

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

Claim No. BVIHCR 2020/0037

BETWEEN:

REX

v

DESCHON HODGE

Accused

Appearances:

Mr. Kael London, Senior Crown Counsel
Mrs. Valerie Gordon, Counsel for the Accused

2023: July 19

**RULING ON A PRE- TRIAL APPLICATION TO EXCLUDE IDENTIFICATION
EVIDENCE OF WITNESS C'QUAN FRETT**

- [1] **TEELUCKSINGH, J:** The accused, Deschon Hodge, is indicted on two counts, namely, Count 1: Possession of firearm with intent to endanger life, contrary to Section 27 A(2) of the **Firearms Act** Cap.126 (as amended) of the Laws of the Virgin Islands and Count 2: Unlawful and Malicious Wounding, contrary to Section 164 of the **Criminal Code**, 1997 (as amended) of the Laws of the Virgin Islands.
- [2] On 12th July 2003, Defence Counsel filed a pre-trial application to exclude the identification evidence of C'quan Frett, on the basis that no identification parade was conducted by the police. The Defence further objects to any dock identification and submits that such would render the trial unfair in the absence of any identification parade.

- [4] At the Preliminary Inquiry, the Crown tendered by way of paper committal, the statements of six witnesses, inclusive of the statement of the sole identifying witness, C'quan Frett.

Summary of evidence

- [5] On 10th December, 2019 at about 5:00 p.m., the virtual complainant, William Shulterbrandt, was a passenger on a motor scooter driven by one 'Juha' which was proceeding in the direction of Ramon's Bar in the Huntum Ghut's area. He observed that there was a group of boys around a blue garbage truck, but did not get a good look at anyone. The virtual complainant heard what sounded like two gunshots and felt his pants 'moved'. At first, he did not feel any pain but later saw blood dripping from his leg. He was later taken to the hospital for medical treatment.
- [6] Witness C'quan Frett stated "...*The person that got shot during the shooting is a friend of mine named William Shulterbrandt and the person that shot him I know as Deschon Hodge aka Dede from Huntum's Ghut. I will be referring to William by his alias Willy and I will be referring to Deschon as Dede...*"
He continued "...I have known Dede for about five years and I know him by seeing him we never had any conversation with each other..."
- [7] Frett also stated that on the material day in question he left his home located at Mount Healthy and proceeded to a function at the Elmore Stoutt High School. There, he saw the virtual complainant, Willy, at a garage near the bridge at Huntum's Ghut, and he was spray painting his scooter. According to Frett, he then went to the school and then to Belle Vue. The vehicle that he was driving was a silver 2008 Suzuki Grand Vitara PV21006, owned by his father, Vern Frett. On arrival at Belle Vue, he went to Willy's house and met Kendry, Willy's brother. He received a telephone call from his cousin, Jevonte Barnes, and then a call from his uncle, Jerron Barnes.
- [8] Frett left Belle Vue along with Kendry and went to Huntum's Ghut through Long Trench. While at the bottom of the hill at Great Mountain, he met Jevonte and Willy on Jevonte's scooter. Frett spoke to Willy and then continued driving at the side of Jevonte and Willie. It was while driving pass the Huntum's Ghut basketball court, he observed several persons there and also at the entrance of 'Trini's garage.'

- [9] According to Frett, "... while driving a short distance past the court in the area of Ramon's Bar, I saw Dede. Dede was wearing a white sleeve t-shirt, a dark long jean pants and slippers..." Frett further stated, "Dede then raised his t-shirt and pulled a gun from the belt buckle area of his pants and I heard three loud gun shots, one of the shots hit the passenger side of my car where Kendry was sitting. Dede then ran back towards the entrance of Trini garage. At this time we had never stopped driving Jevonte and Willy rode off way in front of me and I continue driving..."
- [10] Frett also said, "At the time of the incident, the area was bright, sun was out and when I saw Dede I had a clear unobstructed view of him, nothing was blocking my view of him. Dede is a short, dark skin Negro boy about 18 years old, he had a short haircut, medium built body and he is a local guy. Dede graduated from the Elmore Stoutt High School last year and I don't think he's employed. Dede was about 20 feet away from me when I made eye contact with him..."
- [11] Frett stated that he later saw Willy at the side of the road with a T-shirt wrapped around his leg. He attempted to transport the virtual complainant to the hospital but due to traffic, Willy had to be placed on a scooter to be taken to the hospital.
- [12] Jevonte Barnes confirmed that he was riding his scooter with the virtual complainant at the back through Huntum's Ghut, in the area of Ramon's Bar and the traffic was 'backed up', so he stopped and pulled to the right passenger side of C'Quan Frett's vehicle. At that point, he heard three loud gunshots and rode off quickly. He did not look around and was unable to identify the assailant. He later observed a hole in the area of Willy's right knee and same was bleeding.
- [13] Detective Sergeant No. 192, Jean Avril, was on duty at the Road Town police station, dressed in plain clothes, when he received a report of a shooting incident which occurred in Huntum's Ghut, in the vicinity of Ramon's Bar and Trini garage in which a male person sustained a gunshot wound to his right leg. On Tuesday, 11th December 2019, it was while at the police station, Vern Frett arrived and spoke to Detective Sergeant Avril. Both men proceeded to Frett's residence where Sergeant Avril observed a bullet hole to the front passenger door of a Suzuki jeep. Detective Sergeant Avril also spoke to C'Quan Frett, son of Vern Frett.
- [14] The next day, the accused arrived at the police station with two legislative representatives. He was subsequently arrested by Detective Sergeant Avril in

