In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 31 of 2021

BETWEEN:

THE KING

-and-

DAVIN KYRON THOMAS DILL

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Carrington Mahoney and Mr. Paul Wilson for the Prosecution
Mr. Charles Richardson and Ms. Elizabeth Christopher for the Defendant

Date of Hearing: 7th September 2023
Date of Ruling: 8th September 2023
Date of Reasons: 14th November 2023

RULING
(On a Submission of No Case to Answer - Reasons)

Submission of No Case to Answer – Identification and Recognition Evidence

WOLFFE J:

1. The Defendant faced trial in respect of two counts on the Indictment, *to wit* (i) Murder, contrary to section 287 of the Criminal Code Act 1907 (the "Criminal Code"), and (ii) Having a Bladed Article in a Public Place, contrary to section 315C of the Criminal Code.

The Prosecution closed its case against the Defendant on the 7th September 2023 and on the same date Mr. Charles Richardson, on behalf of the Defendant, advanced a submission of no case to answer in respect of both Counts.

2. On the next morning of the 8th September 2023 I acceded to the Defendant's submission of no case to answer and accordingly directed the Jury to find the Defendant "not guilty" for both Counts on the Indictment. On that date I explained to Counsel that in consideration of the fact that I was scheduled to be out of the jurisdiction the next day for two (2) weeks (at the commencement of the trial I informed both Counsel of my immovable plans to travel), and because I am mindful that whatever decision I make may have an impact on the availability of jurors (who have already been called upon to sit past their July/August 2023 jury period), that I will deliver somewhat of an *ex tempore* or abbreviated decision in respect of the Defendant's submission of no case to answer. I further informed Counsel that reasonably soon after my return to the Island that I will circulate a more fulsome decision but unfortunately due to the recent cyberattack which caused havoc to the Government computer system it is only now that I have been able to complete it.

3. Therefore, set out herein are my reasons for acceding to the Defendant's submission of no case to answer. It should be noted that swaths of what I have written in this Ruling is an expansion of what I said to Counsel on the 8th September 2023.

The Prosecution's case in a nutshell

4. The Prosecution's case relied exclusively or at least primarily on the recognition evidence of three (3) extremely material Prosecution witnesses. Specifically, that of a DC Courtney Simmons, a Devonne Hodgson, and an Elshuna Castle. I will be turning to their respective pieces of evidence shortly but first it would be appropriate to briefly detail what was the Prosecution's case.

5. It was alleged by the Prosecution that on the evening of the 14th June 2020 that the victim, a Joshua Rowse, entered onto the South Shore Rubis Gas Station which is located at #76

South Shore Road in Warwick Parish ("Rubis"). At the time Mr. Rowse was riding a motorcycle with another person as a pillion passenger and he was in the company of two other persons who were riding on another motorcycle. After a few minutes of Mr. Rowse being at Rubis CCTV footage taken from a residence on a road called Tribe Road No. 1 aka Billy Goat Hill showed a black Hyundai Getz motorcar with license plate number 01163 (the "Hyundai") coming off of Billy Goat Hill. The entrance/exit to Billy Goat Hill is directly across the street from the entrance to Rubis and the CCTV footage from the said residence and CCTV footage taken from Rubis from various angles showed the Hyundai exit from Billy Goat Hill, travel across South Shore Road, enter Rubis and then go past Rubis' gas pumps. It was the Prosecution asserted that the Hyundai belonged to the Defendant.

6. The CCTV footage then showed the Hyundai abruptly pulling up to the main entrance of Rubis where Mr. Rowse and a friend were standing. Immediately, the CCTV footage depicts, the front left passenger door of the Hyundai opens and a person is seen to alight from the front left passenger's seat. In a split second thereafter the rear right passenger door on the driver's side of the Hyundai opens and another person is seen to descend from the right rear passenger seat. There is no dispute that both of these persons who got out of the Hyundai had their faces, head, and necks completely covered with some sort of material and that they both were shirtless. There also does not appear to be any dispute that both of these persons then ran in the direction of where Mr. Rowse was standing with what appeared to be pointed objects in their hands, and nor that they chased Mr. Rowse in the direction of the exit of Rubis and westerly onto South Shore Road.

7. Soon after, Mr. Rowse is seen on CCTV walking back up into the exit driveway of Rubis and is being aided by a member of the public. Photographs taken by the Forensic Support Unit ("FSU") of the Bermuda Police Service ("BPS") and further CCTV footage show that at the time he walked back into the driveway of Rubis that Mr. Rowse was bleeding profusely. Further, photographs from the FSU highlighted a grassy patch near South Shore Road where the Prosecution said was where what appeared to be blood as well as a serrated

blade were found. Thereby suggesting that this is where Mr. Rowse was stabbed by the two persons who were chasing him.

