

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CASE NO. ANUHCR 2019/0088

BETWEEN:

THE KING

and

EVERTON FRANCIS

Appearances:

Mr. Sean Nelson, Counsel for the Crown

Mr. Sherfield Bowen and with him Mr. Wendell Alexander, Counsel for the Defendant

2022: November 23rd, 24th, 25th, 28th, 29th, 30th
December 15th

JUDGMENT

- [1] **WILLIAMS, J.:** The defendant, Mr. Everton Francis, shot the virtual complainant, Mr. Kyle Maximaa around 7:45 pm on the 20th of December, 2018. The shooting occurred in Ms. Jennifer Morrissey's yard at Jolly Hill in Antigua and Barbuda.
- [2] Mr. Francis was originally to be tried for Shooting with Intent to Murder, contrary to section 16 of the **Offences Against the Persons Act** Cap 300 of the Laws of Antigua and Barbuda, Revised Edition 1992. This charge was later amended to Shooting with Intent to Cause Grievous Bodily Harm, contrary to section 20 of the same **Act**.

The Charge

- [3] On the indictment, the particulars of the section 20 offence stated: "Everton Francis on the 20th day of December 2018, at Jolly Hill in the Parish of Saint Mary in the State of Antigua and Barbuda, shot at Kyle Maximaa, with the intent to cause grievous bodily harm to the said Kyle Maximaa."
- [4] The side note to section 20 of the **Offences Against the Person Act** indicates that the section deals with: "Shooting or attempting to shoot, or wounding with intent." In relation to this matter, the relevant provision of the section provides that:

“Whomsoever unlawfully and maliciously shoots at any person with intent to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person is guilty of a felony.”

History & Jurisdiction

- [5] The Learned Director of Public Prosecutions initially indicted Mr. Francis for both Shooting with Intent to Murder and Shooting with Intent to Cause Grievous Bodily Harm. That was on the 16th of June, 2020.
- [6] On the 7th of June, 2021 almost a year after the Defendant was indicted on the 7th of June, 2021 the **Criminal Proceedings (Trial By Judge Alone) Act** No. 8 of 2021 entered into force. That law made it mandatory for certain offences to be tried by a Judge sitting without a jury.
- [7] The list of matters to be mandatorily tried by a Judge without a jury was amended by the **Criminal Proceedings (Trial by Judge Alone) (Amendment) Act** No. 7 of 2022 which was published in the Official Gazette on the 21st of April, 2022. The **(Amendment) Act** added certain offences contained in the **Offences Against the Person Act** including those charged pursuant to section 20 of the **Act**.
- [8] The **Criminal Proceedings (Trial by Judge Alone)** mandates, at section 4 (3), that an indictment charging an accused with one of the specified offences “shall not include a count for any offence not referred to” in the mandatory provisions of section 4 (2).
- [9] The effect of the **(Amendment) Act** No. 7 of 2022 in the case of Mr. Francis was that the Second Count, having now been listed as one of the specified offences to be tried by a Judge alone, could no longer remain on the indictment charging Mr. Francis with Shooting with Intent to Murder contrary to section 16 of the **Offences Against the Person Act**. That matter had to be determined by a jury.
- [10] The Crown elected to proceed with the charge of Shooting with Intent to Murder.
- [11] A jury panel was selected on the 23rd of November, 2022. The jurors were excused until the following day, when the hearing of evidence in the matter was to commence. At the time of the empaneling, the jurors were told who the witnesses were prior to being selected, (so that they could indicate if they were familiar with any of them or ought to be excused). The jurors were not informed at the end of the selection process of the nature of the charge that the Defendant faced.
- [12] On the following morning, the Prosecutor, Mr. Sean Nelson, indicated that the Crown wished to amend the charge to Shooting with Intent to Cause Grievous Bodily Harm. That matter however, being contrary to section 20, was a Judge alone matter, but a jury panel was already selected the previous day to try Mr. Francis for the Shooting with Intent to Murder.
- [13] Following a brief adjournment, Counsel, Mr. Sherfield Bowen, on behalf of the Defendant sought leave for the Defendant to file the necessary paperwork pursuant to section 5 of the **Criminal Proceedings (Trial by Judge Alone) Act** for Mr. Francis to be tried by a Judge alone on the original

count of Shooting with Intent to Murder. The Crown did not oppose that application. Directions were given for the filing of the requisite documents.

- [14] Following the filing of the application to be tried by a Judge alone, the jury was then excused. The Crown then applied to amend the charge from a section 16 offence to section 20, which alleged Shooting with Intent to Cause Grievous Bodily Harm.

