

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

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

CRIMINAL CASE No. BVIHCR 2019/16

BETWEEN:

SEAN MARTIN

Applicant

and

THE QUEEN

Respondent

Appearances: Mrs. Valerie R. Gordon, Counsel for the Applicant
Mrs. Tiffany R. Scatliffe Esprit, for the Respondent

2021: May 4th and 7th

RULING ON APPLICATION

- [1] **FLOYD J:** This is an application for the exclusion of evidence. The Applicant is charged with murder contrary to section 148 of the Criminal Code 1997.

THE FACTS

- [2] The incident occurred on August 10, 2018. That evening, the deceased, Jerry Castro, was at the Conroy Howell apartment building with friends, when he was approached by a male person and shot once in the head.
- [3] A portion of the Crown's case relates to the evidence of two witnesses who were close by when the incident occurred and made certain observations regarding the person involved.
- [4] The first witness, Katherine Millard, was working in a hair salon. She knew the deceased and saw him that day. Indeed, he spent some time in the salon before going outside towards the front of the

building, where he often sat. She later heard a shot and looked at the street using the salon mirror. She observed a man in a brown jacket with a hoodie covering his head, and long black pants. The man was moving quickly from a location where she had previously seen the deceased. The man had a pistol in his hand. He crossed the road and fled. Ms. Millard went to the shop door but the man was gone.

- [5] Ms. Millard described the man as 5 ft. 10 in. or a little shorter, with a slim build. The man was walking in a hurry. His jacket was loose fitting, smooth, soft, with no design. She later picked out the colour for police. Her observation of the man was brief. The witness, Katherine Millard, did not identify any person as being the man she saw.
- [6] The second witness is Mark Patterson. Mr. Patterson knew the deceased, Jerry Castro. On the evening of August 10, 2018, he was at home when he received a call from his nephew. During that call, he observed a man in a dark grey hoodie walking down the street. Only his hair and ears were covered and he could see the impression of his locks (hair) behind his head. The man was not walking too fast. He recognized the person as a Rasta Man who worked at the National Bank, lives in Jack Ruby's apartment and is the son of a red-skinned woman called "QT". Mr. Patterson had known this man for 15 years, since he was a child. He recognized his face, size, walk and build. He was used to seeing the man each afternoon walking from work. The man would always say "good afternoon." Mr. Patterson saw the man after August 10 and observed him to walk faster, straighter and to no longer greet him.
- [7] On the day of the shooting, Mr. Patterson was on his porch at home when he heard shots fired. He saw no one else walk by his house. He first saw the man 25 feet away. When the man passed by the porch, he was about 5 feet away and looked up. There are 2 street lights outside his yard. The man walked into the lighted area. Mr. Patterson later went to the scene and spoke to his nephew. He received certain information from his nephew about the shooter.
- [8] On the day he gave a statement to police, he saw the same man wearing a white t-shirt and blue jeans. When the man saw the police, he changed direction and left.

THE POSITION OF THE PARTIES

- [9] No identification parade or photo line up was presented by police to Ms. Millard. The Applicant therefore submits that any identification by this witness at trial would be prejudicial and would constitute an in-court or dock identification.
- [10] No identification parade or photo line up was presented by police to Mr. Patterson. The Applicant therefore submits that any identification by this witness at trial would also be a dock identification and prejudicial. The Respondent submits that no such confirmation was required for the evidence of Mr. Patterson because his is not strictly identification evidence, rather, it should be classified as recognition evidence.
- [11] The Respondent admits that the witness, Katherine Millard, gave a vague and general description of the man she saw. So vague in fact, that it would have been impossible for investigating police to construct a plausible identification parade or photo line up. Counsel for the Respondent therefore takes the very reasonable position that she will not solicit any such dock identification from this witness at the trial of this matter.
- [12] The Applicant submits that the identification evidence of the two witnesses has not been confirmed by procedure set out in **s. 110** of the **Evidence Act**. No identification parade was conducted when it was wholly reasonable to have done so. The burden is on the Crown to satisfy the statutory requirements.
- [13] The Applicant submits that without any prior acquaintance with the Defendant, and with no identification parade having been conducted, the evidence of the witness, Millard, would constitute a dock identification which is dangerous, unsafe and unfair to the Defendant.
- [14] The Applicant submits that the evidence of the witness, Patterson, lacks clarity and detail as it pertains to distances and routes travelled. It is also affected by the information received from other sources, in particular, from his nephew. Most importantly, the evidence was not confirmed by any form of identification parade or photo array. Learned Counsel for the Applicant submits that the

Applicant has consistently disputed the identification and, therefore, an identification parade should have been conducted as the legislation dictates.

- [15] The Applicant submits that the Court should be guided not only by the **Evidence Act** of the Virgin Islands but also, pursuant to **s. 12** of that Act, the **Police and Criminal Evidence Act 1984 (PACE)** of the United Kingdom, particularly **Code D, para. 3.12**, pertaining to identification evidence and procedure. The **PACE** guidelines give fulsome and specific directions in a case such as this.
- [16] Several authorities were relied upon in the written submissions of the Applicant to support the positions referred to above.
- [17] The Respondent submits that the evidence of the witness, Patterson, is a case of recognition, owing to his previous knowledge of the Defendant. As such, an identification parade was not necessary. Based on that, should Mr. Patterson identify the Defendant in court, it would not be a dock identification. The Learned DPP advised the court that she does not, in any event, intend to elicit dock identifications from any witness, including Mr. Patterson. However, she acknowledges that witnesses have been known to make such identifications either of their own accord or through cross examination at trial.
- [18] As for the details of the evidence of Mr. Patterson, including routes travelled and distances, the Respondent submits that the evidence of this witness can be tested at trial. It is admissible and relevant. Its probative value outweighs any prejudicial effect. Appropriate directions can be given by the trial judge in regard to the evidence generally and recognition evidence specifically.
- [19] Learned Counsel for the Respondent is candid in submitting that the evidence of the witness, Millard, is vague and general. Indeed, the evidence was so non-specific and lacking in detail that a photo array or identification parade would have been impossible.
- [20] As noted above, and to her credit, Learned Counsel for the Respondent went further and submitted that she had no intention of leading evidence from Ms. Millard at trial to fill in such gaps. As such, the Crown would not solicit a dock identification from that witness or any other witness.

