

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CLAIM NO. Criminal Case No. 5 of 2019

BETWEEN:

THE QUEEN

AND

**MAYBE RODRIGUEZ
RAFAEL LORENZO HARRIGAN
VERNON EDELL BERNARD**

Appearances: Mrs. Kelli-Gai Smith, Principal Crown Counsel & Mr. Kristian Johnston, Crown Counsel for the Crown
Mrs. Valerie Gordon, Counsel for Maybe Rodriguez
Mr. Michael Lashley Q.C, Mr. Michael Maduro & Mrs. Isis Potter, Counsel for Rafael Lorenzo Harrigan
Mr. Richard Rowe & Ms. Allydah George, Counsel for Vernon Bernard

2022: April 1st, 4th

JUDGMENT ON NO CASE SUBMISSION

OVERVIEW

[1] **FLOYD J:** This is a no case submission and I must therefore decide if a jury properly instructed could convict. The test is set out in **R v Galbraith**¹, wherein two limbs of reasoning are described. The first being where there is no evidence that the alleged crime has been committed by the defendant, the judge must stop the case. The second limb where there is some evidence, but the

¹ 73 CR. APP. R. 124

evidence is of such a tenuous nature, that the judge must stop the case. This is based on inherent weakness or inconsistency in the evidence. This involves an assessment of the quality of the evidence.

- [2] Is the prosecution evidence, taken at its highest, such that a reasonable jury properly directed could not convict? If so, the court has a duty to stop the case. However, if the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' 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 decided by the jury.
- [3] The court must not usurp the function of the jury. The reliability or the credibility of each witness is a matter for the jury to decide.
- [4] The Court of Appeal in the case of **Malcolm Maduro v The Queen**² referred to both the **Galbraith** case and the case of **Taibo (Ellis) v R**³ in stating that in a no case submission "the criterion to be applied by the judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed." Where the case involves circumstantial evidence, the only concern of the judge is whether a reasonable jury could reach a conclusion of guilt on the evidence, by drawing reasonable inferences from the evidence that is given at the trial.
- [5] It has been determined by the Privy Council in the case of **The Director of Public Prosecutions v Selena Varlack**⁴ that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge is equally applicable in cases concerned with the drawing of inferences. The basic rule that a judge should not withdraw the case if a reasonable jury properly directed could, on the evidence adduced by the prosecution, find the charge in question proved beyond a reasonable doubt, was reiterated and extended to circumstantial evidence and the drawing

² HCRAP 2007/004

³ (1996) 48 WIR 74

⁴ [2008] UKPC 56

of inferences. Reference was made to the decision of the Supreme Court of South Australia in **Questions of Law Reserved on Acquittal**⁵ where the court held:

If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction in a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favorable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt.

THE POSITIONS OF THE PARTIES

- [6] Learned Counsel, Mrs. Gordon, for the defendant, Maybe Rodriguez, based her no case submission upon both limbs of the **Galbraith** case. The elements of the offence of murder were not made out by the evidence tendered by the Crown. There was no direct evidence and no inferences could reasonably be drawn from the evidence to support a finding of guilt. There was no proof of an unlawful act and no evidence of an intention to kill Trumayne Daway. There was no evidence that Ms. Rodriguez committed the murder and no evidence of any aiding and abetting by Ms. Rodriguez. There was no evidence of time of death. Although many items were recovered from the scene, nothing was linked to Ms. Rodriguez. The Crown's evidence identified the deceased as Trumayne Daway, also known as Passion and also known as Black Ice. He worked at a car wash. The Crown's evidence also revealed another person known as Black Boy. Although he also worked at a car wash, it was not the same place where Passion worked. Three vehicles were seized and examined by the police, two from the crime scene. They were processed forensically by the police but no DNA and no fingerprints relating to Ms. Rodriguez were discovered. Evidence from the Crown confirmed Ms. Rodriguez was not home overnight from 27th – 28th February 2018. She arrived home early on 28th February. Passion and Ms. Rodriguez had known each other for years, having gone to school together. The text messages between the phone produced by Ms. Rodriguez and given to police, and a telephone number related to the defendant, Vernon Bernard, which included a video clip of what appeared to be a long gun firearm, were never shown to Ms. Rodriguez for verification. Those

⁵ (No 2 of 1993) (1993) 61 SASR 1

messages do not refer to Passion but rather refer to Black Boy and the firearm pictured was never shown to an expert for identification. No firearm was ever recovered by police. The messages are dated several days before the murder. The evidence is not capable of supporting a conviction and the necessary inferences cannot be drawn. Her submissions emphasize that if there is some evidence, it is so tenuous and contains so many inherent weaknesses that it would be unsafe to leave it with the jury. It would be dangerous to leave this case with the jury and the case must therefore be withdrawn.

