

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

(Criminal Jurisdiction)

Indictment No. C 0007/2024

THE KING

and

DANE GILLET

Defendant

Appearances:

Ms. Cheryl Lynn-Vidal SC for the Crown

Mr. Orson Elrington for the Accused

2024:

May 7

July 19

**JUDGMENT ON ADMISSIBILITY- VIDEO RECORDING-IDENTIFICATION-
ELECTRONIC EVIDENCE ACT**

Criminal Law- Video recording-admissibility-Electronic Evidence Act 2021

- [1] **SYLVESTER; J:** On the 10th day of January 2024, Dane Gillett was indicted for the murder of fifteen (15) year old Dwayne Gabourel. The particulars of the indictment are that: Dane Gillett intentionally and unlawfully caused the death of Dwayne Gabourel on the 27th day of September 2021, by injuries inflicted on him on the 25th of September 2021, at Belize City, in the Belize District, in the Central District of the High Court.
- [2] The shooting was captured on a CCTV recording. Both the prosecution and defence completed their Case Management Conference forms pursuant to the Criminal Procedure Rules 2016 part 4 (hereinafter CPR). The defence filed an objection to the admissibility of the video evidence. It was suggested by both the crown and defence that the issue of the admissibility of the video recording should be dealt with preliminarily. The court pursuant to CPR 4.2 (i) (ii), scheduled a pre-trial hearing to consider legal arguments relating to the admissibility of the video evidence. Both the crown and the defence filed their respective submissions.
- [3] Holistically, there are two issues that falls to be determined, they are as follows:
- i. Firstly, whether the CCTV recording is admissible by virtue of the conjoint effect of the Electronic Crimes Act and the Common Law.
 - ii. Secondly, is the CCTV recording and the other circumstantial evidence as submitted by the Crown sufficient to identify the accused as the shooter.
- [4] The first issue shall be dealt with in this judgment. As it relates to the second issue it can only be properly ventilated by the leading of evidence, the appropriate cross-examination and a judicial determination in accordance with the legal principles of identification, circumstantial evidence, *inter alia*.
- [5] The issue of admissibility of a CCTV recording is prescriptive in that the legislation prescribes the manner of the reception of video evidence, ensuring certain legislative safeguards as to its authenticity.

Crown's Submission:

[6] The Crown's submission can be summarised as follows:

- i. Cpl. 772 Eck's statement supports the fact that he is only able to state that the shooter seen in the recording has a similar build to the accused and has the same placement of tattoos. The video recording being challenged is the most essential circumstantial link in the identification of the accused as the person who caused the death of the victim in this case.
- ii. On the evidence, the Crown submits that they will be able to establish the pre-requisites for admissibility – they will be able to prove that the recording is what it claims to be, that it is relevant, and probative. The Crown's position is that surveillance footage is admissible.
- iii. The Crown's case in its entirety is circumstantial. The theory of its case is that a friend of the accused, Michael Henry, died on the 20th of September 2021, from gunshot wounds sustained the previous day. His funeral was held on the 25th day of September 2021, and the repast was held at the Baptist residence situated in Belize City. The accused attended the funeral, and the repast. Surveillance footage retrieved from a DVR obtained after the execution of a warrant at the said Baptist premises shows the accused at the repast, and then his departure from the premises on a motorcycle with Hernan Solis. He is taken over Swing Bridge and to his home at Majestic Alley, in Belize City. After waiting for a few minutes, a signal is given to Solis and then he goes along another path, off camera.
- iv. Solis is next seen riding the motorcycle towards Maulette Grocery Store. He stops outside of the Store. The pillion rider alights, goes towards a young person standing in the store and fires shots at him. The person is fully masked, but as he stretches out his left hand, it is apparent from the recording that his left hand and arm are covered with tattoos.

- v. After the shooting, the shooter gets back on the motorcycle and is taken, by Solis, via another route, back to the home of the accused.

- vi. While the shooter is not wearing the same clothes that the accused wore at the repast, he has the same body-structure. Further, the accused has tattoos on his left hand all the way up to his arm.

- vii. The position of the Crown is that the shooter was in fact this accused Dane Gillett.

- viii. Cpl. 772 Roy Eck a Corporal of Police formerly attached to the Gang Intelligence, Investigation and Interdiction Unit, known as GI-3, was shown the video footage from the repast and the footage from the shooting itself. He identified the accused as one of the people seen in the footage at the repast.

- ix. Eck also identified the accused as the person seen in the footage leaving the premises with another attendee, Herman Solis. He also confirms that the person who is seen firing the shots at the store is similar in body structure to the accused and that the position of his tattoos is consistent with those of the accused.

- x. It is clear from the foregoing paragraphs that the Crown is not relying, as argued by the accused in his submissions, on “*a purported identification by a police officer using that video as its sole means of identifying the defendant as the shooter*”. All that the officer is able to say is that the person has the same body structure of the accused and the same placement of tattoos.

