

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

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

CRIMINAL CASE No. 4 of 2016

BETWEEN:

THE QUEEN

Applicant

and

ANDREAS NORFORD

Respondent

Appearances: Mrs. Tiffany R. Scatliffe Esprit, DPP & Mr. Kael London, Crown Counsel, Counsel for the Applicant /Crown
Mr. Sherfield P. Bowen & Ms. Ruthilia Maximea, Counsel for the Respondent/Defendant

2021: November 24th

RULING 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, it appears, is the one to be considered in this case. That is, where there is some evidence, but the 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.

¹ 73 CR. APP. R.124

- [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 principle underlying No Case submissions is set out in **Archbold Criminal Pleading, Evidence and Practice 2015 at 4-364**:
- A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict. In such a case, a directed verdict must be taken from the jury.
- [5] The Court received electronic copies of the submissions of Defence Counsel on 22nd November, 2021 and electronic copies of the submissions in response, along with authorities, from Crown Counsel on 23rd November, 2021. Hard copies of those submissions, along with authorities from both parties were received by the Court this morning.

The Positions of the Parties – Defence Counsel

- [6] Learned Defence Counsel in his submissions emphasizes that while 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 and the case must therefore be withdrawn.
- [7] He contends that there are theories that link more than one person to the crime. Specifically, the person known as Thirteen. The statement of David Springette (now deceased) was referred to in the evidence of Officer Shortte. Defence Counsel submits that the evidence shows Thirteen was arrested more than once. Clothing found during a search of Thirteen's residence was similar to that described by Mr. Springette as being worn by Thirteen at the time of the incident. Mr. Springette's

statement places a gun in the hand of Thirteen and shooting towards Melbourne Francis. Four loud explosions are heard and Thirteen is seen running from the area.

- [8] Defence Counsel emphasizes that Officer Shortte confirmed no testing was done on the clothing for gunshot residue. The whereabouts of the clothes are now unknown. Thirteen's cell phone was examined but no report was provided. Thirteen was related to a police officer with the RVIPF.
- [9] Defence Counsel contends that Officer Taylor avoided giving clear answers about the examination of Thirteen's phone, if any such examination took place.
- [10] Therefore, Defence Counsel submits, although Officer Shortte testified that Thirteen was eliminated from the police inquiries as a suspect, there is no clear evidence as to why that occurred.
- [11] Defence Counsel contends that the witness, Lenin Joseph, is unreliable as he admitted to being offered \$10,000.00 and a gun by Woody to kill Melbourne Francis. After the death of Mr. Francis, during a discussion between Lenin Joseph and Woody, a comment is made as to the job having been done. Furthermore, Defence Counsel contends that it is significant that Officer Shortte confirmed that Lenin Joseph was never spoken to under caution.
- [12] Defence Counsel also contends that the issue of identification is not made out nor satisfied by the evidence presented. He describes the identification by Lenin Joseph of the Defendant as being an "in-dock identification" because there is insufficient evidence of any association between Mr. Joseph and the Defendant and a lack of knowledge of the Defendant by Mr. Joseph.
- [13] Defence Counsel points to contradictions between the evidence of Lenin Joseph regarding the shots fired by the Defendant with what is found in the autopsy report as testified to by Dr. Lew. Testimony from Lenin Joseph refers to 3 shots to the chest and 1 in the neck, while the autopsy concluded 2 shots to the neck, and 3 more shots, 1 to the elbow, 1 to the hip and 1 to the thigh. This leaves aside the audio recordings of the Defendant describing the shots fired.

- [14] Finally, the learned Defence Counsel referred to the reasons that the case officer managing the file, Officer Shortte, led him to believe that it was the Defendant who was responsible for the murder of Melbourne Francis. The officer referred to the audio recording of the Defendant and comments such as the route taken to the scene and away from the scene as being confirmed by other witnesses observing the shooter. The audio recording referring to shots to the head and the use of a 9 mm Ruger. Defence Counsel submits the autopsy report and the ballistics report do not support those comments. The autopsy report referred to shots to the neck and elsewhere and the ballistics report and evidence confirmed that over 250 models of firearms could fire the bullets related to the seized shell casings. This leaves aside the comment in the statement of David Springette that the shooter came through the alley and passed in front of him. That compares to the audio recording wherein the Defendant refers to coming through the alley, looking at Mooney (Mr. Springette) and passing in front of him.
- [15] Defence Counsel therefore concludes that the evidence is tenuous and any conviction based upon that would be unsafe and indeed wrongful. He chides the prosecution for pursuing a conviction on this basis and submits that fundamental fairness to the Defendant demands that the case be removed from the jury.
- [16] During oral submissions, Defence Counsel referred to the case of **R v Shippey**². Although no copy was filed with the court, Defence Counsel referred to the definition of tenuous as it relates to no case submissions found therein.
- [17] Defence Counsel also referred to an American legal publication for Defence Attorneys known as "Champion." Although no copy was filed with the court, Defence Counsel directed the court to an article referring to the Justice Project and a passage indicating that false testimony by incentivised witnesses was the leading cause of wrongful convictions. Defence Counsel submitted that the witness, Lenin Joseph, should be regarded as such a witness.
- [18] A number of other authorities were submitted by Defence Counsel in support of their position.

