IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL JURISDICTION)

INDICTMENT NO: C077/2016

BETWEEN:

THE KING

and

KEYRIN TZIB

Defendant

Appearances:

Mr. Glenfield Dennison Counsel for the Crown.
Mr. Darrel Bradley and Ms. Kimberly Wallace Counsels for the Defendant**.**

2024: January 25

ATTEMPT TO MURDER-

Ruling on No Case Submission

History of the Matter

1. **NANTON, J.:** KEYRIN TZIB (hereinafter referred to as "the Accused") was indicted for the offence of attempt to murder, contrary to section 117 and 107 of the ***Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020,*** (hereinafter "the Code") which is alleged to have occurred on 6th April, 2015.

2. The trial by judge alone began with the arraignment of the Accused on 17th January, 2024 before this Court pursuant to section 65 A (2)(a) of the ***Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020.***

3. The Crown's case is that the Accused shot Virtual Complainant Kurt Hyde in the head while they were on a boat returning from San Pedro to Belize City. The shooting occurred in the presence of several persons who were on-board the vessel. The Crown relied on the evidence of three live witnesses, two of whom were present on the vessel and one expert Dr Luis Hernandez who treated the Virtual Complainant for injuries associated with a gunshot wound to the face. The statements of 9 witnesses were admitted into evidence by agreement pursuant to section **106 of the Evidence Act Cap of the Substantive Laws of Belize (Revised Edition) 2020.** The evidence of witness, Tyrone Young was tendered pursuant to **Section 123 of the Indictable Procedure Act**. The Crown called closed its case on 25th January 2024.

4. Counsel on behalf of the Accused made a submission of no case to answer at the close of the case for the Crown. The Court heard the submissions of both sides and overruled the no-case submission orally with the promise to deliver a brief ruling in writing. The Court now does so.

Submissions of the Parties

5. Mr Bradley on behalf of the Accused submitted that the Crown failed to prove an essential element of the offence of attempted murder i.e. that the Accused specifically intended to kill the Virtual Complainant. Counsel further relied on the second limb of the test in the case of **R v Galbraith**[1], namely, that the case is so weak because of its inconsistencies or vagueness that no reasonable tribunal of fact could convict on that evidence. He advanced that the evidence of the Prosecution

[1] (1981) 1 WLR 1039

taken at its highest could not reasonably persuade a fact finder so that they feel sure that the Accused is guilty of the crime for which she is charged.

6. Mr. Dennison for the Crown submitted that the Crown has led evidence of each particular element of the offence of attempt to murder. He submitted that the Court must look at the evidence at its highest and that questions of credibility relative to what was perceived by individual witnesses were findings of fact which ought not to be made at the stage of a no-case submission. The Crown urged that the Court guard itself against usurping the role of the fact finder at the close of the Crown's case.

Law

7. The well-known passage from the judgment of **Galbraith** per Lord Lane CJ (at p 1042) is deserving of quotation in full:

> *"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's 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. . . . 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."*

8. The Court also observes that the test for a no-case submission is no different in a judge-alone trial than the **Galbraith** test that would be applied in a trial with a jury.

In support of that proposition the Court relies on the decision of the Northern Ireland Court of Appeal in **Chief Constable v Lo[2] per Kerr LCJ at para 14,** which was referred to with approval by the editors of the **Criminal Bench Book for Barbados, Belize and Guyana,**:

> *"The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?' The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."*

Analysis

9. The Court is assisted in establishing the elements of the offence of attempt to murder by a decision of our Court of Appeal in **Peter Augustine v R[3]** per Carey J:

> "*An attempt to commit a crime is itself a crime. Before the accused can be convicted of this offence, it must be proved; (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. 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. Act(s) done must be something more than mere preparation for the commission of the offence."*

In the context of this case the Crown must therefore advance prima facie evidence in support of each of the following elements:

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[2] [2006] NICA 3

[3] **Crim App 8/01**

(i) The Accused was the shooter.

(ii) The Accused specifically intended to kill the VC, without justification or provocation.

(iii) The Accused took steps that were more than preparatory, and could only have had as its purpose, to commit the offence of murder.

10. There is no dispute that the Crown has advanced evidence capable of supporting a conviction in relation to (i) above. The evidence of the live witnesses Castro and Lanza, as well as the statement of Tyrone Young demonstrates that the Accused was identified as the person holding and firing an M4 Carbine following which the Virtual Complainant fell to the ground with a visible open wound to his face. The agreed evidence of Eric Cob demonstrates that the Accused was issued with a M4 Carbine as part of her duties.

11. The evidence advanced by the Crown in relation to (ii) and (iii) would necessitate drawing the inference that the Accused intended to kill the VC and took steps to do so by firing her weapon and shooting the VC in the head. The evidence from Castro is that he saw the Accused lean back with the butt of the firearm at her shoulder while she was pointing the gun in the direction of Kurt Hyde before he heard the loud bang. After Kurt Hyde fell to the ground he heard the Accused utter the words *"Fucker you"*

12. There is evidence from Noel Lanza that the Accused was squinting her eyes as one would to get a precise aim, and that the butt of the weapon was in her shoulder while she was pointing the weapon at the VC's head. He testified that he saw her close her eyes to take that aim when he jumped from his seat and lunged at her. While in the process of launching he heard the weapon bang and he saw the recoil after the weapon fired off. Hyde then fell to the ground.

13. There is opinion evidence from the doctor that it was medically unexplainable that the VC survived a gunshot injury to the face from an M4 Carbine shot at such close range, which struck a very sensitive anatomical region. The evidence from Dr.

Hernandez is that that gunshot caused life threatening injuries to the VC and that it was medically inexplicable that he survived.

14. There is thus evidence that goes toward the proof of each element of the offence.

15. In relation to the second limb of **Galbraith**, Counsel for the Accused submitted that the evidence going towards the Accused's intention to kill was of such a tenuous character, because it is inconsistent with other evidence that it could not safely support a conviction. In discharging its **Galbraith** assessment, the Court notes that there are discrepancies between the evidence of Delon Castro and Noel Lanza with regard to where the Accused was seated, and the positioning of the persons in the boat, and whether Lanza was in a position to observe what he claimed to observe. In the Court's view; however, those apparent discrepancies are matters which do not rise to the level that would make it impossible for a reasonable tribunal to convict and ought properly to be left to the fact finder upon consideration of all the evidence.

16. In making this finding the Court notes the dicta of the Court of Appeal in **Nelson Gibson v R**[4], on the facts of that case that the fact that a witness's evidence has been shown to be inconsistent with the evidence of another witness did not necessarily warrant withdrawal from the jury. Such inconsistencies were matters for the jury (fact-finder) to resolve if, on one view of the evidence a case was made out.

17. The Court considers that this case falls squarely under the category of cases discussed under 2(b) **Galbraith** where the Prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury. In such cases, 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, the Judge should allow the matter to be tried by the jury.

Disposition

18. The Court overrules the no-case submission made by the Counsel for the Accused.

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[4] Crim. App. 10/12

Candace Nanton
High Court Judge
Senior Courts Belize
Delivered 25th January 2024