

IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION – CENTRAL DISTRICT - BELMOPAN

**IN THE HIGH COURT OF JUSTICE (CRIMINAL
DIVISION)**

INDICTMENT NO. CR20220087C

BETWEEN:

THE KING

And

JOVANNIE O'BRIEN

Before:

The Honourable Madame Natalie – Creary Dixon, J

Appearances:

Mr. Glenfield Dennison, Director of the Crown

Mr. Ellis Arnold and Mr. Bryan Neal, for the Accused

2024: February 7; 8; 9; 14; 15; 19

JUDGMENT

[1] **NATALIE –CREARY DIXON; J:** Jovannie O’Brien (“the accused”) is charged on an Indictment for the offence of murder (2 counts), contrary to Section 117 read in conjunction with section 106(1) of the **Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020**, (“the Code”) arising out of the shooting death of Jamir McKoy and Lloyd Myvette (“the deceased persons”) on August 30, 2021.

[2] The matter commenced with the arraignment of the accused before a Judge alone pursuant to Section 65A (2) (a) of the **Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020**. The accused pleaded “not guilty” on both counts and thus the Court proceeded to try the matter.

[3] In accordance with Rule 10 of the **Criminal Procedure Rules 2016**, (hereinafter “the CPR”) along with section 106 of the **Evidence Act, Cap. 95 of the Substantive Laws of Belize R.E. 2020**, the statements of the following persons were read and entered into evidence:

- (1) Filiberto Pot-Crime Scene Technician
- (2) Lynette McKoy- mother of deceased Jamir McKoy, who identified the body of her son
- (3) Floyd Myvette -brother of the deceased Lloyd Myvette -who identified the body of his brother

THE EVIDENCE

[4] The Crown alleges that on the 30th of August 2021 at about 8:30 pm, the deceased persons met their demise when the

accused entered a yard in which they were “hanging out
“with family and friends and opened fire hitting them.

The Crown

1st witness for the Crown – Jameilie McKoy (“Jamielie”)

[5] The Crown’s first witness was thirteen (13) year-old Jameilie McKoy, who gave sworn evidence without objection from the Defence Counsel.

[6] She detailed that her younger brother Jamir McKoy and a family friend Lloyd Myvette died after being shot at a shop in her yard, in Unitedville Village, Cayo District on August 30, 2024, at about 8:30 pm. She described her location at the time of the shooting, as ‘in front of a shop that was in the front of her yard’. According to her, there was a very bright light on the outside of the shop, and she was standing almost under the light. She could see on the street because of the light on the lamp post on the neighbour’s house to the left. The street was about 15 feet away from her.

[7] As she was about to lean her bicycle against a picnic table near to her, she saw “J” coming in through the flowers patch. He looked at her. There was nothing blocking her view of him. He was about eight (8) feet away from her. She had a clear view of him because of the light that was on. He had on a grey t-shirt, long blue jeans pants, a camouflage hat, and a mask. In his right hand, he had a gun. “J” was her father’s friend; the two would ‘hang out’ together on weekends at her father’s house. She clarified later that she would see him twice per month because he “dah go States”.

She described "J" as tall, slim, brown skin, low hair, and brown eyes.

[8] He pointed the gun at her and lifted his left hand towards his lips, meaning she should be quiet. He then fired two (2) shots, at which time she saw her brother drop to the ground and cry.

[9] He fired three (3) more shots, hitting Lloyd Myvette who was sitting on her father's car. Then she saw "J" running and her father chasing behind him.

[10] The entire ordeal from the moment "J" entered from the flower patch to the time he was chased by her father, lasted about five (5) minutes.

[11] She was able to observe him for the entire five (5) minutes.

[12] She could see his face, nose, part of his mouth that was out of the mask and she also saw his neck and his hands.

[13] "J" and her father used to spend time together at her house for about four to five hours, during which time she would be upstairs the said house with her mother. She would see him walking to her house on those days, at around 2 or 3pm. She also had the opportunity to observe "J" for about five seconds, whenever he would be walking back home after hanging out with her father. During those visits he would be about 4 feet away from her.

- [14] Between April and May 2021, he would visit the house twice a month; the last time he came to her house was in June 2021 during the day; it was a sunny day, she could see him clearly and she had an unobstructed view of him; she could see all of him to include his ears, fingers, nose and eyes.
- [15] She identified the accused as “J” of whom she spoke, and who was also the shooter.
- [16] Under cross-examination, she admitted that the bright light she described under the shop was over her, but there was no light over the shooter. She also admitted that because of the cap that he was wearing she was only able to see a part of his face. She further admitted that she may have been staring at the shooter for less than five (5) minutes, despite her initial assertion that she was looking at him for five minutes and “dehn stare pan him di whole time”. She admitted to being frightened when she heard the gunshots; that everything happened fast and that she was running away from the shooter and screaming.
- [17] She retorted that J was not just her father’s friend, rather, he was “our friend”, and they all used to go to the creek to barbecue. She didn’t notice if the shooter had any tattoos.
- [18] She had seen J elsewhere two (2) weeks before the shooting; J has tattoos; despite saying earlier in her evidence that the shooter’s eyes were brown, she admitted that she was not able to see the shooter’s eyes on the night of the shooting. She again admitted that she couldn’t see the shooter’s entire face. She reiterated that the shooter was

tall; when asked by Counsel, she responded in the affirmative that the shooter was as tall as Counsel, who informed that he was 6 feet 3 inches tall.