² [1988] CRIM L R 767

The Position of the Parties – Crown Counsel

- [19] Learned Counsel for the Crown submits that neither limb of the **Galbraith** test is satisfied, such that the case should be removed from the jury. The issues raised by Defence Counsel as to the evidence of the witnesses, Officer Taylor, Dr. Lew, Lenin Joseph and Officer Shortte, all involve credibility and as such, should be left with the jury for their determination. There is indeed one view of the facts such that a jury, properly instructed, could return a guilty verdict. Further, there are reasonable inferences that a jury might make in leading to that conclusion. If there is one inference of guilt, then the case must be left with the jury.
- [20] With respect to the issue of identification, Crown Counsel submits that the test in **R v Turnbull** should be applied and the evidence left with the jury. It is submitted that it is a matter of voice recognition, calling for the jury to consider whether the evidence of Insp. Shortte satisfies them in that regard. It is not simply a matter of insufficient evidence and therefore the removal of the case from the jury. Similarly, the evidence of Lenin Joseph must be considered in the identification of the Defendant as he was present during the conversations and so testified as to what the Defendant said. All of that is for the jury to decide. The case should be left with the jury and an appropriate **Turnbull** warning given to the jury.
- [21] Crown Counsel pointed out that there is no requirement to caution a witness, as Defence Counsel submits.
- [22] Crown Counsel also took issue with the position of Defence Counsel that the Crown was not desirous of seeking the truth and was unfairly pursuing a conviction. Crown Counsel pointed out the submissions made to limit any possible evidence being elicited from Insp. Shortte that might lead the jury to conclude the Defendant had been involved with the police previously. Further, the audio recordings and transcripts were redacted and edited to remove any inappropriate or prejudicial material that would adversely affect the Defendant and his case in the eyes of the jury.
- [23] Crown Counsel submitted that the reference by Defence Counsel to the article in the “Champion” publication was not helpful as it pertained to the American justice system and convictions stemming from what might be described as racist or biased procedures. That was not the case here nor in this

region generally. Furthermore, there was no evidence of Lenin Joseph being motivated with an incentive. He clearly testified that he received no reward and was not even aware of any reward in this case.

[24] A number of authorities were submitted by Crown Counsel in support of their position.

The Law

[25] 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 offense, 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 offense, then the case should continue before the jury.

[26] Leaving aside the apparent admissions made by the Defendant in the covertly recorded conversations with Lenin Joseph, this case rests heavily upon circumstantial evidence. For that reason, the case of **DPP v Selena Varlack**³ is important. 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 of inferences. Could a reasonable jury properly instructed conclude that the defendant was guilty? Could a reasonable jury, on one view, properly draw inferences as contended by the prosecution? It is not the judge's concern that the guilty verdict may be set aside upon appeal as being unsafe. A judge must decide upon a basis that the jury will draw inferences reasonably open to them and favourable to the prosecution. The fact that one reasonable inference is consistent with innocence does not mean the case must be stopped. It is not the function of the judge to choose between inferences which are reasonably open to the jury.

[27] Furthermore, as to cases involving circumstantial evidence, I am guided by the case of **Malcolm Maduro v The Queen**⁴. 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

³ (BVI) (2008) UKPC56

⁴ ECSC CA HCRAP 2007/004

reasonable inferences from the evidence that is given at the trial. The question then is, whether a reasonable jury may, on one view of the evidence, convict the accused. If so, even if another view of the circumstances thrown up by the evidence may be consistent with innocence, the judge should not withdraw the case from the jury.

