**IN THE SENIOR COURTS OF BELIZE**

**CENTRAL SESSION-BELIZE DISTRICT**

**IN THE HIGH COURT OF JUSTICE**

**INDICTMENT NO: C 005 of 2023**

**BETWEEN:**

**THE KING**

**and**

[1] **CAMRYN LOZANO**

[2] **ALBERT GILL**

Defendants

**Appearances:**

Mr. Robert Lord, Crown Counsel for the King
Mr. Norman Rodriguez for the Defendant [1]
Mr. Hubert Elrington for the Defendant [2]

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2024: April 22; 23; 24; 25; 30
May 13
June 6

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**Written Transcript of the Oral Ruling on No Case Submission**

**Ruling on No Case Submission**

**Thursday 6TH June 2024**

(1:38 p.m. Court Session Commenced)

THE MARSHALL: The King V Camryn Lozano and Albert Gill.

THE PROSECUTION: May I please you, My Lady, Robert Lord for the Crown. The Defence Sr. Counsel Mr. Hubert Elrington and Normal Rodriguez.

THE COURT: Mr. Rodriguez is?

MR. ELRINGTON: Mr. Rodriguez has asked me to hold brief for him this afternoon, because he has left the country.

THE COURT: Today's hearing was for the purpose of the Court ruling on the no case submission that was advanced on the last occasion by Sr. Counsel on behalf of both Accused men and responded to by the Crown. The Court has considered the submissions of the Parties and has reviewed the authorities and is ready to give its ruling in this matter.

**1:39 P.M. TO 2:17 P.M. RULING ON NO CASE SUBMISSION READ INTO THE RECORD BY THE COURT**

THE COURT:

Mr Elrington Senior. Counsel made a joint submission of no case to answer on behalf of both Accused men. He grounds his submission by reference to the second limb of the **Galbraith** test, which is, that even if there was some evidence that the crime of murder alleged has been committed by the Accused, the state of the evidence, taking the Crown's case at its highest, is such that the Court, in its fact-finding function, could not reasonably convict on it if properly directed.

Learned Senior Counsel submitted that the only evidence advanced by the Crown that could identify either of the Accused men as the persons who shot and killed the Deceased is the statement of the Deceased admitted through a number of Prosecution witnesses that the persons, who had shot him was Camryn Lozano and Gill also known as Beans. In relation to the evidence of identification, Senior Counsel says that the evidence advanced by the Crown that the Accused men are the persons who shot at him is inherently weak, as it fails to meet the Turnbull standards, in fact he states, that there is no evidence at all of the circumstances of the identification that was made by the Deceased.

Counsel has submitted that identification evidence has been judicially found to be highly unreliable evidence, because of the ghastly possibility of mistaken identity and where it is relied upon certain warnings have to be given to the fact finder. He contended that while Identification evidence may be less risky to be relied upon, where there is evidence which can strengthen it, in this case, no such supporting evidence exists. He stated that there was no DNA evidence relative to Accused No. 2, Mr. Gill, and that the DNA evidence relative to Accused No. 1, Mr. Lozano consisted of a buccal swab obtained from Lozano, which when analyzed matched a sample of blood taken from a slipper, which was found at the scene. He submitted that the Crown has not advanced any evidence of when or where that slipper got there, and whether it was at all related to this incident. He also raised the possibility of cross contamination during the chain of custody. Senior Counsel further submitted that there is no evidence advanced of a joint enterprise that would connect the two men to the single fatal gunshot wound from which the Deceased died.