[7] Learned Queen's Counsel, Mr. Lashley, for the defendant, Rafael Harrigan, also relies upon both limbs of the **Galbraith** decision. There is insufficient evidence to satisfy the ingredients of both the offence of murder and the offence of possession of a firearm. The Crown has particularised the firearm as an AK47. However, there is no evidence that Mr. Harrigan possessed such a weapon. There is no evidence that Mr. Harrigan possessed the weapon with an intent to commit an indictable offence, specifically murder. No firearm was recovered from the search of the residence of Mr. Harrigan. No testing for gunshot residue was conducted on any possessions seized there. The video clip communicated between Mr. Bernard and Ms. Rodriguez cannot be related to his residence. The gun in the video is placed on something that cannot be determined or confirmed as coming from his residence, such as furniture. The video does not depict enough background. Similarly, the white or off-white floor tiles cannot be confirmed as being in his residence as there is nothing unique or distinguishable about them. Most importantly, there is no evidence from any expert that the item depicted is a firearm as defined in the legislation. The item must be confirmed as being a lethal barrelled weapon capable of discharging a shot, bullet or projectile. No gun was recovered and expertly identified as being an AK47 nor a lethal barrelled weapon. Similarly, the video relied upon by the Crown was never expertly examined and presented as such. The Crown has not established that what is depicted in the video is the murder weapon.

[8] Even supposing the item depicted in the video was at the Harrigan residence, Learned Queen's Counsel relies upon **Blackstone's Criminal Practice, 2020 edition at B12.107** wherein it states that "if all that can be shown is possession in the sense that it is in your house or in a shed or somewhere where you have ultimate control, that is not enough." Reference was also made to the

case of **The Queen v Isabella Merton**⁶ wherein the court held that the Crown must first prove that the object is a lethal barrelled weapon capable of causing injury from which death may result. In order to prove that a weapon is a firearm, it is essential to call evidence that it is one from which any shot, bullet or other missile can be discharged or can be so adapted. Such evidence need not necessarily come from an expert; it could also come from someone who has seen the weapon being fired or who was familiar with the weapon, and who could indicate that it worked and what its observed effect was. No such evidence was called by the Crown in this case and therefore the charge cannot be made out.

[9] With regard to the murder charge, Learned Queen's Counsel submitted that the only evidence regarding Mr. Harrigan is the fingerprint found on the door window of motor vehicle PB-151. Mr. Harrigan is not identified by anyone. It is not clear where exactly the fingerprint was found on the window. There is no evidence as to the age of the fingerprint or when the print was placed there. There is no evidence as to when PB-151 arrived at the crime scene. Three vehicles, including two from the scene, were forensically processed but other than the fingerprint, nothing links Mr. Harrigan to them. Nothing seized from the search of Mr. Harrigan's residence links him to the scene or to the vehicles. Mr. Harrigan is not mentioned in the text messages between Ms. Rodriguez and Mr. Bernard. There is no nexus between him and the messages. Although the firearms expert said the cartridge casings found at the scene could be fired by an AK47, he also said there were over 20 other firearms capable of firing that type of cartridge. The elements of the charge of murder are not made out. Further, the evidence is so tenuous and weak that it is dangerous to leave the case with the jury.

[10] Learned Counsel, Mr. Rowe, for the defendant, Vernon Barnard, also relies upon both limbs of the **Galbraith** test. With regard to the charge of possession of a firearm, no evidence of intent to commit an offence exists. To be in possession of the firearm, Mr. Barnard must have been present at the material time and there is no evidence of that. There is also no evidence to prove the item met the definition of firearm in the legislation. There is no evidence that the object in the video was an AK47 and no evidence that the item depicted was a lethal barrelled weapon capable of discharging a shot, bullet or missile.