Analysis

- [28] Having reviewed the written submissions of both parties and listened to oral submissions this morning, what follows is the decision of the Court in this matter.
- [29] There is no direct eye witness evidence in this case linking the Defendant to the crime. The Crown relies upon the covertly recorded utterances made by the Defendant confirming that he shot the victim, combined with other evidence which the Crown says confirms those utterances. Although the strongest evidence comes from the recorded conversations between the Defendant and Lenin Joseph, as well as the testimony of Lenin Joseph himself, the Crown's case relies upon a combination of evidence.
- [30] The witnesses, D/S Etienne, D/I Ballantyne and Insp. Shortte all attended at the Stickette, Long Look, East End on the night of 9th May, 2013. They were there as a result of a shooting. The area had been cordoned off with police tape. A man, later identified as Melbourne Francis, had been shot dead. D/S Etienne took photographs of the scene that day and the next day in daylight. D/I Ballantyne collected items including cartridge shell casings ejected from a fired gun and lead fragments. Insp. Shortte canvassed the crowd of onlookers and the next day he canvassed homes in the area, looking for witnesses.
- [31] The deceased person was formally pronounced dead by Dr. Hastings, who was designated as an expert in general medicine, at 22:10 (or 10:10 PM) on 9th May, 2013.
- [32] The deceased, Melbourne Francis, was formally identified by his mother, Eileen Dunning. Although she went to the Stickette on the evening of 9th May, 2013 because she had received the bad news that her son was dead, it was not until she attended at the local hospital on 18th May, 2013, that she

identified the body of Melbourne Francis to the attending forensic pathologist, Dr. Hyma, prior to the autopsy being conducted.

- [33] Dr. Hyma produced an autopsy report detailing his findings in this case. Unfortunately, Dr. Hyma subsequently passed away, therefore, one of his colleagues, Dr. Lew, testified about the autopsy Dr. Hyma performed upon the body of Melbourne Francis on 18th May, 2013. Dr. Lew was designated as an expert in forensic pathology. She confirmed that x-rays taken of the body confirmed metal density, which is common in cases of gunshot wounds. Most importantly, Dr. Lew testified about 5 main injuries described as gunshot wounds.
- [34] The first was to the right side of the neck below the ear and jaw. Portions of a projectile were recovered. The path of the wound was right to left and slightly front to back. The projectile severed the spinal cord, causing paralysis and bleeding. This was a fatal injury. The second gunshot wound was close to the first. It was on the right side of the neck below the jaw angle. The projectile shattered the right side of the jaw and struck the bottom of the skull, exiting the body through the left ear lobe. It would have had a concussive effect on the brain and caused bleeding into airways and lungs. The path of the projectile was right to left and front to back. This injury may not have been fatal with immediate medical attention. The third gunshot wound was to the right elbow. It fractured the forearm bones. The path of the projectile was back to front, right to left and slightly upwards. The fourth gunshot wound was to the right hip, below the pelvis. The projectile path of travel was right to left, back to front and upwards. The fifth gunshot wound was to the left inside thigh. The path of travel of the projectile was right to left, front to back and upwards. Gunshot wounds 3, 4 and 5 would not have been fatal.
- [35] Although she was unable to say what position the body of the deceased was in at the time of the shooting, Dr. Lew concluded that the position of the gun at the time of firing was on the right side of the victim. Further, because there was no gunpowder or stippling to the wounds, there was no indication the gun was within 2-3 feet of the victim at the time of the shooting. Therefore, the gun was beyond 2-3 feet from the deceased causing indeterminate range gunshot wounds.

- [36] Dr. Lew testified that the victim had no other natural condition or disease that contributed to his death. The conclusion of the autopsy was that the cause of death was multiple gunshot wounds.
- [37] The shell casings and lead fragments obtained by D/I Ballantyne were handed over to P/C Forbes Washington for transport to the USVI police for examination. That hand over took place on 29th May, 2013.
- [38] 4 shell casings and 2 lead fragments were examined by Maurice Cooper, who was designated as an expert in firearms identification. In 2013, Maurice Cooper was working on contract with the USVI Police Service in St. Croix. There was a Memorandum of Understanding (MOU) that they would assist the BVI Police Service with firearms cases. Mr. Cooper explained the process he used when examining what he described as the fired cartridge cases and the bullet fragments. He looks for Class Characteristics relating to design factors determined prior to manufacturing and Individual Characteristics which include microscopic imperfections occurring during manufacture. Individual characteristics are unique to a firearm and can determine whether the shell casings have come from the same firearm.
- [39] In this case, Mr. Cooper was able to confirm the shell casings probably came from a semi-automatic firearm. He found each to have the same Class Characteristics, being fired 9 mm Luger cartridge cases manufactured by the Winchester Company. Upon microscopic comparison, he found each to have sufficient Individual Characteristics to say that they were all fired from the same firearm. His examination of the lead fragments led him to conclude that they were silver tip hollow point bullet fragments, consistent with Winchester manufacture. Mr. Cooper also testified that there are more than 250 different models of firearms that could fire the bullets he examined. The 9 mm Luger cartridge designation meant that they could be fired by a Luger or many other types of guns. The shell case characteristics meant the bullets came from the same gun but he could not say they were fired by a Luger.
- [40] The witness, Insp. Ivor Francis testified that a police request was sent to the Regional Intelligence Fusion Centre (RIFC) which keeps information on travel records for people across the Caribbean. On 17th December, 2013, he made a request to that agency for travel records for Andreas Norford.