8. Unfortunately Mr. Rowse succumbed to his injuries and was certified dead on the 14th June 2020. An autopsy carried out on the 23rd June 2020 revealed that he sustained fourteen (14) incisions on various locations on his body which led to him dying of (i) pneumothorax and cardiac lacerations and (ii) multiple stab wounds.

9. It was the Prosecution's case that the person exiting from rear right passenger's door of the Hyundai was the Defendant and that it was he, along with the person who got out of the front left passenger's seat, who chased Mr. Rowse to the grassy area on South Shore Road and stabbed and killed Mr. Rowse. As I said earlier, in support of this the Prosecution relied exclusively or at least quite heavily on the recognition evidence of DC Simmons, Mr. Hodgson and Ms. Castle who each indicated that they recognized the Defendant from various pieces of CCTV footage taken at Rubis and/or from Mr. Rowse residence. Essentially the Prosecution's case wholly depended on the correctness of DC Simmons', Mr. Hodgson's and Ms. Castle's identification or recognition of the Defendant.

10. It would not hurt to say at this juncture that it was accepted by Counsel that at the time of the offences that the Defendant was a member of a gang called the Cedar Hill Crew ("CHC"), that Mr. Rowse was a member of a gang called the Jones Village Crew ("JVC"), and, that the CHC and the JVC were rival gangs.

11. I will now turn my attention to the applicable law in respect of submissions of no case to answer.

The Law

12. There was not a great deal of separation between Mr. Richardson and Mr. Carrington Mahoney (for the Prosecution) as to the underlying legal principles related to submissions of no case to answer. They both referred to the well-rehearsed and leading authority of ***R***

v. Galbraith [1981] 2 All ER 1060 and so it would be useful to repeat the eminent words of Lord Lane CJ in *Galbraith* who said:

> *"How then should the judge approach a submission of 'no case'?(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."*

13. Mr. Richardson informed the Court that he is relying on what is commonly referred to as the Second Limb of *Galbraith* which is where there is "*some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence."* In other words, Mr. Richardson contends, that the recognition evidence respectively proffered by DC Simmons, Mr. Hodgson and Ms. Castle Ms. Castle is so rife with inherent weaknesses, vagueness, and inconsistencies, that a properly directed jury could not properly convict the Defendant of the offences charged. There is therefore no need for me to address my mind to the First Limb of *Galbraith*.

14. In respect of the application of the Second Limb of *Galbraith* paragraph D16.56 and onwards of the 2021 Edition of Blackstone's Criminal Practice helpfully states that:

    (a) It is not appropriate to argue on a submission of no case that it would be unsafe for the jury to convict as this would amount to an invitation for the judge to impose his or her own views of the witnesses' veracity.[1]

[1] Paragraph D16.56 of on page 1980 of Blackstone's Criminal Practice (2021).

It should be noted that Mr. Richardson was not making such an invitation.

(b) There is a residual role for the Court as assessor of the reliability of the evidence, and, that the Court is empowered to consider whether the prosecution's evidence is too inherently weak or vague for any sensible person to rely on it. Therefore, *"if the witness undermines his or her own testimony by conceding uncertainty about vital points, or if what the witness says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witness's evidence, and therefore (in the absence of any other evidence) there is no case to answer"*.[2]

(c) Central to the application of the test of *Galbraith* is to undertake an assessment of the reliability of the evidence adduced by the prosecution.[3]

15. Later authorities have sought to clarify or even modify the words of Lord Lane CJ in *Galbraith* however, and I do not think that this is in dispute between Counsel, the above approach in Galbraith has stood the test of time and that the law has settled on the following when determining submissions of no case to answer:

> *"(a) If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.*
> *(b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.*
> *(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases, which are considered in D16.59).*
> *(d) The question of whether a witness is lying is nearly always one for the jury, save where the inconsistencies are so great that any reasonable tribunal*

[2] Ibid, page 1980.
[3] Ibid, para. D16.57, page 1980.

> *would be forced to the conclusion that it would not be proper for the case to proceed on the evidence of that witness alone."*[4]

16. Of course, any approach to a submission of no case to answer turns on the facts of the particular case. As stated earlier, the primary issue in the case at bar, is the correctness of the recognition of the Defendant as the person who alighted from the rear right passenger seat of the Hyundai, chased Mr. Rowse, and being concerned with another, stabbed and killed Mr. Rowse. To this, I turn to the equally regarded case of ***Turnbull [1977] QB 224*** which in identification or recognition matters should be read in concert with ***Galbraith***. As paragraph D16.59 of Blackstone's (2021) states:

> *"The correct approach to submissions of no case to answer in prosecutions turning upon identification evidence was laid down by the Court of Appeal in Turnbull [1977] QB 224 (see F19.2 and F19.18), namely that, if the quality of the identification evidence on which the prosecution case depends is poor and there is no other evidence to support it, the judge should direct the jury to acquit (pp. 229H–230A). However, supporting evidence capable of justifying leaving a case to the jury, even where the identifying evidence is poor, need not be corroboration in the strict sense (p. 230B–D).*
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> *Although Turnbull predates Galbraith [1981] 2 All ER 1060 , there is no suggestion that the principles in it have been affected by the later decision. In fact, the obligation on the trial judge to uphold a submission if the identifying evidence is poor and there is no supporting evidence may be regarded as the clearest example of the application of the second limb of the Galbraith test (Daley v The Queen [1994] 1 AC 117)."*

17. Applying this reasoning to the case at bar, the pressing question will be whether the quality of the recognition evidence of DC Simmons, Mr. Hodgson and Ms. Castle is so poor, and without any evidence in support, that I should uphold the Defendant's submission of no case to answer.

18. It is also accepted by both the Prosecution and the Defence that the Prosecution's case is substantially rooted in circumstantial evidence. That is, that the guilt of the Defendant can

[4] Paragraph D16.58 of on page 1980 of Blackstone's Criminal Practice (2021).

be proved, in whole or in part, by the drawing of certain inferences from circumstantial evidence. Paragraph D16.64 of Blackstone's (2021) comments that:

> *"On the proper application of the test in Galbraith [1981] 2 All ER 1060, the prosecution are not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution."*

19. In furtherance of this point Mr. Richardson referred to the authority of *Daniel Terrance Goddard and Robin Jack Fallick v. Regina [2012] EWCA Crim 1756* in which Aikens LJ at paragraph 36 opined:

> *"We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the 'classic' or 'traditional' test set out by Lord Lane CJ in Galbraith. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."*

20. Against this authoritative backdrop, it is Mr. Richardson's contention that when one examines and assesses the Prosecution's recognition in order to determine whether a reasonable jury could infer that it was the Defendant who exited from the rear right passenger door of the Hyundai brandishing a knife and who along with another delivered the fatal stab wounds to Mr. Rowse, then the only conclusion that one would reach is to withdraw the case from the Jury. Further, Mr. Richardson submits, the Prosecution have done little or nothing to counter all realistic hypotheses or possibilities which are consistent with the Defendant's innocence.

21. Mr. Richardson and Mr. Mahoney also referred to other authorities such as: *Shippey [1988] Crim LR 767*; *Curtis Lee Goring v. R. [2011] EWCA Crim 2*; *R v. Dean Malcolm Lewis and James Marshall-Gunn [2017] EWCA Crim 1734*; *R v. Khan (Wassab) & Ors (2013) EWCA Crim 1345*; and, *Director of Pubic Prosecutions v. Selena Varlack (2008) WL 5044314 (2008)*. However, those authorities essentially encapsulated the principles set out in *Galbraith* and *Turnbull* and so there is no real need to cover them in any detail.

22. So without further delay I will now set out the recognition evidence upon which the Prosecution relied on to point a finger at the Defendant as the person who killed Mr. Rowse.

The Recognition Evidence

23. Due to the fact that the state of the recognition evidence adduced by the Prosecution featured quite substantially in my decision to withdraw this case from the Jury it is necessary that I recount it in some detail. In this regard, the recognition evidence of DC Simmons, Mr. Hodgson, and Ms. Castle was as follows[5]:

DC Simmons:

During her examination in chief Mr. Mahoney referred DC Simmons to CCTV footage taken at Rubis on the 13th June 2020 which was the day before the incident on the 14th June 2020. There was no dispute that the Defendant appeared in the CCTV footage of the 13th June 2020 but what was very much in dispute was DC Simmons' evidence that she was able to see "markings" and white blemishes on his right arm down to his forearm. She was meticulously particular about calling what she saw as "markings" and not "tattoos" and her efforts to do this became much clearer as the Prosecution's case unfolded further.

DC Simmons also stated that in respect of the CCTV footage of Rubis on the 14th June 2020 (the day of the stabbing) that she was able to see the person exiting the rear right passenger door of the Hyundai as being light brown skinned with his face covered with a

[5] Set out in the order in which they gave evidence at trial.

black cloth. She also said that she could see markings from the person's triceps down to his hand.

DC Simmons was also shown CCTV footage taken at the Rowse residence located in Warwick Parish on the 29th May 2020, and she said that she recognized the Defendant as being one of a few men who accosted Mr. Rowse's father, mother, and brother, and, threatened to do serious harm to Mr. Rowse.[6] She said that she was able to recognize the Defendant from the markings on his left arm as well as his slim build and light brown complexion.