The Crown has responded to that submission that there is a case to answer, and that there is no basis for the case to be stopped at this stage. The Crown submitted that the full case for the Crown consisted of evidence of identification from the res gestae statements of the Deceased, which was admitted into evidence through several Prosecution witnesses. Counsel contended that these statements

established that the Deceased identified the two Accused men as the persons who shot and killed him. He submits that that evidence in itself is sufficient to warrant a conviction, but further advanced that following, that there was supporting evidence for the Crown's case, and that the evidence of the circumstances of the identification itself comes from the photographs, particularly RH 5, which shows a lit lamppost. He also stated that the evidence of Dr Estradaban, that the Deceased was shot multiple times. The evidence of Pamela Staine that Accused No. 2 Albert Gill came to her home about 5 minutes prior to when the Deceased came to her home, and a short while before the shooting. He also stated that the DNA evidence from the analyst that the buccal swab taken from Accused No. 1 contained a DNA profile, which matched the blood on the slipper found by the CST on the scene on the night of the incident with such a high match probability that the probability of a random occurrence was so high that it could safely be excluded. The Crown also relied on the ballistic evidence that show expended shells of two separate firearms were found on the crime scene.

Now, the Court has considered the submissions made on both sides, and the Court now considers, what is the test that the Court should asses in a submission of no case?

The test in this jurisdiction for when a case should be stopped is examined by our Apex Court, the Caribbean Court of Justice ("the CCJ") in the Belizean case of **Bennett v R**. In that case the Court stated,

*"The power to stop the trial at the close of the Prosecution's case is founded in the common law. The appropriate tests are to be found in the well-known case* ***R v Galbraith****. In accordance with that decision, there is no difficulty if there is no evidence that the crime alleged has been committed by the defendant …The judge will of course stop the case. 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. He then identified two scenarios:* ***(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 the strength or weakness depends on the view to be taken of the witness's reliability, or other matters which are generally speaking to be taken 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."***

The Court can therefore only stop this case without calling upon the Defendant to answer the charge:

(i) if there is no evidence to make out any element of the charge, which is often referred to as principle 1 of Galbraith.

(ii) if the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, that's principle 2 A of Galbraith.

Now, the high nature of the threshold that the Defendant must clear in relation to the second limb of Galbraith is demonstrated to this Court by decisions coming out of the Caribbean jurisprudence. The first that this Court will draw reference to is the Belizean Privy Council decision of **Taibo**, which is binding authority. In that case the Board held that even if a case is "very thin" if a tribunal of fact could without irrationality, be satisfied of guilt the Court is required to let the matter proceed.

The Court also refers to the CCJ decision, one coming from Barbados of **James Fields v The State**. In that case the CCJ upheld that a fact finder, in that case a jury, is entitled, in their freedom to determine for themselves what facts they

accept and what fact they don't, and to rely on the evidence of a witness, even if they accept at certain points that that witness had lied, thus highlighting the danger at the no-case stage of trying to resolve questions concerning who is telling the truth and what evidence is or is not to be believed. The Court makes reference to the dicta of Anderson JCCJ and Saunders PCCJ, where it was stated in paragraph 32.

> *"[32] It is elementary law that the judge is the trier of law, and the jury is the trier of fact. The categories of evidence which are admissible are matters of law for the judge; the weight to be placed on admissible evidence is a matter of fact for the jury. The criminal law provides multitudes of examples where the judge may properly exclude certain categories of evidence from consideration by the jury. A judge is also entitled to stop the trial altogether at the end of the Prosecution's case if there is no evidence that the crime has been committed by the Defendant or where the evidence given is of a tenuous character, for example, because of inherent weakness, vagueness, or inconsistencies.* ***But even in such cases where the evidence is tenuous, if 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 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 case to be tried by the jury."***

Now, this Court has also considered what is the test for Judge sitting alone, and the case now suggests that: The test is the very same for both a judge-alone trials as it is for judge and jury trials. And this is borne out by a decision of the Northern Ireland Court of Appeal in **Chief Constable v Lo**, where it was stated that:

*"[14] The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from than that set out in in Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the Prosecution's case, 'do I have a reasonable doubt?'* ***The question that he should ask, is whether he is convinced that there are no circumstances in which he could properly convict."***

The Court also relies on the Belizean High Court decision of **R v Nicoli Rhys**, per Benjamin CJ.

There's also reference to the **Stones Justice Manual**, which deals with the test of a judge sitting alone. So, those are the tests, the Court will now approach the evidence that has been advanced in this case.

