IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C80 of 2022

BETWEEN:

THE KING

and

KAREEM FRANKLIN

Defendant

Appearances:

Mrs. Portia Staine-Ferguson, Senior Crown Counsel for the King

Mr. Ronell Gonzalez Counsel for the Defendant

2024: May 20; 21; 22; 23
June 7
July 22

JUDGMENT

ATTEMPT TO MURDER-JUDGE ALONE TRIAL

Background

[1] **NANTON, J.:** The Court has indicted the Accused for two counts of Attempt to Murder contrary to **Section 18 read along with Sections 107 and 117 of the Criminal Code**[1] arising out of an incident which is alleged to have occurred on 1st March 2020.

[2] The Trial by Judge Alone began with the arraignment of the Accused on 20th May 2024 pursuant to **Section 65 A (2) (b) of the Indictable Procedure Act.**[2] The Accused pleaded Not Guilty to both counts on the indictment.

[3] The Crown's case is that the Accused, while seated at the back of a motorcycle and armed with a firearm, shot at the Virtual Complainants, two police officers, while they were pursuing him on motorcycles.

[4] At the close of the case for the Crown, Counsel on behalf of the Accused made a submission of No Case to answer, which was overruled by the Court in an orally delivered decision.

[5] The Court informed the Accused of the three options available to him i.e. remain silent; to give a statement from the dock, or to give evidence under oath and explained each option to him. The Accused opted to make a statement from the dock and called two witnesses.

[6] The Parties gave closing addresses, which were carefully considered by the Court.

[7] The Court found the Accused NOT GUILTY to both counts on the indictment but GUILTY to the offences of 'Use of deadly means of harm to wit a firearm with intent to cause grievous bodily harm'.

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[1] Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2003
[2] Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020.

Elements of the Offence

[8] The elements of the offence of attempt to murder are laid out by our Court of Appeal in **Peter Augustine v R**[3] per Carey J. who stated that before the Accused can be convicted of an attempt to commit an offence, the Crown must prove;

(a) that he had the intention to commit the full offence and that in order to carry out that intention, he

(b) did an act or acts which is/are step(s) towards the commission of the specific crime, which

(c) is/are directly or immediately and not merely remotely connected with the commission of it, and

(d) the doing of which, cannot be reasonably regarded as having any other purpose than the commission of the specific crime.

[9] All the above must co-exist. Intention alone is not sufficient - it is no offence merely to intend to commit a crime. Doing of the acts alone without intention is not sufficient and the act(s) done must be something more than mere preparation for the commission of the offence. To commit the crime of Attempt to Murder the Accused must have formed the specific intention to kill and must have done an act or acts directly, or immediately connected with or towards the commission of that offence and that the act(s) could not be reasonably regarded as having any purpose other than murder.

Summary of Crown's Case

[10] The case for the Crown was essentially that police officers, Stephen Choco and Joseph Sutherland (the Virtual Complainants) were on mobile patrol in the Belize City District when they observed the Accused on the back of a motorcycle being driven by an unidentified male. The occupants of that motorcycle aroused their suspicion and they gave chase. The driver of the motorcycle sped off and the

[3] Crim App 8/01

Accused, who was seated at the back of the cycle, pulled out what appeared to be a firearm and fired shots in their direction. Sutherland fell off his own motorcycle, but was not injured by the gunshots. Stephen Choco continued to give chase and the Accused continued firing at him. The Accused and the driver of the motorcycle eventually made good their escape.

[11] PC Ciau retrieved video footage obtained from a building near the scene. This video footage was later seen by Police Officers, Kris Staine and Marlene Gonzales (separately) who each recognised the Accused Kareem Franklin as the individual armed with the alleged firearm seated on the back of the motorcycle. Officer Gonzales subsequently arrested and detained the Accused. Officer Rodriguez later charged him for the offences arising out of the incident.

[12] Several months after the Accused's arrest and charge, Sgt Elroy Vernon conducted two separate group identification procedures, both of which were witnessed by Justice of the Peace Andrew Godfrey. The Virtual Complainants each identified the Accused as the person they saw on the back of the motorcycle holding an apparent firearm and who fired shots at them.

Analysis

[13] The Court has directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy the Court so that it is sure of the guilt of the Accused, and if there is any reasonable doubt the Court is duty bound to acquit him.

[14] The Court has considered all the evidence with the intention of reaching a fair and dispassionate assessment of that evidence. The Court notes that in assessing credit and reliability it must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be

resolved on the evidence. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence, or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that particular bit.

[15] In examining the evidence, the Court also directs itself that the credibility of a witness is not a seamless robe where one lie, or even several, strips the witness of all believability. The Court in this regard relies upon the decision of the English Court of Appeal of **R v Fanning and Ors**[4]. The Court notes that if a witness has lied about some bit of evidence, the evidence must be properly evaluated, taking into account the fact that the witness told the untruth and the reason for the lie, and may still convict if the Court is sure that the material parts of that evidence to be true. The Court is guided by the CCJ decision of **James Fields v The State**[5] which states:

> "*Where there are different or conflicting accounts in the evidence about a particular matter, you must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in your view their evidence is honest and accurate. When doing this you must apply the same fair standards to all witnesses, whether they were called for the prosecution or for the Defence. It is entirely for you to decide what evidence you accept as reliable and what you reject as unreliable."*

[16] The Court is assisted in the legal parameters of its fact-finding function by a recent decision of the Jamaican Court of Appeal in **Vassell Douglas v R** [6] , per Fraser JA (Ag.) *"We have distilled from the foregoing authorities that in any trial, more so a bench trial, the judge is **not** required to identify all the inconsistencies or discrepancies that arise during the trial unless it is considered damaging to the Crown's case."*

[17] The Court begins firstly with analyzing the evidence on the Crown's case, and **if** the evidence is strong enough to consider a conviction; it would consider the case for

[4] [2016] 2 Cr. App. R. 19 at para. 27
[5] [2023] CCJ 13 (AJ) BB
[6] [2024] JMCA Crim 10.

the Accused, as is the required reasoning process noted by our Apex Court, The Caribbean Court of Justice (hereinafter "the CCJ"), in **Dionicio Salazar v R**[7].

Summary of Evidence for the Crown

[18] The Crown called the following 9 witnesses in the order shown below:

i. #1163 Police Sgt Elroy Vernon- Officer who conducted a group identification procedure with each VC.
ii. Justice of the Peace Andrew Godfrey, who was present during each identification procedure.
iii. #2191 Police Constable Stephen Choco- Virtual Complainant
iv. Police Constable Edward Ciau – IT personnel who retrieved video footage of incident which was admitted and marked **EC1**
v. #1804 Police Sgt Kris Staine – identified Accused on **EC 1**
vi. Joseph Sutherland- Virtual Complainant
vii. Jason Reneau- Crime Scene Technician who tendered photographs
viii. Woman Police Constable Marlene Gonzales- identified Accused on **EC 1**
ix. #1528 Police Sgt Andy Rodriguez- investigating officer

Issues

[19] There are two main issues which directly affect the outcome of this case and the Court will examine each in turn:

i. *Whether the evidence of identification of the Accused as the shooter is both credible and reliable.*
ii. *Whether the shooter formed an intention to kill the Virtual Complainants.*

[7] [2019] CCJ 15 (AJ)

Identification

[20] The Crown's case involves multiple sources of identification with varying levels of reliability. The Court will consider each source on its own merits, and thereafter consider the combined weight of all the evidence based on the facts that it has accepted.

[21] The evidence of identification advanced by the Crown consists of the following:

i. **EC 1** –video footage showing a person holding an apparent firearm on the back of a motorcycle.
ii. Police Sgt Kris Staine- who identified the Accused as the person in **EC 1** holding an apparent firearm on the back of a motorcycle.
iii. Woman Police Constable Marlene Gonzales - who identified the Accused as the person in **EC 1** holding an apparent firearm on the back of a motorcycle.
iv. Police Constable Joseph Sutherland- who identified the Accused at a group identification procedure as the person who fired shots at him.
v. Police Constable Stephen Choco – who identified the Accused at a group identification procedure as the person who fired shots at him.