The Elements

- [15] The offence of Shooting with Intent to cause Grievous Bodily Harm required the Crown to prove that the defendant, Mr. Francis:
- i. Shot at Mr. Maximaa.
 - ii. Had the intent to cause grievous bodily harm.
 - iii. Acted maliciously.
 - iv. Had no lawful excuse.
- [16] Although Mr. Maximaa did not know the person who shot him and could not properly identify Mr. Francis, the defence does not dispute that it was Mr. Francis who shot Mr. Maximaa. That point is not in dispute.
- [17] The issues that were contested were whether the evidence shows that the Defendant acted maliciously and intentionally; and whether the Crown discharged its burden of showing that the Defendant was not acting lawfully.

Sources of Evidence

- [18] Hearing of evidence began on the 25th of November, 2022.
- [19] The testimony of seven of the witnesses was formally read into the record. This was in keeping with section 13 of the **Criminal Proceedings (Trial by Judge Alone) Act**, which provides that:
- “The deposition of all witnesses whose attendance is not considered to be necessary by the Prosecution who are not required by the Accused to attend the trial shall be read into evidence at trial.”
- [20] The Crown did not call some of the witness listed on the back of the indictment; Counsel for the Defendant did not express any interest in having those witnesses attend court.
- [21] *Viva voce* evidence was lead from nine witnesses. Several exhibits were tendered.
- [22] There was also a visit to the *locus in quo*, where four of the witnesses pointed out landmarks referred to in their respective testimony.

Virtual Complainant's Evidence in Chief

- [23] Mr. Maximaa stated that on the night in question, he "got a ride from Town to Jennings." He got off at the bus stop in Jennings and was walking from there to Bolans, where he lived. While descending Jolly Hill, he felt like he wanted to urinate and said that he "went down in a little ditch to the side of the road, in front of a farm" to relieve himself.
- [24] The virtual Complainant said that while he was urinating, he saw a vehicle pull up on the same side that he was on, about 20 to 30ft away.
- "When I zip up I saw like somebody come towards me with a gun in their hand. I turned around and said: 'What is the problem?' The person said: 'Thief! Thief! Thief!' and waving the gun and pointing the gun towards me. The person was now about 5ft from me... He was arguing and cursing and 'vibing'. I asked him if he's sure it's the right person, because I don't know him. After asking him if he [is] sure [it] is the right person, he shot me... I got shot in my lower stomach."
- [25] Mr. Maximaa continued:
- "He was trying to wrestle with me. To hold me. After that he was trying to block me out from walk[ing] out the front. I get away. When he trying to grab me and pull me, I get away. Somebody open[ed] the door. He was shouting out: 'Call the police! Call the police!'"
- [26] Mr. Maximaa testified that after he was shot, he walked to the back of the property where the shooting occurred, went down pass the supermarket and then saw his brother under a tree in the yard of Samantha Marshall's office.
- "I told him what happened to me. He called one of his close friend on his phone. 'Jay' – Rohan Jarvis came after. They put me in the vehicle – he [Jay] and my brother."
- [27] The virtual Complainant's brother and Jay asked Mr. Maximaa who shot him and why he was shot.
- [28] Mr. Maximaa, his brother and 'Jay – (Rohan Jarvis) - headed to the hospital in Jay's vehicle using the main road. As the vehicle approached the area where Mr. Maximaa got shot "police were just about to arrive. When we pull up the police had come just about the same time." Mr. Maximaa was subsequently transferred to the police vehicle and taken to the Mount Saint John Medical Centre, MSJMC.

Cross Examination of Mr. Maximaa

- [29] The Defendant's Counsel, Mr. Bowen, put to Mr. Maximaa that he was not very truthful in his testimony. The virtual Complainant disagreed.
- [30] Mr. Bowen put to the witness several things, including:

- i. where Mr. Maximaa was, about 20 minutes before the shooting stating that the witness was at his [the virtual Complainant's] home;
- ii. that he (the virtual complainant) spoke with his mother about their dog less than half an hour before he was shot; and;
- iii. that he (the virtual complainant) was in fact seen walking in the opposite direction to that which he testified – that is from the direction of his home in Bolans towards Jolly Hill, rather than from Jennings heading towards Bolans by way of Jolly Hill.

[31] Mr. Maximaa denied he was at home at the time suggested by Counsel; he stated that it was his brother his mother spoke to about the dog; and he maintained he was not walking from South to North – from Bolans to Jennings - as Counsel suggested.

[32] Counsel's cross examination also focused on Jay [Mr. Rohan Jarvis] and the Defendant's association with Jay.