connection with the investigation into the shooting incident in Huntum's Ghut. About 6 pm later that day, Detective Sergeant Avril and Detective Constable Robin proceeded to conduct an audio interview with the Accused under caution.

[15] In that interview, the accused, Deschon Hodge, stated inter alia to the police, that he was also known as 'Dede', he was 19 years old and lived in Huntum's Ghut. He lived there for about four to five years. He stated that he was self-employed as he painted and cut grass. He went to the Elmore Stoutt High School but did not complete his education there. He said he would occasionally work with truck drivers. He stated that on Tuesday, (this was the day of the shooting incident), he went down the road on his bike, picked up his friend, Kejohn, he went to Lower Estate and from there went to school to perform in Darna time, a band. He then took a friend to Huntum's Ghut because of an injury. The accused stated that he later played in the band from 11:30 a.m. to 12:30 p.m., took a break, then later played in the afternoon. He stated there was a commotion outside the Elmore Stoutt High School where someone stole a gold chain from his friend. According to the accused, he confronted the virtual complainant about the stolen chain who then became upset and threatened to fight the accused.

[16] The accused further admitted in his interview, on that day he was dressed in a white shirt, pants and his crocks. He admitted that he knew a man by the name of C'quan Frett and described him as 'the same black dude with the plaits.' He stated that he went to school with C'Quan Frett. In describing their relationship, he said "...we good we don't have no problems if I see he I hail he, we hail each other." When asked if "they hang out with each other", the accused replied "not all the time." He said that C'Quan was present when the incident with Willy occurred and that C'Quan was "basically trying to keep everything cool." The accused stated that he was on the basketball court when he heard gunshots but did not know the direction of the said gunshots. He got on his brother's bike and left. He said when the shots were fired, everybody was on the ground between the garbage trucks and Trini garage. He did not know where William was at the time. He spoke to Jevonte that day. He said that when he heard that Willy got shot, he was in Lower Estate by his friend, Dee. He did nothing else for the rest of the day and ended up sleeping at Dee's home. He said his

phone was not working and he left Dee's, early in the morning. On the day in question, he never used a firearm. He denied in the interview, ever owning a firearm or using a firearm. He denied that he raised his T-shirt and pulled a gun from the belt buckle area of his pants. He was aware that his name was calling by other people as being responsible for the shooting of Willy. He suggested that this was because he 'acts' as though he is not afraid of anyone. The accused was subsequently charged by the police for these offences.

Submissions of Counsel

- [17] This Court has given due consideration to the very helpful oral and written submissions of both Defence and Crown Counsel and the legal authorities filed therein.
- [18] Defence Counsel initially submitted that the accused disputed the identification in his caution interview and that no steps were taken to confirm that the accused was the person that the sole eye witness, witness C' Quan Frett referred to as 'Dede.' Defence further contends that an identification parade ought to have been held by the police to test the witness' ability to identify the suspect as the person he saw at the material time and this provides a safeguard against mistaken identification. In the absence of any identification parade or photo line up presented to the witness C'Quan Frett, then any identification by this witness at the trial would constitute a dock identification nearly 3 years 6 months after the offences were allegedly committed. Such a dock identification would be dangerous, unsafe and unfair to the accused.
- [19] Defence Counsel further contended that the purported identification by Mr. C'Quan Frett has not been confirmed by the identification procedure set out in Section 110 of the **Evidence Act** of the Virgin Islands, 2006 (as amended). The Defence submits inter alia that this accused did not refuse to cooperate or participate in any identification parade or any other form of identification procedure and the Prosecution did not demonstrate that it was not reasonable to hold an identification parade as dictated by the legislation. Defence Counsel urged that this Court be guided not only by the **Evidence Act** of the Virgin Islands (as amended) but also section 12 of that Act and the provisions of the **Police and Criminal Evidence Act** 1984 (PACE) CODE

D (UK legislation) in particular paragraph 3.12 pertaining to identification evidence and procedure.

- [20] Crown Counsel orally submitted that based on the statement of C'Quan Frett tendered in the Magistrate's Court as part of the paper committal proceedings, he knew the accused prior to the incident for about five (5) years. The Crown's case is therefore one of recognition and not one of identification. Crown Counsel contends that the accused in his interview to the police did not dispute identification but rather confirmed that he knew witness C'Quan Frett and that they had a good relationship with each other.