⁶ BVIHCR 2018/0029 at para 7

- [11] With regard to the murder charge, Mr. Rowe submits the elements of the offence are not made out. There is no evidence that Mr. Bernard was present. The text messages refer to Black Boy not Passion. There is no evidence of any plan to cause harm or do anything untoward to anyone, let alone Passion. One message stated: "Do it today." Yet the message is dated several days before the murder took place. There is therefore no congruence or nexus between the messages and the event. The texts are so vague and innocuous that they cannot prove an intent to kill. No forensic evidence collected from the three vehicles processed by police matched Mr. Bernard. To leave the case with the jury would cause them to speculate about matters, which would be dangerous. Counsel relied upon the case of **CPS v F**⁷ confirming the judge's obligation to stop a case where the necessary minimum evidence to establish the facts of the crime have not been called.
- [12] Learned Principal Crown Counsel agreed that this is a circumstantial case. However, the strands of the Crown's case, when taken together, justified the case being left with the jury. Principal Crown Counsel submits that neither limb of the **Galbraith** test is satisfied, such that the case should be removed from the jury. The indictment charges all three defendants, acting together, with murder. It is not an allegation of conspiracy. The cause of death was confirmed by the pathologist as being wounds suffered from high velocity projectiles. Shell casings found at the scene could have been fired from an AK47, as well as other guns. The text messages found on the phone belonging to Ms. Rodriguez also related to a telephone number associated to the defendant, Bernard. Those messages refer to a "machine" and an "AK", and then a video of what appears to be an AK47 is produced. There is also a reference to a person named Bones, which evidence confirms is Mr. Bernard. The name Black Boy appears and "I want him bad." Crown Counsel submits that even without mentioning Passion, the jury can infer the conversation is about Ms. Rodriguez helping Mr. Bernard to use an AK47 to kill Passion. She submits it is reasonable for the jury to think the participants are speaking in code. The evidence shows the Brandywine Bay location is used for romantic liaisons and therefore an inference that Ms. Rodriguez went there with Passion on that pretext is possible. The phrase "he still press" can be taken to mean that Passion is attracted to her. There are also 3 phone calls between her phone and the number for Passion on 27th February. Ms. Rodriguez is out all night on 27th – 28th February and is picked up in Purcell, an area where Mr. Harrigan lives.

⁷ [2011] EWCA Crim 1844

[13] D/S Bakker testified that the couch and floor tile in the video matches that found in Mr. Harrigan's residence. Although D/S Bakker actually stated in evidence that the floor tile was white, then it was off-white and it was only similar to that shown in the video. Mr. Harrigan's fingerprint is found on the window of a vehicle found at the crime scene. A nearby resident sees three people dressed in black stealing his vehicle at 11:00 p.m. on 27th February. Evidence shows Ms. Rodriguez wore a black T-shirt that night. She admits there is a gap in time between the text messages and the killing. She reminds the court that there is no requirement to prove motive. She relies upon the deeming provision in the **Firearms (Amendment) Act, 2006, s. 12A** regarding the occupier of a premises being the owner of a gun. As for the possession of a firearm charge, Counsel relies upon the reference in the **Merton** case of proving a firearm by medical evidence of direct injury caused by its discharge.

[14] Principal Crown Counsel submits that the elements of both charges are made out. The evidence is such that a reasonable jury properly instructed could, on this evidence, find the charges proven beyond a reasonable doubt. The assessment of the strength of the evidence must be left to the jury. The totality of the evidence must be examined and an inference of guilt is open to the jury in this case.

ANALYSIS

[15] The consideration for this court is that a no case submission should succeed if there is no evidence to prove an essential element of the offence, or if the evidence is so weak that no reasonable jury properly directed could convict. If there is some evidence which, at face value, establishes each essential element of the offence, then the case should continue before the jury. Having received and reviewed the submissions and authorities presented by the parties, what follows is my decision on this application.

[16] The evidence in this case from family members of the deceased, confirmed that he was last seen at about 9:00 p.m. on 27th February 2018, when he was dressing to go out for the evening. He was apparently with someone but that person was never properly seen nor identified. It was confirmed that Ms. Rodriguez and Mr. Harrigan were known to the deceased person and his family for years. In fact, Mr. Harrigan was a cousin to the family. There was no indication of any ill will between any

of those parties, including Mr. Daway, Ms. Rodriguez and Mr. Harrigan. Police witnesses confirmed that no family members advised of ill will between Mr. Daway and Mr. Bernard. When Mr. Daway left home that evening, he was wearing jewelry and carrying a cell phone. None of those items, except for a bracelet, were recovered from the crime scene or the body of the deceased. Mr. Daway owned a black Hyundai vehicle, worked at a car wash and was known as Passion. At approximately 1:00 a.m. on 28th February 2018, police became aware of an incident at Brandywine Bay. The body of Mr. Daway was discovered, clad only in boxer shorts, in a black Hyundai vehicle with licence number PL-630. A second vehicle, licence number PB-151, was parked close by. The pathologist, Dr. King, gave the cause of death as haemorrhage or bleeding and respiratory failure, mainly as a result of a gunshot wound to the chest. There were multiple other gunshot wounds entering the backs of both thighs. The wounds were consistent with high velocity projectile injury.