EC 1-Video Footage

[22] The Court admitted **EC 1** on the conjoint effect of the common law and the provisions of the **Electronic Evidence Act 2021** (hereinafter "the EEA"). The Court accepts the common law test for the admissibility of video evidence as set out in the decision of the Supreme Court of Canada in **R v Alexander Nikolovski**[8], per Cory

[8] [1996] 3 SCR 1197

J for the majority. This jurisprudence has been adopted in the Caribbean in the Jamaican Court of Appeal decision of **Randeano Allen v R** [9].

> *"28. Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well.* ***It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused."*** *(emphasis mine)*

[23] The **EEA** reads, where relevant:

> *"2… "electronic record" means a record … stored by electronic means in an information system …*
>
> *"information" includes data, text, images, sound, codes, telephone communications, computer programs, software and databases; and*
>
> *"information system" means a system for generating, sending, receiving, storing or otherwise processing electronic records.*
>
> *4.* ***Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record****." (emphasis mine)*

[24] The Court in interpreting this section presumes that the National Assembly knows the common law when it is legislating.[10] In the Court's view, the intention of the National Assembly when passing **Section 4 of the EEA** was to make electronic evidence more easily admissible and provide assistance by way of a presumption

[9] [2021] JMCA Crim 8 paras 38-40
[10] Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at 649

to overcome the accuracy requirement, the first step in **Nikolovski**, with regard to adducing of electronic evidence.

[25] It is the Court's view that, by virtue of the definition section, video footage would be an electronic record stored in an information system, namely the NVR. **Section 4** provides that a device that *"is of a kind*" that ordinarily produces an accurate record the Court shall presume it produced an accurate record on the occasion in question unless there is sufficient evidence to cast doubt on that presumption.

[26] In the Court's view, it is a notorious fact of which it takes judicial notice, as defined in **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service**[11] that NVRs, which are a commonplace technological advancement, are devices which ordinarily produce an accurate record.

[27] The evidence of Cpl Edward Ciau, which has been accepted by this Court, is that on 2nd March 2020 he retrieved video footages from a dental clinic located on the corner of Mahogany Street and Central American Boulevard. He gained access to the password protected NVR system from Dr Arden Usher, who inputted his password into the system. Cpl Ciau testified that the NVR system was in good working condition. He retrieved two files from that NVR, which he copied onto a flash drive. He then returned to his office and using his password protected desktop computer he downloaded the video files onto a DVD-R which he labelled with his markings. He explained that a DVD-R is a type of disc that once information is stored thereupon it cannot be manipulated or deleted. Officer Ciau identified that DVD-R in Court (**EC1**) and demonstrated how the video could be paused, zoomed in and slowed down while viewing.

[28] Defence Counsel objected to the admissibility of **EC1** on the basis that Dr Arden Usher himself had not testified as to him granting permission to Officer Ciau to the NVR system. The Court, having found that the evidence led by the Crown supported

[11] [1923] AC 191 at page 212

the statutory presumption that **EC 1** was an accurate record of what the NVR recorded, overruled this objection and **EC-1** was admitted into evidence.

[29] Cpl Ciau was not cross examined.

[30] The Court has derived considerable assistance from the English Court of Appeal decision of **AG's Reference [12],** which speaks to the use that can be made of evidence such as **EC 1**. Though the decision spoke to photographs, the Court observes that it is equally appropriate to videos, per Rose LJ

> *"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 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…"*

[12] (No. 2/02) [2003] 1 Cr.App.R. 21

Police Sgt Kris Staine's Identification from EC 1

[31] The Court approaches the evidence of Sgt Kris Staine in the following manner based on the guidance of the Jamaican Privy Council decision of **Beckford and Anor. v R**[13], per Lord Lowry:

> *"The first question for the jury is whether the witness is honest. If the answer to that question is 'Yes', the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely is he right or could be mistaken?"*

Whether Sgt Staine is Honest

[32] The first step of this analysis requires the Court to determine whether Sgt Staine is an honest witness. In its determination of the credibility of Sgt Staine, the Court carefully analysed his testimony and found that no material inconsistencies, discrepancies or implausibility arose during his testimony, which caused the Court to doubt his honesty or credibility.

[33] The Court found that Sgt Staine was a forthright and straightforward witness. There was no apparent attempt to deceive or mislead the Court. Under cross examination, the witness acknowledged weaknesses in his identification evidence without any attempt at deception. For example, he readily accepted that at no point in the video was he able to see a full frontal view of the armed individual and that his view would have been impacted by the nature of the video itself- whether it was zoomed in or out and the length of time of the viewing. While these factors affected the reliability of his identification, the manner in which he addressed those weak points suggested honesty and transparency.

[34] The witness accepted that he and the Virtual Complainants were members of the same unit and that they would at times attend general unit meetings at the same

[13] (1993) 42 WIR 291 at page 298

time. However, he stated that they had never worked together on the same team with them and that he held no grudges or bias towards them or against the Accused. Sgt Staine also said that he had known the brother of the Accused, who also was a police officer. The Court believed this response and did not form the view that Sgt Staine was a biased witness. On the contrary, he seemed quite fair and his responses were quite reasonable. He withstood the rigours of cross examination without any adverse impact on his credit.

[35] The Court, after a careful examination of his evidence and demeanour in the witness box, concluded that he was an honest witness whose testimony could be believed.

Circumstances of his Identification

[36] The next step of the analysis requires the Court to examine closely the circumstances in which Sgt Staine's identification was made and to consider any specific weaknesses to determine, whether he is or may have been mistaken.

[37] Sgt Kris Staine testified that on 3rd March 2020, investigator Andy Rodriguez showed him **EC 1,** which contained two video files on a computer. He said that the video was in technicolour, and it was zoomed in and slowed down so that he could get a clearer view of the persons on the motorcycle. He watched the video for about 10-15 minutes and recognised Kareem Franklin, the slim, brown skin, male person seated on the back of the cycle wearing a black t-shirt and holding a black object.

[38] He said that he knew Kareem Franklin, whom he identified in Court as the Accused, for about 3 months prior to viewing that video. He had known him by name as he had conducted 4-5 stop and searches within that time span. During these stop and searches he interacted with the Accused for about 1-3 minutes, and he became more familiar with his body structure and his facial features. He was also familiar with the Accused's brother as they worked together in the same unit. He had last seen the Accused about one week prior to viewing the video.

[39] In cross examination, he accepted that he did not have a front to front face visual of the individual on the cycle, but that he had a ¾ side view of that person, which was more than a half view, but less than a full frontal view. He said that he could not identify the driver of the cycle, but it is noted that there were less opportunities on EC1 to see the face of the driver as his head was always faced in the opposite direction.

[40] Sgt Staine disagreed with the suggestion that he merely wanted someone to be charged for these offences against police officers from his unit. He stated that although he and Officer Choco were on the same unit they did not work together on the same team. He stated that he bore no grudges and that he was a fair person.

[41] He stated that he had no recollection that the video had been posted on the police blog, nor did he reach out to Officer Rodriguez about knowing the person on the cycle.

[42] The Court reminds itself of the need for caution in accepting identification evidence, because of its inherent challenges and that mistaken identification has led to miscarriages of justice in the past.

[43] The Court also notes specifically that although a case of recognition evidence may be more reliable than identification by persons unknown to the suspect, errors can be made even in the recognition of close friends or relatives. Therefore, the fact that Sgt Kris Staine claimed to have known the Accused does not mean that he cannot be mistaken.