The accused confirmed in the police interview, material details mentioned by C'Quan Frett in his statement such as the Accused's nickname being 'Dede', his address and the description of his clothing on the day in question. The Crown relied on the Privy Council case of **Ronald John v The State**¹ and argued that in cases of recognition, the identification parade would serve no useful purpose. Counsel further contends that an identification in Court would not be a dock identification where the witness C'Quan Frett would be identifying the accused for the first time in Court since both parties admit that they know each other. In the circumstances, the Crown argues that it would not be unfair to admit the recognition evidence of C'Quan Frett in the trial.

- [21] Crown Counsel also submitted that the evidence of C'Quan Frett could be tested at trial, his evidence is relevant and admissible and that appropriate directions as per the Turnbull guidelines, can be given concerning the credibility and circumstances under which the recognition of the accused as the assailant, came to be made by Mr. Frett. The safeguards of the trial would involve the Judge further identifying to the jury, any potential weaknesses of the recognition evidence of the witness to determine if the witness C'Quan Frett was mistaken or correct when he said he recognized the accused as the man who shot at the virtual complainant, William Schulterbrandt.

¹ (2009) UKPC 12

[22] The Crown also referred to the case of **Sean Martin v Queen**² where similar arguments were premised on Section 110 of the **Evidence Act** of the Virgin Islands. The facts in that case involved the recognition evidence of two of the witnesses of the accused and the learned trial judge, Floyd J, ruled that based on the long term knowledge of the accused by the witness Patterson and the circumstances of that relationship, he was satisfied that it was a case of recognition evidence. Based on that relationship and in accordance with section 110(2) of the **Evidence Act**, it was unnecessary for the investigating police to conduct an identification parade or any other form of confirmatory procedure. Crown Counsel argued that in the instant case, there was no need for the police to conduct an identification parade as there is no dispute that C'Quan Frett and the accused knew each other prior to the incident and such recourse to PACE was unnecessary in this case.

The Law

[23] Section 110(1) of the **Evidence Act 2006** (as amended) of the Virgin Islands refers to the exclusion of identification evidence.

“Identification evidence adduced by the prosecutor is not admissible unless-

(a) either-

(i) an identification parade that included the accused was held before the identification was made; or

(ii) it would not have been reasonable to have held such a parade; and

(b) the identification was made without the person who made it having been intentionally influenced to make it.

(2) Without limiting subsection (1) the matters to be taken into account by a court in determining whether it was reasonable to hold an identification parade as mentioned in that subsection include -

(a) the kind of offence and the gravity of offence;

(b) the importance of the evidence;

(c) the practicality of holding such a parade having regard among other things-

² BVIHCR 2019/0016

- (i) to whether the Accused refused to co-operate in the conduct of the parade, and to the manner and extend of, and the reason, if any, for the refusal; and
- (ii) in any case, to whether the identification was made at or about the time of the commission of the relevant offence, and
- (d) the appropriateness of holding such a parade having regard among other things, to the relationship between the accused and the other person who made the identification.

(3) Where-

- (a) the accused refused to co-operate in the conduct of an identification parade unless a legal practitioner acting for him or her was present while it was being held; and
- (b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such legal practitioner to be present,

it shall be presumed that it would not have been reasonable to have held an identification parade at that time.”

[24] This Court relies on **Blackstone’s Criminal Practice 2021 Part F Chapter F19.1** *“The visual identification of suspects or defendants by witnesses has long been recognized as potentially unreliable. Honest and convincing mistakes can be made by witnesses who entertain no doubt that they are right and even by witnesses who purport to identify persons already known to them. Much has been done ... to reduce the risk ... the procedures prescribed by PACE CODE D (in so far as it relates to visual identification) are designed to test the witness’ ability to identify under controlled conditions any suspect, that the witness may claimed to have seen or recognized on the previous occasion. Procedures used by investigators to confirm identification include video identification, identification parade, group identifications and photo identification.”*

F19.3 *“it does not follow that a (PACE) CODE D identification procedure must always be held whenever an identification issue arises. Such a procedure will serve no useful purpose in a ‘recognition’ case because the witness (even if mistaken) would almost inevitably ‘identify’ the person the witness has claimed to have recognized.”*

[25] In the case of **Ronald John v The State of Trinidad & Tobago**³, the appellant Ronald John, was convicted in 2006 of the murder of a proprietor of a club who was shot to death during the course of a robbery. In March 2007, his appeal against his

³ [2009] UKPC 12

conviction was dismissed by the Court of Appeal but was later was granted special leave to appeal before the Privy Council.

The only evidence against the appellant was given by one Jeffrey Lewis, a taxi driver, who was hired by the appellant to drive him and two other men to various places in South Trinidad including to the club. Lewis had been in a position to sufficiently describe the appellant to the police so they were able to arrest him. He stated that some months previously, once or twice a week, he would see the appellant hanging around the area on Queen and Nelson Streets in Port-of-Spain and so was able to recognize him although he, Lewis, did not personally know the appellant. On the day of the murder when the appellant hired Lewis he sat in the front passenger seat where Lewis observed him for about 20-25 minutes that day. Lewis gave statements to the police in which he gave a detailed physical description of the gunman, and stated the appellant was known to the other bandits as 'Dollars', he lived at Sea Lots in Port-of-Spain where Lewis had picked him up and later returned him on the day of the robbery. Lewis had also mentioned another address of Pioneer Drive where the appellant was found by the police when he was arrested. The police never placed the appellant, Ronald John, on an identification parade as the police regarded his evidence as essentially recognition rather than observation evidence. The appellant was subsequently arrested and charged for murder.

