In the Supreme Court of Belize, A.D. 2013
(Criminal Jurisdiction)

Central District

Indictment No C73/2012

THE QUEEN

V

TRISTON GORDON

BEFORE: **The Hon. Mr. Justice Adolph D. Lucas**

Appearances: Ms. Kaysha T. Grant, Crown Counsel for the Crown
Mr. Lionel L.R. Welch for the Defence

RULING

[1] The accused, Triston Gordon, is indicted for the crime of murder as a consequence of the shooting death of Kenyon Plunkett which allegedly occurred on 28 April 2011, Belize City. On his arraignment on 8 April 2013 he pleaded not guilty.

[2] The trial commenced on 9 April 2013 conducted by a judge sitting without a jury. This procedure is sanctioned by section 65A of the Indictable Procedure Act, Chapter 96 of the Substantive Laws of Belize, Revised Edition 2000, as amended by Act No. 5 of 2011.

[3] Ms. Kaysha Grant, learned Crown Counsel having called six (6) witnesses closed the case for the prosecution on 10 April 2013. At that juncture of the proceedings I asked Mr. Lionel Welch, learned defence Counsel if I should read the accused person's three rights to him, namely, his right to remain silent, his right to make a dock statement and his right to give evidence. Mr. Welch replied of his preference for the accused to be addressed of his rights the following day.

[4] On the next day, 11 April 2013 Mr. Welch asked that the three rights of the accused to be read to him. However, I was disturbed by certain features of the prosecution's case in respect of non identification of the accused in the dock by the Crown's main witness and the absence of direct evidence to link an injured person to the body of Kenyon Plunkett on which doctor Hugh Sanchez performed post mortem examination on 29 April 2011. In view of that apparent evidential lapse I invited the learned defence counsel to make a no case submission. The authority for this unusual procedure of judge's invitation to defence Counsel to embark on a no case submission is **Ivan Fergus v The Queen [1994] 98 Cr.APP.R. 313**, at page 320.

[5] Mr. Lionel Welch learned defence Counsel submitted that the prosecution failed to prove that the accused was the perpetrator of the crime. He was not identified in the dock by the prosecution's main witness – Kyle Chaplin.

[6] With respect to the evidence in terms of the link between a person who was suffering from 9 mm gunshot injury and the body upon whom doctor Hugh Sanchez performed the post mortem examination on 29 April 2011, the learned defence Counsel contended that prosecution have failed to adduce evidence on this important ingredient. He referred to the judgment of **R v Florence Bish (1978) 16 JLR 106** in support of this contention.

[7] Ms. Kaysha Grant learned Crown Counsel was forceful in addressing the two issues. With respect to the non-identification of the accused in the dock Ms. Grant unavoidably conceded that Mr. Kyle Chaplin the Crown's main witness did not identify the accused while he was in the dock. In her submission on this live issue reference was made to certain portions of the Kyle Chaplin's written statement dictated to the police which points to the witness' knowledge of the accused for four years. He knows his name and his alias. He was along with the accused before the shooting. He witnessed the shooting of a dreadman by the accused, he said, in an alley. The deceased was shot from a backward position.

[8] Sergeant No. 327Alejandro Cowo had recorded by hand a statement from Kyle Chaplin on 8 May 2011 in which he implicated the accused as the person who shot at "a dreadman" in an alley on Lakeview Street, Belize City. Prior to that shooting, according to Chaplin in the written statement, the accused had declared that he was going to "deal with a dread" who was a mechanic and the accused showed him (Chaplin) a firearm which he had in his possession. Mr. Chaplin witnessed the accused shooting at the back of the "dread".

[9] During the trial Mr. Chaplin could not remember giving the statement to Sergeant Cowo or to any other police officer. Although his memory was refreshed by Assistant Marshal – Mr. Fitzroy Alvarez – reading the statement to him during the adjournment he insisted that he could not remember the contents of the statement. On the application of Ms. Grant I deemed him a hostile witness. He was cross-examined by Ms. Grant but he remained adverse to the prosecution. The statement was read by Sergeant Cowo. Pursuant to section 73A of the Evidence Act, Chapter 95 as amended by Act No. 6 of 2012 the statement was admitted "as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the prosecution to prove its case".