[44] Bearing those challenges in mind, the Court has considered carefully the circumstances of the identification, and the Court's views thereon, are as follows:

i. *Recognition:* Sgt Staine testified that he knew the Accused for about 3 months and he described the circumstances in which he had interactions with him. This evidence was never challenged. It was never put to the witness that he did not know the Accused. He said that he

last saw him one week prior to having viewed the video. On the other hand, the Court notes particularly that the witness did not have a very close or familiar relationship with the Accused. He would have encountered him only on 3-4 occasions, which differs from someone recognising a friend or relative with whom they have a closer connection. Therefore, although this is a case of recognition it is not the strongest of recognition cases, but it still is sufficiently reliable to enable the witness to make a positive identification if the circumstances as examined below allow it.

ii. *Lighting*: The Court is helped considerably on this issue by the evidence of **EC 1**, the video demonstrates clear bright natural lighting as the incident occurred during daytime.

iii. *The period of observation:* The witness observed the Accused for the period that the motorcycle rode into the camera's view. However, as conceded by the witness the only opportunity to view the Accused's face was a ¾ view during the time period that his face came into frame on the video. He explained that he viewed the video multiple times and that it was paused zoomed in and slowed down. This was shown to be possible by the evidence of PC Ciau. It was evident that the witness had in fact viewed the video multiple times as before being shown **EC 1** in Court; he was able to recall very specific and minor details that may have been missed on an initial viewing. Details such as exact clothing worn by the persons in the video, a female exiting a random car etc. The witness also recalled the exact moment that he was able to make the recognition. He then identified this moment in Court when the **EC 1** was paused and zoomed. The Court notes that the face of the shooter was shown on screen for one second at that time stamp. The Court takes note of the nature of video footage evidence, which allows the viewer to stop and pause moments as contrasted to a real life continuously moving incident. The Court also notes that the witness would've had an opportunity for observation uninterrupted by fear or the

usual traumatic circumstances attached to a live observation and the unique ability to re-watch as many times as was necessary, which he clearly did.

iv. *Distance and obstruction*: Sgt Staine stated the video was zoomed in further when he viewed the footage at the police station than where he was positioned while giving evidence in Court. At the police station he viewed the video on a large screen, which he said was positioned closer than where the Court's TV monitor was positioned. He did not estimate a distance, but demonstrated to the Court a distance which was approximately 15-20 feet. In the Court's own view of **EC 1** this is a distance where a proper observation could be made. The witness stated that nothing obstructed his view. The Court notes for itself from its own viewing of **EC 1** that a clear observation of the shooter's face could be made at the time stamp mentioned above when the video is zoomed in. The witness stated that he saw a ¾ side profile and not a full frontal view of the shooter's face. This is consistent with what is depicted in **EC 1**. The witness also said he could identify the Accused not only by his face but also by his built. The Court found that the video footage allowed a limited, but sufficient opportunity for the features of the person holding the firearm to be observed and the Court specifically observed consistency with that description given by Sgt Staine and that of the shooter on **EC 1** and that of the Accused himself at Court as the Court itself had several opportunities to observe the Accused in the dock.

v. The Court did not conclude that there had been any contamination of his identification.

[45] The Court found the specific weaknesses in Sgt Staine's evidence to be as follows:

i. The limited nature of his prior interactions with the Accused having interacted with him on 4-5 occasions.

ii. The fact that Sgt Staine view would have been an on screen viewing as opposed to a real life face to face interaction meant that certain features may not have been observed.

iii. The incident occurred very quickly in a matter of seconds although this is mitigated by the ability to pause, slow down and/or zoom.

iv. The shooter's face remained on screen for a brief moment although there was the ability by the observer to pause/slow down and zoom the video.

[46] The Court is of the view that the strengths of the identification evidence far outweigh its weaknesses even cumulatively considered. The Court finds that Sgt Staine had sufficient opportunity to make a correct identification of the person on the back of the cycle when he pointed out the Accused as that person. The Court is satisfied, subject to its assessment of the case for the Accused, that Sgt Staine has correctly identified the Accused as the armed individual on the back of the cycle.

Identification by Cpl Marlene Gonzales

[47] The first step of this analysis requires the Court to determine whether Marlene Gonzales is an honest witness. In its determination of the credibility of Marlene Gonzales the Court looked through her testimony under evidence in chief and cross examination. The Court also assessed her demeanour and the manner in which she responded to the questions posed. In assessing her credit and reliability the Court examined whether any material inconsistencies, discrepancies, and any implausibility arose in her evidence. The Court notes that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence.

[48] The Court carefully analysed his testimony and found that no material inconsistencies, discrepancies or implausibility arose during his testimony which caused the Court to doubt her honesty or credibility.

[49] The Court found the witness generally to be an honest witness i.e. that she did in fact view the video contained in **EC 1,** and that it was from watching same that she purported to identify the person seen on the back of the motorcycle as the Accused.

Circumstances of Identification

[50] Officer Marlene Gonzales saw a video posted on the police WhatsApp blog. She watched the video via her Samsung Galaxy cell phone. She said that she stopped the video, pressed rewind, and enlarged the video while viewing it. She said that she specifically paused and enlarged the video when the motorcycle approached the speed bump, this was at the time stamp **3:37:07**.

[51] The witness testified that she knew Accused for about 3 months prior to viewing the video footage. She recognised him from having visited the home of the Accused's grandmother- a Justice of the Peace – at Oleander Street. She stated that she would see the Accused there although she had no direct interactions with him. She would see him about once or twice per week at different times during the daytime or evenings and for approximately 3 minutes each time and at a distance of about 3-4 feet away more or less. She recognised the Accused on **EC 1** by his facial features and his body structure.

[52] At this stage, the Court again reminds itself of the need for caution in accepting identification evidence, because of its inherent challenges and that mistaken identification has led to miscarriages of justice in the past. The Court specifically refers to its self-directions relative to identification and recognition evidence outlined above.

[53] The Court also notes specifically that although a case of recognition evidence may be more reliable than identification by persons unknown to the suspect, errors can be made even in the recognition of close friends or relatives. Therefore, the fact that Officer Marlene Gonzales claimed to have known the Accused does not mean that she cannot be mistaken.

[54] Bearing those challenges in mind, the Court has considered carefully the circumstances of the identification, and the Court's views thereon, are as follows:

i. *Recognition:* Officer Gonzales testified that she knew the Accused for about 3 months prior to viewing the video footage. The nature of that knowledge of the Accused was challenged under cross examination- she accepted that she did not know the Accused by name and would only see him when she visited his grandmother's home, who was a Justice of the Peace at Oleander Street. She had no direct interaction with him. The witness did not have a very close or familiar relationship with the Accused. Her interaction with him varied from someone recognising a friend or relative with whom they have a closer connection. Her interactions were also indirect as she never had any conversation with the Accused, unlike Sgt Staine who would've interacted directly with the Accused. In those circumstances, although this is a purported case of recognition, it is a relatively weak recognition case.

ii. *Lighting*: The Court is helped considerably on this issue by the evidence of **EC 1** which demonstrates clear bright natural lighting.

iii. *The Nature/period of observation:* The witness watched the video footage on her cell phone whilst in a moving vehicle- the circumstances were therefore not ideal. While she stated that she paused and enlarged the video it is doubtful; whether, she would have had the technical capability to slow down the video on a cell phone. The Court on the other hand accepts her evidence that she would have been able to stop, replay and rewind the video as many times as she needed to

make an identification. The Court also notes that this witness also only saw one of the video footages and not the both clips that were shown to Officer Staine. She therefore did not have the benefit of the different angles that both clips provided. The witness identified the moment when the motorcycle approached the speedbump as the moment that she was able to recognise that the armed individual was the Accused. The Court notes that the face of the shooter was shown on screen for one second at that time stamp. The Court takes note of the nature of video footage evidence which allows the viewer to stop and pause moments as contrasted to a real life continuously moving incident. The Court also notes that the witness would've had an opportunity for observation uninterrupted by fear or the usual traumatic circumstances attached to a live observation and the unique ability to re-watch as many times as was necessary, which the Court accepts that she did.

iv. *Distance and obstruction*: The witness did not estimate a distance, but the Court would have been able to infer from the fact that she watched the video on a cell phone that she would have had the screen in her hands and at a close distance, even closer than the distance at which the video was shown in Court. In the Court's own view this is a distance where a proper observation could possibly be made if the video was of sufficient quality. The Court notes for itself from its own viewing of **EC 1** that an observation of the shooter's face could be made at the time stamp mentioned above if the video is zoomed in and if a witness is familiar with the shooter. The Court found that the video footage allowed a limited, but sufficient opportunity for the features of the person holding the firearm to be observed.

[55] The Court found the specific weaknesses in Officer Gonzales' evidence to be as follows:

i. The limited and indirect nature of her prior interactions with the Accused.

ii. The fact that this witness viewed the footage on a small cell phone screen as opposed to a larger screen or real life face to face interaction meant that certain features may not have been observed.

iii. The incident occurred very quickly in a matter of seconds although this is mitigated by the ability to pause and zoom.

iv. There is no evidence that this witness was able to slow down the video as she viewed it on the cell phone. Slowing down the video could have significantly strengthened the view of the armed individual and could have provided a stronger basis for identification as the gunman's face only remained on screen for a brief moment.

