the scene of the incident, Officer Andrea Dublin, wrote the date of the incident as Wednesday 6th of February 2019. She confirmed this in her statement made on the 11th of March 2019 (shortly after the incident) and also another statement she made in May 2022. Her colleague, Detective Corporal Anthony also wrote in his statement made after the incident on 25th March 2019 that the incident happened on the 6th of February 2019. However in their testimony, they said the incident happened on the 7th of February 2019. When asked under cross examination, both said that they realized it was 7th of February when they saw the content of their colleague's statement. Their colleague who labeled the exhibits had put 7th of February 2019 as opposed to the 6th of February they wrote. All the other officers that gave evidence said the incident happened on the 7th February thus making it three separate dates by different witnesses of the prosecution. Conrad Anthony and Andrea Dublin had presented their credentials and stated they had trainings in Scene of crime investigation and were presented as Scene of Crime experts. This in my view show they are expected to pay attention to details. The testimonies of experts are usually taken seriously.
- [26] Also another point of inconsistency is that while all the police officers said they were at the site shortly after the incidence and that it was early afternoon or late morning, the virtual complainant said the incident happened at about 9am in the morning.
- [27] If I choose to overlook all the above, the whole contradictions and inconsistency were taken to the highest level by the officers of the police force in their evidence at the visit to the Locus. While Officer Conrad Anthony who stated that he was the officer that extracted the bullet allegedly lodged into the wall of the virtual complainant's wall said he extracted the bullet from the back wall of the house and actually took the court to the part of the wall he allegedly extracted the spent bullet from at the back of the house, the other officers including the virtual complainant took the court to the front of the house and pointed to a part they saw officer Anthony retract the spent bullet. These means there was no certainty on where an alleged spent bullet was extracted.

- [28] It is also important to state that the prosecution called Sergeant Bascombe who photographed the scene. He tendered and presented the pictures he took at the site of the incident. He presented the front wall of the virtual complainant's house which was originally pink and a part of the wall with plywood now changed but not painted pink like the other part. He stated that the bullet hole was on the newly replaced plywood **not painted**.
- [29] Upon arrival at the locus, the virtual complainant insisted that the plywood was only changed after the incident and that it was the original plywood **painted pink that the bullet went through**. He said he only made the change because the original plywood was broken after the bullet was retracted from it. This means that contrary to what we saw presented in the photos, the plywood allegedly penetrated in the photos presented by the police is actually not the one the virtual complainant identified.
- [30] All these contradictions came up in the course of the prosecution's case. It is without doubt that there has been a time lag between 2019 and now but that cannot be blamed on the accused, after all, he is presumed innocent and it is the responsibility of the prosecution to prove. Where there are doubts in the mind of the judge, it should be resolved in favour of the accused. These in my view are not mere inconsistencies, they are fundamental contradictions.
- [31] I have asked myself if really with all these contradictions there is a need to call the defendant to give evidence. Is the case of the prosecution if considered under the second leg of Galbraith not tenuous enough to be rejected at this stage? Am I able to hold that there is totally a prima facie case made out despite the weakness of the case caused by these several contradictions?
- [32] Relying on the conclusion of the learned author of **Blackstone Criminal Practice 2025** at paragraph 16.58, particularly at (c), where the author stated that:-
- (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.
- [33] In view of this principle I am persuaded that the contradictions and inconsistencies have weakened the case presented by the prosecution in this instance, I believe a case is not made out and the court should stop the trial at this stage and uphold the submission of No case to answer.

[34] This application succeeds and the accused, Samuel Livingstone is hereby discharged of the offence of shooting with intent.

Tunde A. Bakre

High Court Judge



By the Court

Registrar