[26] At the Privy Council, it was contended by the appellant's attorney that an identification parade ought to have been held in this case and the absence of one resulted in an injustice. It was further argued, that the judge erred in not directing the jury that the failure to hold a parade constituted a substantial weakness in the prosecution's case.

[27] Lord Brown of Eaton-Under-Heywood delivering the majority judgment, stated:

Paragraph 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 R. 208, 215 and endorsed by Lord Hoffmann giving the judgment of the Board in Goldson & McGlashan v R (2000) 56 WIR 444. 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 place in the form of an identification parade."

[28] Paragraph 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.'

[29] Paragraph 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 such evidence to that effect."

[30] In paragraphs 18 and 19 of the said judgment, the Board referred to the cases of **R v Conway**⁴ and **R v Fergus**⁵ where there was a dispute over whether the accused was a person known or sufficiently known by the witness, and the convictions were set aside because of the failure to conduct an identification parade. In the case of **Conway** (supra) the witness said that she knew the accused, saw him in a public house and entertained him to dinner but did not know his name, or where he lived or anything of importance about him. The accused disputed that the witness knew him. He expressly requested an identification parade but was refused. No parade was held despite a specific provision in the then Code of Practice for the Identification of Persons by Police Officers which said

"...In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one...". The witnesses made dock identifications at the committal proceedings and at the trial. The Court of Appeal held that the judge should have stopped the case because the identification evidence was too tenuous and because there had been a breach of the Code." In the case of **Fergus** (supra), the witness claimed 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."*

[31] In the case of **Ronald John** (supra), the Court held at paragraph 25,

"... on a true analysis of the evidence, an identification parade in this case would have served less purpose not only than in either Pop or Pipersburg but also than in Goldson itself.... unlike the position in Goldson, this was a case where the witness provided the police with sufficient particulars of identification "to enable the police to take the accused into custody". But, perhaps more importantly, the very fact that Lewis was an accomplice meant that, assuming always he was telling the truth, he was altogether better placed to know who the killer was than Claudette (the first to be shot and seeing the gunmen for moments only) had been in Goldson. As the State suggested to the jury, 'there must have been some element of familiarity between Jeffrey Lewis and the person said to be the accused, because a person would not reasonably go from North to South to mark a scene with a complete and total stranger,' and as the judge observed: it was open to the

⁴ (1990) 91 Cr. App R 143

⁵ (1992) Crim. LR 143

jury to find Lewis's evidence "the best evidence available since it comes from a person who might be best positioned to know what allegedly transpired as the alleged driver of the car." In short, the only purpose of an identification parade here would have been to guard against the possibility (a) that the police might have arrested the wrong man (someone completely unknown to Lewis) but that nevertheless (b) Lewis might falsely identify him in the dock when seeing him for the very first time in the belief that the indemnity required him to do so—both possibilities which their Lordships have already indicated appear somewhat fanciful."

- [32] At para 26, the Board nevertheless concluded that the police in the case of **Ronald John** (supra) should have held an identification parade, being a case of capital murder and there was on the face of it nothing to lose by holding a parade. The Board went on further in paragraph 27 to state that the failure to hold an identification parade in the case could not be regarded as having caused a miscarriage of justice. The Lordships did not view the case of **Ronald John** as comparable to that of **Aurelio Pop** (2003) UKPC 40 or **Pipersburg** and **Robateau v The Queen**. The Court noted that 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 due to an improper leading question by prosecuting counsel. Additionally, the failure to hold an identification parade which should have been held under Belize legislation, required that the judge should have *"warned 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."*

- [33] In **Pipersburg** (supra) no identification parade had been held because the suspects' pictures had been published in the media. That was the basis used by the Prosecution to justify why no identification parade was conducted and the Prosecution further sought for the witness to make a dock identification at trial. The Board found that the trial judge did not point out to the jury that Mr. Robateau had thereby lost the potential advantage of an inconclusive parade. The Board also found that the judge did not warn the jury of the distinct and positive dangers of a dock identification without a previous identification parade. In particular, he did not draw their attention to the risk

that the witnesses might have been influenced to make their identifications by seeing the appellants in the dock. The judge also did not explain that the jury would be required to approach that evidence with great care.”

- [34] In the case of **Violet Hodge v The Commissioner of Police**⁶ at paragraph 32 whereby the Court of Appeal stated:

“The normal function of an identification parade is to test the accuracy of the witness’ recollection of the person whom he says he saw commit the offence. It is settled that in cases of disputed identification, an identification parade should be held when it would serve a useful purpose per R v Popat (1998) 2 Cr AppR.208. This principle is not all embracing as a situation may arise where there is no point in holding an identification parade. An example would be a case where it is incapable of serious dispute that the defendant was known to the witness.”