Now, the case for the Crown rests on the following pieces of evidence:

The evidence from Patrick Genitty. Patrick Genitty is a police officer, who arrived at a house shortly after the incident happened. He was flagged down by someone who told him to come and take this young man out of his house before he died. He exited the police vehicle and then he went towards a green cement bungalow house. When he entered that house he saw someone whom he recognized as Egbert Baldwin, who is the Deceased, and someone he had known for the past 5 years. Egbert Baldwin said, *"please help me man".* When Patrick Genitty was about 2 feet from the Deceased, he leaned over to see where he had gotten shot. And then he asked the Deceased, *"Eggy da who shot you?"* Eggy then replied, *"Camryn Lozano and Beans."* I then ask him once again and he then said *"Camryn Lozano and Beans"*. He said that he asked him once again and the Deceased replied, *"Camryn Lozano and Beans."*

In cross examination, he said he had proceeded to the scene about a minute and 30 seconds after he received information that shots had been fired in the Japan area. He was asked in cross examination whether, he had asked the Deceased

where he got the information from, and he did say he did not ask. He was asked how the Deceased appeared at the time, and he said that the Deceased seemed like he was strong and that he wanted help.

Evidence also comes from Linda Casanova, pretty much the same as that of Officer Genitty, but from her perspective. She said that she too arrived with PC Genitty, and she saw that PC Genitty stooped down by the Deceased, and asked him, Eggy dah who shot yuh? And that the Deceased replied, *"Camryn Lozano and Beans."* That PC Genitty again asked, Eggy who shot yuh? And he Deceased replied again, *"Camryn Lozano and Beans."*

There's evidence from Shawn Gillett. Shawn Gillett helped PC Genitty place the Deceased in the police mobile. He placed the Deceased in the pan of the vehicle along with Cpl. Lewis. Genitty was the driver, and he was in the pan with the Deceased. While in that vehicle, he asked the Deceased if he saw his shooters, and the Deceased replied *"Yes g dah Camryn Lozano and bally dem called Beans, but he real name dah Albert Gill."* He then said that the Deceased said that he wanted to vomit, but he didn't, and that the Deceased said that his gunshot wounds were burning.

There's similar evidence coming from Michael Gentle, who was at home when his wife received a call and then they proceeded to Egbert Quilter Avenue.

Upon reaching there he saw the Deceased being brought out of the house, and he asked the Deceased, *"Who shot yuh dawg?"* And the Deceased said, *"Camryn, Camryn, dawg."* And he was about 5 feet away from me.

In cross examination he was asked, whether the Deceased had called any other name besides Camryn, and he said not to him. His common law said pretty much the same thing, which was that she was with her common law husband when she arrived and saw the Deceased being brought out of the house, and she was standing 2-3 feet away from her common law husband when he asked the Deceased, *"Who shot yuh dawg?"* And the Deceased responded, *"Camryn, Camryn shot me."*

Now, Linton Broaster was approached by Sergeant Bowen and he was asked whether he knew anyone who known by the name *'Beans'*. He said he knew a *'Beans'* to be Albert Gill, who lived in the Japan area, and he knew him as *'Beans'* through numerous stop and searches, and he also worked in the Ladyville area for over 5 years.

Dr Estradaban, was the doctor who performed the post mortem examination on the body of the Deceased. He identified that the Deceased had suffered from 3 gunshot wounds, one of which was a fatal wound. He described all of the gunshot wounds as being shots from behind. When asked in cross examination, are you

able to say the Deceased Egbert Baldwin was walking or running when he got shot? He said, *"No, I cannot say, but what I can say is that he was on a back position in relation to the shooter"*. He was further cross examined by Senior Counsel, Mr. Elrington, where he was asked again, if all the shots were from behind, and the doctor said, *"Yes"*. He asked if the shooter was definitely behind the Deceased. He said, *"Yes"*. He said that he could not say if it was one or two different guns that shot the Deceased. He also said that he could say that the distance was a far distance, which is estimated beyond 32 inches, because 32 inches is the legal definition for shooting at far range. He said he knew this, because there was no burning of the skin from his examination of the body.