- [17] The crime scene was dark, being a beach or shoreline area. Police waited for daylight to process the scene. 18 cartridge casings were collected from the ground near the vehicles. The vehicles were moved to the police station for forensic analysis. Another vehicle, licence number PS-177 and owned by Curtis Smith, was recovered in Purcell Estate. It was also forensically processed by police. Vehicle PS-177 was dusted for fingerprints and swabbed for DNA. Latent prints were recovered from the exterior of the vehicle. Vehicle PB-151 was dusted for fingerprints and swabbed for DNA. One latent fingerprint was recovered from the interior front right door window. Vehicle PL-630 was dusted for fingerprints, swabbed for DNA and some fingerprints were lifted. All swabs and fingerprints were sent for testing and analysis. Fingerprints and buccal swabs were taken from the defendants. Fingerprint analyst Forbes Washington reviewed all of the fingerprints obtained. He concluded there was a match to the left middle finger of Mr. Harrigan. He was informed that the latent print came from the right-side inner door glass of PB-151. Peer analysis of this finding was carried out by fingerprint analyst Hailey Noddings of the Royal Cayman Islands Police Service. She was provided with the same latent and comparison fingerprints, and reached the same conclusion as Officer Washington. Her examination was independent of any other fingerprint examiner. She was unable to speak to the age of the latent print she identified. She was also given comparison details for Vernon Bernard but nothing provided to her matched fingerprints for Mr. Bernard. She found three unidentified fingerprints that did not match either Mr. Harrigan or Mr. Bernard. Officer Washington received fingerprints from vehicles PL-630, PB-151, and PS-177. There were no matches to Ms. Rodriguez.

Fingerprints from PL-630 and PS-177 were not matched to Mr. Harrigan. No fingerprints from any of the 3 vehicles matched Mr. Bernard. He agreed that one cannot say when and how a latent print was deposited on a surface. Even if it looks fresh, one cannot say when a latent print was placed there. In sum, other than the single fingerprint from the door window of PB-151 matching Mr. Harrigan, no fingerprint or DNA results linked the defendants to these vehicles.

- [18] Vehicle PB-151 was owned by Neville Smith and serviced by Roland Allen. Mr. Smith purchased it in January or February of 2018. The vehicle was last seen on 20th February 2018 until it was recovered by police and the owner advised. Vehicle PS-177 was reported stolen by Curtis Smith on 28th February 2018. He resides across the street from Brandywine Bay Beach. He was awoken by the sound of the vehicle starting. He observed 3 people in black clothing drive away in it, at about 11:00 p.m. He could not identify the people. His vehicle was recovered later that day.

- [19] Firearm and toolmark expert Maurice Cooper examined the 18 cartridge cases recovered from the scene. Mr. Cooper concluded that 16 of the cartridge cases were fired from the same gun. The remaining 2 contained rust which hindered his examination. Those 2 cases could not be either included or excluded as having been fired from the same gun. All are high velocity rifle items. He also testified that there are more than 20 different types of firearms that could discharge this type of cartridge, including an AK47.

- [20] Search warrants were executed at the residences of Maybe Rodriguez, Raphael Harrigan and Vernon Bernard. A black coloured T shirt was recovered from the residence of Ms. Rodriguez, which she apparently wore on the night in question. Photographs were taken of a couch or furniture item, along with the floor tiles in the Harrigan residence. No firearms and no ammunition were recovered from any of the residences. The weapon used in this case was never recovered.

- [21] Martha Rodriguez is the mother of Maybe Rodriguez. She testified that her daughter left home at approximately 7:00 – 8:00 p.m. on 27th February, 2018. She went to sleep and awoke at approximately midnight or 1:00 a.m. She made several attempts to telephone her daughter. She was successful on one occasion but could only hear loud music. She was unable to conduct a conversation at that time. She next saw her daughter arriving home by taxi at approximately 6:00

a.m. on 28th February, 2018. She confirmed her daughter had been wearing a black CCT shirt that night and that morning.