[33] Mr. Maximaa denied that his testimony was what Jay told him to say. He denied that on the night of the incident Jay was in fact waiting at Samantha Marshall's Office area waiting for the virtual Complainant to return. He denied that the area under the tree where he saw his brother following the shooting was a meeting spot, or as Counsel later termed it 'Command Central' for illegal activity.

[34] Mr. Bowen's cross examination raised a number of issues with Mr. Maximaa that formed a part of the Defendant's case:

- i. That Mrs. Morrissey, in whose yard the virtual Complainant was shot was the holder of 'box money.'
- ii. That the intention of the virtual complainant that night was to burglarize the house and steal the 'box money'. (The virtual Complainant denied he had any such intent).
- iii. That a neighbour of Mr. Morrissey, Mr. Thomas, who also was the holder of 'box money' had his home broken into two months previously and the money stolen.
- iv. That Jay was in fact convicted in relation to the October 2018 theft of the money from Mr. Thomas's home.
- v. That the virtual Complainant worked previously with Jay and was in fact Jay's friend first, rather than Jay being the virtual complaint brother's friend as Mr. Maximaa testified in his evidence in chief.

[35] Defence Counsel questioned the virtual Complainant as to why he did not call the police or 911 after he got shot. Mr. Maximaa said: "After I got shot, I walk to the back of the yard. I walked to Samantha Marshall's Office. I didn't call 911; I was more studying my wound." He said it was not true that the last person he wanted to call was the police; or that he wanted Jay to know first what occurred. He said it was not true that the reason he did not run – but rather walked – when heading to Bolans after being shot was because he did not want to call attention to himself.

[36] Mr. Maximaa denied that he had the house under surveillance for several weeks prior to the incident. He also denied that he had house breaking tools with him.

- [37] According to the virtual Complainant, the Defendant said to him: “Ah thief! Ah thief you be, long time.” He accepted that he did say in his statement to the police following the incident that what the Defendant said to him was: “Ah whey you doing dey? You thief!”

Conflict of Evidence

- [38] There were areas of conflict between Mr. Maximaa’s testimony in the witness box and the evidence of other witnesses. There was conflict as well between Mr. Maximaa’s sworn testimony in the witness box and the physical evidence. Some of the areas of conflict were:

- i. The virtual Complainant in his evidence in chief spoke of going “down in a little ditch to the side of the road” to urinate. During the visit to the *locus in quo*, he pointed to an area well beyond the ditch.
- ii. Mr. Maximaa said he was “in front of the farm” when he urinated. He pointed to an area within Ms. Morissey’s property which is now fenced. This area is in fact to the side of the farm.
- iii. While Mr. Maximaa testified to urinating away from the house in the open area, the Crown’s witness Ms. Shurel Browne placed him outside the window of the house, and two police witnesses who visited the scene the night of the incident testified that there was an area on the wall of the house that was wet and from which they said a scent of urine emanated.
- iv. Mr. Maximaa in his testimony said that as he was zipping up his pants, the Defendant approached him and there was a conversation. Ms. Browne testified to hearing voices outside the window, but was only able to recognize the defendant’s voice. Based on the measurements provided by the Crime Scene Investigator, Corporal 222 Alpheus O’Garro, the distance from where the virtual Complainant said he was and the window of the house was about 50 feet. Judicial notice is taken of the fact that the virtual complainant speaks rather softly and even in court, where there is amplification of the witness’ voice, it was not always easy to hear him from 25 feet away.
- v. Mr. Maximaa testified that he went into town, at Tindale Road to collect something from a friend after 6:00 pm and was returning to Bolans at about 7:25 pm just before the shooting occurred. He said he was traveling in a North to South direction. His mother, Ms. Vilma Lawrence, said when she arrived home at 7:30 pm, the dog was in the house and she asked Mr. Maximaa who let the dog in the house and he responded to her. About 20 minutes later, her other son informed her that the virtual complainant was shot. To get from her house to the scene, one would have to travel in a South to North direction. The Defendant in his interview with the police said Mr. Maximaa was walking in a South to North direction when he, the Defendant, first saw the virtual Complainant.
- vi. Mr. Maximaa testified that when he saw his brother after the shooting, “I told my brother what happened to me. He called one of his close friend on his phone – Jay.” When confronted in cross examination that Jay was in fact his friend, he first sought to deny

that he said it was his brother's friend. Then he stated "I did say my brother called his friend Jay. He's both of us friend" and then he claimed he had said so earlier. Mr. Jarvis – Jay – in cross examination accepted that the virtual Complainant was his very good friend, loyal and he only knew of Mr. Maximaa's brother because of the virtual Complainant.