- [19] In re-examination, she clarified that she only started running *away from* the shooter *after* the shots were fired.

2nd Witness for the Crown – Dr. Mario Estrada Bran

- [21] The Crown then called its next witness, Dr. Mario Estrada Bran, a Forensic Pathologist. The Court deemed him an expert in Pathology without objection from the Defence. He testified that he was ordered to perform autopsies on the bodies of the two (2) deceased. His findings were that Jamir McKoy died of a gunshot wound to the abdomen and Lloyd Myvette died of gunshot wounds to the trunk. He ruled both deaths as homicides.

3rd Witness for the Crown-Adrian Lemus (“Adrian”)

- [22] This witness testified to being in the ill-fated yard at the material time, hanging out with his friends. He heard someone holler “bwoy”, and then he saw a man firing away in front of him. He threw himself on the ground and ran away. He described the yard where the incident occurred as comprising a car on the street side, and lamp posts between the two yards; in other words, there were lamp posts in front of both of his neighbours’ yards. There was also a light right under the shop.

- [23]** The person who came into the yard and fired the shots was also the person who yelled “bwoy”. He described that person as slim; not too fat nor too slim; tall. He was wearing a grey t-shirt, jeans pants and a camouflage hat. He had an unobstructed view of the shooter from about twenty (20) feet away. He was able to see this person for forty (40) seconds. He could see the person’s forehead, eyes, torso, and clothes; however, he was unable to recall the footwear.
- [24]** He recognized the shooter and had seen the shooter the day before at the “Chiney “Shop for about one (1) minute and thirty (30) seconds. This was a person he had known for five (5) months, and whom he had seen almost every day of those five months; they would hang out almost every day at the person’s house. The person was his friend. He knew him by the nickname “J”. The witness went on to state that at the Chiney shop the accused rode up to him on a bicycle and told him that he would shoot him in his face. The accused was wearing slippers and socks, shirt and pants and a camouflage hat at the time.
- [25]** The threat was made in the presence of the witness’s little brother Ivan Lemus.
- [26]** In August 2021, the witness was in the business of selling “weed” (marijuana) for “O’Brien”; the same “O’Brien” that told him at the Chiney shop that he would shoot him in his face and the same “O’Brien” who did the shooting on the night of August 30, 2021.

[27] Under cross-examination he repeated that he was able to see the shooter before he began shooting; from the time he first saw the shooter to when the shooter started to shoot was about 10 seconds. He was able to observe the shooter for about five seconds before he started shooting.

[28] He said that from the time the shooter told him “bwoy”, he watched the shooter; then the shooter took out his “hammer” (gun) and started to shoot; that was about ten seconds. He denied that he was lying about that time period.

[29] When the shooter started shooting, he fell face down on the ground for about three seconds and the shooter kept shooting. He got back up and ran, whilst the shooter was still shooting. When it was suggested that he wasn’t watching the shooter from the time he was facing the ground to the time he ran, the witness replied that “I drop but kept my face to the shooter, because he was shooting me, right?” Counsel then asked the next logical question: “so you were running but looking backwards?” To which the witness replied “well, I turn my head.” Another logical question followed: “you looked where you going?” To which the witness replied, “dat too”. If the witness was “turning his head” to “keep his face to the shooter” whilst running away, it is difficult to imagine how this could have given him a proper view of the shooter at that time.

[30] Cumulatively, the witness said he was able to observe the shooter for thirteen (13) seconds. During those thirteen seconds of observation, he agreed that the shooter was wearing a mask. He demonstrated that the

mask covered immediately below the shooter's nostrils and his entire mouth, down to his chin. He agreed also that the shooter was wearing a cap that covered from his forehead to his brow. He also agreed that the cap had a peak. As a result, he also agreed that all he was able to see of the shooter was a little bit of eyes and nose.

[31] He strongly denied that he never told the police that the shooter had tattoos on his arm.

The exact exchange is best highlighted verbatim:

Q. You agree with me that you didn't tell the police that this shooter had anything on his arm?

A. I tell them this arm (touches left arm). He has tattoos.

Q. Did you put it in your statement about the tattoos on his arm?

A. Yes.

Q. There is nothing in your statement that says anything about tattoos. You are lying.

A. I tell the police. I don't know if they put it.

Q. I asked you if you put it in your statement and you say "yes".

A. I don't know if I mention it.

Q. So you changing now?

[32] After he was shown his statement, the witness admitted that there was no mention of any tattoos in his statement. He also admitted that he couldn't see tattoos that night, but that was not because the lighting condition was poor, as suggested by Counsel. Without more, the witness appeared to have changed his statement, mid air, thus casting doubt on his ability to recall or truthfully recount the traumatic period.

[33] He said he knew the shooter was the person he knew as “J” because he had on the same camouflage hat he had on the day before; because he recognized his voice; and because he recognized him from behind, since he would hang out with him every day.