- [22] Edmon Camillo testified that he often drove Maybe Rodriguez. Sometime after 5:00 a.m. on 28th February, 2018 he received a telephone call from Ms. Rodriguez, requesting that he pick her up. He drove to get her in Purcell Estate. She wore a black CCT shirt and blue jeans. He saw a man with her but could not identify him. He drove her home. That was the first time he had picked her up at that location and at that hour. Ms. Rodriguez was calm, relaxed and normal while she was in his presence.
- [23] Shamar Richardson was a friend of Ms. Rodriguez. They were together on 27th February 2018 from about 11:30 a.m. Ms. Rodriguez wore a black CCT shirt and blue short pants. They had lunch, shopped and went back to her house. He left her at approximately 8:00 p.m. that evening. Mr. Richardson knew Trumayne Daway as Passion. He knew Passion to work at a car wash. Mr. Richardson also knew someone known as Black Boy who worked at a different car wash.
- [24] D/S Moore was designated as an expert in communication data analysis. He examined the recent call list for a phone attributed to Maybe Rodriguez for the period 27th and 28th February 2018. He created a spreadsheet with the information. He also examined a Call Detail Record (CDR) for a phone attributed to Trumayne Daway. This listed all calls to and from that phone. He concluded that there were 3 phone calls on 27th February 2018 on Mr. Daway's phone record from the phone associated to Maybe Rodriguez. They appeared on the CDR record but not on the call list of the phone attributed to Ms. Rodriguez. Therefore, they had been deleted from that phone. The calls occurred at 7:30 p.m., 8:50 p.m. and 8:58 p.m. D/S Moore said that he could not say who deleted the calls and he could not say when the calls were deleted. The difficulty I have with this evidence is that the CDR provided to D/S Moore relating to the phone number associated with Mr. Daway was not admitted into evidence through either Augustus Pond or D/C George. If the matter proceeds, it would require jury instructions that would have an impact on the strength of that evidence.

- [25] D/S Bakker testified that he examined the phone belonging to Maybe Rodriguez. He was not designated as an expert. He discovered a series of messages in the form of a chat between the phone of Ms. Rodriguez and a contact known as Maya. In his cautioned police interview, Vernon Bernard confirmed the phone number associated with this contact was his number. He confirmed in his interview that he knew Ms. Rodriguez and was at some point in time involved in a relationship with her. That conversation also contained a video clip of what police say is an AK47 on a piece of material that police say is a couch in the residence of Mr. Harrigan. This series of messages is central to the Crown's case.
- [26] D/I Shortt confirmed police never ascertained who the person known as Black Boy was. He agreed there was nothing unique about the floor tiles in the video. They are common in Tortola. He agreed it is an entirely circumstantial case. He agreed it is possible to download videos from the internet and there were many possibilities as to how the video came to be on the phone. No expert analysis of the video nor of what was depicted as being the gun were conducted. No firearms expert reviewed the video and the image depicted. D/S Bakker said the couch and the floor tiles in the video were similar to that found in Mr. Harrigan's residence. He at first described the tiles as white and then changed to off-white. The item shown in the video is part of something that is similar to the couch seen in the search. D/S Bakker could not say if the gun in the video was an imitation or a toy. Although it appeared real, he was not an expert. D/I Shortt could also not confirm if the gun portrayed was a toy or real, although in the context of the investigation, he believed it to be real. He could not say if it was capable of firing.
- [27] I have attempted to review the evidence in this case in some detail because I think it is important in fully analyzing the no case submission. I begin with count 2, the charge of possession of a weapon with intent to commit an indictable offence, more specifically, possession of an AK47 firearm with intent to commit murder. This charge is under **s. 27(B) of the Firearms Ordinance CAP 126**. This flows from the **Firearms (Amendment) Act 1993**, which in turn updates the original legislation, **the Firearms Act CAP 126**. This last act defines a firearm under **s. 2** as any lethal barreled weapon of any description from which any shot, bullet or other missiles can be discharged or any weapon that is so designed or can be adapted for such discharge. It does not include any air gun, toy gun or antiquarian gun. A similar definition is found in the **Firearms and Air Guns Act**. That definition

clearly indicates a requirement for expert testing of the object or evidence from someone familiar with the weapon who saw it in use, in order to ensure its compliance with the definition.