- vii. The virtual Complainant was pressed repeatedly in cross examination about his relationship with Jay and whether Jay influenced him. Mr. Maximaa stated that Jay was a friend to both himself and his brother. When Mr. Jarvis testified said that Mr Maximaa once worked for him in the car wash business. Mr. Jarvis accepted under cross examination that rather than taking his friend to the hospital first after the shooting, he stopped at the scene at Jolly Hill because he "wanted to know who shot my soldier." Mr. Jarvis accepted that: "I was outraged and said take me back to the scene."
- viii. The location of two physical bits of evidence, placed the virtual Complainant not where he said he was, towards the front of the premises, but rather in a location more in keeping with the Defendant's narrative that Mr. Maximaa was at the window close to the back of the house. These items were the red substance looking like blood seen on the ground and the spent bullet retrieved from the left front lamp of the vehicle that was parked at the back of Ms. Morrissey's house.

[39] The visit to the *locus* also presented a number of worthwhile observation:

- i. The area where the virtual Complainant said he went to relieve himself was an open area and according to the Crown's witnesses, it was well lit at the time. Just before Ms. Morrissey's property, on the same side, is a huge tree that can offer some privacy. On the opposite side of the road, there are no houses but it is lined with trees.
- ii. Ms. Morrissey's house is the property immediately following 'the farm' as one descends Jolly Hill. There is a ditch between the side of the road and the properties. After the ditch, one would have to go up a slight embankment to get into Ms. Morrissey's yard.
- iii. The route the defendant took after the shooting, back to the tree at Samantha Marshall's office, was not the quickest route to get there as Mr. Maximaa utilized a network of back roads. The quicker route was along the main road (which was used when the Court returned to Ms. Morrissey's house).
- iv. The tree towards which the virtual complainant went and met his brother and from where Jay picked him up, is on the opposite side of the road to where he lived. Based on the route that Mr. Maximaa indicated he went, a right turn would take him into his house, the left turn he took led to the tree opposite his house.
- v. The journey to the *locus* traveled via Tindale Road, which is where the virtual Complaint said he went that evening. Along the way the various landmarks mentioned by Mr. Maximaa were apparent – the bus stop opposite the Golden Grove School from where he said he got a ride after leaving Tindale Road and the bus stop in Jennings where he said he disembarked the vehicle. The visit was supported by police escort to enable a smooth flow to and from the *locus*; nevertheless the visit provided a sense of how much

time it would take to travel from Bolans to Tindale Road and return, (bearing in mind that according to Mr. Maximaa's testimony parts of the journey were completed on foot).

No Case Submission

- [40] At the close of the Crown's case, Mr. Bowen submitted that his client did not have a case to answer.
- [41] Mr. Bowen grounded his submissions on the principles of **R v Galbraith** [1981] 73 Cr App R 124; [1981] 2 All ER 1060; [1981] 1 WLR 1039; 2 Crim LR 767.
- [42] Counsel stated that what his client did, according to the evidence (which included his interview with the police that the Crown tendered), was to try to prevent a break in at Ms. Morrissey's premises. He said that Mr. Francis in the course of doing a good deed, was attacked by the virtual Complainant.
- [43] Counsel noted that the report which was made to the police and which the police responded to by going to Ms. Morrissey's premises at Jolly Hill, was about an intruder. He noted that once the police arrived at the scene, the focus of the investigation became the shooting and the report that caused the police to attend the premises in the first place was not investigated. According to Mr. Bowen, once the police arrived, the persecution of his client began and nobody cared about the matter regarding the intruder any more.
- [44] Mr. Bowen stated that the challenge which the Crown faced was to prove any unlawful conduct on the part of the Defendant. The burden, Mr. Bowen noted, to prove unlawful conduct could only be discharged by the Crown, if they first positively disproved Mr. Francis's defences.
- [45] The Defendant's case was that Mr. Francis was driving from Jennings to Bolans - that is in a North to South direction. He saw the virtual Complainant enter onto Ms. Morrissey's premises. He drove past the premises turned and came to have a second look as he drove by, this time in a South to North direction. On this journey the Defendant observed Mr. Maximaa at the window. Mr. Francis drove to the top of the hill, turned around and came back down, parked his vehicle and went to see what the virtual Complainant was up to. Mr. Francis observed Mr. Maximaa for a while then started shouting "thief". Mr. Maximaa said "shut up" then pulled an object from this pocket and started firing stabs at the Defendant. Mr. Francis said in his statement to the police that he was in fear, drew his weapon and fired a single shot at the virtual Complainant, who then exited the yard.
- [46] Mr. Bowen noted that even in the words of the virtual Complainant, there was a "wrestling up". He submitted that in those circumstances, Mr. Francis was put in a state of fear.
- [47] Counsel noted that two of the factors that undermined the cogency of the Crown's case, were (1) the poor quality of the investigation as evidenced by the failure to do any fingerprint examination of the window when the report made to the police concerned an intruder; and (2) the unreliability and incredulity of the testimony from the virtual Complainant.