[56] Upon a careful examination of the full testimony of Officer Marlene Gonzales, the Court concludes that there were significant challenges to the reliability of Officer Gonzales' purported recognition of the Accused. While the Court does not outright reject this witness' testimony as untrue or unworthy of credit as evidenced by the Court's acceptance of the witness as generally credible and its acceptance of the strengths of the identification itself. The weaknesses of the evidence, outlined above means that the Court finds that the quality of her evidence on its own does not meet the threshold of reliability that would allow the Court to rely **solely** on this evidence as probative of identification beyond a reasonable doubt. That however, does not mean that the evidence is without value. The Court will further consider its value as supportive evidence below.

Can the Court Make its Own Identification From EC 1

[57] The Court is satisfied that where the photographic, or in this case video image is sufficiently clear the fact finder can compare it with the Defendant sitting in the dock (**Dodson and Williams**).

[58] The Court can therefore use **EC 1** to determine whether the person holding the object resembling a firearm is the Accused. **Nikolovski** has held that the Court is

permitted to look at **EC 1** and compare it with the Accused whom it has seen over days of trial and determine after appropriate warning, and reminding itself that certainty to the standard of beyond reasonable doubt is required, whether they are one and the same person.

[59] The Court notes that it is not being asked if it recognises someone it knows. The Court is being asked to make a comparison between images and the physical features of someone who was, until this trial, a stranger.

[60] The first question the Court needs to consider, is whether these images are of sufficient quality to make any comparison with the Accused. The Court is of the view that the video footage, when slowed down and zoomed in, is of sufficient clarity to make a comparison. The footage has sufficient natural lighting and a partial view of the shooter's face is shown with sufficient clarity. In the one moment that his face is shown on the screen there is nothing obstructing a view of his face at that point of the video. The Court is also permitted to stop this video, zoom in, or enlarge it, and examine it in the same way that any witness is permitted to do.

[61] However, unlike the other witnesses who made identifications from **EC1**, the Court reminds itself that the Accused is a stranger to this Court and not someone the Court has known personally. The Court also notes the passage of 4 years since the incident and the time at which the Court has viewed the footage, which also weakens the Court's ability to make a reliable identification. In this regard, I caution myself against making assumptions as to what the Accused may have looked like 4 years ago. The Court is not aware of the appearance of the Accused in 2020 and whether some of his features have changed with time.

[62] The Court observes that when the video is zoomed in and slowed down; the Court is able to observe a degree of similarity in the appearance of the Accused now and the armed individual in the video such as his complexion and size and haircut. Notwithstanding, this observation; however, the Court declines to make its own

identification bearing in mind the standard to which it must be satisfied i.e. so that it feels sure that the person in **EC 1** is the Accused.

The Group Identification Procedures

[63] At the commencement of the trial, Learned Defence Counsel took objection to the admissibility of the evidence of the group identification procedures on the basis that the procedures were unfair. Counsel also urged the Court to conduct a voir dire to determine the admissibility of same. The Court held that in the circumstances where it was being alleged by the Crown that the Accused had refused an identification parade, and thereafter covert group identification procedures were held; the Court would hear the evidence in the ordinary course of the proceedings, and thereafter the Court, as Fact Finder, would determine the weight if any to be attached to same.

[64] As this is a Trial by Judge only it must be remembered that the Court wears two hats as Trier of both fact and law. As Arbiter of the law, the Court maintains its gate keeping function to ensure that the Accused has a fair trial on the basis of legally admissible evidence. The Judge as a legally trained Fact Finder is of course able to distinguish between admissible and inadmissible evidence, and direct itself on the weight to be attached to different types of evidence; however, that ability does not detract from the duty of the Judge as Arbiter of the law to ensure that only evidence that is relevant and admissible is adduced. The Court is cognisant of the fact that where facts are disputed a voir dire may be held and a clear example would be as it relates to caution statements that are alleged to have been given involuntarily, and if so would be inadmissible.

[65] It is the Court's view; however, that in this case a voir dire would have been inappropriate to determine the admissibility of the group identification. The particular facts relative to that procedure were not being disputed and the Court was able to make a preliminary ruling on the basis of the depositions.

[66] In the UK case of **Thomas Henry Beveridge**[14] the Court of Appeal held, that pursuant to **Section 78(1) of the Police and Criminal Evidence Act 1984** a Trial Judge must consider the depositions and statements and the submissions of Counsel when a point was taken on an identification parade. The Court held that there might be occasion when the Trial Judge would think it desirable to hold a trial within a trial; but such occasions would be rare and the instant case was not one of them.

[67] In **David Baptiste**[15] - the Trinidad and Tobago Court of Appeal had to answer the question of whether a Trial Judge erred by not holding a voir dire to determine the admissibility of a confrontation exercise where the Appellant refused to attend an id parade. The Court of Appeal stated :

> *Upon consideration of the aforementioned authorities, we do not agree with the submission of Mr. Selvon that the judge was required to conduct a voir dire to determine the admissibility of the confrontation evidence. The judge, in deciding on this issue, was neither performing a gatekeeping role nor a function which required him to filter a category of evidence which fell outside the scope of minimum reliability. A voir dire to determine disputed issues of fact is traditionally only required with respect to categories of evidence which, in the long experience of the courts, have proven to be fraught with potential difficulties and which may, on one view, be described as presumptively unreliable. In that limited category of cases, it is critical that the judge perform a factual screening exercise to determine whether the evidence rises to the relevant level, in accordance with the prescribed test of admissibility, in order for it to be placed before the jury. The classic case in which a voir dire is necessary is where the judge is required to decide disputed issues of fact on the voluntariness of an admission. The issue relating to the confrontation did not fall into this limited category of cases of evidence which might be described as presumptively unreliable and therefore the judge was not obligated to determine its admissibility by holding a voir dire. The judge was simply required to hear the arguments in the absence of the jury and scrutinize the depositions in order to give his ruling.*
>
> *It is sufficient for a judge, after ruling on an issue such as the one in question (in the absence of the jury) to fully allow both the prosecution and defence versions to be canvassed before the jury for their determination. The judge in*

[14] (1987) 85 Cr App R
[15] Cr App 23 of 2016

his summing up must then isolate the issue, put it in its proper evidential and legal framework and give adequate directions and guidance to the jury on it.

[68] In this case where the Crown relied on evidence that the Accused refused to participate in an identification procedure, the evidence of the covert group identification procedure was presumptively admissible evidence. Where an identification parade is refused by a suspect, an informal exercise may well be a proper procedure by which to test a witness's ability to identify a suspect.

[69] The provisions of the **UK Police and Criminal Evidence Act 1984** are often referred to as guiding authority to the Police in the conduct of their investigations: According to Code B Annex C. Group identification may take place either with the suspect's consent and cooperation or covertly without their consent.

[70] **Rules 146-149 of the Police Standing Orders of Belize, Crime and Criminal Investigation Chapter 55** states that if a suspect refuses or having agreed fails to attend an identification parade or the holding of an identification parade is impracticable arrangements should be made if practicable to allow the witnesses an opportunity of seeing him in a group of people. **Rule 148** states that the suspect should be asked for his consent to a group identification; however, where the suspect refuses the officer in charge of the identification has the discretion to proceed with a group identification if it is practicable to do so.

[71] Officer Elroy Vernon conducted two group identification procedures, one with each VC, in the presence of JP Godfrey. According to Officer Vernon, the group identification procedures were held following a refusal by the Accused to participate in an identification parade.

[72] Andrew Godfrey also testified that he witnessed the Accused's refusal to participate in the identification parade and that he witnessed the group identification procedures conducted in August and September 2019. The Court accepted as truthful the evidence of both witnesses that the Accused had refused to participate in an

identification parade. In the circumstances of such a refusal the Court does not find the course adopted by the police to conduct a group identification to be objectionable.

[73] The Court overruled the objection of the Defence and held that the evidence of the group identification procedures was prima facie admissible evidence.

Circumstances of the Group Identification Procedures

[74] Having determined its admissibility, the Court now turns to the circumstances of the group identification procedures to determine whether the individual procedures were conducted in such a way so as to provide a real test of the witnesses' ability to make an identification and if so what weight if any to attach to it.

