In the Supreme Court of Belize
(Criminal Jurisdiction)

Central District

Indictment No C29/2012

THE QUEEN

V

NICOLI RHYS **Accused**

BEFORE: **The Hon. Chief Justice Kenneth Benjamin.**

Appearances: Mrs. Cheryl-Lynn Vidal, Director of Public Prosecutions, for the Crown.
Mr. B. Simeon Sampson, SC., for the accused.

February 4 & 6, 2013.

RULING

[1] The accused, Nicholi Rhys, is on trial before a Judge without a jury for the offence of Murder contrary to section 117 read along with section 106(1) of the Criminal Code, Chapter 101 of the Revised Edition, 2003 of the Substantive Laws of Belize. The Indictment was laid on January 10, 2012 and alleges that on the 10th day of June 2010 in Belize City in the Belize District, he murdered Andre Trapp. The trial has commenced.

[2] At the close of the case for the Prosecution, learned Senior Counsel appearing for the accused submitted that there is no case to answer based on the

first limb of **R v Galbraith [1981] 2 All E.R. 1060**. In his judgment Lord Lane, CJ, 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.

The crux of the defence submission was that there is no evidence as to who was the person that shot the deceased, Andre Trapp, far less was there evidence that it was the accused who did the shooting.

[3] In response on behalf of the Crown, the learned DPP urged the Court to find that the evidence of the various circumstances when taken together was enough to lead to a sure conclusion that the accused murdered Andre Trapp. Implicit in the reply was the premise that the Crown's case was based or largely based on circumstantial evidence.

THE LAW

[4] There can be no demur that no direct evidence was led as to anyone being seen discharging a firearm at the deceased. There is however clear evidence that the deceased died from ex-sanguination due to internal bleeding cause by gunshot wounds. It therefore follows that the Crown's case, in the absence of a confession by the accused, must depend to a substantial degree on circumstantial evidence, that is to say, that when all the circumstances and events proven are put together, there is the unlikelihood of coincidence and the only rational inference would be the guilt of the accused. It is permissible in a criminal case, for the jury or as in the present case, the judge as the tribunal of fact, to draw from the facts proven such inferences as to establish the guilt or innocence of the accused.

[5] The test in **Galbraith** has been adopted in Belize by the Court of Appeal (see: **DPP v Marlon Blease** – Criminal Application for Leave to Appeal No. 10 of 2002). However, for the purposes of resolving the defence's submission that there is no case for the accused to answer, the test to be applied must be tailored more appropriately for a case based on circumstantial evidence. The learned DPP, quite

correctly, took the Court to the learning set out in the judgment of King, CJ in the Supreme Court of South Australia in **Question of Law Reserved on Acquittal (No. 2 of 1993) (1993) 61 SASR 1** at page. 5. The relevant passages are as follows:

> "It follows from the principles as formulated in Bilick in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inference which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty must be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypothesis consistent with innocence are reasonably open on the evidence. … He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis not reasonably open on the evidence …
>
> I would restate the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt as thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer.
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> There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonable open were drawn, a reasonable mind could not reach a conviction of guilt beyond reasonable doubt, or to put it another way, could not exclude all

> hypotheses consistent with innocence, as not reasonably open on the evidence."

These dicta were accepted as an accurate articulation of the law by the Privy Council in **DPP v Selena Varlack – Privy Council Appeal No. 23 of 2007** and more recently by the Court of Appeal of Belize in **The Queen v Melanie Coye and others – Criminal Appeal No. 16 of 2010**. In the latter case, Mendez, JA made the following points (at para. [167] following **Varlack**:

> "It is important to stress that even if, on one view of the evidence, it is possible to conclude that a reasonable jury might return a verdict of not guilty, that in itself would not justify withdrawing the case from the jury, if a reasonable jury properly directly might, on another view of the evidence, convict."

It is important for the Court in the present case to remind itself that at this stage of the case, the judge must not embark on a fact-finding exercise that involves the assessment of the strength of the evidence and the drawing of definitive inferences. Rather, the just must identify the inferences capable of being drawn that are most favourable to the prosecution and determine whether a reasonable mind could arrive at a verdict of guilt to the criminal standard. The judge is required to look at the evidence critically and as a whole, and answer whether there can be a conviction without irrationality.

THE EVIDENCE

[6] The learned DPP embarked on a careful analysis of the purport of each witness' evidence extracting the circumstance or event being relied upon by the Crown in support of its case. Much reliance was placed on the physical exhibits collected at the scene and in other places proximate to the scene, the positioning of the vehicles identified in the photographs taken by the scenes of crime technician, Brian Lopez and the testimonies of PC Alrick Arnold and SPC Usher as to what they observed.

[7] The present trial is being conducted without a jury. Accordingly, the court must be astute to refrain from making findings of facts. In addition, given my dual role as judge of the law and the tribunal of fact, it is desirable that only such aspects of the evidence necessary to resolve the submission are highlighted.

[8] Douglas Langford testified that the spoke to the deceased in the parking lot before seeing him walking towards his gold vehicle. He then heard gunshots ring out. The evidence of what appears to be a bullet hole in the side mirror of the vehicle alongside the deceased's vehicle's driver's side coupled with the recovery of a slug and the existence of which is identified as a bullet hole in a PVC pipe in line with these vehicles is commended as the pathway of a bullet fired from the direction where the green pick-up was later seen attempting to exit the parking lot. The DPP then referred to the number of 9 mm shell casings found in the green pick-up at the scene as capable of leading to the inference that multiple shots were fired from that pick-up.

[9] Turning to the evidence of PC Arnold, it was posited that taken at its highest, this testimony identified the accused as exiting the passenger side of the green pick-up while another person was exiting from the driver's side. The person identified as the accused was subsequently seen being escorted by Police Officers along Regent Street.

[10] The location of two caps, a blue shirt and a rag were offered as capable of being treated as evidence of the accused jettisoning these items while fleeing after exiting the pick-up. More particularly, the proximity of the blue T-shirt to where the accused was found was commended as a strong reference that it belonged to him.

[11] The evidence of SPC Usher as to the position in which he found the accused was said to be the basis of an inference of a consciousness of guilt. SPC Usher spoke of seeing the accused crouched under the verandah of a house enclosed by a fence. The Court was invited to draw the further inference that the person found in this position by SPC Usher was the same person observed by PC Arnold exiting the green pick-up, the person having taken off his blue T-short and was now wearing a black undershirt.

[12] The expert witness of Dr. Estradabran that the entry wound he observed on the body of Andre Trapp was that of a medium calibre weapon such as a .38 or 9 mm was married with the seven (7) expended shells found when the green pick-up was processed was commended as proof of 9 mm shots being discharged at Andre Trapp who was the only person observed by Douglas Langford in the parking lot.

[13] It cannot be overemphasized that at this stage it is not for me to believe or disbelieve the witnesses or determine which inference I prefer one over another.

[14] In the round, I have no difficulty concluding that taking the evidence led at its highest and drawing the conclusions which are logical and most favourable to the prosecution, that there is enough evidence for the accused to be called upon to lead a defence. Accordingly, the submission is rejected and overruled. The trial will continue.

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KENNETH A. BENJAMIN
Chief Justice