- [35] In the case of In the case of **Mark France and Rupert Vassell v The Queen**⁷ in 2001, following a trial before Cooke J and a jury, the appellants were convicted of murdering Glenroy Sutherland. Their applications for leave to appeal against the conviction were dismissed by the Court of Appeal in 2003. On 16 March 2011, the Judicial Committee of the Privy Council advised Her Majesty that permission to appeal against the appellants’ conviction should be granted.

The facts were as follows: That evening when he was killed, Glenroy Sutherland was outside his home in Jamaica, with his brother, Hubert, and three friends on the opposite side of the road. They were talking when a minibus approached. When it stopped, Hubert Sutherland claimed that he recognized the appellant, Mark France, and another man whom he knew as “Legamore”. Each man had a gun in his hand. Mark France was seated in the front passenger seat area and Legamore, near the steering wheel. Both men pointed guns outside the window and fired. When he saw the gun held by France pointed towards him and his brother, they both ran. He stopped later and turned around to discover his brother shot and lying on the ground. The minibus drove off. He took his brother to the hospital who died on arrival.

⁶ BVIMCRAP2015/0005

⁷ (2012) UKPC 28

[36] Hubert Sutherland gave evidence that he observed the face of France for about four seconds and that of Legamore for about six seconds. He had known both men for about eight to ten years before the murder. Although he did not know Legamore's real name, he pointed to the appellant, Vassell, when asked to identify him during the trial. He had known him through playing football with him on a regular basis. He had also seen him in a betting shop, although, as he accepted under cross-examination, he had not spoken to him. It was put to him that he was mistaken about his identification but he rejected this suggestion.

[37] Neither of the appellants gave evidence. Both made unsworn statements from the dock. They denied involvement in the murder. Vassell claimed that he did not know the deceased or his brother, Hubert. France did not expressly deny knowing the brothers but he did not acknowledge that he did. Both appellants claimed that they did not know each other. One of the grounds of appeal was that the trial judge had failed to give appropriate directions in relation to the identification of the appellants by Hubert Sutherland. It was submitted on appeal, that the trial judge had failed to give adequate directions on the identification evidence. The grounds of appeal had a number of aspects including that the judge did not direct sufficiently to the fact that no identification parade had been held. The appellants also submitted that they had been subject to impermissible dock identifications and that the prejudice which this evidence had caused was compounded by the judge's failure to address its adverse impact.

[38] On the issue whether Hubert Sutherland's identifying evidence of the Appellants was Identification or recognition, Lord Kerr noted at paragraph 25:

"Hubert Sutherland gave evidence that he had played football with Rupert Vassell for some four years at John Mills All Age School. This was from 1992 until 1996. They played every weekday evening and on Saturday and Sunday mornings. During this time he knew that Vassell lived on Lincoln Road. Following this period he used to see Legamore three times per week at a betting shop on Half-Way-Tree Road. This pattern continued throughout the period from 1996 until 1998 when the murder of Glenroy Sutherland occurred."

Paragraph 26 *"Mr. Sutherland claimed to have known Mark France for about eight years. He lived in Elgin Road which was a road that ran parallel to that*

where the witness lived, Greenwich Road. He saw him about five times a week. France rode a red 'CBR' motor cycle. He had the nickname "Twinnie", apparently because he had a twin brother who had died in 1997."

Paragraph 27. *"Although counsel for the appellants submitted that these were not cases of recognition, there is really no basis on which that claim can be made. Mr. Sutherland described how he knew both appellants before the shooting of his brother. He gave evidence about his knowledge of where they lived. He was not challenged on that evidence. Nor was he challenged about his claim that Legamore attended the betting shop on Half-Way-Tree Road or on the evidence that France rode a red CBR motor cycle. It is true that Mr. Sutherland did not know Legamore's proper name before the killing but that is nothing to the point. His acquaintance with both men before the murder was extensive. He had countless opportunities to observe them. His claim to be able to identify them on the basis of those earlier contacts cannot be characterised as anything but recognition. The judge was plainly right to direct the jury that this was a recognition case and, for the reasons given at para 23 above, his directions as to how it was to be approached cannot be criticized."(emphasis mine)*

- [39] On the issue of the lack of identification parade at paragraph 28, Lord Kerr referred to cases of **R v Popat**⁸, per Hobhouse LJ at 215 and endorsed by Lord Hoffmann giving the judgment of the Board in **Goldson and McGlashan v The Queen**⁹.