On 20th December, 2013, he received a reply from the RIFC which seemed to indicate that the Defendant left the BVI on 28th October, 2013 and arrived in St. Kitts that same day.

- [41] Insp. Jumo Shortte testified regarding Insp. Mark Hughes. He first met Insp. Hughes in 2008 in the police Mentor Program. He came to know Insp. Hughes well over the years. Insp. Hughes was involved in this case and was in charge of the Special Investigations Team. Insp. Shortte knew Insp. Hughes to be in charge of the covert operation in this case. Unfortunately, Insp. Hughes suffered with a long-term illness and passed away in February, 2019. As a result of a pre-trial ruling, the statement of Insp. Hughes was allowed to be read into evidence by Insp. Shortte.
- [42] That statement confirmed that Insp. Hughes was a Det. Insp. With the RVIPF in charge of Intelligence and Covert Policing from October 2008 – March 2014. His responsibilities included the use of covert surveillance techniques to secure evidence. In September 2013, he was in charge of Operation Vanguard, a covert surveillance operation to secure evidence regarding the murder of Melbourne Francis. The main subject was Andreas Norford aka AJ. Insp. Hughes instructed D/C Primo to install a covert listening device into a rental vehicle in this operation. D/C Primo was responsible for the maintenance and removal of that equipment. All recorded product was copied on to a master disc and a working copy. The lead investigator in this operation was D/C Taylor. The surveillance activity was authorised in writing by a senior officer before deployment. The authorised covert activity was deemed necessary and proportionate in what it sought to achieve. The information could not have been obtained by less intrusive measures. When conducting intrusive surveillance, Insp. Hughes followed the guidelines of UK legislation known as, the **Regulation of Investigatory Powers Act 2000 (RIPA)**.
- [43] D/C Primo testified that in 2013 he was he was assigned to a specialist unit. His duties included technical investigations and the installation of audio-video devices. On 15th September, 2013, he spoke to D/I Hughes and D/S Prevost gave him a black Suzuki vehicle. Into that vehicle D/C Primo installed an audio recording device. The device was in good working order. The device was not visible in the vehicle. It was used to record conversations in the vehicle without the knowledge of the occupants. He returned the vehicle to D/S Prevost later that day. The vehicle was returned to

D/C Primo by D/S Prevost on 19th September, 2013 and D/C Primo removed the device. He gave the vehicle back to D/S Prevost later that day.

[44] Officer Taylor testified that he worked with the RVIPF for 2 years from 2012 – 2013. He was assigned to the Serious Investigations Unit. On 15th September, 2013, he was instructed by D/I Hughes to commence a covert monitoring post. This records audio video material from a surveillance device to obtain private information. The device placement and methodology are unknown to the target under investigation. In this case, audio was recorded from a device placed in a rental motor vehicle. The equipment he used was in good working order. He commenced recording at 19:51 on 15th September, 2013 and continued on past midnight into 16th September, 2013. He again recorded audio commencing at 23:23 on 18th September, 2013 and continuing past midnight into 19th September, 2013. Officer Taylor listened to the audio product live and made notes. After each recording, he downloaded the audio on to a master CD and 2 working copies. Other officers looked after the creation of transcripts of those recordings. Officer Taylor was aware that this covert activity had been authorised.

[45] In cross examination, Officer Taylor confirmed that on occasion he travelled to the USVI to meet with an American Police Officer, Mark Joseph. He did hand over cell phones for examination during those meetings. He could not recall whose phones they were or how many or if he retrieved the phones. He recalled a cell phone delivery in 2013 regarding a murder investigation. He said that his only involvement in this case was the covert monitoring and the transcription of one witness debriefing. He was involved in this case for less than 2 months.

[46] Joel Frett testified that on the night of 9th May, 2013, he was at the Church of God of Prophecy in Long Look. He left the church around 7:30 pm and walked to his vehicle, which was in a nearby parking lot. He was alone. The church was a 2-minute walk from the Stickette and the parking lot was beside the church. His vehicle was parked facing the main road and pointing towards the Stickette. The parking lot was elevated above the main road and the scene. He got to his vehicle, opened the door, and heard a pop sound. He looked towards the Stickette. He saw people there, no one moved. Mr. Frett saw someone with their hands pointing down to the floor and seconds later he heard 2 more pops. People screamed and ran. That same person then ran on to the main road

away from the Stickette, in front of the church and the parking lot. He could not see the person's face. It may have been covered or the tam he was wearing pulled down. The person ran with a pronounced limp. The person wore a black shirt, a black tam, and baggy clothes or pants. He was 5'10" or 5'11." He was smaller and slimmer than Mr. Frett. He had a low hair cut since the tam was not full. He saw no locks under the tam. Mr. Frett said he would have seen dreadlocks under the tam if there were any. He saw the person for 2 – 3 minutes at a distance of 50'-100'. He ran towards Little Dix Rd. or East End. There were street lights in the area and they were on. The area around the Stickette was lit. During the loquis when the court attended to view the scene, Mr. Frett pointed out the locations he referred to in his testimony and the distances were noted. He pointed to a street light on a pole in front of the parking lot and said the church and all the homes below were lit up at the time.