[28] This approach was confirmed in the **Merton** case noted above. The Crown must prove that the object is a lethal barrelled weapon. Note the term lethal. The obvious conclusion is that the weapon is capable of causing death or injury from which death may result. It must also be proven that the object is capable of discharging a shot. Where no witness is produced to say that she saw the weapon being fired and where the firearm is not produced in evidence because it was not recovered, and therefore the court does not receive the benefit of expert opinion evidence, how can the court be satisfied that the defendant was in possession of a firearm? The court in **Merton** referred to **R v Jarrett, R v James, R v Whyllie**⁸ where, at **para 39**, the court indicated there was evidence that Mr. Wiley discharged a weapon referred to by a witness as a gun. As a result of the discharge, a bullet entered the deceased's brain, resulting in death. There could be no doubt therefore that the weapon was a firearm within the associated definition. That definition is similar to the one found in this territory.

[29] Principal Crown Counsel submits that without expert evidence pertaining to the object seen in the video retrieved from the phone of Maybe Rodriguez, it is sufficient to rely upon the evidence of the pathologist, Dr. King, as to the death of Trumayne Daway being caused by high velocity projectile rounds. This submission would be attractive, were it not for the dates cited in the indictment and the evidence tendered. The indictment alleges the murder of Mr. Daway occurred on 27th February 2018, count 1. The evidence tendered points toward the death occurring on the night of 27th February. However, the Crown has particularised the charge of possession of a weapon, count 2, to have occurred between 12th February and 17th February 2018. The prosecution is therefore clearly referring to the video recording of the item alleged to be an AK47 being the weapon the defendants possessed. As such, there is no nexus between those two events and the Crown cannot rely upon the cause of death and the facts surrounding the injury causing death to support possession of the weapon some 10 – 15 days later. The dates are entirely different. We therefore must return to the need to establish the item as a firearm as defined in the legislation.

⁸ JM 1975 CA 55

- [30] If I understood the submissions correctly, Principal Crown Counsel also referred to a deeming provision found at **s. 12A of the Firearms (Amendment) Act 2006** which states that the occupier of any house or premises in which any air gun is found shall be deemed to be the owner or keeper of the air gun. However, the difficulty with this contention is that it refers to air guns and the finding of air guns, not firearms. In this case, although the submission is that the weapon was located at the residence of Mr. Harrigan, when the video was recorded, based on some floor tiles and from fabric or upholstery, the weapon was never actually found. Therefore, this provision is of no assistance in determining the issue.
- [31] The court also accepts and is guided by the reference to **B12.107 of Blackstone's Criminal Practice 2020 edition** that if all that can be shown is possession in the sense that it is in a person's house or somewhere else where the person has ultimate control, that is not enough to establish possession.
- [32] In this case, the evidence of police officers who viewed the video and offered opinions that it depicted an AK47, is insufficient to satisfy the required terms of the charging legislation. Elements of the offence that must be proven include that the object was a firearm, specifically in this case an AK47. To do that, the Crown must prove the object was a lethal barrelled weapon capable of discharging a bullet. Merely looking like an AK47 is not sufficient.
- [33] For all of these reasons, I uphold the no case submission for both defendants, Harrigan and Bernard, with regard to count 2.
- [34] Turning to count 1, the murder of Trumayne Daway by the defendants, Rodriguez, Harrigan and Bernard. This appears to be a case based solely on circumstantial evidence. The Crown and even the investigating officer agree on that. There is no eyewitness evidence. There is no forensic evidence save for the fingerprint of Mr. Bernard found on a vehicle discovered at the scene. There is no evidence as to when that vehicle arrived at that location. No fingerprints or DNA from any of the defendants, except for the one fingerprint noted, were found on any of the vehicles. The murder weapon was never found. No guns or ammunition were discovered during the search of the residence of each defendant.