There's also the evidence of Pamela Staine, who lived in that area, where the shooting is alleged to have happened, and she stated that around 7:00 p.m. a man she knew as Eggy had come to her home to borrow some money. She spoke with him, and he left. A little while after he left, she heard some gunshots. She also stated that about 5 minutes before Eggy had come to her house, Mr. Gill, whom she identified in Court as Accused No. 2 had also come to her house.

So, the timeline was that Mr. Gill came, about 5 minutes later, Eggy came, and about some minutes later from that she heard gunshots. She described how she knew Albert Gill, Accused No. 2. She said, she knew him from the neighborhood. She knew him for many years. She would see him regularly. The lighting at the

time was very good. When she saw him, he was close to her, he was in the house. She also knew Eggy for some years, and she described the lighting as I indicated before. When asked, now this is important evidence, when asked whether the road that leads into her house, whether the two persons, Eggy and Accused No. 2 would have had to use the same road. She indicated that she could not say, because there were a lot of entrances in and out, and she was asked further, whether they could have used separate pathways to leave your house, and she said, yes, there is about 4 different pathways. So, she could not say, which one, either Eggy, the Deceased, or the Accused No. 2, Gill came or left through.

There's also the DNA evidence of analyst, Cortney Schartz, who was deemed an expert by this Court. To summarize her evidence, she stated that she compared reference sample received from a buccal swab taken from Accused No. 1. A buccal swab taken from Accused No. 2, and also an FTA card, and she compared against evidence item, 1.1, which was a cutting from a strap of a Nike slippers. Having analyzed the references she had as against the evidence sample, she found that one sample in particular, which was the buccal swab obtained from Accused No. 1 was sufficient to do further statistical analysis, but the others were not. She said that she first did a visual comparison of all the profiles to determine where there was any worth pursuing statistical analysis, and only the one from the

buccal swab taken from Camryn Lozano was one that was worth doing statistical analysis.

When she conducted that statistical analysis, which is conducted using a software program that compares the likelihood of an unknown individual in a population having the same DNA profile and the profile, which was the evidence profile to the odds of it being the profile that she had asked it about, which in this case, was that of Camryn Lozano. She found that it was labelled as very likely that it did belong to the profile received from Camryn Lozano, and she gave the statistical likelihood, which was of it being randomly matched, which was in this case one in 10 to the 32nd power, which is something in number of trillion.

So, in summary that evidence is that it's highly improbable to the statistical probability of one in 10 to the 32nd power that someone other than the Accused No. 2 contributed to that DNA profile, which was obtained from the blood on the slipper. When asked if she was able to say how long the material would have been left on that material, the material being the slippers. She said, no, she could not say. When asked if it could have been for years; she said, it was possible. When asked whether she could say that the material got there in the year 2020 or 2021; she said that that is not be able to be told by DNA.

There's also the forensic analyst Gomez, who would have just found that the apparent blood on the slippers was in fact, human blood, as he did an analysis of same.

So, that is the evidence that the Crown relies on, in addition to the ballistic evidence that these expended shells were from two different firearms.

Now, the Court has considered the general danger of disputed visual identification. In the case of **Hall**, which is a CCJ decision, 2020. The Caribbean Court of Justice noted at paragraph 149 that, *"There is a general danger in relying on disputed visual identification as the sole basis for a conviction. That is well recognized both by the common law and statute. The danger is especially acute when the charge is for murder and the penalty on conviction is death, as was the case when the charge in this matter was laid, and when it was first heard and determined by the trial judge. In such cases, in particular, the constitutional value of fundamental fairness, and the fundamental rights to due process and the protection of the law, as they exist in Barbados, demand careful and heightened scrutiny of visual identification evidence that is offered in singular support of guilt. The primary responsibility for this examination and eventual filtering exercise falls upon the judge in a trial by jury and is not to be lightly passed over. Indeed, the special need for caution is corroborated by current cognitive scientific research on*

*the subject, which compellingly demonstrates the potentially perilous unreliability of such singular reliance on visual identification as the basis for conviction."*

So, where as in this case the Prosecution's case rests wholly or substantially on the evidence of visual identification. Before this Court can leave this matter to the fact finder, I have to consider whether the person claiming to have seen the Accused men had the opportunity to make that identification. The circumstances of that identification is therefore of xtreme importance.