4th Witness for the Crown-Ivan Lemus (“Ivan”)

[34] With the aid of the light bulb in front of the yard, as well as lamp posts at the corner of the neighbour’s house, on the lot beside Jamir McKoy’s house, this witness was able to observe the incident, whilst standing by the car in the yard. He said light was all around; so, if anyone walked to the right or to the left, they would be surrounded by light.

[35] At about 8:30 pm, he saw a male person about forty-five (45) feet away from him. He stared at him for about twenty (20) seconds. Using the timer in the courtroom, the witness then agreed that it really was about ten (10) seconds that he stared at the accused, not twenty. He saw the person’s face, wearing a camouflage hat and a mask. He saw from the person’s brow to the end of his nostrils. This person was sneaking out of the yard. They were at opposite ends of the yard; ten feet away from the shop, and consequently about ten feet away from the light bulb. The light shone for about seventeen (17) feet away, so the light shone fully on them. Also, the lamp post lights were shining in between. The person had a shiny object in his hands which he raised in both hands and pointed it towards them.

[36] As the witness saw him raise both hands, he hollered for his friends and said “bwoy”. When the shooter was raising his hands, he saw his face and heard gunshots. Like the other witnesses prior, this witness indicated that the shooter was wearing a grey t-shirt, dark long pants, and a camouflage hat. When the shooter raised his hands to shoot, the witness saw a big spark and heard a loud noise. He was looking directly at the shooter when the first shot was fired. He recognized the shooter as someone with whom he used to “hang out and smoke weed”. He said the shooter would hang out with him at his house every week and a half for about thirty minutes or so, between 4 pm and 5 pm. He had known the shooter for about five (5) months. Before the shooting, he had seen him the day before at the Chiney Shop wearing the same camouflage hat and mask. However, he was not wearing the mask on his face at that time. At that time, he threatened the witness and his brother. He knows that person/shooter as “J” and “O’Brien”. That person is brown-skinned. He is “about less than 6 feet; a little taller than [me]”, and I’m 5 feet 3 inches.” They would hang out even with masks on. In August 2021 most persons wore masks because of the requirements under the COVID laws. Consequently, he was able to recognize the shooter with a mask on.

[37] He saw Jamil McKoy running behind the shooter and the shooter running in the direction of the lamp post. The entire incident from the time the shooter was seen to the time he was chased, lasted about twenty (20) seconds.

[38] Under cross-examination, the witness was shown a photo - taken at night- of the place where the shooter is alleged to have been. He agreed that there was no light shining in that area from any lamp post. He also agreed that the closest lamp post was about forty-five (45) feet away from the shooter. He also agreed that the light from the lamp post was very dim.

Despite this, he did not agree that the area was not well-lit.

[39] He admitted that his vision was impeded by poor light, mask, and a bucket cap. From the time he watched the shooter to when he raised the gun was three (3) seconds. In re-examination, he said there was light where the shooter was. He knew about the hidden tattoos because whenever they would hang out at the accused man's house, he would take off the long-sleeved shirts and his tattoos would be revealed. Further, he spoke of a tattoo of a "grim reaper," but was unable to say on which arm it was.

5th Witness for the Crown-Jamil McKoy ("Jamil")

[40] His house is about fifteen (15) feet away from the neighbour's house, and there is a lamppost light right in front of the neighbour's yard.

[41] On that night, whilst hanging out with his family and friends, he heard his daughter scream, followed by six or seven gunshots. He threw himself on the ground and remained there for the duration of the gunfire. Whilst on the ground, he was able to see the fire from the gun and where the gunshots were coming from, which is on the left-hand side of his shop

going out into the street. He was also able to see the shooter's face; he said the shooter was about 5 feet 8 inches tall, slim body, low afro haircut, and wearing a camouflage hat and a fisherman's mask. After the ordeal, the shooter stood watching everyone for about twenty (20) seconds, after which the witness gave chase. The shooter was about twenty (20) feet away from the witness when the witness was chasing him, and there was nothing blocking his view of the shooter. He explained that the reason he chased after a man with a gun was because he was traumatized, and also because he wanted to get a look at the shooter's face. He chased the shooter for about one hundred and fifty (150) yards when he stopped because the area was dark.

During that time he saw the shooter's face on three (3) different occasions: (1) With the fire from the gunshots; (2) in the lamp post light by the neighbour's yard, whilst he was chasing him; and (3) at the last lamp post before the chase ended, because the shooter was "watching on me" and turning his head to look back at the witness whilst running. At this time, he disagreed that it would be just a side of the accused man's face that he could see in those circumstances; he said he saw the shooter's entire face because whilst being chased the shooter "turned his head all the way back" intermittently to glance at the witness running behind him. He also said that at the last lamp post he noticed that the mask had fallen completely under the shooter's neck. According to the witness, the shooter was wearing a grey t-shirt, dark blue jeans pants, and a black and white tennis shoe; he had known this person for about seven (7) months prior. He would see him every two weeks, every

other Sunday. At those times they would hang out at the witness's board house for about two to three hours, "smoking weed and talking idleness".

Sometimes they would go to the Creek to barbecue together.