Identification by Stephen Choco

Whether Stephen Choco is an Honest Witness

[75] The first step of this analysis requires the Court to determine whether Stephen Choco is an honest witness. The Court, in assessing credit and reliability, must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes; however, on the authority of the Belizean CCJ decision of **August and Anor. V R** [16] that it need not comb the record for inconsistencies or contradictions.

[76] In its determination of the credibility of Stephen Choco the Court has carefully looked through his evidence for material inconsistencies which arose during his testimony. One discrepancy noted on the evidence is that Stephen Choco testified that the shooter had fired immediately whereas, Officer Sutherland stated that there was a

[16] [2018] 3 LRC 552 at para 60

pause of some seconds before the shooter fired. The Court does not consider this to be a material discrepancy.

[77] The Court found that Stephen Choco was a forthright and straightforward witness. There was no attempt to deceive and he acknowledged weaknesses in the identification evidence without any attempt at deception. When asked whether he had known that someone by the name of Kareem Franklin had been charged for this offence he admitted that he was informed of that by a colleague.

[78] There was also independent and corroborative support for a valuable portion of Stephen Choco's testimony from **EC 1,** which captured some of the incident to which this witness relates. There was also consistent and supporting evidence of this witness' testimony through that of other witnesses in this matter such as Officer Sutherland reference the incident itself, and Officer Vernon and JP Godfrey reference the group identification.

[79] The Court concluded that Stephen Choco was an honest witness whose testimony could be believed.

Circumstances of the Identification

[80] The next step of the analysis requires the Court to examine closely the circumstances in which Officer Choco's identification was made, and to consider its specific weaknesses to determine whether, the Court can be sure beyond a reasonable doubt as to the veracity and reliability of his identification.

[81] At this stage, the Court reminds itself of the need for caution in accepting identification evidence, because of its inherent challenges and that mistaken identification has led to miscarriages of justice in the past. Indeed, the Court specifically reminds itself of the fact that the CCJ has opined recently in the Barbadian decision of **R v Hall** per Jamadar JCCJ, that, *"this 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."

[82] Miscarriages of justice often have their root in mistaken identification by seemingly sure witnesses. The Court notes that an honest witness may be mistaken, and that Stephen Choco, although honest, may have conscientiously convinced himself that the person he saw with the firearm was the Accused without intending to make a mistaken identification, but is in fact in error. The Court also notes that mistaken witnesses may nonetheless be convincing.

[83] In this particular case where there are identifications made by several witnesses, the Court warns itself that several identifying witnesses may all be mistaken.

[84] The Court; therefore, considered carefully the circumstances of Stephen Choco's identification, and the Court's views thereon, are outlined below.

Initial Observation

[85] Stephen Choco testified that his first contact with the shooter was when the two persons on a motorcycle turned onto Mahogany Street. At that point, the shooter was about 8-10 feet away from him, and he saw him for about 5 seconds. He said that he saw the shooter's face as the shooter was facing him and that nothing blocked his view of same. He said that it was daylight and they had been on a slow patrol pace. His second contact with the shooter was while giving chase to the occupants of the motorcycle. At that point the shooter was about 45-50 feet away from him and he viewed him for about 3 seconds at a glance. The Court finds that although the separate time periods were short, the cumulative time period and other circumstances allowed sufficient opportunity for a proper identification to be made.

The Group Identification Procedure: 23rd September 2020

[86] In **Francis (Waldron et al)[17],** a Jamaican Court of Appeal case, it was submitted by the Appellant that care should be taken so that the conditions are fair to the suspect in the way they test the witness' ability to make an identification. Typically, the place where the group identification is held should be one where other people are either passing by or waiting around informally, in groups such that the suspect is able to join them and be capable of being seen by the witness at the same time as others in the group, for example pedestrians leaving in an escalator, pedestrians walking through a shopping centre, passengers on railway and bus stations, waiting in queues or groups, or where people are standing or sitting in groups in other public places.[18] In this case, the witnesses were parked in a vehicle on a public road and the Court accepted the evidence that there were several persons standing around by the Magistrate's Court and on the street side, which is expected at that time of day.

[87] The length of time between observing an assailant and being called upon to identify an assailant is important. The group identification was held on 23rd September 2020 more than 6 months after the incident occurred and curiously after the Accused had already been charged with these offences. Stephen Choco also stated that he was in fact aware that someone by the name of Kareem Franklin had been charged for these offences, although there is no evidence that he knew what Kareem Franklin looked like. This evidence leaves doubt as to whether this identification procedure was contaminated.

[88] The witness stated that he was seated in the police vehicle when he saw a masked person in front of the Court from a distance of about 40 – 50 feet away. On the first occasion, the person was 15-20 feet away from him, a distance he demonstrated in Court. He said that it was daylight and that he saw the front body and face of the person he identified. On the second occasion, he had the person in his view for

[17] Cr App 36 of 2002
[18] Leon Gomez Belize High Court Decision unreported

about 3-4 seconds, and he was able to see the person's front body and upper face. He pointed that person out to Officer Vernon in the presence of JP Andrew Godfrey. He later identified the Accused in Court as the person he had identified at the group identification procedure.

[89] The fact that the person was masked is also a significant factor, which affected the witness' purported identification. Choco did not have a full view of the person's face and as such his identification was limited to the upper facial features. The witness did not expressly indicate what features stood out, so that he could have made such an identification. For example, the Accused man himself has very light coloured eyes – this is a feature which could have stood out to a witness; however, there was no mention of that being an identifiable feature either immediately after the incident or at the time of the identification procedure. To add to the challenges is that there was no recorded initial description of the assailant that could have assisted the Court in its determination of the reliability of this subsequent identification.

[90] The Court also considered the absence of an identification parade. An identification parade enables a suspect to put the reliability of an eye witness' identification to the test. In this regard, the Court reminds itself of the dicta in **Pipersburgh** which states that where identification of the perpetrators is plainly going to be a critical issue in the trial, the balance of advantage will almost always lie with holding an identification parade. In this case, the failure to hold an identification parade, although attributable to the Accused's own refusal to participate, means that the identification did not take place in the controlled environment of an identification parade. This is a fact which I have taken into account in my assessment of the strength and correctness of the identification made by Stephen Choco.

[91] While the conditions of the initial observation are strong the cumulative effect of the challenges identified above relative to the belated group identification procedure significantly diminished the reliability of Stephen Choco's identification. Based on those accepted weaknesses, the Court is unable to rely on the identification made by Stephen Choco at the group identification procedure.

Identification by Joseph Sutherland

Whether Joseph Sutherland is an Honest Witness

[92] As outlined above the Court will first analyse carefully the evidence of Joseph Sutherland to determine whether he is an honest witness. The Court need not comb through the record for inconsequential inconsistencies/discrepancies, but will consider those which the Court assessed could impact on the credibility of this witness.

[93] The witness' account of the initial incident is internally consistent and cohesive and is externally largely consistent with the corroborative testimony of Stephen Choco and the independent evidence **EC 1**.

[94] The witness' account of the group identification procedure is also materially consistent with the testimony of JP Andrew Godfrey and that of Sgt Vernon. There was some discrepancy on whether the police windows were up or down and tinted or untinted; however, the Court did not find that this was a material issue nor did it affect the overall credit of the witness.

[95] The Court generally found the witness' account to be truthful.

Initial Observation

[96] Joseph Sutherland testified that his first contact with the shooter was on Sarstoon Street when he saw a motorcycle with two occupants turning left onto Mahogany Street. The shooter was on the back of that motorcycle about 3 feet away from him. He was able to see the face and upper body of the shooter and nothing was blocking his view. Sutherland was travelling at a patrol speed of approximately 5 MPH.

[97] His second contact with the shooter was while following the occupants of the motorcycle from a distance of about 30 feet away. At that time he had the shooter in his view for about 5-6 seconds. The sun was out. He described the shooter as a slim built male of brown skin complexion.

[98] The Court finds that the circumstances of this initial observation, although quick-paced it could not be described as fleeting and would have allowed the witness a sufficient opportunity to make an identification.

Group identification Procedure: 3rd August 2020

[99] Joseph Sutherland attended an identification procedure on the 3rd August which was 5 months after the incident. He was seated in a police vehicle when he first saw the person he would identify walking alongside the vehicle. The person was about 3-4 feet away from him and wearing a face mask under his nose covering his mouth. He said that there were about 4-5 people around that person but they were not walking directly with him. He said that he had a side angle view. He was able to identify the person by his built and complexion.

