

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. SLUCRD2014/1272,1273,1274,1275

THE CROWN

vs

1. TIMOTHY DESMOND
2. SAMUEL KHODRA
3. DANIEL KHODRA
4. DYLAN EDMUND

Defendants

Appearances: Ms. Kelly Thomson together with Chanika Carrington Counsel for the Crown
Mr. Huggins Nicholas Counsel for the First Defendant, Timothy Desmond
Mr. Jeannöt-Michel Walters Counsel for the Second Defendant, Samuel Khodra
Mr. Lorne Theophilus Counsel for the Third Defendant, Daniel Khodra
Mr. David Moyston Counsel for the Fourth Defendant, Dylan Edmund
The Defendants present

2022: April 4

DECISION ON A NO CASE SUBMISSION

- [1] **TAYLOR-ALEXANDER J;** The Crown's case presented to a jury at the murder trial of Ulanda Frederick is that Timothy Desmond, Samuel Khodra, Daniel Khodra and Dylan Edmund in a joint enterprise killed Ulanda Frederick by violently shooting him multiple times in a footpath at Leslie Land in the city of Castries on the 1st of July 2014. The Crown's evidence coming from an alleged eye-witness is that Timothy Desmond and Samuel Khodra were the principal parties and were both brandishing guns that was used to shoot the deceased. The Crown says that evidence of the surrounding circumstances establishes that the principal parties were assisted in this enterprise by Daniel Khodra and Dylan Edmund, the secondary parties, who provided force of numbers.

- [2] At the close of the Crown's case on the 31st of March 2022, the Defendants Daniel Khodra and Dylan Edmund submitted that the evidence adduced by the Crown showed nothing of a crime being committed by either of them and consequently there is no case for them to answer to.
- [3] Specifically, the Defendants submit that the Crown's case is at best tenuous and that none of the references to them by the Crown's witness establishes any criminal conduct on their part or that they were part of a criminal enterprise. There is no evidence of an agreement between the parties; no evidence of a plan to execute the killing; there is nothing in the Crown's evidence to suggest that these Defendants by their presence encouraged the shooting. The Defendants reminded the court that mere presence at a scene is not enough to suggest a person is part of a criminal joint venture. The Defendant relied on the cases of **Cpl Montoute v Delvin George** Case No. 0014/2007 (unreported), a high court decision out of St .Lucia on a sufficiency hearing, in support of this submission and on the case of **Ferguson v Weaving** [1951] QB 814 in support of their further submission that even if the Crown proved that these Defendants were present at the scene, a failure to stop the other two Defendants from committing a criminal act cannot in itself make the them guilty of procuring or assisting in the criminal enterprise.
- [4] The Secondary Defendants asks that they be discharged as Defendants.
- [5] **R v Galbraith** (1981) 2 All ER1060, is the well-established common law authority on how a judge should approach a no case submission. The dicta of Lord Lane CJ explains the approach succinctly. He said:-
- 1) *If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will stop the case.*
 - 2) *The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*

a) *"Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*

b) *Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. "*

[6] Both Defendants rely on the first limb of **Galbraith**.

The Relevant Evidence of the Crown

[7] The Crown's evidence on the secondary parties comes from parts of the evidence of Nicole Hippolyte which the Crown says when construed in the round reveals the conspiracy for the criminal enterprise. Nicole Hippolyte's evidence is that in 2014 she lived in Leslie Land area. She had lived there for a few years. She knows Timothy Desmond and knew him prior to 2014 as she would see him when she was passing to and from work. She also knows Samuel Khodra. In 2014 she did not know him too long she would see him when she was passing by on her business she knew him to have an alias "Fries". She also knows Daniel Khodra whom she knows by his alias "Bolom". She knew him from when she was passing by on her business. She also knows Dylan Edmund known as "Shatto" from when she was passing on her business. She was in the business of hairdressing and she was a roving hairdresser.