Reference was made to the case of **John v State of Trinidad and Tobago**¹⁰ addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Kerr stated at paragraph 29, *"That in France's case there was no challenge whatever to Mr. Sutherland's claimed prior knowledge of him. France referred to Mr. Sutherland in his unsworn statement from the dock, by name and did not refer to his evidence about the circumstances in which Hubert Sutherland claimed to know him. The Board is satisfied that the holding of an identification parade in his case would have served no useful purpose."* (emphasis mine)

At paragraph 30, Lord Kerr opined that *"the challenge to Mr. Sutherland's claimed knowledge of Vassell could hardly be described as forthright...."* Sutherland under cross-examination stated that he played football with Legamore. He did not know his correct name. He knew him but only to play ball and not to talk with him. In his unsworn statement, Vassell, however claimed not to know Mr. Sutherland. He said that he knew "none of them" and that he knew nothing of what Mr. Sutherland had been talking about.

⁸ [1998] 2 Cr App R 208

⁹ (2000) 56 WIR 444

¹⁰ [2009] UKPC 12

Paragraph 32 Lord Kerr further stated:

“It is at least open to question whether the diffident challenge made to Mr. Sutherland’s claimed acquaintance with Vassell was such as to render an identification parade necessary. After all, it had been claimed that they met on a daily basis for four years and that Mr. Sutherland saw him on average three times a week in the two years before the murder. There was no challenge to the evidence that Vassell played football at John Mills School or that he attended the bookmaker’s premises in Half-Way-Tree Road. Likewise, the address given for Vassell by Mr. Sutherland was not disputed nor that he was known by the nickname “Legamore”. It is difficult to resist the conclusion that, against this background, it is extremely likely that Mr. Sutherland would have picked out the man that he claimed to have known as “Legamore” for eight years and more and whom he had already identified to the police as one of the occupants of the minibus. It is, therefore, at least, very doubtful that any useful purpose would have been served by holding an identification parade. In any event, it cannot be plausibly suggested that the failure to hold an identification parade caused a serious miscarriage of justice. The appellants’ arguments on this aspect of the appeal must be rejected.”

[40] On the issue of dock identification Lord Kerr stated at the following paragraphs:

*“33. ...A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified. The dangers inherent in such an identification are clear and have been the occasion of repeated judicial warnings – see, for instance, *Pop (Aurelio) v The Queen* [2003] UKPC 40; 147 SJLB 692, *Pipersburgh v The Queen* [2008] UKPC 11, 72 WIR 108; *Edwards v The Queen* UKPC 23, 69 WIR 360 and *Tido v The Queen* [2012] UKPC 16, [2012] 1 WLR 115. The inclination to assume that the accused in the dock is the person who committed the crime is obvious.*

Paragraph 34. “There has been a tendency to apply the term “dock identification” to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in both instances. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time, “This is the person who committed the crime”. He is saying that “the person whom I have identified to police as the person who committed the crime is the person who stands in the dock.” (emphasis mine)

[41] Lord Kerr at paragraph 35 in the said judgment made reference to the case **Stewart v The Queen**¹¹ where witness Ms. Minnott, claimed to have known the appellant and his family for a long time and recognized the appellant on the day of the killing. Although the Defence attacked Ms. Minnott's evidence on this, the Board held that there was no real challenge to her in fact knowing the appellant and his family in the way she described. At paragraph 10, Lord Brown, delivering the judgment of the Board said:

"It is the Board's clear view that this cannot properly be regarded as a dock identification case at all. As already indicated, Ms. Minnott knew not only the appellant but also his mother and his brother as well and it can hardly be thought that she was mistaken in her recognition of all three of them as having been present on the day in question. By the time she came to point out the appellant in the dock at trial (the 'dock identification' as Mr. Aspinall seeks to characterise it) she had already told the police precisely who he was ... It was in answer to the question 'and you see Peter Stewart here today?' that she pointed to the appellant in the dock. It was pure formality."

[42] In applying the reasoning in the **Stewart** case, Lord Kerr stated at paragraph 36:

"The same considerations apply here. This was not in any real sense a dock identification. It was, as Lord Brown said in Stewart, a pure formality. The warning in the present case needed to be directed, therefore, not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made..."

Analysis

[43] This Court has to first determine whether the evidence of C'Quan Frett, the Crown's sole identifying witness, is one of identification or one of recognition.

[44] In this case, the Crown's sole identifying witness, C'Quan Frett was able to identify the gunman not only by the accused's alias 'Dede' but also by his full name, Deschon Hodge. Frett further indicated to the police that he knew that the accused was from the area of Huntum's Ghut. He told the police that the accused had attended and graduated from the Elmore Stoutt High School. Such particulars of the accused's address, the school he attended and his alias 'Dede' as stated by the witness C'Quan

¹¹ [2011] UKPC 11

Frett, have actually been confirmed by the accused in his interview with the police dated 12th December, 2019. In addition to these personal details of the accused, the witness C'Quan Frett provides the police with an approximate age and physical description of the accused as being "*a short dark skinned Negro boy about 18 years, he has a short haircut, medium built body and he is a local guy.*" The accused at the time of the interview gave his age as 19 years. The police conducted an audio visual interview under caution with the accused two days after the shooting incident in which there will be the opportunity for a jury to determine if such physical description as given by the witness C'Quan Frett corresponds with the actual physical appearance of the accused as depicted at the time of the said interview under caution. Interestingly, while Frett stated that he knew the accused only by "*seeing him and that he never had any conversation with him*", the accused in his interview to the police, seemed to suggest their relationship was closer such that he told the police that he and the eyewitness, Frett were friends, he went to school with C'Quan Frett . When asked by the police how close their relationship was, the accused indicated '*we good, we don't have no problems.*' They would '*hang out*' together although '*not all the time*' and when they were together they would '*crack jokes*' (as per page 23 of the transcript of the interview of the accused).