[100] On the second view, the police vehicle drove past the individual at a speed of about 5MPH. He was able to view the entire body and face of the individual for about 8 seconds. There were about 6-7 people around and the individual's mask was now under his chin as he was talking on his cell phone.

[101] In Court, the witness identified the Accused as the person he pointed out to Sgt Vernon as the shooter he had seen on the back of the motorcycle firing shots at him.

[102] In cross examination, the witness stated that he had actually known the Accused prior to the incident having seen him at Swift Hall several times; although, he could

not recall how many times. At first, he stated that he did tell that to the police, but when shown his statement he accepted that in his statement to the police he had said that it was his first time seeing the gunman.

[103] In re-examination, the witness attempted to clarify the conflicting evidence by stating that it was only after the incident that he realised he had known the individual. In answer to the Court, he stated that he found out who it was through video footage, but he also could not recall if someone had told him of the identity of the shooter.

[104] As discussed above the length of time between observing an assailant and being called upon to identify an assailant is critical. The group identification was held on 3rd August 2020, 5 months after the incident occurred and again curiously after the Accused had already been charged with these offences. This on its own raises doubt as to the integrity of the procedure.

[105] The Court also considered the very likely possibility of contamination to be a live issue with respect to this witness' evidence as the witness himself admitted that he found out about the identity of the assailant prior to this identification procedure.

[106] While the person was masked, the witness stated that the person had the mask below his nose for the first occasion, and below his chin while he was on his phone. His view; therefore, would not have been obstructed as is the case of Choco above, however it was still a limited view.

[107] The Court also again considered the absence of an identification parade. An identification parade enables a suspect to put the reliability of an eye witness' identification to the test. In this regard, the Court reminds itself of the dicta in **Pipersburgh** which states that where identification of the perpetrators is plainly going to be a critical issue in the trial, the balance of advantage will almost always lie with holding an identification parade. In this case, the failure to hold an identification parade, although attributable to the Accused's own refusal to

participate means that the identification did not take place in the controlled environment of an identification parade. This is a fact which I have taken into account in my assessment of the strength and correctness of the identification made.

[108] While the conditions of the initial observation are strong, the cumulative effect of the challenges identified above relative to the group identification procedure significantly diminished the reliability of Joseph Sutherland's identification. Based on those accepted weaknesses, the Court is unable to rely on the identification made by this witness at the group identification procedure.

Cumulative Effect

[109] The evidence of identification, which this Court has accepted comes primarily from the evidence of Sgt Staine, which is supported in some measure by the evidence of Marlene Gonzales subject of course to the weight considerations applied to that latter identification. The Court acknowledges that not all identifications carry the same weight. For example, the identification made by Kris Staine, after a complete analysis, is held by this Court to be more reliable and sufficiently compelling on its own as compared to the identification made by Marlene Gonzales. On the other hand the Court places no reliance on the belated identifications made by the VCs several months after the incident in less than ideal conditions and rejects those identifications for the reasons already outlined.

[110] The Court has addressed its mind to the fact that several witnesses can be mistaken; however, it finds as a fact that these witnesses: Kris Staine and Marlene Gonzales were not.

[111] The evidence of Kris Staine on its own has satisfied this Court so that it feels sure that the person on the back of the motorcycle brandishing what appears to be a firearm is the Accused, and that evidence's reliability is further increased and

supported by that of Marlene Gonzales. The Court also finds that these identifications were independent, and rejects the possibility that the sources of identification were influenced by each other.

[112] It is the Court's view that there is credible evidence upon which the Court as Fact Finder can properly conclude to the standard that it feels sure that the Accused is the person alleged to have shot at the VCs in this matter subject to its consideration of the case for the Accused, which the Court will consider below.

Mens Rea: Intention to Kill

[113] The Court refers to **Section 6 of the Criminal Code,** which lays out the test for intention:

> *(1) The standard test of intention is–*
> *Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?*

[114] The Court has derived great assistance from a judgment of our Court of Appeal in ***Gareth Hemmans v R***[19] on the question of intent, per Hafiz-Bertram JA:

> *"[51] Section 6 of the Criminal Code provides for the standard test of intention, that is,* ***whether the person, (the appellant in this case) intended to produce the result, that is, to kill*** *Mr. Zaiden when he chopped him with the machete.*
>
> *[52] Section 9 of the Criminal Code sets out the approach to be adopted in relation to proof of intention to kill. Section 9 of the Criminal Code provides that:*
>
> *"9. A court or jury, in determining whether a person has committed an offence-*
> ***(a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by***

[19] Crim. App. 12/16

reason only of the existence of the factor specified in the second column as appropriate to that question, but
(b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances*.*

[53] The relevant question and factor in this case as shown in the table being ***whether the person charged with the offence intended to produce a particular result by his conduct (question) by the "fact that the result was a natural and probable result of such conduct." (appropriate factor)****.*

[54] Mr. Sylvester contended that there is nothing on the record to show that the trial judge considered sections 6 and 9 of the Criminal Code, which sets out the statutory matters which should be taken into account in relation to proof of intention to kill. In the view of the Court, ***the judge was not required to set out sections 6 and 9 in his judgment or use the formula as set out therein, provided that he makes it clear that the appellant intended to kill Mr. Zaiden. The question to be asked is whether the trial judge arrived at the conclusion of intent to kill by looking at all the facts and circumstances which were disclosed in the evidence****." (emphasis added)*

[115] The Court notes that intention is a state of mind that can only be resolved by inference or an admission by the Accused. In this case, the Accused denied involvement in the shooting at all.

[116] The Court understands that the evidence of an intention to kill in the absence of direct evidence can only be inferred from surrounding circumstances, and that to convict the Accused of Attempt to Murder; the Court must find that the Crown has proven such an intention to kill to the standard that this Court feels sure.

[117] As is often the case, the Crown has not advanced direct evidence of intention, but it submits that specific intent i.e. intention to kill can be inferred from the following circumstances:

Evidence of Stephen Choco

"I observed the passenger on the motorcycle that we were chasing/ following pointed an object, which resembled a firearm in our direction;

thereafter, I heard three loud bangs. I saw PC Sutherland swerve and fell on the gravel. I thought he was shot, but I continued pursuing the two male persons on the motorcycle up unto the boulevard. I continued following them across the boulevard, that's when I lost sight of the motorcycle and the two riders onto Parsey Street. Then I returned to check the condition of PC Sutherland. He was ok. Then we went back to the station."

[118] Under cross examination, the witness stated that he heard the loud sounds immediately upon the shooter pointing the firearm in their direction.

Evidence of Joseph Sutherland

[119] The evidence of Joseph Sutherland was that while he was about 30 feet away, he saw the male person behind the cycle reach with his right hand and pulled out a black object resembling a firearm and then pointed it in his direction. He said that person fired the first shot, which hit the front of his motorcycle wheel and in trying to avoid and move out the way he fell off the motorcycle and scraped his hands. In all, the person on the motorcycle fired 3 shots. Sutherland said he then got up and fired 4 warning shots. There was medical evidence advanced relating to injuries sustained from fall and the evidence of Joseph Sutherland that his motorcycle was hit by the wheel and had a gas leak after the incident. He said that he felt fearful for his life.

Evidence of Jason Reneau- Crime Scene Technician

[120] The agreed evidence from Crime Scene Technician Jason Reneau was that seven 9 mm expended shells were found on the scene. This is consistent with the testimony of both Virtual Complainants as to the number of shots fired.

Intention to Kill

[121] If the Court finds that the Accused was in fact the gunman on the back of the motorcycle who fired the shots in the direction of the police officers, then the only remaining issue is whether to categorise that conduct as the crime of Attempted Murder, or something else.

[122] An essential element of these offences is that the Crown must prove to the required standard that the Accused formed the specific intent to kill. The Crown contends that the whole circumstances in which that took place made it perfectly plain that the gunman's intention had been to kill the Virtual Complainants. The Accused, on the other hand, through his Counsel, essentially denied that he was the person armed with the firearm on the back of the motorcycle who fired shots at the VCs. There was some cross examination, although limited, which was designed to suggest that there may have been some other intention of the gunman, or to suggest that it was unlikely that death was the natural and probable result of the actions of the gunman.