- [35] The theory of the Crown's case is that Mr. Bernard asked Ms. Rodriguez to lure Mr. Daway, perhaps with the offer of romance, to Brandywine Bay Beach, where he shot Mr. Daway to death with an AK47. Mr. Harrigan was present to apparently drive all of them away from the scene. However, the vehicle failed to start and the defendants stole another vehicle from a nearby residence. The evidence tendered must support this theory.
- [36] Dealing with Mr. Harrigan, the fingerprint experts confirm that there is no way of telling how that fingerprint got there and no way of saying how long it had been there. Principal Crown Counsel submitted that there is precedent for the conviction of someone based on a single fingerprint. She cited the case of **R v Michael Gayle**⁹. However, in my view, that case can be distinguished from the case at bar. In **Gayle**, the fingerprint was located on a broken window in a house. It was submitted that this was the point of entry for a burglary. Evidence showed that the window had been cleaned two weeks earlier, thus establishing a possible time period for the placing of the fingerprint. Evidence from a family member showed that, although the defendant was known to her, she had never seen him visit the house. In the case at bar, expert evidence confirmed that fingerprints can remain in place for a very long time. The owner of the vehicle and the mechanic were not asked about Rafael Harrigan, whether they knew him and whether he had ever had contact with the vehicle. They were also not asked about the cleaning of the motor vehicle since its purchase in January or February of 2018. For these reasons, the value of the fingerprint evidence in this case is significantly less than the value of the fingerprint evidence in the **Gayle** case.
- [37] I am also troubled by the video recording, which police say depicts an AK47 on a couch in the residence of Mr. Harrigan. I have looked closely at that video clip. It cannot be said nor inferred that the gun is on a couch. Not enough material is showing. The brief panning of the camera reveals floor tiles. But there is nothing to infer that the tiles are in any way unique. Indeed, D/S Bakker variously describes them as white and off-white. Even to compare the fabric in the video with the couch is difficult. The exhibit photographs 6 and 7 of the couch do not get close enough to show fabric detail to compare to the video. In reviewing this evidence, I make no comment on the strength of it but rather seek to clearly describe the evidence that will be considered. There is no evidence relating to the object in the video as being used in the murder. The firearms expert said the cartridge

⁹ [1996] UKPC J0612-1

cases at the scene could be used in an AK47 and many other firearms. Mr. Harrigan is not named in the text messages between Ms. Rodriguez and Mr. Bernard. The fingerprint and the video constitute the extent of the evidence against Mr. Harrigan. There is very little else. I therefore ask myself, even if that evidence is accepted and the most favourable inferences open to the prosecution are made, could a reasonable mind reach a conclusion of guilt beyond a reasonable doubt? I do not think so.

[38] The most salient elements for the charge of murder that the Crown must prove are an intention to cause death or grievous bodily harm by the commission of an unlawful act. The unlawful act in this case must be the discharge of a firearm. But there is no evidence that any of the defendants discharged a firearm. Is there evidence from which an inference of such a discharge can be drawn? We know Mr. Daway was killed by a high-powered firearm. We know, or at least it appears, that Mr. Bernard sent a video of a high-powered firearm to Ms. Rodriguez. Can it be inferred from that video and the words of the messages that Mr. Bernard was in possession of a high-powered firearm? There is no proof the gun was real and met the definition of a firearm. There is no proof of Mr. Bernard nor Ms. Rodriguez being at the scene nor being in any of the vehicles at the scene nor being in the third vehicle. There is insufficient circumstantial evidence, in my view, that is capable of producing such an inference, and if there is, it is extremely tenuous. There is no basis, it seems to me, to even infer that they were there. And again, if there is, it is extremely tenuous. The fingerprint of Mr. Harrigan is difficult to base a firm inference that he was there upon, given that it cannot be dated or given an estimated age. There is also no basis to infer that any of these defendants wished to cause death or grievous bodily harm to Mr. Daway, although there is of course no requirement to prove motive. The closest we come to identifying a target for grievous bodily harm or death is someone known as Black Boy.

[39] The strongest evidence for the Crown is the text messages and the video contained therein, which I have already referred to. However, we must examine the dates and the words used. The messages begin on **12th February 2018**. On page 9, "I buyin a machine...\$2,500" and a picture of folded bills on a surface. Page 11, "Them is the AK looking one? Yea I goin show u wen I geh it." Page 12, "Noting the pic you send that aint by you. By another house I does Ben. Be. My parna." Then on **16th February 2018** on page 13, "My new baby." Followed by the video of a gun. Then on **19th February**

2018 on pages 19 – 21, “All 2nite good. Parna don’t press u no more. No. OK. I wan u do me ah favor. Tell me. U remember when Parna. Tryin diss me. Buh he wan take u out n ting. **Black Boy**. U lost? Your parna. Yea. Yeah. He does still press. Ohh wen he the see me yeah I the passing straight. **I wan him badd men**. I just gah walk pass **by the car wash** n geh he number n take he somewhere. OK I love you. **You wan me do it 2day? Yea**. I wan call you. N show u how to do it. Okay call.” (Emphasis added) The copied messages between these parties go on to **21st, 23rd, 24th February, 2018** and to **Wednesday and Thursday undated** but all contain no relevant content. These messages name only one-person, Black Boy, and refer to a car wash. The gun is depicted on **16th February** but the phrase “I wan him bad” appears in relation to Black Boy on **19th February**. The reference to wanting it done that day also refers to **19th February**.