The evidence of the circumstances in which the Deceased made his identification could not be advanced by the Deceased himself, for obvious reasons. In this case, the Court; therefore, has to consider and examine carefully, whether there is evidence which can strengthen or support that identification that can make it of sufficient reliability that it could be safely be led to the determination of the fact finder.

In relation to this case, all we have is RH 5, which showed a lit lamp post. There is no evidence of the position of the shooter in relation to that lamp post, nor is there evidence of the position of the Deceased in relation to that lamp post. And whether that lamp post, lit or not assisted in the identification. There is also no evidence of distance, obstruction, the parts of the body that were seen, the length of the observation, or that the Accused men were known to the Deceased. There was

no evidence advanced by the Crown of a background between the Deceased and his alleged shooters. There's no evidence that he knew them before, whilst there's evidence from the other witnesses, that they knew them. There's no evidence that the Deceased knew them. So, there's no evidence to support recognition, other than him calling them by name.

Now, the Court wishes to draw a distinction at this stage between the test, which it would have applied to determine the admissibility of the statements as opposed to the test which the Court is now applying. At the stage of admissibility the Court was concerned with the question of whether the statements of the Deceased should have been admissible for the truth of it as an exception to the hearsay rule. Either under the principles of res gestae or dying declaration.

This Court answered that question in the affirmative and for the following reasons: Relying on the principles outlined in **Andrews**.

The Court had considered that bearing in mind the circumstances in which the statement was made i.e. the close proximity to the shooting incident; the fact that the Deceased was at the time on the ground bleeding from gunshot wounds. The possibility of concoction or distortion could have been disregarded. The instinctive reaction to that event, would have given him no real opportunity for fabrication. The statements were sufficiently proximate to the pressure of the event

and the mind of the deceased was likely to have been dominated by that event, which was the event of his shooting.

The fact that the statement was repeated to several persons did not make the statements more accurate, but it did go to support the accuracy of their recollection of the actual words that were stated, but not the veracity of what the Deceased himself has said. The repetition may have minimized the possibility of error in the witness' recollection of what was told to them, but it cannot in any way be said to strengthen, whether the Deceased in fact made an accurate identification.

It was in those circumstances that the statements were admitted, and this is in line with the principles outlined in the binding CCJ authority **Japhet Bennet**, which also considered the tests to be applied by a Trial Judge when considering whether to admit hearsay statements. The CCJ also held that the Court must apply a two pronged approach. The first test is when the application is made, and the Court has to decide whether to admit the statement or not, that has already gone, this Court has admitted the statement. The second test according to **Japhet Bennett** occurs at this precise stage, which is at the close of the Prosecution's case.

And **Japhet Bennet** states, *"If, however, there was a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge, given which the hearsay evidence could in the end safely be held to be*

*reliable, the judge should, in principle, admit the evidence. That would be more so, if at the stage, it was already clear that that test would or would not be met. Where; however at the close of the Prosecution's case, a no case submission was made, the final test was whether the evidence thus far produced could be safely held to be reliable, as it was for the jury to decide whether in fact the evidence was reliable or not. If that test was met, the judge would leave the evidence for the jury, after having given them the necessary directions, to consider its ultimate reliability. If it was not met, the judge should conclude that the evidence was inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge would uphold the submission and direct the jury to acquit the Defendant.*

*Further, the CCJ highlighted that the second limb of the* ***Galbraith*** *test allows the judge room to achieve procedural fairness.*