- [45] In this particular case, neither the Crown nor the Defence as per the accused in his interview with the police, is disputing that C'Quan Frett and the accused know each other. Defence Counsel in her oral submissions on 17th July, 2023 was very forthright to this Court when she admitted that the accused is not disputing knowing C'Quan Frett and clarified what was in dispute was the identification made of him as the gunman on the day in question. Defence Counsel further admitted that this was a case of mistaken recognition. This Court was made aware that at the time the Defence filed written submissions, Mrs. Gordon did not have the benefit of the transcript of the accused's interview to the police (when written submissions were filed) as same was only prepared and disclosed to her on the morning before Defence's further oral submissions in this application. Defence Counsel also had issues with the disclosure of the copy of the DVD of the interview and due to technical difficulties was unable to

hear the entire interview. This Court has been assured by Crown Counsel that such issue has been rectified.

[46] This Court notes the evidence of eyewitness Claudette Bernard, in the case against **Goldson and McGlashan** (supra), was accepted by the Privy Counsel to be recognition evidence and the fact that there was no identification parade held, did not constitute a miscarriage of justice. Ms. Bernard's evidence was deemed to be recognition evidence even though she identified the gun men as people known to her by the nicknames 'Sector', 'Yoogie' and 'Marlon.' The police set about looking for people known by these names. Furthermore in that case of **Goldson** (supra), Detective Inspector Rowe was informed that McGlashan was called "Sector" but when he put this to him at the hospital, McGlashan replied that his name was Peter Phillips. He was arrested and charged. Mr. Irvin Goldson, who was alleged to be 'Yoogie', was arrested in August 1993 and similarly charged.

[47] At the trial, Ms. Bernard identified McGlashan and Goldson as Sector and Yoogie by pointing to them in the dock. She said, as at the preliminary inquiry, that she had known them for 3 and 15 years respectively. But at trial, she went into more detail about the nature of her acquaintance with them. She had seen Sector, two or three times a week on the streets, outside her house and from her mother's house in nearby McIntyre Villas. She also knew that his girlfriend's name was 'Ginger' although she had spoken to him only once. The last time she had seen Sector before the murder, was the afternoon of the previous day. Yoogie was not around as often as Sector but she had known him much longer as they grew up in the same Franklyn Town community. She knew also that he lived on Somerset Street and his mother was a 'Miss Tulloch'

[48] Similarly in the case of **Ronald John** (supra) another case of recognition evidence, the only eyewitness in the case against the appellant was taxi driver Jeffrey Lewis who was hired by the appellant to take him to the scene of the robbery of a club resulting in the murder of the proprietor. The witness gave the police a detailed description of the appellant including the areas where the appellant lived. Lewis knew

only the alias of the appellant as 'Dollars' and described the occasions he would see the appellant in Port-of-Spain area while plying his taxi prior to the murder.

[49] This Court notes that in both the cases involving Jeffrey Lewis and Claudette Bernard, there was a dispute as to identification on the part of the Defence as they contended that the particular eye witness in the respective cases of Goldson (supra) and Ronald John (supra) did not know the appellants prior to their being arrested for the particular murders. Yet such evidence of Claudette Bernard and that of Jeffrey Lewis were accepted by the Privy Council as recognition evidence and the failure to hold an identification parade in the respective cases was not viewed as a miscarriage of justice.

[50] This Court notes that in this case, the eyewitness C'Quan Frett, identified the accused not only by his address and alias but also by both of his proper Christian names – all pieces of information were confirmed by this accused in his interview under caution. In any event as previously mentioned, it is not in dispute that the evidence of C'Quan Frett is considered as recognition evidence.

[51] This Court reminds itself of paragraphs 14-16 in Ronald John v R (supra) where Lord Brown which addressed the question of how to assess whether an identification parade would serve any useful purpose. The first situation considered by Lord Brown is where the suspect is in custody and the witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crimes.

This Court is of the view that the first situation identified in case of Ronald John, does not arise based on the circumstances of this case where there is no dispute that the accused and the identifying eye witness, C'Quan Frett know each other.

The second situation as outlined in Ronald John case, is however applicable to this case where the witness and the suspect are well known to each other and neither disputes this. In such a scenario, Paragraph 15 of the case of Ronald John (supra) is applicable to this case where:

“an identification parade obviously cannot help in this situation as Lord Hoffman pointed out in Goldson, a parade would not be merely unnecessary but could be positively misleading” as “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 it somehow confirmed the identification.”