The last time the witness saw him before the incident was about the second week in August at the Chiney Shop. That day was a sunny day. He said he was able to see the fire from the gun and where the gunshots were coming from, which is on the left-hand side of his shop going out into the street. He said he knew him "very, very good" and that they were "like cousins". He further described this person he would hang out with as red-skinned; short afro hair and about 5 feet 8 inches tall. He said the person he saw at the Chiney shop, the person he was chasing and the person whose face he saw whilst chasing after him, was Jovannie O'Brien. After a trying time during which the witness gave gravely inconsistent and nonsensical responses to calculate the length of time for which he saw the witness cumulatively, the witness admitted to being nervous in court. He was however able to indicate that he saw the accused for a total of eleven (11) seconds that night as follows: three (3) seconds each on the first and second sightings, and five (5) seconds on the third occasion, when the mask fell down.

- [42]** He could positively identify the shooter on the night even with the cap and mask on because the hat looked like the very same one that he had sold the accused before the incident; also, the mask was the same mask that the accused was always wearing during the COVID 19 pandemic. He could

identify the shooter if he saw him again by his body, face, and height.

[43] Under cross-examination, he admitted that he gave conflicting times in court and in his statement, for the period under which he had the shooter under observation. In his statement to the police given on the night of the incident, he said the period of observation was for eight (8) minutes; in court however, he indicated that it was eleven (11) minutes. He explained in re-examination that the conflicting period given was because he was traumatized.

[44] In cross-examination, he also explained that the picture of the shop that was shown to him did not detect the bright light that was there. Both explanations were acceptable to the Court. He stated however that that was because only a piece of the shop” was shown in the photograph; the side with the bright light was not captured in the photograph. He admitted that whilst chasing the shooter, he got just a ‘little bit of help” from the bulb by the shop; what really helped him was the lamp posts by the neighbour’s yard. He agreed that the lamp posts light covered about ten (10) to fifteen (15) feet in a circle. He disagreed, however, that the two lamp post lights in the photograph of the scene at night “barely lit up the street”.

[45] When he was asked if the shooter had on a baseball cap with a peak, he said yes. A second later when he was asked by Defence Counsel if it wasn’t a “fisher man cap”, the witness immediately retracted and agreed that it was a “camouflage cap - not a beak; a bucket cap – go round and round, no

beak". He also admitted that he gave different descriptions of the hat in the two statements he gave to the police: in the first statement dated August 31, 2021, the night of the incident, he described the hat as a "camouflage baseball cap"; in his second statement dated September 2, 2021, two days after the incident, he described the hat as a "bucket cap; fisherman type". He denied the suggestion that he described the hat as a bucket hat in court, because the other witnesses had told him that they described the hat as a bucket hat.

6th Witness for the Crown - Sergeant Alejandro Rodriguez

[46] Sgt. Rodriguez recalled that shortly after 9pm he visited the scene of the incident on the night of the shooting. The scene was processed by the Crime Scene Technician and six (6) 9mm expended shells and one (1) slug were recovered. Acting on information, Sergeant Rodriguez proceeded to the house of Jovannie O'Brien, where he was found with a female and two children. He informed Mr. O'Brien that he was wanted for questioning in relation to the shooting incident, and that a search would be conducted at this residence for firearm and ammunition. Both were detained in relation to the discovery of two (2) live 9 mm rounds of ammunition. The following day the scene was revisited about 9am, and an additional 9 mm expended shell was found, and a slug taken out of a door panel.

[47] On that day he recorded a statement from Jamil McKoy, and also conducted an interview with Jovannie O'Brien. In the

notes of interview, Jovannie O'Brien indicated that on the night of the incident he was home with his wife and children.

[48] Sergeant Rodriguez obtained a search warrant to be executed at the residence of Jovannie O'Brien for the items of clothes the shooter was allegedly wearing on the night of the incident; those items were a grey t-shirt, blue jeans pants and a camouflage cap. Those items were found at the residence of Jovannie O'Brien. Mr. O'Brien refused to participate in an ID parade.

[49] Under cross-examination, he described the lighting condition as not too bright, but they had some light. He would not agree that the lighting condition was poor, as "you could see visible". He denied that he went to the accused man's residence searching for a "Calbert O'Brien". No firearm was found at the residence.

7th and final witness for the Prosecution - Filberto Potts

[50] Having been deemed an expert by the Court, the Senior Crime Scene Technician's evidence was read in evidence. Photographs FP1 - 31 were tendered as exhibits in this case. Having agreed that generally, the expended shells would fall about four (4) feet from the shooter, he agreed that the light from the shop was not enough for him to see that area; neither were the lamppost lights enough to see the extra casings. He also agreed that the lamp post light did not throw light as far as forty feet. To see the general area, he needed "extra light" and had to employ the use of a big flashlight. He

did not concern himself with the brightness of the bulb by the shop. It was not a bright bulb, but you can see movements on the street.

- [51] The bulb was about thirty feet away from the shooter; he could not say the range of light that that bulb would throw; he did not agree that the lamp post was further than the bulb. He agreed that the lamp post was about thirty-fourty (34) feet away from the shooter. He also agreed that if it was 15 feet from the shooter, the remaining 15 feet to the shooter would not shine. In re-examination he was shown a few photographs in which he indicated that the reflections were from the lamp posts lights.