*So far as the power to stop the case upon a no case submission is concerned, the trial judge in Belize must rely on the* ***Galbraith*** *test, because a 'safety valve' similar to* ***Section 125 A of the Criminal Justice Act of UK*** *has not been adopted by the Belize legislature. It appears to us; however, that the second limb of* ***Galbraith*** *allows the judge, to a great extent, room to achieve procedural fairness and to safeguard a sufficient level of verdict accuracy.*

*We note in passing that these common law powers and discretions of the judge have an even stronger foundation in Belize, because they directly flow from, and give further content to, the judge's constitutional duty to ensure a fair trial.*

Okay, so, now that the Crown has closed its case, and prompted by the submission of a no case answer made by the Defence. This Court is duty bound to consider the entire case for the Crown, and to assess whether the evidence adduced has met the necessary threshold to call upon the Defence to answer the charge.

It is worth reemphasizing that the Court is not at this stage concerned with the honesty of the Deceased. That is a question of fact, which is not what this Court is to determine at this stage.

The Court addresses the Crown's contention by stating, that although the nature of the statements made so close in contemporaneity to the act qualified it as part of res gestae and even possibly as a dying declaration. Under the circumstances where he was bleeding out, and likely to be under a hopeless expectation of death. That only deals with the issue of the unlikelihood of concoction/fabrication, but does not address the issue of mistake against which **Turnbull** cautions, and the body of law developed over time on identification evidence shows that an honest witness can be mistaken.

At this stage, the Court is more aptly concerned with the risk of error. The Court has combed through the evidence being cautious to draw reasonable inferences that are favourable to the Crown. However, this Court is unable to conclude that the remaining evidence can support the correctness of the identification. In so far, as to make it safe and reliable to be left to the fact finder, and it's for these reasons.

(1.) It is dubious what reasonable inference can be drawn from the blood on slipper in relation to this incident. The slipper does not have a causal connection with the commission of the act to support the correctness of the identification. At its highest the DNA evidence can establish that at some point, Lozano, Accused No. 1, his DNA profile matched the DNA profile found on the slipper, which was found on the scene; however, had this slipper been a weapon, or has some casual connection to the actual shooting incident. That might have been strong supportive evidence. However, a slipper on a roadway in an area where the Accused himself resides does not go very far in supporting the correctness of the identification.

(2.) The ballistic evidence suggests that two firearms were used. While this is consistent with the Deceased's contention that two people shot him. It doesn't support the contention that the Accused men were the two persons who shot him, which is the crucial issue. The issue is not whether two people shot him. The issue

is whether these two people shot him. So, that does not minimize the possibility of mistake.

(3.) The evidence of Pamela Staine, which the Court admits is the most compelling. It only places Accused No. 2 in the vicinity of the shooting. And the closest time is 15 minutes prior to the shooting. But that is also to be taken in the context of her evidence that the Accused No. 2 lives in that neighborhood. He is someone she frequently saw, and she is spoke with him very often, and there were several entrances and exits to her home. So, to say that the Accused, No. 2 being on the scene 15 minutes prior to the shooting does not really go to support the correctness of the Deceased identification in a way that brings it or elevates it from the dangerous realm in which it is in.

The Court is therefore unable to conclude that the evidence highlighted above brings this evidence outside of the category of cases highlighted by the second principle in **Galbraith**. The Court finds that taking the Prosecution's case at its highest, a jury, in this case a judge properly directed could not safely convict.

The Court also wishes to state that this case is decided on the basis of its specific evidence or rather the absence of that evidence. The Court also wishes to distinguish the context in which statements of res gestae can be relied upon. Now. Counsel for the Crown would have advanced several cases as supportive that a

case founded on res gestae evidence can proceed on its own, and the Court does not dispute that. However, the Court considered very carefully the cases that were advanced by the Crown.