DC Simmons gave evidence that to arrive at her recognition of the Defendant that she used a combination of the CCTV footage from Rubis on the 13th June 2020, still images that she had of the Defendant from three (3) social media postings on the Defendant's Instagram account (Prosecution Exhibit 5), Royal Gazette images of the Defendant, and her general knowledge of the Defendant. She said that she had always known the Defendant to have a short haircut, goatee, tattoo sleeves on both arms, and a tattoo on the hairline of his head.

During cross-examination by Mr. Richardson she said that:

- She could not make out exactly what were the markings on the Defendant's arm from any of the CCTV footage shown to her and that although she saw blemishes on the right arm of the Defendant in the Rubis CCTV footage of the 13th June 2020, she could not see any such blemishes on the person she says is the Defendant on the Rubis CCTV footage of the 14th June 2020.

- In the CCTV footage of the 13th June 2020 the Defendant does not look muscular but that the person she recognized as the Defendant in the footage of the 14th June 2020 does look like he as thick arms. She maintained though that the person she identified as the Defendant was of slim and not muscular build.

[6] To maintain anonymity I have not mentioned the names or addresses of Mr. Rowse's father, mother and brother.

- When shown a Discharge Summary from the King Edward Memorial Hospital ("KEMH") indicating that the Defendant was admitted into the hospital on the 27th May 2020 and was discharged on the 11th June 2020 she maintained that she saw the Defendant in the CCTV footage taken at the Rowse residence on the 29th May 2020. She said that if proven that the Defendant was in fact in the hospital on the 29th May 2020 then she would accept that she was wrong about her recognition of the Defendant at the Rowse residence on that day.

- She was shown an email dated 23rd September 2020 from an imagery consultant named "Jason" who works for an overseas company called "Complete Digital Forensic Solution" which was engaged by the BPS to render an opinion as to what can or cannot be seen on the CCTV footage. The imagery consultant wrote to the BPS informing them *inter alia* that: the people in the Rubis CCTV footage on the 14th June 2020 (the incident date) are moving fast and that the CCTV camera is having a hard time keeping up with the action; when he tried to correct the fast moving images the results were negative; there is an issue with the overall resolution of the CCTV footage and there appears to be insufficient resolution to discriminate fine details, like say a tattoo; the colour of the person's skin (presumably the person who the Prosecution says is the Defendant) is similar to the ink from the tattoo and so the CCTV computer cannot tell what is ink and what is flesh; that there is insufficient contrast from the light to dark on the skin to make out a tattoo in fine detail; the data he saw was on the "edge" of being useful; the police could spend between $10,000 to $20,000 to process the case further but the result will most likely be neutral or negative; without detailed information from the images there is little he could say in Court to support any argument and that more likely than not there will be insufficient data to include or eliminate a known person from the CCTV footage; and, that he is not convinced that the police would gain any useful and actionable information from examining the footage.

  To this, DC Simmons said that although she was copied in on the emails from the forensic company she did not read them, including the one dated the 23rd September

2020, before making her recognition of the Defendant and his markings from the same CCTV footage. She stated that she made her recognition by using her naked eye.

Devonne Hodgson:

He said that he had known the Defendant for 6 or 7 years and had seen him about 3 times per week over that period when socializing in the Warwick and Southampton areas.

He was shown the CCTV footage of the Rowse residence taken on the 29th May 2020. He identified various person in the footage but he could not identify anyone else. Therefore, he did not say that he recognized the Defendant as did DC Simmons.

In respect of the CCTV footage of Rubis on the 14th June 2020 he said that from the person getting out of the rear of the Hyundai that it was from the person's "builtness" and shape that he "thought" and "believed" the person was the Defendant. He said that when he saw the person from the front he was analyzing who he was and that it was when he saw the clip showing the back of the person that it was when he made his "assumption" as to his recognition of the Defendant. He explained that during the summer time you would see guys with their shirts off and that although you may not be positive it may be someone you may say to yourself that it "looks like" that person.

During cross-examination he said that:

- He never babysat the Defendant and nor did he consider him his company.

- Two (2) days prior to participating in a recognition process he was asked by police if he knew a man by the name of "Davin Dill" (which of course is the name of the Defendant), but that he did not realize before doing the recognition that the police were interested in the Defendant.

- He was not 100% sure that the person in the CCTV footage was the Defendant but that he "believes" that it is. He accepted that he could be wrong.

- He also accepted that he told police at the recognition procedure that he saw the "builtness" of the person getting out of the car with the knife but that he was not sure exactly who it was and that it looks like somebody who he "might" know.

- That the complexion of the arms of the person in the 14th June 2020 Rubis footage looks lighter than the complexion of the Defendant in the 13th June 2020 Rubis footage. He said that it depends on the time and type of day.