[123] The Court considers that it is been sufficient on this issue to direct myself that I could only convict of the two counts of Attempted Murder, if I am sure that the gunman had intended to kill each Virtual Complainant, and that if the Crown had not persuaded me that this was his intention, then I can only acquit the Accused completely or convict the Accused of a lesser crime.

[124] There is no direct evidence of intention i.e. what was in the mind of the shooter when he fired the shots. The Court is being asked to infer intention based on the facts that it has accepted as true. In this case, the facts that this Court has accepted are as follows:

i. That Police Officers Choco and Sutherland's suspicions were aroused by the persons on the motorcycle.
ii. That they gave chase to the occupants of that motorcycle.

iii. That the person seated on the back of the cycle pulled out a firearm.
iv. That almost after he pulled out the firearm he pointed it in the direction of the officers and fired 3 shots.
v. In attempting to avoid being shot, Officer Sutherland lost control of his motorcycle and fell to the ground.
vi. That upon falling Officer Sutherland also fired shots.
vii. Officer Choco continued to give chase, but stopped eventually to render assistance to his colleague.
viii. The shooter and unidentified driver made good their escape.

[125] The Court understands that in coming to this decision on intention; I am entitled to draw inferences by taking account of the whole evidence, including the evidence demonstrating that the shooter had been on the back a motorcycle with a loaded firearm and fired said firearm in a public area and specifically in the direction of the two officers, who had been giving chase. The Court is entitled to consider the natural and probable consequence of such an act objectively. The Court can ask itself what reasonable inference would be drawn from the act of an individual pointing a gun, which he knew to be loaded in the direction of another and pulling the trigger. That fact is of course relevant to the question of intent and is one which the Court has certainly taken into consideration in considering all of the evidence and the proper inferences that can be drawn from that evidence.

[126] However, that is not the only consideration, the Court must go further.[20] Issues such as the distance in which the shooter was to the VCs, the fact that neither of the men were actually struck by the bullets, and whether the shooter's firing of the gun may have been merely to cause some lesser harm (than killing) in an attempt to slow down the pursuit of the officers, so that he could evade capture. The Court also is entitled to take into account the evidence of Sutherland that his cycle wheel was in fact struck by one of the bullets causing him to fall. These are all be features of the

[20] Pinto v R (2011) 2 BHS J. No. 77

evidence, which are capable of providing powerful insight into what the gunman subjectively had intended when he fired the shots.

[127] The Court must answer the question of whether these facts are capable of proving the mens rea for these offences i.e. that the shooter specifically intended to kill Stephen Choco and Joseph Sutherland, and that it does so prove that intent beyond reasonable doubt. This Court has considered all of the evidence drawing such inferences that appear to be proper in the circumstances.

[128] This Court is not bound to infer that the shooter had the requisite intention to kill the Virtual Complainants just from the fact that he shot in their direction, or because of the mere fact that death was a natural and probable result of the actions of discharging a firearm. While those facts are relevant to the question of the intent of the shooter and has been taken into account, the Court still must consider the totality of the evidence and all inferences to be drawn from that evidence. The Crown must satisfy me so that I feel sure that the shooter intended to kill when he inflicted the unlawful harm. I am not so satisfied.

[129] The circumstances are that the shooter fired 3 shots in the direction of the officers whilst on the back of the motorcycle. There is no evidence that he pointed at any particular part of their bodies; for example, towards the direction of their heads or chest, in fact the evidence is that one shot hit the wheel of the motorcycle causing Sutherland to fall and the other bullets did not make contact. Now, it is possible that the shooter intended to kill, but had a bad aim, but the Court is not satisfied so that it feels sure that killing was the necessary intent.

[130] Overall, intention has to be determined on a subjective assessment bearing in mind the whole of the evidence. The set of facts adduced by the Crown and accepted by this Court is capable of more than one inference, i.e. that the gunman intended to kill, ***or*** that he did not intend to kill but intended serious harm.

[131] In this case, where the inference adverse to the Accused is not the sole reasonable inference that I can accept based on the facts as I have accepted them and there is an inference of equal weight, which is more favourable to the Accused. I am duty bound to employ the inference on the facts as I have accepted them, which is more favourable to the Accused.[21] This Court; therefore, employs the more favourable inference to the Accused which is that of the lesser intention to commit grievous harm.

Availability of an Alternative Offence

[132] At common law, where an offence consisted of several ingredients, the jury could convict of any offence the elements of which were included in the offence charged, subject to the rule that on an indictment for felony the jury could not convict of a misdemeanour: See **Taschereau, The Criminal Code of Canada, p. 819; Archbold, Criminal Pleading Evidence and Practice (1979), 40th ed. pp. 452-3.** Thus, on a charge of murder the jury at common law could find the Accused guilty of manslaughter. On a charge of robbery, the jury could find the Accused guilty of larceny only, if the element of putting in fear was not proved.

[133] In **Blackstone's Criminal Practice 2007** at para. D17.49, the learned authors state:

> *"The judge in summing up is not obliged to direct the jury about the option of finding the accused guilty of an alternative offence, even if that option is available to them as a matter of law.* ***If, however, the possibility that the accused is guilty only of a lesser offence has been obviously raised by the evidence, then the judge should, in the interests of justice leave the alternative offence to be left to the jury."*** *(emphasis mine)*

[134] This statement of the principle is based on the decision of the House of Lords in **Coutts**, which is highly persuasive authority on how to treat with the issue of

[21] Silva

whether a direction as to a lesser alternative offence should be given. In **Coutts**, the Court approved the following dicta in **R v Fairbanks**[22].

> *"These cases bear out the conclusion, which we should in any event have reached, that the judge is obliged to leave the lesser alternative only if this is necessary in the interests of justice. Such interests will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant. Again there may be instances where there was at one stage a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue. In these and other situations it would only be harmful to confuse the jury by advising them of the possibility of a verdict which could make no sense."*

[135] The power of the jury at common law to convict of an included offence was, in the case of certain offences, enlarged by statute. For example, in Belize the **Indictable Procedure Act Cap 96 section 126-135** expressly categorises offences for which verdicts for lesser included offences are available. **Section 136** further provides:

> *"Every count of an indictment shall be deemed divisible, and if the commission of the crime charged, as is described in the enactment creating the crime, or as charged in the count, includes the commission of any other crime, the accused person may be convicted of any crime so included which is proved, although the whole crime charged is not proved, or he may be convicted of an attempt to commit any crime so included."*

[136] The counts charging the offence of Attempted Murder, even without specifying the means used, necessary includes the use of deadly means with the intent unlawfully to cause some harm. It is difficult to think of any circumstance in which a charge of Attempted Murder would not necessarily include such an offence.[23] This Court finds that where the intention to kill on a charge of attempt to murder has not been proven beyond a reasonable doubt, but the Court finds that the Accused acted unlawfully and his intention was to cause serious harm, then the Court is entitled to return a verdict for that offence, if the Court is satisfied beyond a reasonable doubt that the intent for that lesser offence has been proved and that it is in the interests of justice

[22] [1986] 1 WLR 1202
[23] R v Simpson [1981] O.J. No 23 at para 40.

to leave that lesser offence available to the fact finder, in this case the Judge. It must be remembered that justice serves the interests of the public as well as those of the Defendant, and if the evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted altogether merely, because the jury (or fact finder) cannot be sure that he was guilty of the greater offence.

[137] Lord Bingham stated in **Coutts** at para. 12:

> *"In any criminal prosecution for a serious offence there is an important public interest in the outcome (see R v Fairbanks [1986] 1 WLR 1202 at 1206). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge. (see Von Starck v R [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275; Hunter v R [2003] UKPC 69 at [27], [2004] 2 LRC 719 at [27])."*

[138] **Section 83 of the Criminal Code** states:

> *Every person who uses a sword, dagger, bayonet, firearm, poison or any explosive, corrosive, deadly or destructive means or instrument, shall–*
>
> *(a) if he does so with intent unlawfully to cause harm to a person, be liable to imprisonment for five years;*
>
> *(b) if he does so with intent unlawfully to wound or cause grievous harm to a person, be liable to imprisonment for ten years; or*
>
> *(c) if he does so with intent to maim or to cause dangerous harm to a person, be liable to imprisonment for twenty years.*

[139] **Section 96 of the Criminal Code** defines the categories of harm:

> *"Harm" means any bodily hurt, disease or disorder, whether permanent or temporary;*
> ***"grievous harm" means any harm which amounts to a maim or dangerous harm as hereinafter defined, or which seriously or permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;***
> *"dangerous harm" means harm endangering life;*

[140] On a consideration of the Crown's case and subject to the Court's evaluation of the case for the Accused, this Court is satisfied so that it feels sure that the Crown has proven that the Accused intended to cause grievous harm to each of the VC's when he discharged the firearm and fired the shots at them.