[47] Lenin Joseph testified that he first came to BVI from Dominica in January 2007. He lived with family for a time and worked in swimming pool maintenance. He moved to a residence in Scatliffe Alley with a co-worker, Domingo Richards. Eventually, Mr. Richards was evicted for selling crack cocaine from the apartment. After about a year, Mr. Joseph lost his pool maintenance job and began selling crack cocaine too. Like Mr. Richards, Mr. Joseph was evicted for selling drugs. He then moved to Long Look. At that location, Melbourne Francis lived in an upstairs apartment. They knew each other but only in passing. Lenin Joseph worked in construction for a time but went back to selling crack cocaine for a drug supplier known as Woody or Jefferson Joseph. At some point, the drugs he was selling were stolen from him and Jefferson Joseph demanded payment. Once repaid, Lenin Joseph got out of the drug trade. He testified that he sold drugs from 2008 to 2012. Sometime afterwards, Jefferson Joseph approached him, offering \$10,000.0 and a gun if Lenin Joseph would kill Melbourne Francis. After thinking about it, Lenin Joseph declined the offer.

[48] While working in construction on a job site at the local hospital in 2013, Lenin Joseph met a co-worker known as Kip. Kip eventually told him that AJ or Andreas Norford had killed Melbourne Francis. Lenin Joseph had known Andreas Norford for some time. They met when Lenin Joseph was selling drugs at Scatliffe Alley. They were not friends but knew each other. Lenin Joseph has a cousin, Vernon Laroque, who is a police officer with the RVIPF. After Kip told Mr. Joseph that Mr. Norford had killed Melbourne Francis, Lenin Joseph went to Officer Laroque and told him what he

knew, that Melbourne Francis had been killed by Andreas Norford. Mr. Joseph testified that he did that because he was afraid if he did not, more people would be killed by Mr. Norford. And so began Lenin Joseph's relationship with the police in this case.

[49] Lenin Joseph was given money by the police to rent a vehicle, top up his phone and buy a tablet from the Defendant. In September, 2013 after Lenin Joseph began his relationship with the police, he contacted Kip to arrange a meeting with Andreas Norford. They met on 11th September in a different vehicle and on 13th, 15th and 18th September in the rental vehicle. They drove around, purchased weed or marijuana, drank alcohol and attended bars and clubs. They had conversations in the rental vehicle and it was those conversations that were covertly recorded. Mr. Joseph said he did not force Mr. Norford to talk to him or drink with him or use weed with him. Mr. Joseph also said that during his conversations with the police, he was never promised anything nor forced to speak with them. In cross examination, he was asked whether he received any reward. Mr. Joseph said that he received no reward and was not aware of the existence of a reward in this case.

[50] Lenin Joseph testified that during one of these social meetings, the Defendant told him that he used a 9 mm gun to kill Melbourne Francis with three shots in the chest and one in the neck as he was falling. He saw a guy named Moonhead who turned his head and watched him twice. He walked up to Trouble who did not see him. He went past Moonhead and Project running towards the area of the church. He had a vehicle waiting for him driven by Kirvan, Fireman Eddo's brother. He had to run to meet him in the East End area. Trouble was shot and then leaned on his side. The Defendant said that if he had shot Trouble with a 357 magnum it would have destroyed his head.

[51] In another of these recorded conversations, Lenin Joseph testified that he told the Defendant someone said Thirteen did the killing of Melbourne Francis. To which the defendant replied, Thirteen is not the bad man. As the Defendant said this his demeanor appeared normal to Mr. Joseph.

[52] Lenin Joseph also testified about another occasion when he went to lunch with the Defendant at the Happy Lion. He said a guy in a reddish colored shirt and brown pants spoke to the Defendant at that location and said "there are plenty of cameras". When Mr. Joseph asked the Defendant who that guy was, he was told that was the getaway driver. He got scared and sold the car.