- He said that in the 14th June 2020 footage the footage is blurry and you cannot make out tattoos.

- He said that he looked at the front and the back of the person who he recognized as the Defendant. He accepted that there was nothing special about the back of the person, and it is just that the Defendant is tall. He accepted that in respect of the movement of the person that the camera footage with the persons getting out of the Hyundai car is not seamlessly flowing.

- He said that if you add the Hyundai (which he said the Defendant drove) with the body structure of the person in the footage, and that the Defendant is the only person who is tall and light skinned that he knows with an Hyundai car with tinted windows, then the recognition can be made. He said that he made his description based off of the Defendant's body and the Hyundai. He said that if he just saw the body of the person then he would have said that "maybe" it looks like the Defendant but then when he sees the person with the car and with no shirt on he is thinking *"its gotta be him"*. He accepted that he said that it "might" be the Defendant, and, that at first he told the police that it "might" be the Defendant's car and that it could have been a different car.

- He knows Elshuna Castle and that he has spoken to her before. He could not remember if he had spoken to her after Mr. Rowse passed but he may have messaged her. He said that he was in a relationship with Ms. Castle before she was in a relationship with Mr. Rowse was and that she does not like him [Mr. Hodgson]. He said that she barely would speak to him.

Elshuna Castle:

Prior to the death of Mr. Rowse she had been his girlfriend for 2½ years.

She said that she has known the Defendant for about 10 years *"from previous school and same generation"* meaning that they were in the same generation in their school years.

She said that up to June 2020 she would see the Defendant often when she was with Mr. Rowse in the Warwick area. She was with Mr. Rowse every day and she would see the Defendant about twice a month in the Hayward's store area and this would be during the day or night. She said that she had never spoken to the Accused.

She said that on the 6th May 2023 (almost three years after the death of Mr. Rowse) she participated in a CCTV Recognition Process with a DS Seymour Foote in which she was shown CCTV footage of the 13th June 2020 and the 14th June 2020, as well as the footage of the Rowse residence taken on the 29th May 2020. She said that in the CCTV footage at Rubis she identified the Defendant and that in the Rowse residence footage she recognized other persons but not the Defendant. Again, this is unlike DC Simmons who said that she recognized the Defendant from the Rowse residence CCTV footage.

She was not at the incident at Rubis when Mr. Rowse met his death but she heard everybody describing what happened such as from people who were there as well as her seeing a video that was circulating when it happened and which put more "talk on the streets about it". The video was of Mr. Rowse laying on the ground bleeding to death and that she had seen it about 10 times on her phone.

Referring to the first clip of CCTV footage at Rubis, after the person got out of the rear seat, she said *"That's definitely Che Jennings right there. Sorry go back and that one right there"*. She explained that she then asked DS Foote to rewind the footage and then stated that the same person she said was "Che Jennings" is *"definitely Davin Dill"*. She said that she then identified Che Jennings as the person getting out of the front passenger seat and who was wearing shorts.

She said that she was able to say it was the Defendant getting out of the rear of the Hyundai by his tattoos, body structure, and physically seeing him on the streets. She described him as having no shirt on, wearing long black sweat pants, and with a shirt over his face. She said from the body structure: *"I could just tell it is him. When you know somebody's body structure, you see them often, you would know that is somebody"*. She said that had seen him previously "in passing" in the Warwick area but that she was 100% sure that the person in the clip was the Defendant.

She said that in respect of the Hyundai that she had previously seen it before in the Warwick area in passing and that she had seen the Defendant drive it sometimes and she would also see his friends driving it.

During cross-examination she said that:

- She was *"mistakenly wrong"* for telling the police (DS Michael Redfern) that she went to the same school with the Defendant for 10 years. She explained that being "from the same generation" meant that everybody from different high schools were in town at the Hamilton bus terminal and were around each other every day.

- She was not buddies with the Defendant, never hung around him, never "sat off" together, and never had conversations with him. She accepted that she and the Defendant never had a close relationship and that she just knows the Defendant from seeing him around and in passing.

- She accepted that in her evidence in Court that she stated that the last time she saw the Defendant before the incident was on Mr. Rowse's birthday on the 22nd May 2020 but that at the recognition process in 2023 she told DS Foote that she had not seen the Defendant prior to incident. She explained that having had to go through all of this was not easy.

- She said that prior to going through the recognition process that Mr. Rowse's mother contacted her in April/May 2023 and that they talked about what they believed happened at Rubis on the 14th June 2020.

- That from "day one" she had it in her head that the Defendant killed Mr. Rowse. That is, before the 30th September 2021 when the Defendant had been charged for the offences. She said that no-one told her that the Defendant had been charged.

  She said that the charging of the Defendant in September 2021 confirmed her belief and that she had held that belief until May 2023 when she identified the Defendant in the clips at the recognition process.