- [21] Several authorities were relied upon in the written submissions of the Respondent to support the positions referred to above.

THE LAW

- [22] Visual Identification is explored in **Blackstone's Criminal Practice 2021 at Part F Chapter F-19.1:**

The visual identification of suspects or defendants by witnesses has long been recognised as potentially unreliable. Honest and convincing mistakes can be made by witnesses who entertain no doubt that they are right, and even by witnesses who purport to identify persons already known to them...Much has been done...to reduce the risks... The procedures prescribed by **(PACE) Code D** (insofar as they relate to visual identification) are designed to test a witness's ability to identify, under controlled conditions, any suspect the witness may claim to have seen or recognised on a previous occasion.

Procedures used by investigators to confirm identification include video identification, identification parades, group identification and photo identifications.

- [23] **Blackstone's at Chapter F-19.3** goes further:

It does not follow that a **(PACE) Code D** identification procedure must always be held whenever an identification issue arises. Such a procedure will often serve no useful purpose in a 'recognition' case, because the witness (even if mistaken) would almost inevitably 'identify' the person the witness has claimed to have recognised

- [24] The use of an identification parade, or rather the failure to use one in a case of recognition evidence, was referred to in **Violet Hodge v The Commissioner of Police, ECSC BVIMCRAP 2015/005 at para 32:**

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

ANALYSIS

- [25] After reviewing all of the material filed and upon hearing the submissions of counsel, what follows is my decision in this Application.

- [26] A witness may give evidence as to the identity of an accused person whom that witness is able to identify visually or in any other manner. However, Courts must be very cautious when approaching eyewitness identification evidence because of its notorious unreliability. Even honest and forthright witnesses may misidentify individuals. It can lead to wrongful convictions. For those reasons, safeguards have developed in order to assist in the reception of such evidence.
- [27] Identification parades are an example of that. Indeed, **s. 110 (1) of the Evidence Act** makes identification inadmissible unless an identification parade has been utilized or it is shown that it would not have been reasonable to hold such a parade.
- [28] The Act goes on to list matters to be considered when determining whether it was reasonable to hold an identification parade. Of note is **s. 110 (2)** which refers to whether the identification was made at or about the time of the commission of the offence and considering the relationship between the accused and the other person who made the identification. Given the long-term knowledge of the Defendant by the witness, Patterson, and the circumstances of that relationship, I am satisfied that it is a case of recognition evidence. Based upon that relationship, and in accordance with **s. 110 (2) of the Evidence Act**, it was unnecessary for the investigating police to conduct an identification parade or any other form of confirmatory procedure when considering the evidence of Mr. Patterson.
- [29] I am satisfied that the provisions of the **Evidence Act** were followed. I am further satisfied that the provisions of the **Evidence Act** were sufficient in and of themselves, and no recourse to the provisions of the UK legislation, **PACE**, was necessary in this case.
- [30] I am satisfied that Mr. Patterson's evidence of identification was not intentionally influenced, such that an identification parade was required, pursuant to **s. 110 (1) (b) of the Evidence Act**. His observations were made before he attended the scene and was spoken to by his nephew and others. In any event, what transpired once he arrived at the scene and how that may impact his evidence as a whole, can be explored in cross-examination. Indeed, all of the issues relating to the evidence of Mr. Patterson raised by the Applicant can be explored in cross-examination. They are matters affecting weight and credibility, rather than the admission of the evidence in the first place.

- [31] Even in a case where the witness is mistaken in identifying the suspect but there is a long-term relationship or knowledge of each other, an identification parade would be unhelpful. The Privy Council in the case of **John v The State of Trinidad & Tobago, [2009] UKPC 12 at para 15** said that in such circumstances, “a parade then would be not merely unnecessary but could be positively misleading.” Such recognition evidence would not be served by the use of an identification parade.
- [32] Therefore, in relation to the evidence of the witness, Patterson, I adopt the words of Baptiste JA in the **Violet Hodge** case supra **at para 34**, “in the premises, no useful purpose would be served in the circumstances of this case by holding an identification parade. It would be in essence to test the honesty of (the) evidence that he knew the Applicant. That, however, is not a claim that could be tested by a parade.” No such confirmatory process using an identification parade was required for the evidence of the witness, Patterson. It was recognition evidence based on long-term knowledge of the person observed. That evidence shall be admitted.
- [33] Similarly, but for different reasons, the evidence of the witness, Millard, did not require the use of an identification parade. Her evidence was so vague and lacking in detail that such a confirming process was impossible. The requirements of **s. 110 (1) (a) (ii) of the Evidence Act** were followed. For the evidence of Ms. Millard, it would not have been reasonable to have held an identification parade. That evidence shall be admitted. I am mindful of the submissions of the Learned DPP that she does not intend to elicit any dock identification of the Defendant from Ms. Millard (indeed from either of these witnesses).
- [34] Appropriate directions and instructions as to identification evidence will be required from the trial judge to the jury in the course of this trial proper. Since recognition evidence is a form of identification evidence, all of the same cautions and concerns will apply.
- [35] For all of these reasons, the Application is dismissed.

Richard G. Floyd
High Court Judge