Defence's case: Unsworn statement from the Dock

- [52] Having been informed of his three options¹, the accused opted to give an unsworn statement from the dock. He stated that on Monday August 30, 2021, he was at home in United Ville Village with his wife Bertina and two children Jarel and Dina. They were just doing "normal family stuff." At midday he went to buy lunch for himself and family and went back home. A few minutes after 9pm, the police arrived at his residence and asked for Calbert O'Brien. He informed them that there was no-one there by that name. They took him

¹ The accused was informed that he had a right to remain silent; a right to give unsworn testimony from the dock-in which case he could not be cross-examined by the Crown and neither could the Judge ask him questions except to clarify something he said; he was also told that the Judge should not make any inference or assumption in relation to his choice to remain silent or give an unsworn statement; the unsworn statement of the accused is the exercise of a right given to him in law (*Elmer Ax v R*, No. 5 of 2017, Belize, Court of Appeal Case); the accused was also told that he could give sworn evidence, which would subject him to cross-examination by the Crown. He was also told that he could call witnesses if he desired.

away and when they returned, they searched the house and found a bullet. He and his wife were taken to the police station. They told him that if he claimed the shooting they would let his wife go home.

- [53] He is not a violent person and was wrongfully accused. He was just a couple months in Belize on vacation, building a house for his wife and children in Belize. He stated that he is always travelling and that he was not raised to hurt anybody like that and had never been charged for such a heinous crime as this.

Defence's witness

- [54] The defence's only witness was Bertina O'Brien, the wife of the accused. She testified virtually that she is from Switzerland and had been married to the accused for five (5) years and they have 5½ year old twins. They got married a year and a half after meeting each other.
- [55] On the 30th August 2021, she and her husband and their two children were at home. That day she didn't leave home. Her husband left home once that day, about 11:30 am to get food for the family's lunch. He returned fifteen (15) minutes later, around 11:45 am. Between 11:45 am and 9 pm, she and her husband were home playing with the children. They had dinner in the night and at 7 pm they put the children to bed. Between 8:30 pm and 9 pm, she said her husband was home. Around 9 pm the police came to their house asking for Calbert O'Brien. When she denied knowing anyone by that name, they then asked for her husband, whom she said was lying in the

bed. They searched the house and found a bullet; both herself and the accused were charged. All the time she has known her husband he has only been charged with a crime once, and it wasn't a violent crime. She described him as a loving person, especially with children. He is five feet seven inches tall.

[56] Under cross-examination she agreed that she would not like to see her husband convicted and taken away from his family, however, she denied that she would lie for him so that does not happen. When asked if her husband had any bad habits, she said he smokes a lot of cigarettes. He also smokes marijuana. Before that night, they had been in Belize for two to three weeks building a family house. She and her husband have been living in Switzerland since 2017.

Submissions

Defence Counsel

[57] The essence of Defence Counsel's submission was that the evidence of identification was weak, tenuous, and contradictory, unsupported by the testimony of the Scenes of Crime Technician and created reasonable doubt that the accused person was the shooter. Further, the evidence of the alibi witness was uncontroverted; the witness was believable, making it such that the court cannot feel sure that the accused was the shooter. Two of the witnesses who gave evidence of identification have an interest to serve: they are the sister and father of the deceased.

The Crown

- [58] The Crown maintained that sufficient evidence had been led in relation to identification, such to make the Court feel sure that the accused was the shooter on the night of August 30, 2021.
- [59] During the first witness' testimony, Counsel for the defence objected to a dock identification on the basis that it was irregular and undesirable.
- [60] The Crown responded that sufficient evidence had been led to show that this was a case of recognition and not one of dock identification. That being the case, the Investigating Officer had properly exercised his discretion not to hold an ID parade as it would serve no useful purpose.
- [61] The Court concurred with the Crown that this was indeed a case of recognition - not a dock identification- for which an ID Parade would serve no useful purpose. The Court pointed out that there was a tendency to broadly define any identification that occurs in court as a dock identification, which distinctively is where the witness would be identifying the alleged perpetrator for the first time. The Court prayed in aid the case of the landmark decision of the Privy Council in **France et al v R 28**², where Lord Kerr stated that:
- “[33]...A dock identification in the original sense of the expression entails the identification of an accused person for

² Mark France and Rupert Vassell v The Queen [2012] UKPC 28

the first time by a witness who does not claim previous acquaintance with the person identified.”

[62] This is clearly not the case here as the Crown’s witness had said that the accused was known to her and her family before the incident.

[63] Further, according to Lord Kerr: “It is now well settled that an identification parade should be held where it would serve a useful purpose...”

It would serve no useful purpose in this case as the witnesses, having determined that it was ‘J’ who was the shooter that night, would more than likely point him out on an ID parade. Additionally, the accused does not deny that he was known to the witnesses.