- She said that she talked to DC Redfern at the beginning of May 2023 and that he asked her if she knew the Defendant. This was before she had done the recognition process. She said that DC Redfern asked her if she would be able to pick out anybody in the CCTV footage and that this was moments after, in the same conversation, that he had asked her if she knew the Defendant. She did not accept that DC Redfern put the name of "Davin Dill" into her head because she already thought that it was Davin Dill who killed Mr. Rowse.

- When shown the CCTV footage of when the person gets out of the rear passenger seat she accepted that you cannot see the person's face and that the images of the footage is clear when it is played at normal speed but blurry when it is paused. She said that when you have seen fights physically in person and you know everything

that has been going on in your boyfriend's life then you know people whether footage of them is a little blurry or not.

She said that when she says the person in the CCTV footage has tattoos she is referring to the dark areas on the arms and she asked that Mr. Richardson not stop on the parts of the video "where it looks horrible". She then used the pointer to show that she saw tattoos up on the person's left shoulder area and downwards. She said that she was not saying that she had a clear view. When the video was played in its fullness and asked where in the footage she said that she saw tattoos she said *"its fine, disregard what I was saying, forget it"* and that *"it does not make sense"*. She also said: *"so because I am wrong about that [the tattoos] does not mean that I am wrong about who I think that that is or who I know that that is"*.

- She said that she does not know a person named Devonne Hodgson and that she had not had any conversations with a Devonne Hodgson. She said that she definitely did not "go with" or "mess with" a person named Devonne Hodgson from Warwick just before Mr. Rowse became her boyfriend. She said that she definitely was not intimately involved with Mr. Hodgson prior to being intimately involved with Mr. Rowse.

  This evidence is inconsistent with the evidence of Mr. Hodgson who stated that he was in a relationship with her prior to her relationship with Mr. Rowse.

Decision

24. Having heard and assessed the evidence at trial and having considered the submissions of both Mr. Richardson and Mr. Mahoney (including their respective authorities) I find that:

    (a) The recognition evidence of DC Simmons, Mr. Hodgson, and Ms. Castle, individually and collectively, is of a tenuous character due to significant inherent weaknesses, inconsistencies and vagueness in their respective evidence.

(b) The recognition evidence of DC Simmons, Mr. Hodgson, and Ms. Castle, individually and collectively, is contrary to all reason and is significantly improbable when one considers the totality of the evidence adduced by both the Prosecution and the Defence.

(c) The quality of the recognition evidence of DC Simmons, Mr. Hodgson, and Ms. Castle, individually and collectively, is poor and devoid of little supporting evidence. This is due in large part to the woefully unreliable quality of the CCTV footage adduced to support their recognition evidence.

25. In this regard, I refer to the following:

(i) There is no evidence whatsoever from any of the Prosecution witnesses that they identified or recognized any facial (including the eyes), voice or head features of the Defendant from the CCTV footage taken at Rubis on the 14th June 2020 (I will momentarily say more about DC Simmons saying that she recognized the Defendant in the Rowse residence footage recorded on the 29th May 2020).

Of course, identification or recognition of an individual can be made from characteristics other than by reference to their face or head but it has to be said that one's face, even just one's eyes and/or voice, are the best features from which they can more accurately be identified or recognized.

(ii) Mr. Hodgson stated that he recognized the Defendant by his "builtness". I took this to mean from the Defendant's body structure. He also said that he recognized the back of the Defendant because he had seen him with his shirt off before during the summer periods.

A couple of issues arise from this. Firstly, Mr. Hodgson did not indicate whether there was something specific about the body structure of the Defendant that would

make it stand out from other similar body structures. In other words, there did not appear to be anything distinguishable from what he said was the body structure of the Defendant and what may also be the body structure of countless other people.

This leads me to my second point. It is no surprise that Mr. Hodgson did not use words in his statement to the police or in his oral evidence in Court which conveyed sufficient certainty as to his recognition of the Defendant. To the contrary, he used words of uncertainty. Such as: that he "thought" or "believed" that it was the Defendant; he made an "assumption" that it was the Defendant; that it "looked like the Defendant"; that he was not 100% sure that it was the Defendant but that he could be wrong; that "maybe" it looks like the Defendant; and, that it "might" be the Defendant. There never was from Mr. Hodgson a full-throated recognition of the person in the CCTV footage as definitely being the Defendant.

To be clear, I make no findings whatsoever that Mr. Hodgson was fabricating his evidence and nor will I do so. In fact, I find that Mr. Hodgson was a credible witness who was being honest as to the extent to which he was able to recognize the Defendant from the CCTV footage. However, I do unequivocally conclude that there is enough evidence to suggest that the reliability of his evidence as to recognition of the Defendant from the CCTV is highly questionable.