The first case is that of **Miller**. In the case, this was a continuing action in which the Deceased named one of his 4 assailants by saying *"It was Jules and them boys."* Now his dying declaration was made in the context of other eye witness evidence, and those other eye witnesses testified to different points of the attack, and there was also evidence advanced by the Crown of motive, which was an ongoing dispute between the Deceased and his attackers that has also been given in the context to validate that hearsay statement. So, there was not just the res gestae statement in **Miller** or the dying declaration in **Miller**. There was supportive eyewitness evidence.

**Andrews**, which is the main case on res gestae. In **Andrews**, apart from the Deceased's statement there was evidence from the Accused accomplice, who had turned state witness that the Appellant had asked him for knives, took the knives, and that he saw the Appellant going into the Deceased's flat with a blanket over his head and forcibly entered the deceased's flat. That witness was also present when the Appellant stabbed the Deceased; therefore, the res gestae statement in that case, **Andrews** was not the sole evidence upon which the Crown's case rested, but it was

evidence that was used to corroborate the main witness' testimony, who was effectively an accomplice.

Now, the Court does not wish to be misunderstood as suggesting that there is any requirement in law that a statement of res gestae/dying declaration must be corroborated - - that is not the law, that is not the Court's position. The Court's position is that **Turnbull** cases, or cases that rely on identification evidence where it is the sole and decisive evidence against an Accused person, it must meet that minimum threshold outlined in **Turnbull** before it can safely be left to the fact finder, because of the inherent danger of this type of evidence.

Now, a very good example of a case where it was the sole decisive evidence in the form of a res gestae or dying declaration, because it could have been admitted under either, was **Nembhard v the Queen**, a Privy Council Decision, and that appeal concerned evidence admitted of a dying declaration made by the Deceased on a trial for murder.

In that case, the Appellant had been found guilty on the sole basis of an utterance made by the Deceased to his wife. However, the distinguishing features in that case varied vastly from the circumstances of the identification of this case. In that case, the evidence was that the Deceased was shot down by two bullets fired at close range to his abdomen, from front to back. The assailant had

disappeared and there were no eye-see witnesses. Immediately, after the shots were fired the Deceased's wife ran outside and saw her husband bleeding profusely. His words to her were *"You are going to lose your husband. It is Neville Nembhard. Ms. Nembhard's grandson that shot me and take my gun. Your husband did not do anything. Just as I came through the gate and turned to lock the gate, I saw him over me, and your husband could not help himself."*

Now that is markedly different from the res gestae statement that appears in this case. In that case, the wife gave context of the recognition by stating in evidence that the person, whose name her husband called lived across the street, that they knew them for 10 years. The statement itself also describe the circumstances in which the identification was made. The Deceased would have said that it was a close range shot that the assailant was standing over him and it was close enough for the assailant to take the weapon from him. The wife also ran to the scene almost immediately, and she gave evidence of the conditions of lighting etc. That is absent from this case.

There is simply no evidence of the circumstance of the identification. There is no evidence from the scene of the shooting itself apart from the light pole. There is evidence that the Deceased left the scene and ran into a different house. There is no evidence of recognition; there is no evidence that the shots were to the front, in fact, the evidence shows that the shots were to the back. While joint enterprise is

being alleged, there is no evidence of joint enterprise apart from there being apparently 2 firearms that could have been discharged. And there is also no evidence as to who was the shooter, and what role each participant may or may not have played.

So, in this case, which the Court considers to be markedly different from **Nemhard**, the evidence of the Crown resting solely on the correctness of the Deceased's identification. Where the circumstances of that identification cannot be ascertained and there is little by way of support for that identification by other evidence. The Court finds itself duty bound to stop the case.

So, the case against Accused No. 1 and Accused No. 2, you are being discharged of the indictment against you. That's the ruling of the Court.

MR. ELRIINGTON: Much obliged.

THE COURT: I've not produced a written ruling, but the transcript can be made available to the parties if you desire.

(2:18 p.m. Court Session Ended)

**Candace Nanton**
High Court Judge
Senior Courts Belize
Dated 6th June, 2024