[64] It must be mentioned that the case of *Krismar Espinosa Criminal Appeal No. 8 of 2015*, states that an ID parade must be held when a suspect demands that it be held. Incidentally, the accused in this case **declined** to participate in an ID parade. In the circumstances, the Court is of the view that the Investigating Officer rightly exercised his discretion not to hold an ID parade, and more importantly, no substantial miscarriage of justice occurred for the failure to hold an ID parade.³

³ In *Tido v R* 79 WIR at para 22, it was said that if the defendant resolutely resisted participation in an identification parade that might be a good reason for admitting the evidence.

THE LAW

[65] Section 117 of the Code provides:

“117. Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned.”

“Murder” is defined in the Criminal Code as intentionally causing the death of another without justification or provocation...”

[66] Belize’s Court of Appeal decision of **Peter Augustine v R**⁴ has assisted in identifying the elements of the offence of murder. According to that case, to convict the defendant of murder the Crown must prove to the satisfaction of the Court so that it is sure that:

1. Jamir McKoy and Lloyd Myvette are dead.
2. Their deaths were caused by unlawful harm by the defendant.
3. The defendant intended to kill the deceased.
4. There was no legal justification for the killing of the deceased.
5. The defendant was not provoked into killing the deceased.

ANALYSIS

[67] The Court has directed itself that the defendant is presumed innocent with regard to the counts in the Indictment and has

⁴ Criminal of Appeal No. 8 of 2001

nothing to prove. The Court has directed itself in relation to both counts that the obligation is on the Crown to satisfy it so that it is sure of the guilt of the defendant, and if there is any reasonable doubt the Court ought to acquit the accused.

[68] In satisfying the elements of the offence of murder, The Crown must prove that the deaths were caused by the accused; in essence, the sole issues for determination and satisfaction of the elements of the offence are identification and credibility. In assessing credibility, the Court must examine inconsistencies, discrepancies, and any implausibility in the evidence of the witnesses. I have directed myself that if there are inconsistencies and discrepancies, I must see if they are material, and if they can be resolved on the evidence. I may disregard so much of it as I find to be untruthful and accept so much of them that I find to be truthful.

DID THE PROSECUTION PROVE THE ELEMENTS OF THE OFFENCE?

[69] The first element -that is- that **Jamir McKoy and Lloyd Myvette are dead**, is not in dispute. However, this element is proven on the agreed evidence of Lynette McKoy who identified the body of her son Jamir McKoy; Floyd Myvette who identified the body of his younger brother Lloyd Myvette and Dr. Mario Estrada Bran who performed the autopsies on both deceased persons on September 6, 2021, and prepared the post-mortem reports thereafter. The reports were tendered as Exhibits E1 and E3 respectively.

[70] **Element No. 2: that their deaths were caused by unlawful harm by the defendant.** The evidence does not raise any issue of self-defence or provocation. The deaths of the victims were therefore caused by unlawful harm, but were these unlawful deaths caused by the accused/defendant?

[71] To answer this question, I first have to assess the identification evidence of the Crown witnesses to determine if in all the circumstances, they could properly identify the accused as the shooter on the night of August 30, 2021. In other words, the answer to this question is based largely on the visual identification of the accused, by the witnesses.

[72] It is now well-settled law that where the Prosecution's case depends wholly on visual identification evidence a Turnbull warning must be given to the jury. In cases such as the present where the judge sits alone, the judge should give those warnings to him or herself. The warnings required- and which I gave myself, are that there is a need for caution to avoid the risk of injustice; this is because even in cases of recognition, witnesses can still be terribly mistaken. Further, a witness who is honest and convinced in his own mind may be wrong; a witness who is convincing may be wrong; more than one witness may be wrong; a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong. In other words, Jamielie, her father, Adrian and Ivan Lemus could all be mistaken in their identification of the accused, even though they all purport to know him very well.

[73] For these reasons, I further warned myself that I should be cautious and carefully examine the circumstances under which each witness is said to have identified the shooter. In particular, I considered:

- (1) **That this is a case of recognition:** The Court notes that recognition evidence is more reliable than identification by persons unknown to the suspect. The Court, however, also reminded itself that errors can be made even in the recognition of one's close family and friends and that several identifying witnesses may all be mistaken.

In this case, Jameilie, Adrian, Ivan, and Jamir all stated that they recognized the accused; that is, they knew him before the date of the incident. The number of times and the circumstances under which the witnesses allege that they interacted with the accused are detailed above and need not be repeated here. Suffice it to say that those times and circumstances of recognition were not disputed by the Defence. Those numerous times and circumstances would ordinarily allow the witnesses to properly recognize the accused and identify him as the shooter. However, they would be more likely to identify the shooter provided there was proper lighting, sufficient period of observation and distance. These will be considered below.