Summary of the Defence Case

Unsworn Statement of the Accused

[141] The Accused in his unsworn statement denied having committed these offences, and said that on 1st March 2020 he was at his home at #3 Oleander Street with his mother Jaqueline Franklin for the entire day. He stated that around 1:00 p.m. he got dressed in a white shirt and blue ball pants, then left his home to go across the street on the football field where he played football. He said that while playing he heard some bangs that sounded like gunshots. He looked across the street and saw his mother seated outside the gate watching him play football. He said after they realised the sounds were not in their exact area, he and the guys continued to play football.

[142] He said that the next day he spoke with his brother who informed him that he was a suspect in a shooting. His brother came for him and took him to the police station. He denied being arrested and said that his brother was alone when he came into the house and took him.

Jaqueline Franklin

[143] His mother, Jaqueline Franklin gave sworn evidence to the effect that on 1st March 2020; she was at her home with her son, Kareem Franklin, the Accused. She said that at about 1:00 p.m., the Accused, who was dressed in a white undershirt and a blue ball pants, went to play football across the street, and she sat on a bench in front her yard watching the game until it ended at about 5:00 p.m.

[144] She said that while they were playing football, she heard what sounded like gunshots and she looked on the field and watched her son, and he looked at her. When they realised the shots were not in the immediate area they continued playing football.

[145] She said that she recalls on 2nd March 2020 that her other son, Raheem alone came inside, and took the Accused, and told her that he was taking him to the police station.

[146] In cross examination, she stated that she had never given a statement to the police, but that she could remember what happened in 2020. She stated that she never spoke to the Accused about this case.

Raheem Franklin

[147] Raheem Franklin testified that on 2nd March 2020 he was working mobile patrol with Cpl Marlene Gonzales when he got a call from his Commander informing him that there was a video alleging that it was his brother Kareem Franklin. He said that he would go for him, because he feared that the police would beat him. He proceeded to No. 3 Oleander Street where he told his brother about the incident. He said his brother went into the backseat of the police mobile, and Marlene Gonzales was

seated in the car. He said that prior to the call, he could not tell what Gonzales viewed on her phone.

[148] Under cross examination, he stated that he never gave a statement to the police, because the investigating officer never asked him for one. He said that he knew there was a video, but that he never saw the video himself.

Analysis

[149] The Court reminds itself that the Accused bears no burden in this matter to call witnesses or to prove anything on his defence. The Court wishes to emphasise that throughout his trial, the Accused was never under any onus to prove his defence; as such there was no obligation on him to call any evidence on his own behalf.

[150] The Court has further directed itself that the Accused is presumed innocent and has absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy the Court so that it is sure of the guilt of the Accused, and if there is any reasonable doubt the Court is duty bound to acquit him. It is only if the Court rejects the Defendant's case that it returns to the Crown's case, and considers the totality of the evidence and determines whether to convict.

[151] I assessed the evidence of the witnesses for the Defence in the same manner as I did those of the Crown.

Alibi

[152] The Court notes that the Accused advanced an alibi through his unsworn statement from the dock, which was not tested in cross examination and the evidence of his witness Jaqueline Franklin. The Accused and his witness both stated that at the time these offences are alleged to have been committed, the Accused was at home

and only left his home to play football across the street. It was while playing football that shots sounding like gunshots were heard.

[153] The Court reminds itself that even though, the Accused has advanced an alibi in respect of two counts on the indictment, the burden of proving the case against the Accused remains with the Prosecution throughout this trial. The Crown must satisfy the Court, so that it feels sure that the Accused was not where he says he was, and that he was at the time committing the offences in question. If the Court accepts the Accused's alibi as true, or finds that it is possibly true then that would be the end of the matter. The Crown would not have displaced its burden. However, for the reasons advanced below, I reject the Accused's alibi.

[154] The Accused's statement from the dock was untested under cross examination and as such the Court can accord whatever weight it deems appropriate. The Court found the statement to be self-serving and unworthy of belief on the strength of the Crown's case, but also because the Court formed the view that the alibi was untrue.

[155] The Accused's account was supported by sworn testimony through the evidence of his mother Jaqueline Franklin. The Court found Ms Franklin to be unworthy of belief. Separate from her allegiance to her son, which on its own might have cast some doubt on the veracity of her testimony, Ms. Franklin presented as a rehearsed witness. When challenged by Crown Counsel on her ability to recall where her son was and details, such as what he wore and the exact time he left home, the witness simply stated, she remembered everything. This is highly implausible as there is nothing to suggest why that day would stand out, and she accepted that she had never given the police or anyone a statement. She and the Accused gave identical accounts; although, the Court expects truthful accounts to bear similarity the exactness of their accounts such as the exact time of day, the exact clothing, their exact responses when they heard the gunshots, suggested a level of rehearsal and collusion that is inconsistent with a truthful account. The Court also found the

witness' response that she had never spoken about this matter with her son to be implausible. After 4 years of coming to Court and visiting her son at Prison, it is inconceivable that she would never have discussed this matter contrary to what the witness wanted this Court to believe.

[156] Notwithstanding, the Court's rejection of his alibi, the Court reminds itself that such a rejection does not prove that the Accused is guilty. The Court acknowledges that false alibis may be put forward for many reasons: an Accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi out of fear that his own evidence will not be enough. Further, the Accused can make genuine mistakes about dates and occasions like any other witness can.

[157] The Court finds that although it has rejected the Accused's alibi about where he was at the material time that does not prove that he was committing the offences to which the alibi relates. It is quite possible, that in this case, the Accused fabricated an alibi to bolster what he thought was a weak case. The Court therefore bears this in mind in its rejection of the Accused's alibi, and consequently places no reliance on same in relation to it being probative of his guilt.

[158] The Court did not find that the evidence of Raheem Franklin greatly assisted the Court in the determination of the main issues in this trial. This witness only testified as to the circumstances of the Accused's arrest. The Court recognises that his version differs in some measure to that of the Crown's case in that he stated that he was the one who actually took the Accused from his home and not Officer Marlene Gonzales. However, his evidence that Marlene Gonzales was present in the mobile is consistent with the Crown's version of events that Marlene Gonzales was present at the time of arrest. In this Court's view, whether it was Marlene Gonzales who physically took the Accused out of his house or not is not an issue that affects the outcome of this case. On all accounts, the Accused was arrested and detained following the circulation of video footage.

Conclusion

[159] The Court has carefully considered the unsworn statement of the Accused and the evidence of the case for the Accused as a whole. The Court rejects the Defence's case for the reasons above, and also on the strength of the evidence on the Crown's case, which was sufficient, cogent and convincing, and which it is permitted to do on the authority of a decision of the Privy Council in the Dominican case of **Bally Sheng Balson v The State**[24].

[160] The Court having considered all the evidence i.e. the cases for the Crown and the Accused is satisfied so that it is sure of the guilt of the Accused of the following offences:

i. **GUILTY of the Use of Deadly Means of Harm to wit a Firearm with Intent to Cause Grievous Bodily Harm to Joseph Sutherland contrary to Section 83 (b) of The Criminal Code.**
ii. **GUILTY of the Use of Deadly Means of Harm to wit a Firearm with Intent to Cause Grievous Bodily Harm to Stephen Choco contrary to Section 83 (b) of The Criminal Code.**

[161] The matter is adjourned for a separate sentencing hearing as advised by the CCJ in **Linton Pompey v DPP** [25].

Candace Nanton
High Court Judge
Senior Courts Belize
Dated: 23rd October 2024

[24] [2005] 4 LRC 147 at para 38
[25] [2020] CCJ 7 (AJ) GY at para 32