- [53] Lenin Joseph testified that he did not know the conversations were being recorded.
- [54] He was also challenged in cross examination that in his statement to the police he said the Defendant said he shot Trouble three times in the head and once in the throat.
- [55] Lenin Joseph testified that he and the Defendant smoked marijuana or weed together. However, he stated that weed made him feel relaxed and not high. In fact, he said he had never been high in his life.
- [56] Insp. Shortte testified as already referred to above. He confirmed that he knew the Defendant well, including his family, siblings and parents. He was friends with the Defendant's mother and step-father. He knew the Defendant's date of birth, place of birth, full name, last known address and his aliases. In the course of this case, he was given discs containing the covert audio recordings. Over a two-to-three-week period, he listened to the recordings over 120 times. He recognized the voices of the two persons as being very distinctive and known to him. He made transcripts of the recordings. He provided the transcripts to another officer for verification. He identified the voices as being Andreas Norford and Lenin Joseph. He said he spent quite a bit of time with the Defendant and had dealt with him in the past. He knew his voice and his accent. Insp. Shortte testified that he was friends with the Defendant's mother and would visit the house from time to time. He was also friends with the mother's partner as they had been police officers together. He testified that on 19th September, 2013 he was at a location where the defendant was present and he listened to him speak for over one hour. In 2010 and 2011, similar situations arose with the Defendant being very vocal in the presence of Insp. Shortte. Based upon all of that, he was able to identify the voice of Andreas Norford in the audio recordings.
- [57] Insp. Shortte confirmed that he has no training in either sound technology or voice recognition. No voice identification parade was conducted in this case. However, he took statements from Lenin Joseph. He spoke with Lenin Joseph over the course of several days. Based upon those interactions, he was able to identify the voice of Lenin Joseph in the audio recordings.
- [58] Insp. Shortte described the Defendant's appearance in 2013 including short hair, not as long as it is now (referring to the Defendant in court). In 2013 the Defendant had short plaits or he had just

started wearing locks. His hair was just above the shoulder/neck level. Insp. Shortte had seen the Defendant out and about and had seen him walk with a slight limp.

[59] Insp. Shortte confirmed that Jason Leonard aka Thirteen was the prime suspect in this case. He was arrested twice. His address was searched. His clothing was seized and examined. His cell phone was seized and examined. He was questioned by police. Cell phone records were obtained and examined and a financial investigation conducted. He was placed under surveillance for a period of time. The investigation reached a dead end and he was cleared as a suspect. The police found no evidence that he was involved in this crime.

[60] Two other suspects later emerged. Kirvan Richards was charged with murder but the committal of the case to the High Court failed. Jefferson Joseph aka Woody was charged with inciting to commit murder. He was later murdered while out on bail. The person known as Kip was never located by police.

[61] In cross examination, Insp. Shortte confirmed that the clothes belonging to Thirteen were seized. He believed forensic tests were carried out although he was unaware of the results. He was unsure of the current whereabouts of that clothing. The clothing seized from Thirteen was similar to the description of clothing worn by Thirteen in the statement of David Springette. Insp. Shortte confirmed that clothing possibly related to a shooting is not always tested for gunshot residue. Further, gunshot residue does not always stick to clothing after a gun is fired. Insp. Shortte testified that Thirteen is related to another police officer. Insp. Shortte confirmed the cell phone belonging to Lenin Joseph was never examined by police because there was no need to. He also confirmed that Lenin Joseph was never cautioned because he was a witness not a suspect.

[62] Much of this evidence is circumstantial. It must be for the jury to decide what inferences may properly be drawn therefrom. Those inferences must be assessed “together with the surrounding circumstances in general...weighed, assessed and determined by the jury, in light of proper directions from the judge, applying the appropriate standard of proof.” See **Melody Baugh-Pellinen v R**⁵.

⁵ [2011] JMCA Crim 26 at para 38

- [63] A number of inferences are possible based on the evidence in this case. If the jury accepts the covert audio recordings of the conversations between the Defendant and Lenin Joseph, they might conclude that the Defendant murdered Melbourne Francis. To reach that point, they must be satisfied as to the identity of the voices on the recordings. To be satisfied of that, they must consider and accept the evidence of Insp. Shortte, combined with the testimony of Lenin Joseph. It is true that the basis upon which Insp. Shortte identifies the voices comes from a recognition that he reached in the course of dealing with Lenin Joseph and overhearing conversations involving the Defendant. Is that sufficient? It is for the jury to decide.
- [64] As the Court already held in the 17th September, 2021 pre-trial ruling on the admissibility of the audio recordings, voice identification can be a complex issue. As the Court of Appeal held in the case of **Baptiste v The Queen**⁶ “voice identification has the same if not more dangers as visual identification. Therefore, the very reasons why the direction is required as explained in **R v Turnbull** in cases of visual identification are also applicable to voice identification.” The Court went on to refer to **s. 112 of the Evidence Act**, as being the legislation in the Territory of the Virgin Islands designed to deal with this issue and reflect the considerations set out in the **Turnbull** case. The Court held that **s. 112** is applicable to both visual and voice identification. The Court stated at para 36 that “when voice identification is admitted, the judge is required to direct the jury on voice identification and in so doing the judge must address the factors outlined in the section.”
- [65] The pre-trial ruling went on to state that in the case at bar, the voice identification evidence is strengthened by the fact that the parties speaking in the recordings are actually together, in person. They are not communicating electronically. They are also within each other’s line of vision. For this reason, the evidence is not voice identification in the classic sense. However, the issue remains. Once the evidence is found to be admissible, then in fairness to the rights of the Respondent and in keeping with the rules of evidence, the trial judge would be required to follow the terms of **s. 112** and provide a **Turnbull** warning to the jury. The witness, Lenin Joseph, as an in-person party to the conversations, will be able to identify the Respondent and the words spoken. The Respondent was known to Mr. Joseph. They were familiar with each other. Any evidentiary issues and considerations can be adequately dealt with under the terms of **s. 112** and a **Turnbull** warning.