(iii) Ms. Castle's evidence is even more problematic. She simply said that she "…*could just tell it is him. When you know somebody's body structure, you see them often, you would know that is somebody"*. For someone who admittedly had only seen the Defendant in passing and to whom she had never spoken to, this is insufficient data upon which one can say definitively that she recognized the Defendant's body structure from the CCTV footage. Furthermore, like Mr. Hodgson, she gave no evidence whatsoever of what in particular stood out to her that assisted her in arriving at the conclusion that it was the Defendant's body structure that she saw in the CCTV footage.

I should add that when pressed in cross-examination as to how long and to what extent she knew the Defendant, Ms. Castle said that she was *"mistakenly wrong"* for telling the police (DS Michael Redfern) that she went to the same school with the Defendant for 10 years. In essence, Ms. Castle undermined her own testimony as to how well she knew the Defendant especially when coupled with her acceptance that she was not buddies with the Defendant, never hung around him, they never sat off together, and that she never had any conversations with the Defendant. She also accepted that she and the Defendant never had a close relationship. This brings into stark question her familiarity with the body structure of the Defendant and therefore her ability to recognize it from CCTV footage. Ultimately, this erodes the correctness, accuracy and reliability of her recognition of the Defendant.

(iv) A major hinge in the Prosecution's case is that Ms. Castle said that the person exiting from the back seat of the Hyundai has tattoos on his arms and that DC Simmons said that this person has "markings" on his arms. The import of this evidence was that since the Defendant has tattoos on his arms (which is not in dispute) then Ms. Castle's and DC Simmons' recognition of the Defendant from the CCTV footage at Rubis on the 14th June 2020 is reliable. However, the opinion of Jason (the imagery consultant) which was set out in an email to the BPS dated 23rd September 2020 i.e. before the Defendant was charged, before Ms. Castle was spoken to by the police, and before DC Simmons drafted her statement, runs a coach and horses through Ms. Castle and Ms. Simmons' recognition evidence (Mr. Richardson's words).

I set out in earlier paragraphs the conclusions which Jason arrived at in that September 2020 email and so it would be redundant to repeat them. What Jason wrote compels one to ask the crucial question: "If a person who is trained in the analysis of images is of the view that no tattoos (or markings) nor any persons can be distinguished from the CCTV footage then how is it possible that Ms. Castle and DC Simmons could do so with their naked eyes and without the use of sophisticated

equipment (or even a magnifying glass) to assist them?" I find that it would be impossible or at least extremely difficult for Ms. Castle or DC Simmons to do so and any suggestion that they would be able to would be illogical and nonsensical.

I also do not accept that DC Simmons would not have had some sight of the conclusions of Jason as she was copied in on the chain of emails that flowed between the police and Jason's company. I cannot say to what extent she may have had sight, it may have been a passing glance, but one would have thought that a police officer whose training and job description included the reviewing and assessment of CCTV footage would have taken special interest in the opinion of an expert in relation to CCTV footage which she had under her review. If she did not have sight of Jason's email prior to rendering her opinion that she saw markings on the person in the Rubis CCTV footage then she should have most definitely should have had regard to Jason's email after she did her witness statement so as to determine whether her opinion should in any way whatsoever be amended (and to provide a subsequent opinion in this regard). This could have even occurred just before she gave evidence in Court during the trial.

In respect of the evidence of Ms. Castle, when challenged by Mr. Richardson as to whether the CCTV footage was clear enough to see tattoos Ms. Castle said that she was not saying that she had a clear view. Also, when asked to point out in the footage where she saw tattoos Ms. Castle said that the Court (and presumably the Jury) should disregard what she said about seeing tattoos on the arms of the person getting out of the back seat of the Hyundai. This vacillation by Ms. Castle's did not bode well for the reliability of her evidence.

(v) Staying with the opinion of Jason, it is obvious that the quality of the CCTV footage is such that it is difficult for one to make out any or little identifying features of the person exiting from the rear passenger seat of the Hyundai. Mr. Mahoney, and to some degree DS Michael Redfern, tried to parse out the words of Jason and say that by him saying that the "quality is not horrible" that he was not saying that the

quality was poor. This may be semantics but the overwhelming tone and content of Jason's email is that the quality of the CCTV footage was such that one could not make out any tattoos or markings and nor could it "include or eliminate" a known person. As Jason said, *"the data is what the data is"* and while they may wish to the Prosecution and DS Redfern cannot diminish those words.

(vi) Another major hinge in the Prosecution's case was that DC Simmons recognized the Defendant in the Rowse CCTV footage on the 29th May 2020. It is clear that the prosecutorial motivation for this was to somehow show that since the Defendant was present at the Rowse residence inflicting violence on the 29th May 2020 then this should be seen as being a lead up to what happened on the 14th June 2020 when Mr. Rowse was violently killed.