Defence submission:

[7] The Defence submission can be subsumed as follows:

- i. That the surveillance footage is not admissible. There is nothing in the nature of an audit trail that will allow the court to assess its reliability.
- ii. Firstly, when officer Eck was invited to view the video, contrary to law, he was not told that: (a) An individual who is known to him may, or may not, appear in the material he was shown and that if he did not recognize anyone, he should say so.
- iii. Most Importantly as was stated in the **Queen v Trenton Williams [2018] SC Bda 19 Crim.** the state failed to keep or provide a record where Officer Roy Eck purports to recognize the defendant viewed on a CCTV recording in order to safeguard against the possibility that the officer was merely assenting to a wish or subconscious desire to recognize a guilty participant.
 - a. The police officer's initial reactions to the recording are not set out and available for scrutiny. There is no video recording of when the officer purported to have recognized the defendant and equally fatal is the fact that a Justice of the Peace was missing from the entire process.
 - b. There was no record to say if the police officer failed to recognize the defendant on first viewing or if he did so subsequently.
 - c. The exact words that the officer used by way of recognition were also not recorded.
 - d. There is no record of what about the image that is said to have triggered the recognition by the officer.
- iv. The insurmountable hurdles or "problem" as it is described by the court in **Queen v Trenton Williams** is twofold. There was no adherence to the safeguards and secondly though the officer recorded what he saw in the video as he saw it, he in addition asserted recognition of the defendant and only asserted that he recognized "similar features", body structure and the tattoos covering the left hand from the wrist way up to the shoulder of Dane Gillett. He couldn't say what was the exact tattoo designs were on the left

hand, but he knew and had seen Dane Gillett's entire left hand was full of tattoos of various designs.

- v. The officer having conducted several interviews with Dane Gillett and has seen his left hand with tattoos thereon. He did not say how many times, where, in what circumstances. It is also well known that police intelligence keeps a good record of photos of local gang associates, but he did not say or detail that. And in any event like in **Queen v Trenton Williams** it's unlikely that that would have been helpful since his own description of the video could not find that there was a sufficient facial exposure of the person in the video that anyone could say he was the same or even similar. The video is therefore not sufficiently intelligible to be admitted into evidence. In short, this court is left with no record of any proper basis upon which Corporal Roy Eck could back up his alleged recognition.
- vi. The defence further submits that the burden is on the Crown in proving the authenticity of the video evidence capable of supporting a finding that the electronic record is what the person claims it to be.

PART 1:

Whether the CCTV recording is admissible by virtue of the conjoint effect of the Electronic Crimes Act and the common law.

[8] The reception of video evidence in a criminal trial is prescribed by the **Electronic Evidence Act 2021** of the Substantive laws of Belize (hereinafter called the Act). It gives the court the power to admit video recording, by the party, in this case the prosecution who is seeking to rely upon it, proving its authenticity, and that it was not tampered with.

[9] The relevant parts of the Act are sections 3- 6 and state as follows:

"3. Nothing in the rules of evidence shall apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.

4.-(1) This Act does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

(2) A court may have regard to evidence adduced under this Act in applying any common law or statutory rule relating to the admissibility of records.

5. The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

6. (1) In any legal proceeding, subject to subsection (2) of this section, where the best evidence rule is applicable in respect of electronic record, the rule is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.

(2) In any legal proceeding, where an electronic record in the form of a printout has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, the printout is the record for the purpose of the best evidence rule.”

[10] The above sections of the Act enable the reception of video recorded evidence to be used in court. This has a dual function, either identification at the time when the recording was retrieved, by someone who knew the assailant or anytime thereafter by someone who can properly identify the person/s on the recording/s.

[11] The electronic record can also be admitted subject to the court’s discretion pursuant to section 11 of the Act which states as follows:

“11.(1) Unless otherwise provided in any other law, an electronic record is admissible, subject to the discretion of the court, if the parties to the proceedings have expressly agreed at any time that its admissibility may not be disputed.

(2) Notwithstanding subsection (1) of this section, an agreement between the parties on admissibility of an electronic record does not render the record admissible in a criminal proceeding on behalf of the prosecution if at the time the agreement was made, the accused person or any of the persons accused in the proceeding was not represented by an attorney-at-law.”

[12] Pursuant to the principles emanating from the Common Law, there are four circumstances in which, subject to a sufficient warning, the jury could be invited to conclude the accused committed the offence based on a photographic image from the scene of the crime which is admitted into evidence. Ergo, with the increase in the use of video footages in proving identification of suspects, useful guidance has been provided to guide the courts when deliberating in that area of the law. This guidance was provided in **Attorney General Reference (No. 2 of 2002) [2022] EWCA Crim 2373[2003] 1 CR App R 21**¹ per Rose LJ opined as follows:

“19. In our judgment, on the authorities, there are, as it seems to us at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up, a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

- (i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (Dodson and Williams);*
- (ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (Fowden and White, Kajala v Noble, Grimer, Caldwell and Dixon and Blenkinsop); and this may be so even if the photographic image is no longer available for the jury (Taylor v Chief Constable of Chester);*
- (iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give*

¹ Criminal Bench Book page 232 [Identification Evidence]

evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (Clare and Peach);
(iv) *a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury...*”