⁶ BVIHCRA 2013/0003 at para 27

- [66] That portion of the ruling is supported by the evidence of Insp. Shortte and the evidence of Lenin Joseph. I do not accept the submission of Defence Counsel that there was no evidence of any association between Lenin Joseph and the Defendant. The Defendant testified as to their relationship based upon the purchase of drugs over time. That was before their social meetings in September 2013. I certainly would not classify any identification of the Defendant as being an “in-dock identification” as Defence Counsel submits. However, we come back to the point that all of this presumes that the jury considers and then accepts the evidence of Insp. Shortte and Lenin Joseph in this regard. They may or they may not. However, if they do, then they may infer guilt and therefore, it must be left with the jury.
- [67] An inference could be drawn that the Defendant was present at the Stickette at the time of the shooting from the evidence of Joel Frett. The observations of the person running away from the Stickette after the shooting might be found to correspond with what the audio recordings indicate and what Lenin Joseph testified that he heard the Defendant say. Conversely, the evidence of Mr. Frett and his observations may cause the jury to infer that he was observing the person known as Thirteen, especially when the statement of the now deceased David Springette is introduced, as it was already referred to in the cross examination of Insp. Shortte. However, it is a matter for the jury to decide.
- [68] The evidence of Lenin Joseph in itself may or may not be accepted by the jury. Certainly, he has a chequered past. He sold drugs for a long time. He was actually approached by Woody about murdering Melbourne Francis. He says that he declined that offer. He moved in unseemly circles, acting at times outside the boundaries of the law. He says that when he heard about the Defendant being responsible for the murder of Melbourne Francis through his friend Kip, he went to his cousin, Insp. Laroque. He did that because he did not want anyone else to be killed. The assessment of the credibility of Lenin Joseph is up to the jury. His evidence about what the Defendant says is significant as it infers that the Defendant shot Melbourne Francis. But the weight to be placed upon that is for the jury to decide. His evidence is supported, it may be argued, by what is heard in the audio recordings.

- [69] It may also be argued, however, that the evidence of Mr. Joseph and indeed the audio recordings about the shooting are not supported by the autopsy results. That report as testified to by Dr. Lew, indicates 2 shots to the neck and 3 shots to entirely different parts of the body. That does not conform to either the testimony of Lenin Joseph or the audio recordings, regarding the placement of the shots to the body of the deceased. Is that significant? Does it lead to an inference that the Defendant was not the shooter or is it explained by common sense conclusions that the shooter did not clearly see where the bullets landed in the heat of the moment? It is a matter for the jury to decide.
- [70] As for the submissions of Defence Counsel that the witness, Officer Taylor, was being evasive and avoided giving clear answers regarding any forensic examination of the cell phone belonging to Thirteen, I would respectfully disagree. I note that the evidence of Officer Taylor confirmed that there were many times when he took cell phones to an American Officer in the USVI for examination. In fact, he did so in 2013 in relation to a murder investigation but he had no recollection of whose phone it was. He also confirmed that he worked on this case for less than 2 months and his only involvement was in the covert monitoring and 1 witness debrief. If the jury accepts his evidence in a similar fashion, then they may infer that Officer Taylor was not evasive and unresponsive in his evidence. But it is for the jury to make that determination.
- [71] With regard to the defence submission that the witness, Lenin Joseph, should have been cautioned by police, I again refer to the decision of this court in the pre-trial application dated 17th September, 2021. At para 51, the court held that “**s. 12 of the Virgin Islands Constitution 2007**, grants everyone the right to equal protection and benefit of the law. Under **s. 15 (3)**, any person arrested or detained shall be informed of his or her right to remain silent. Similarly, under **s. 15 (4)**, any person arrested or detained shall have the right to retain and instruct a legal practitioner. The common thread that triggers all of these rights is the arrest or detention of the subject.” As Insp. Shortte testified to, at no time when the police spoke to Lenin Joseph, was he under arrest or detained. There was therefore no need to issue a caution.
- [72] Defence Counsel calls into question the basis upon which Insp. Shortte determined that it was the Defendant who was responsible for the murder of Melbourne Francis. While some of those reasons may indeed be challenged as the evidence is reviewed, surely that determination is the ultimate