- (2) **The period of observation; the time during which the witness could see the person's face:** On the authority of **Allen James v R, Crim. App 7/09** in which a 3 - 4 second period of observation was deemed sufficient in a case of recognition, then surely these

periods of observation by Jameilie, Adrian, Ivan and Jamir are sufficient periods of observation to properly identify the shooter, especially from the distance at which they were standing to where the shooter was standing. Jameilie said she saw the shooter's face for five minutes; both Adrian and Ivan said they were able to see the shooter's face for at least five seconds each before he started shooting; Jamir stated that he had three opportunities for observing the shooter (a) by the fire from the gun; (b) lamp post light by the neighbour's yard whilst the witness was chasing the accused, and (c) the last lamp post before the chase ended; the witness also indicated that the shooter's mask fell away at the last lamp post; cumulatively these sightings amounted to eleven seconds for which he had the shooter under observation. However, in attempting to explain why he would chase a man with a gun, Jamir stated that it was because he was traumatized and "to get a good look at the shooter". This is in contrast to his earlier evidence that he "was able to see the face of the shooter" from the fire from the gun, which would be before he gave chase. This inconsistency was not resolved. In cross-examination, he explained that he gave conflicting information in relation to the period of observation of the shooter, both in court and in his statement to the police because he was traumatized and hadn't even buried his son as yet. Although this explanation was acceptable to the Court, it was doubtful whether the witness could still properly see the face of the shooter whilst the shooter was running away from him and looking back intermittently at the witness.

Adrian's evidence was also doubtful. Adrian is the only witness who claims to have seen the shooter take out his gun. All other witnesses-including Jameilie, who was the first to see the

shooter- stated that the shooter already had his gun in his hand when they first observed him. None of the witnesses mentioned that the shooter had the gun anywhere else but in his hand, at any time, or took it, or returned it, anywhere. This casts some doubt on Adrian's evidence. Adrian's credibility is again called into question as he told the Court that it was the shooter who had called out "bwoy", when the evidence also reveal that his brother Ivan said he (Ivan), yelled out "bwoy", when he saw the shooter. There was no evidence that this word was said twice (possibly by the shooter and also Ivan). I had no reason to disbelieve Ivan that he made this utterance. Adrian cannot be believed when he said that he recognized the shooter's voice, when in fact, it was his brother and not the shooter who had called out "bwoy". It seemed an attempt to embellish the evidence; what else did he embellish? At this point, even the period of time for which he claimed to have observed the shooter was disputable: initially he said twenty seconds, but this was whittled down to ten seconds after he was made to count the seconds with the aid of a timer in the Court. Adrian cannot be seen as a credible witness.

(3) The next factor for consideration is **the distance between the witness and the person observed**: According to Jameilie, she was eight feet away, Adrian was twenty feet away; Ivan was some sixty feet away and Jamir was twenty feet **away**. From these distances, the witnesses would have been able to properly identify the shooter, provided among other things, that there was no interference with the observation. Therefore, that was the Court's next consideration:

(4) **Whether there was any interference with the observation**:

This is one of the biggest weaknesses in the Crown's case. The

shooter was wearing a mask and a hat. The dispute as to the type of hat was never resolved, but it was clear that the hat impeded the view of the shooter's facial features, making identification more difficult. All of the witnesses except for Jameilie and Jamil, said that they were only able to see a little part of the shooter's eyes and nose; Jameilie indicated that his mask showed a little part of his mouth, whilst Jamil indicated that the mask fell down whilst the shooter was being chased. He said he saw the shooter's entire face because whilst being chased the shooter "turned his head all the way back" intermittently to glance at the witness running behind him. It is doubtful that the witness would have been able to see the shooter's face properly under these circumstances, and in any event, it is doubtful whether the witness would have seen more than a side glance of the shooter, such that he could properly identify him. This was compounded by the fact that the incident occurred at night, in poor lighting conditions. The lighting conditions will therefore be my next consideration.

- [74] **The Lighting conditions:** Jameilie stated that she was able to observe the shooter largely with a very bright bulb that was directly over her head. Jameilie's evidence in relation to the bulb was significantly contradicted by the Crime Scene Technician who stated that "It was not a bright bulb, but you can see movements on the street." This bit of evidence is in direct contrast to the evidence of Jameilie, who said that the bulb was very bright. This casts doubt on Jameilie's evidence as it related to the very important point of the lighting conditions and the extent to which the witness would have been able to properly identify the shooter. Ivan agreed that the closest lamp post was about forty-five feet

away from the shooter and very dim. This would of course affect the witness' ability to properly identify the shooter. All witnesses indicated that they were able to identify the shooter with the aid of the lamp posts. The Investigating Officer described the lighting condition as "kinda...not too bright but they had some light"; he did not agree that the lighting condition was poor, as "you could see visible", but it is clear that he would not describe the lighting conditions as effusively as the witnesses. According to Ivan for example, "light was all around, no matter which way you walked", thus giving the impression that the area was well-lit. It is clear that the officer was not saying that the area was well-lit. This would greatly affect the witness' ability to identify the shooter and cast doubt on their evidence. Interestingly, it was Ivan who agreed after cross-examination that his vision of the shooter was also impeded by poor lighting. Surely, this did not make him a credible witness. The witnesses were not credible.

[75] I noted also that the technician agreed that there was a bulb in the shop that was thirty feet away from the shooter. This would be the same bulb that Jameilie said (by inference) was eight feet away from the shooter: since she said she was eight feet away from the shooter and she was standing directly under the bulb, the inference is that the bulb was eight feet away from the shooter. The technician's evidence would therefore greatly contradict her evidence. It would also mean that her evidence in relation to how close she was to the shooter, was rather dubious; this would also affect her ability to identify the shooter, and her credibility.