[40] The difficulty that I have with this evidence is that it makes no mention of Passion. In fact, no evidence in this case relates to causing harm to Passion. The text evidence refers to Black Boy and although a video of a gun appears in the chat, it does not appear on the same day as the phrase “I wan him bad.” The chat also refers to wanting it done on 19th February. The killing of Passion occurs on 27th February, 2018. The concern that I have with this evidence is how it relates, if at all, to the required elements of intention and the unlawful act being the shooting. Defence Counsel submit there is no nexus and congruence between this conversation and the event nor this conversation and any relation to Trumayne Daway. Defence Counsel submit that the conversation and the references are vague and if not innocuous, then they do not rise to a level necessary to prove an intention to cause death or grievous bodily harm, specifically to Trumayne Daway. It would call for the jury to speculate not infer. I agree.

[41] As to the death of Trumayne Daway, Crown Counsel seek to infer from the evidence that all three of these defendants acted together to cause his death. Defence Counsel submit that an equally plausible inference from the evidence is that the death occurred during a robbery, since most of the valuables of Mr. Daway were not recovered. While that may be true, do we reach the stage where the jury should consider those competing inferences? Defence Counsel submit that even the most favourable inferences do not support the Crown’s case and conclude guilt. Although I note that **s. 148 (3)** indicates that malice aforethought is deemed to be established by evidence proving an intention to cause the death of or to do grievous bodily harm to any person, whether such person is

the person actually killed, I struggle to find that the evidence reaches that level, such that a reasonable jury properly instructed could so conclude. I agree that the content of the text messages is vague and it certainly does not mention Passion. There appears to be no connection of the video of the gun one day to a wanting of someone bad three days later. And there is no connection to a totally different person who died 8 days later. I am unable to hold that such circumstantial evidence is capable of producing in a reasonable mind the necessary inferences.

[42] Crown Counsel submits that the jury can somehow infer from the content of the chat that the parties are speaking about harming Passion. She submits that the parties are speaking in a code and it would be reasonable for the jury to think they are communicating in code about Pasion. I cannot accept that. I find that there is no evidence of any code and no evidence of a need for a code to be used by the parties. If there was a code, there is certainly no evidence of what that code was and what it means. All of this would merely invite the jury into the realm of speculation, which must be avoided.

[43] This is a very serious case that I have pondered and reviewed at length. I instruct myself on both limbs of the **Galbraith** test. I am careful to avoid taking a position on whether it would be safe to convict on the evidence tendered as outlined in the **CPS v F** case noted above. The evidence in this case is weak. There can be no doubt about that. However, I must not seek to usurp the function of jury. In considering the first limb of the **Galbraith** test, I must determine whether the elements of the charge of murder are made out. The Crown must prove that there was an intention to cause death. The only significant evidence of that must surely come from the recorded text messages. The Crown submits that the depiction of an AK47 coupled with suggestive words fulfills that requirement. However, I am not satisfied in that regard. The video is sent on 16th February. It is not until 19th February that the message "I wann him badd" is sent. The words are not "I want him dead." Whether it is Passion (who is not mentioned) or Black Boy, the words, combined with the gap in time between the video and the words, and between both the words and the death of Trumayne Daway, cannot be taken to prove that essential element of the offence and I find that no reasonable jury properly instructed could reach that conclusion. Furthermore, when considering the evidence as a whole, I cannot see that the essential element of intent is made out elsewhere in the evidence. Overall, when I assess all of the circumstantial evidence in this case, as I have outlined above, I find it to be so

tenuous that I must come to the conclusion that even if all of the evidence were accepted and all of the inferences most favourable to the prosecution were made, a reasonable mind could not reach a conclusion of guilt beyond a reasonable doubt for each of the defendants.

[44] For all of these reasons, I uphold the no case submission on count 1 for each of the defendants.

Richard G. Floyd
High Court Judge

By the Court

Registrar