However, this theory precipitously falls away when one considers that the only person who says that the Defendant was present in the Rowse residence CCTV footage was DC Simmons. Ms. Castle nor Mr. Hodgson, both of whom say that they personally knew or knew of the Defendant for a considerable period of time, could not recognize the Defendant in the footage taken at the Rowse residence. It is for this reason that DC Simmons' recognition of the Defendant on the 29th May 2020 cannot be relied on and because of this it brings into question her powers of recognition of the Defendant, or any markings on the person, on the CCTV footage taken at Rubis on 14th June 2020.

(vii) The above subparagraph naturally draws me to the Defendant's evidence that he was in the hospital on the 29th May 2020 (documentation from the KEMH indicate that he was admitted on the 27th May 2020 and discharged on the 11th June 2020). With this, the Defendant purported that he could not therefore have been at the Rowse residence on the 29th May 2020 as DC Simmons said that he was.

To be blunt, any suggestion that the Defendant was able to leave the hospital on the 29th May 2020 and go to the Rowse residence is absurd as stated by Mr. Richardson

and agreed to by Dr. Steven Dore who was tendered as Prosecution witness to speak to the documentation as to the Defendant's admission to and discharge from the hospital. I am fortified in this view as the Prosecution were unable to successfully present any evidence that would persuade me to reject the documented evidence that the Defendant was in the hospital at the time the Rowse residence incident occurred.

In fact, Dr. Dore reinforced the evidence that the Defendant was in the hospital on the 29th May 2020 by saying that it would have been highly unlikely that the Defendant would have left the hospital without an alert protocol being deployed at the hospital, and most tellingly, that it would have been highly dangerous to his health if the Defendant would have disconnected his chest tubes from his body or from the briefcase sized apparatus which was connected to the chest tubes.

Further, when shown the Rowse residence CCTV footage Dr. Dore said that if the person who DC Simmons said was the Defendant was in fact the Defendant, and that he had left the hospital, then he [Dr. Dore] would have expected to see the chest tube apparatus protruding from the Defendant's shirt. Obviously, such equipment could not be seen in the Rowse CCTV footage.

Again, all of this substantially reduces the evidence of DC Simmons that she recognized the Defendant from the CCTV footage of the Rowse residence recorded on the 29th May 2020.

(viii) Just prior to going through the recognition process both Ms. Castle and Mr. Hodgson were asked if they knew "Davin Dill". Such a question, especially when asked just before embarking upon a recognition process, had the real potential of consciously or subconsciously putting into the minds of Ms. Castle and Mr. Hodgson that the person they will likely see in the CCTV footage will be the Defendant. This is whether or not they already knew that the Defendant was a suspect in the case.

(ix) When shown the CCTV footage Ms. Castle first identified the person getting out of the rear passenger seat as being Che Jennings, not the Defendant. This may be a small point since one may accept that she quickly corrected herself but it is something to put into the mix when considering the correctness or reliability of her recognition evidence.

26. In response to the Defendant's submission of no case to answer Mr. Mahoney contended that the evidential issues raised by Mr. Richardson (some of which include the above issues highlighted by me) are matters which should be left within the province of the Jury. This was a constant refrain of Mr. Mahoney and while such a submission can be reasonably advanced in respect of some evidential areas targeted by Mr. Richardson there were significant areas of the evidence that Mr. Richardson illuminated which properly and squarely fall within the confines of ***Galbraith***, ***Turnbull***, ***Goddard***, and the other authorities cited by Counsel. It cannot be that every question raised about the character of the evidence adduced at a trial, and which are the subject of a submission of no case to answer, can be simply resolved by saying that it is matter for a Jury. If that was the solution then almost every submission of no case to answer would fail. There is a type or character of evidence, such as that which surrounds the identification or recognition of an accused person, which can and indeed should be withdrawn from the Jury if its quality is poor and unreliable. The evidence in this case, I find, is of such a type or character.

27. The cumulative effect of the points raised above is such that I am compelled to conclude that the Prosecution's case against the Defendant, taken at its highest, is such that a Jury properly directed could not convict the Defendant as being the person who, being concerned with another, killed Joshua Rowse on the 14th June 2020. Put another way, the recognition evidence put forth by the Prosecution is so inherently weak, inconsistent, illogical and unreliable and that a Jury properly directed cannot convict the Defendant of the offences charged.

Conclusion

28. Accordingly, I confirm my Ruling made on the 8th September 2023 that the Defendant's submission of no case to answer should succeed and that the Jury should be directed to acquit the Defendant on both charges on the Indictment.

Dated the 14th day of November, 2023

The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge of the Supreme Court of Bermuda