[76] The last circumstance of observation considered by the Court will now be addressed: that is

- (1) **whether there is any significant difference between the description the witness gave to the police and the appearance of the accused:** The major difference between the description given to the police and the accused man's actual appearance, is that of the shooter's height. one witness, Jameilie, described the accused as being over 6 feet tall, whilst the Court took judicial notice that the accused appeared to be no more than 5 feet 7 inches, which is considered average height. It was appreciated that the accused was taller than Jameilie, who might therefore perceive him to be "tall". It is noted that the accused is also taller than her father; it is also noted that even if the average person would not describe the accused as a tall man, neither could he be described as a short man.

On the other hand, whilst the issue of height is a subjective concept, and whilst the accused may be seen as tall because he is a bit taller than the first witness, the disparity in height between the accused and Defence Counsel is obvious to the naked eye; it is obvious that Defence Counsel is much taller than the accused. It is curious why the witness still maintained that the shooter was over six feet tall, especially as she had the benefit of comparing the height of both Counsel and the accused, in the Court. Even whilst both were seated at the same time, as was the case for most of the trial, the difference in height was obvious. Therefore, as the witness who was closest to the shooter, and therefore whose description of him would be most reliable, this witness is the only one who described the shooter as being over 6 feet tall. The court was not able to reconcile this bit of evidence.

[77] After applying the guidance in Turnbull, I did not find that the witnesses convinced me that the unlawful harm that was inflicted on the deceased persons was inflicted **by the accused**. The Crown therefore failed to prove that element of the offence of murder.

(5) I will now consider Element No 3: **The defendant intended to kill the deceased**: The inference can be drawn that the arbitrary, unprovoked release of rapid gunfire pointed at unharmed persons signalled the shooter's intention to kill; the natural and probable result of shooting at someone is that they are likely to die if they are shot. Section 6 of the **Criminal Code** reads that "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?" The answer is yes. The choice of weapon (a gun) is also a strong inference that the shooter intended to kill. However, since it was not proven that it was the accused who inflicted the unlawful harm to the deceased persons, it follows that it cannot be proven that **the accused** intended to kill the deceased persons.

The prosecution has failed to prove this element of the offence.

[78] Elements 4 and 5, require evidence that **there was no legal justification or provocation for the killing of the deceased persons**. The evidence did not disclose any provocation or legal justification for the killing of the deceased persons. Again, since it was not proven that the accused was the person who inflicted the harm, these

elements of the offence are not proven and need no additional comment.

[79] Additional weaknesses in the identification evidence include the fact that:

(1) The incident was unexpected, fast-moving and shocking and involved persons scrambling for cover and some seriously injured. The witnesses' attention was therefore not focused on the shooter during those times.

[80] The Court noted that there was circumstantial evidence that could strengthen the Prosecution's case:

- (1) According to Officer Alejandro Rodriguez, the clothes that the shooter was said to be wearing on the night of the shooting - being a grey t-shirt, long blue jeans pants, and camouflage hat were found at the home of the accused.
- (2) The accused was said to be wearing the same clothes he was wearing when he threatened the witnesses.
- (3) The camouflage hat had been sold to the accused by the Crown's witness Jamir McKoy. That was not contested by the defence.
- (4) Evidence was led to show that the accused had threatened to kill two of the witnesses the day before the incident. This was not contested by the Defence⁵

⁵ Section 43 of the Evidence act is instructive

[81] However, there was no evidence led to satisfy the court as to any uniqueness in the items of clothing found at the home of the accused. What was the likelihood that someone other than the accused could be in possession of a plain grey t-shirt, long blue jeans pants, and tennis shoes? The likelihood was great. No evidence was led as to the uniqueness of a camouflage hat either. How common or unique are those types of hats within that space? That is unknown, but not unlikely.

Also, the threat was overshadowed by the witnesses' inability to identify the accused as the shooter on the night of August 30, 2021.

[82] I reminded myself that the Crown bore the burden of proving all of the elements of the offence beyond a reasonable doubt. I cannot be satisfied so that I feel sure that the witnesses have correctly identified the accused as the shooter on the night of August 30, 2021, and the Crown has therefore proven all of the elements of the offence of murder.

2. Despite this, the Court briefly considered the evidence of the accused.

The accused raised the defence of alibi. All that the Court will say on this issue is that it is for the Crown to disprove this alibi and prove their case beyond a reasonable doubt. No burden was placed on the accused man to prove his innocence or to prove his alibi.

The alibi was reasonably sound, and the prosecution did not disprove it.

: 'In criminal cases, after proof that the offence has been committed, evidence may be given to show that the accused person– (a) had or had not a motive for committing the offence; (b) had or had not the means and opportunity of committing the offence; (c) **that he made preparations, or threatened, to commit the offence..**'

DISPOSITION

[83] The Court is not satisfied so that it is sure of the guilt of the accused on the charge of the 2 counts of murder in the indictment. The Court therefore finds him **NOT GUILTY** in respect of both counts and discharges him.

Dated this **12th** day of **March 2024**

[84] This is the Judgment of the Court.

NATALIE - CREARY DIXON, J
High Court Judge

By the Court Registrar