[13] This area of the law has developed, and police officers have used video recordings, still images, recordings and photographs to identify suspects which has led to successful convictions, while at the same time providing sufficient safeguards to ensure the accused is guaranteed a fair trial, as enshrined in section 6 of the Constitution of Belize. The reception of video recordings into evidence is subject to the court’s discretionary power to exclude it in circumstances where its prejudicial value outweighs its probative effect. In **Reg v. Fowden & White [1982] C.L.R 588**, a police officer and a store detective were allowed to identify an accused in a video film, where the appellant was charged with theft. On appeal the court ruled that the prejudicial value outweighed its probative effect, in that, the identifying witness knew the accused from a similar shoplifting case one week later, and the defence was deprived from testing the accuracy of the identification without causing embarrassment. The court opined at p.589 as follows:

“The evidence should not have been admitted as the prejudicial value outweighed its probative effect, because the identifying witness knew the accused from a similar shoplifting case a week later, and accordingly the defence were deprived from testing the accuracy of the identification without causing prejudice and embarrassment.”

[14] In **Reg. v. Maqsud Ali [1966] 1 Q.B. 688**, the evidence of a murder was tendered against two accused based on admissions recorded in Punjabi dialect on a tape recorder concealed in a room in a police station. The evidence was tendered

through translators who had listened to the tape and a transcript of their translations. The evidence was ruled to be admissible, at page 701, Marshall J. opined:

“For many years now, photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.”

[15] In **Fowden’s case**, the court made it clear that, there was no difference between, identification via, video recording, photograph or tape recording. At page 589 it was stated thus:

“There was no difference in principle between a video film and a photograph or tape recording. Although it was not strictly necessary to decide the point the court was of the opinion there was no reason in principle why the Crown should not be able to identify a witness who knows someone to look at a photograph and give evidence to the effect that he knows the person, and it is the accused.”

[16] In **Reg v. Grimer [1982] C.L.R 674**, a security officer was able to identify an accused who had stolen a cologne from a shop via a video recording. The security had known the assailant socially for many years and so was able to identify him. The jury saw the video and the accused was convicted and appealed on the ground that the trial Judge erred in admitting the video. The court explicated at p. 674 as follows:

“That there was no distinction between the evidence of a man who looked at a video tape (provided there was no challenge to the validity of the tape itself) from that of a bystander who observed the primary facts, saw someone with whom in the past he was acquainted and could say so to the jury.”

[17] In **Taylor v Chief Constable of Cheshire [1986] 1 WLR 1479**, the evidence of the prosecution consisted of evidence from a witness who saw the video recording of the events alleged to constitute the offence. However, the recordings were not available at the time of the trial, having been inadvertently erased. The witness was able to give *viva voce* evidence as to what he had seen on the video and the accused was convicted. The appellant’s appeal was dismissed, and Ralph Gibson L.J stated the legal position succinctly at p. 1486 par. E, as follows:

*“For my part I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shoplifter by a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of those activities on a recording of what the camera recorded. He who saw may describe what he saw because, as Ackner L.J. said in *Kajala v. Noble*, 75 Cr.App.R. 149 to which I have referred, it is relevant evidence provided that that which is seen on the camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. As with the witness who saw directly, so with him who viewed a display or recording, the weight and reliability of his evidence will depend upon assessment of all relevant considerations, including the clarity of the recording, its length, and, where*

identification is in issue, the witness's prior knowledge of the person said to be identified, in accordance with well-established principles.

Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident, and that study may affect greatly both his ability to describe what he saw and his confidence in an identification. When the film or recording is shown to the court, his evidence and the validity of his increased confidence, if he has any, can be assessed in the light of what the court itself can see. When the film or recording is not available, or is not produced, the court will, and in my view must, hesitate and consider very carefully indeed before finding themselves made sure of guilt upon such evidence. But if they are made sure of guilt upon such evidence, having correctly directed themselves with reference to it, there is no reason in law why they should not convict. Such evidence is not, in my view, inadmissible because of the hearsay principle. It is direct evidence of what was seen to be happening in a particular place at a particular time and, like all direct evidence, may vary greatly in its weight, credibility and reliability.”

[18] In **John Bowie v James Mackenzie Tudhope (1986) S.C.C.R. 20**, the appellant was tried summarily for assault and robbery committed in a shop. The incident was recorded by a video camera, and two police constables who knew the appellant, identified him on the recording as one of the men seen committing the offence. The appellant was convicted and appealed. His appeal was dismissed. The court followed the authority of **Fowden’s case** (supra) as an accurate statement of the law.

[19] The court is therefore satisfied, that by virtue of the conjoint effect of the Electronic Evidence Act and the common law, the CCTV recording can be admitted into evidence. However, as stated prior in this judgment, at the trial of the matter the court will delve into the issues of circumstantial evidence and the CCTV recording, in an effort to resolve the second issue mentioned in par. (3) (ii) above.

Decision

[20] The CCTV footage is therefore admitted into evidence, pursuant to the conjoint effect of the Electronic Evidence Act 2021 and the Common Law.

Dated 19th July 2024.

Derick F. Sylvester
Justice of the Supreme Court