[8] On the 1st of July 2014 at 8:10 pm, she was in the Leslie Land area and was walking along an alleyway toward the Marian Home. While walking along the alleyway she heard a door slam. She noticed that there was someone approaching her. She recognized the person as the deceased Ulanda Frederick coming along the alleyway toward her from its entrance near the Marian Home. As Ulanda approached, she heard someone say "nice girl" from behind her she saw that it was Timothy Desmond. She then heard whistling behind her which alerted her. She noticed somebody push her, she fell on the pavement. It felt like a gutter. It was

Samuel Khodra whom she knows as Fries. Timothy Desmond said to her "if you talk you will die". Shortly after, Ulanda was shot. Nicole Hippolyte says she saw four to five people. She recognized them. It was Timothy, Fries, Dylan and Bolom. Timothy was three to five feet away from Ulanda. She saw two guns one black and silver and the other a plain black gun. Fries had a black and silver gun and Timothy had a plain black gun. She saw Ulanda get shot by two guns and two shooters. She does not recall who shot first. Bolom who is Daniel Khodra and Dylan Edmund were behind Timothy and Fries. All of them had black clothes on. She cannot recall the color of the rags on their faces but they had rags on their faces. She was not far from them. She could see the fire from the gun and smell the gunpowder. She says it was not long after she saw Ulanda, that she saw the four to five persons. Everything happened in the spur of the moment.

- [9] She said Timothy Fries and Bolom were wearing the same clothes from what they were wearing earlier that day when she saw them. Earlier that day, before the shooting Fries asked her to buy him a pack of cigarettes, Timothy questioned her as to whether she was going to be passing back and she said yes. That was not the first time she had seen them that night she had earlier seen them where she passed where she would normally see them. The first location where she saw them is a couple of blocks away from where Ulanda got shot. She saw them there about after 1:00 PM or so. She says all how she passed she would see them. She says when she saw them before Ulanda got shot they were drinking. After Ulanda was shot, he fell on his face and the shooters and them went towards the bridge side.
- [10] Relevant to the case, were photographs of the scene of the shooting which was evidence in the case and a "walk through video" which though not evidence assisted in giving the jury a visual appreciation of the location.
- [11] The prosecution contends that the secondary Defendants' guilt is proven by the drawing of certain inferences from circumstantial evidence taken from the evidence of the eyewitness Nicole Hippolyte. All the pieces of evidence when assessed in the whole leads to the irrefutable conclusion that the secondary Defendants intended to and caused the death of Ulanda Frederick under the joint liability principle.
- [12] Blackstone's Criminal Practice 2019 at paragraph D 16.65 provides guidance on the proper application of the Galbraith test in cases based upon inferences drawn from circumstantial

evidence. It provides that the question is whether it is properly opened to the jury to reach the inferences contended for by the prosecution. In **Goddard** [2016] EWCA Crim 1756 Aikens LJ stated the position thus:-

"We think that the legal position can be summarized as follows; (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the classic or traditional test set out by Lord Lane CJ. in Galbraith. (2) Where a key issue in the submission of no case to answer, is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does not involve the rejection of all realistic possibilities consistent with innocence. (3) however, most importantly the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference; if a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence putting the prosecution's case at its highest, the case must continue, if not it must be withdrawn from the jury".

The Criminal Code of Saint Lucia on Joint Liability

[13] The only guidance on joint liability in the Criminal Code is at Section 53 under the rubric **"Several Persons Causing Event"** it provides:-

- (1) *Where an event is caused by acts of several persons acting either jointly or independently, each of those persons who has intentionally, recklessly or negligently contributed to cause the event shall, subject to the provisions of Part 4 of this Chapter, be deemed to have caused the event.*
- (2) *Any excuse or justification applicable in respect of any one of those persons shall be applicable to any person regardless of whether such excuse or justification is applicable in respect of any of the other persons.*

[14] Section 53 is not inconsistent with recent developments in the Common law set out in the UK Supreme Court and Privy Council decisions of **R v Jogee**; **Ruddock v The**

Queen which provides guidance on the appropriate the state of mind required for the formation of a joint enterprise, in accordance with the common law principles. The dicta of Gibbs J in **Stuart v The Queen**, was cited with approval in the **Queen v Jevone Demming** BVIHCRA2015/000 in relation to the co-existence of concepts within a Criminal Code and the common law. He said :—