- [48] Mr. Bowen submitted that since the Crown could not disprove self defence, there was nothing upon which a conviction could be grounded so the case should be stopped.

Crown's Response

- [49] Mr. Nelson on behalf of the Crown reiterated that the Prosecution's case was one in which the Defendant was charged with shooting with intent to do grievous bodily harm. He said that it was not about the prosecution of Mr. Kyle Maximaa - the intruder. Counsel Nelson accepted that the virtual Complainant was an intruder. Mr. Nelson said that although Mr. Maximaa was trespassing, the issue was whether or not the Defendant acted reasonably.
- [50] Mr. Nelson stated that in the Crown's view, Mr. Francis shot the virtual Complainant with the intent to wound Mr. Maximaa.
- [51] According to the Prosecutor the issue was whether, at the time, Mr. Francis had a lawful excuse to do what he did. This, Mr. Nelson said, was tied to the reasonableness of Mr. Francis' action. Mr. Nelson said that the question to be asked, was whether Mr. Francis had an honest belief that he needed to defend himself.

The Test

- [52] In **Chief Constable of Police Service of Northern Ireland v Lo** [2006] NICA 3; 2006 WL 3610012, Lord Chief Justice Kerr said, at paragraph 14:

"The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in **Galbraith**. The exercise that the judge must engage in is the same, suitably adjusted to reflect that he is the tribunal of fact... the judge should not ask himself the question, at the close of the prosecution's case, 'do I have a reasonable doubt?' The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."

- [53] The testimony of the virtual complainant, Mr. Kyle Maximaa faced many challenges:
- i. The testimony conflicted directly with the evidence of his mother, Mrs. Vilma Lawrence – who appeared to be an honest, reliable and credible witness – as to where he was 20 to 30 minutes before he was shot.
 - ii. The physical location he pointed out at the locus as to where he said he was differed from the description given in his oral evidence.

- iii. Where Mr. Maximaa said he was or pointed out that he was, contrasted with where items of evidence were seen by the Crime Scene Investigators.
- iv. Could Mr. Maximaa be relied on at all, regarding whether he was in fact telling the truth on matters such as if he left from home or was coming from Jennings in the opposite direction; or as to where exactly he was in the yard?
- v. Mr. Maximaa appeared to be misleading as a witness at times, for example when questioned about Mr. Rohan Jarvis and their association. He sought to shift the connection with Mr. Jarvis to his brother. However, Mr. Jarvis's testimony placed the virtual Complainant as the primary contact.
- vi. His conduct on the night generally creates some uncertainty as to whether he is being truthful and can be believed. For example (1) Is it natural and likely that someone who is a few minutes from their home who has the urge to urinate, to go into the lighted area of someone's yard to relieve themselves. (2) After being shot, even if the intention is to go to one's home, would a person not seek to do so by the most direct route rather than a longer circuitous route away from the main road?

[54] The Crown was required to expressly disprove that the Mr. Francis was not and could not have been acting in self defence. The only evidence that could be adduced on that point was from the virtual Complainant, who did not impress as a credible witness. The Crown was therefore unable to establish that the Defendant was not acting in self defence.

[55] In the circumstances, the submissions on behalf of the Defendant must be upheld. Mr. Everton Francis is accordingly acquitted on the charge of shooting Mr. Kyle Maximaa with intent to do him grievous bodily harm.

Postscript

[56] One cannot speculate on what evidence there might have been. A decision has to be made only upon what evidence is presented. But the Prosecution ought not to adduce evidence which has no probative value. For example, there is testimony of a bag being obtained from the virtual Complainant and stored as an exhibit. But the bag is not tendered nor the relevance of gathering it made apparent. Then a witness recites a list of his credentials and qualifications, including a particular expertise. However, when asked why a particular procedure, in keeping with his stated qualifications is not done, the response is: the person to do that was not summoned. Why then is evidence led of the witness's expertise in that area?

Colin Williams
High Court Judge

By the Court

Registrar