question for the jury to answer. Defence Counsel submits that “the basis used by Jumo Shortte to conclude that Andreas Norford is the shooter cannot be supported by the facts of the case.” With the greatest of respect to Learned Defence Counsel, that is not Insp. Shortte’s conclusion to make. It is for the jury to decide. Insp. Shortte’s evidence in that regard goes only to what he was tasked with determining as a police officer. Did he have reasonable and probable grounds to believe that an offence had been committed and that Andreas Norford was responsible? He testified that he did. He therefore laid the charge that resulted in this indictment. To go further is the task of the jury, when they consider all of the evidence.

- [73] With respect, I also do not agree with the submission of Defence Counsel that the ongoing prosecution of this case shows a lack of the pursuit of truth by the Crown and constitutes, to use Defence Counsel’s words, “a breach of fundamental due process”. He appears to allege improper prosecutorial conduct depriving the Defendant of fundamental fairness. Defence Counsel submits that the prosecutor’s role is not that it shall win a case but that justice shall be done. On that last point, I am in agreement with Defence Counsel. The role of the Crown Attorney was described in the case of **R v Boucher**⁷ wherein the Court held:

It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.

- [74] In my review of this case, I find that Crown Counsel have sought to be fair in the presentation of the evidence and therefore have sought that justice be done. Examples of that behaviour include the redacting of the audio transcripts and the editing of the audio recordings to remove any material that would be prejudicial to the Defendant and impair his right to a fair trial. Similarly, the Crown ensured that the testimony of Insp. Shortte dealt with the issue of his contact with the Defendant and therefore his ability to recognize or identify the voice of the Defendant while not entering into the realm of prejudicial evidence relating to previous police dealings with the Defendant.

⁷ (1954) 110 C.C.C. 263 S.C.C

- [75] All of that was done in the best traditions of the office of the prosecution service.
- [76] In sum, discrepancies and credibility assessments are matters within the exclusive purview of the jury. Reliability of evidence, inferences to be drawn and weight to be assigned to it are all matters for the jury.
- [77] Issues relating to the reliability and credibility of Lenin Joseph generally, and specifically as it pertains to the identification of Andreas Norford and his utterances, are matters to be assessed by the jury.
- [78] Similarly, issues relating to the reliability and credibility of Insp. Shortte, especially as it pertains to the identification of Andreas Norford and Lenin Joseph, are also matters to be considered and assessed by the jury.
- [79] The key evidence in the case for the Crown is the audio recordings. There may be issues relating to the obtaining and identifying of that evidence but it is not totally unsupported by any other evidence. If that were so, then I would have to stop the case. I also remind myself that supporting evidence need not be corroboration in the strict sense. It is for the jury to decide.
- [80] All of this means that there may be an interpretation that a jury might accept that allows the Defendant to have been at the Stickette on 9th May, 2013, where he shot and killed Melbourne Francis. It is an inference that might be drawn from the totality of the evidence. The jury might reach such conclusions and make such inferences, depending on which evidence and which witness they believe, if any, in that regard. As such, I must leave it with the jury.
- [81] Defence counsel submits these are not inescapable inferences to be drawn from the evidence. Indeed, he submits that the evidence is so tenuous that it is unsafe to leave such evidence with the jury. With respect, I must disagree. As I have said previously, the evidence will require careful directions to the jury as to how they may receive and consider it. But it must be left with them nonetheless.
- [82] The comments made by the Defendant to Lenin Joseph and as found in the audio recordings, if they were indeed made by the Defendant during the course of his social meetings with Mr. Joseph, place

him at the scene of the murder firing the shots that killed Melbourne Francis. The utterances may, however, not have been made by the Defendant if the voice identification is not accepted or the words spoken are not accepted in light of the autopsy findings. But it is for the jury to decide.

[83] The evidence is not so tenuous nor has it been so discredited as to warrant the case being taken away from the jury. I find there is evidence such that a reasonable jury properly directed might, on one view of the evidence, convict.

[84] For all of these reasons, I am not persuaded that the evidence is so poor that it would be unsafe to leave it with the jury. As noted in **Ryley v Barron**⁸, the decision does not depend so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

[85] The no case submission is therefore dismissed, for the reasons advanced.

Richard G. Floyd
High Court Judge

By the Court

Registrar

⁸ 1965 8 WIR 164 (Phillips JA applying Parker CJ in practice note (1962) 1 ALL ER 448)