With respect to that second situation, Lord Kerr noted at paragraph 28 of judgment of **Mark France and Vassell** (supra) that:

“the holding of an identification parade would serve no useful purpose because “it carries the risk of adding spurious authority to the claim of recognition.”

This Court is of the view that third situation in **Ronald John** (supra) does not apply to the circumstances of this case, where an identification parade ought to be held, where the witness claims to know the suspect but the suspect denies it.

[52] In this case, this Court is of the view that based on the aforementioned authorities of **Goldson** (supra), **Ronald John** (supra) and **Mark France and Rupert Vassell** (supra) an identification parade in this case would have served no useful purpose where the witness’s evidence, C’Quan Frett is one of recognition.

[53] This Court refers to the very helpful ruling of learned Justice Floyd in the case of **Sean Martin v The Queen**¹². In that case Justice Floyd referred to section 110 (1) of the **Evidence Act** (Virgin Islands) where identification inadmissible unless an identification parade has been held or it has been shown that it would not be reasonable to hold an identification parade. Justice Floyd at paragraph 28 of the said ruling further noted that the Act continues to list the matters to be considered when determining whether it was reasonable to hold an identification parade. Section 110(2) of the said Act refers to whether the identification was made at or about the time of the commission of the offence and considers the relationship between the accused and the other person who made the identification.

The judge held in that case that:

“given the long term knowledge of the Defendant by the witness Patterson and the circumstances of that relationship, I am satisfied that this is a case of

¹² BVI HCR No. 16 of 2019

recognition evidence. Based upon that relationship and in accordance with section 110(2) of the Evidence Act, it was unnecessary for the investigating police to conduct an identification parade or any other form of confirmatory procedure when considering the evidence of Mr. Patterson.”

The learned trial judge further stated at paragraph 29 that he was satisfied that:

“the provisions of the Evidence Act were followed” and that the said provisions were “sufficient in and of themselves and no recourse to be provisions of the UK legislation, PACE, was necessary in this case.” At paragraph 30 of the ruling, Justice Floyd was satisfied that “Mr. Patterson’s evidence of identification was not intentionally influenced, such that an identification parade was required, pursuant to s. 110 (1)(b) of the Evidence Act. His observations were made before he attended the scene and was spoken to by his nephew and others. In any event, what transpired once he arrived at the scene and how that may impact his evidence as a whole, can be explored in cross-examination . Indeed, all of the issues relating to the evidence of Mr. Patterson raised by the Applicant can be explained in cross-examination. They are matters affecting weight and credibility rather than the admissibility of the evidence in the first place.”

- [54] Similarly in this case before me, based on the consensus of both Counsel that the evidence of C’Quan Frett is of one recognition, (given the circumstances of the relationship between the accused and the sole identifying witness, C’Quan Frett), I am also of the view that the evidence of C’Quan Frett is recognition evidence. It was therefore not necessary for the police to conduct an identification parade in this matter. Further, in this case, there is no need to rely on the (UK) PACE provisions.
- [55] This Court further relies paragraphs 35-36 of the **Mark France and Rupert Vassell** case (supra) in which reference was made to the case of **Regina v Stewart** (supra). The pointing out of the accused in the dock by the witness in court, the witness (in this case C’Quan Frett) having told the police precisely who he was, would be “pure formality” and would not be “in any real sense of the word a dock identification.” Lord Kerr held that the warning in the case of **Mark France and Rupert Vassell** (supra) needed to be directed therefore “not to the dangers of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime, but to the need for careful scrutiny of the circumstances in which the purported recognition came to be made.”

[56] Defence Counsel referred in her submissions and drew the court to potential weaknesses in the evidence of C'Quan Frett in that recognition was made, namely, such recognition was made when the car was moving, when the bullet damaged the passenger side of the vehicle that C'Quan Frett was driving and there were "several boys in the area" at the time of the shooting. This Court is the view and adopts the reasoning of Justice Floyd in the **Sean Martin** case (supra) that these issues and/or weaknesses of the recognition evidence can be dealt with in cross-examination and do not affect admission of the evidence. The weaknesses of such evidence can potentially however affect the weight of the evidence and the credibility of the identifying witness. The weaknesses in the evidence can also potentially undermine the correctness of the recognition evidence which can be adequately addressed in the trial process at the relevant stage with the appropriate directions and caution to the jury that there is the need for careful scrutiny of the circumstances in which the purported recognition of the accused came to be made by C'Quan Frett.

[57] It is in these circumstances, the Crown will be allowed to adduce in trial, the recognition evidence of the sole identifying witness C'Quan Frett. This Court further relies on the case authorities of **Goldson** (supra) and **Mark France and Rupert Cassell** that the witness pointing out/identifying the Accused in Court will not be regarded as a dock identification in the strict sense but a mere formality.

[58] I wish to commend and thank both Senior Crown Counsel Mr. Kael London and Defence Counsel, Mrs. Valerie Gordon for their thorough submissions and assistance in this matter.

Angelica Teelucksingh
High Court Judge

By the Court

Registrar