*"[It] does not mean that it is never necessary to resort to the common law for the purpose of aiding in the construction of the Code it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground: see **Robinson v. Canadian Pacific Railway Co.** [1892] AC 481, at p 487, cited in **R. v. Scarth** [1945] St. R. Qd. 38, at p 44. If the Code is to be thought of as 'written on a palimpsest, with the old writing still discernible behind' (to use the expressive metaphor of Windeyer J. in **Vallance v. The Queen** (1961) 108 CLR 56, at p 76), it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance."*

[15] I find the provision of the St. Lucia Criminal Code to be consistent with the restated Common law position in **Jogee** and the common law is useful to explain the application of Section 53.

[16] In **R v Jogee [2016] UKPC 7**, at para 1, the Privy Council succinctly explained the legal principle of joint enterprise under the common law. The board found:-

"..In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence..."

- [17] **Jogee** requires a finding that a secondary party to a joint enterprise must intend to encourage or assist the principal to act with the particular intent required for the commission of the offence. This is not inconsistent with the requirement of section 53 of the Criminal Code.
- [18] According to **Jogee** in cases of alleged secondary participation there are likely to be two issues. "The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms, it may include providing support by contributing to the force of numbers in a hostile confrontation. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1... If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent."
- [19] The important learning from **Jogee** on the intent of a secondary party as it relates to this case is this. An association between a principal and secondary party may or may not involve assistance or encouragement. The same is true of the presence of a secondary party at the scene when principal party perpetrates the crime. Both association and presence are likely to be very relevant evidence on the question whether assistance or encouragement was provided. The board found that numbers often matter and should not be discounted. "Most people are bolder when supported or fortified by others than they are when alone". Further, once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on the principal's conduct or on the outcome.
- [20] The Defendants have asked that I assess each individual piece of evidence referenced by the eyewitness about Daniel Khodra and Dylan Edmund, and in doing so the only logical conclusion would be that the crown's evidence taken at its highest only establishes the presence of these Defendants at the scene but with no criminal intent.
- [21] I disagree. I am required to take each piece of evidence yes but I am obligated to assess it in light of all of the surrounding circumstances and circumstantial evidence to determine

whether all of this evidence would allow a reasonable jury to form the same conclusion that the crown has asked can be formed.

[22] I have therefore assessed the crown's case at its highest as follows:-

- That the Defendants were seen together earlier that day this evidence satisfies me that the defendants were known to each other and were in fact friends;
- That the Defendants was seen earlier that day congregating in an area very close to where the crime eventually took place, the photograph evidence and the visual walk through establishes that the location where the offense took place is not a location that allows for congregating it is a narrow footpath, and
- The Defendant's presence there would suggest that they were there for a particular purpose.
- the Defendants were earlier seen all dressed in black; That at the time of the offence, they were seen similarly dressed but this time all with rags covering their faces.
- That at the time the deceased was shot by the two shooters, the evidence of the eyewitness was that the shooters were in front on that footpath with the secondary parties standing behind;
- The eyewitness says but when she saw the deceased approaching in her direction she heard a whistling sound from behind her which alerted her. She was pushed down to the ground by one of the principal shooters.
- All four defendants were there at that time.
- That after the shooting all of the Defendants left in the same direction.

[23] Having assessed this evidence I have no doubt that on the authority of Goddard, a reasonable jury properly directed can find it from these bits of circumstantial evidence that the defendants, not only by force of numbers, but also by the other relevant circumstantial evidence referred to above can reach the conclusion of a joint criminal venture, with the required shared mental element.

[24] In the circumstances I reject the submission of Daniel Khodra and Dylan Edmund, and find that there is a case for these Defendants to answer to.

[25] I wish to thank counsels for the Defendants Mr. Theophilus and Mr. Moyston and the counsels for the Crown Ms. Thompson and Ms Carrington for their assistance and guidance on the relevant case law to which I had regard. It is those cases that have satisfied me of the correctness of my ruling.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT JUDGE

BY THE COURT

A handwritten signature in black ink, appearing to be 'J. M. Taylor-Alexander', written in a cursive style.

Dp. REGISTRAR