[10] To buttress the identification of the accused as the shooter of the dreadman, the Crown led in evidence that on 28 April 2001Sergeant of Police No. 327 Alejandro Cowo alerted the mobile patrol and foot patrol to be on the lookout for Triston Gordon also known as "Heads". This was the Christian names and alias of the accused which Kyle Chaplin included in his written statement. "It is for the tribunal of fact to decide whether the same person – Triston Gordon- is one of fact", Ms. Grant said in her closing statement on this issue of the identification of the accused.

[11] On the linkage between the "dreadman" and the body of the male dread person whose body doctor Hugh Sanchez performed the autopsy, the Crown Counsel made it crystal clear that the prosecution are placing reliance on circumstantial evidence. These are the circumstances which were alluded to by Ms. Grant:

(1) Mr. Kyle Chaplin stated in his statement that he and Triston Gordon stopped at the corner of Lakeview and Banak Streets where Triston Gordon shot at a dreadman on 28 April 2011.

(2) The investigating officer Sergeant Cowo received certain information which led him to go to the Karl Huesner Memorial Hospital where he saw a person with apparent gunshot wound to the back of his head. The Sergeant thereafter went to the corner of Lakeview Street in the vicinity of Mike's Shop. There he observed a bicycle which was referred to, submitted by Ms. Grant, in witness Chaplin's statement.

(3) Sergeant Cowo – the same investigating officer – was present at the post mortem examination. The deceased was identified to him as Kenyon Anthony Plunkett by Ms. Lavern Olivera – the godmother of the deceased.

[12] For completion may I add that Sergeant Cowo, in his examination-in-chief had given the name of the person, who he saw at Karl Huesner Hospital and to whom he had issued medico legal report form, as Kenyon Plunkett. He told the Court, when asked about the source of this information, that he was told of the name by a family member who did not provide a written statement to the police.

[13] The learned Crown Counsel asserted that in terms of a no case submission where there are two or more inferences a judge should not uphold a no case submission. She referred to the Court passages from the judgment of King CJ, under the heading, "**Question of Law Reserved on Acquittal (No. 2 of 1993), (1993) 61 SASR1, 5**, which statement the Court of Appeal of Belize endorsed in **The Queen v Melanie Coye and Others, Criminal Appeal No. 16 of 2010,** in support of her assertion.

[14] I am grateful to both learned Counsel for addressing the issues of my concern.

[15] On a no case submission to a judge sitting without a jury I am guided by various legal authorities; but I will not refer to all of them in formulating my ruling. One of the judgments I rely on is **R v William Courtney [2007] NICA 6** from the Court of Appeal in Northern Ireland. The appeal was from the judge's decision in accepting a no case submission. Like in this case he sat without a jury. Kerr LCJ cited the well known case of **R v Galbraith**. Having quoted the relevant portion of Galbraith in terms of the principles whether or not a judge should accept

a no case submission the learned Chief Justice made reference to the judgment of **Chief Constable of PSNI v LO [2006] NICA 3** wherein the principles pronounced in Galbraith were discussed in terms of no case submissions in a non jury trial. For this exercise I will quote para. 14 of the Chief Constable of PSNI case, which is found in **Courtney** judgment at page 15. It says:

> *"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."*

[16] The case at bar also consists of circumstantial evidence. There is learning which obtains from **The Queen v Melanie Coye and others.** At page 7 of the judgment Honourable Mr. Justice of Appeal Mendes appropriately advised:

> *"More appropriate to a case such as this where the Crown's case is built upon circumstantial evidence are the following passages from the judgment a King CJ in Question of Law Reserved on Acquittal (No. 2 of 1993) (1993) 61 SASR 1, 5 which were accepted by the Privy*

Council in DPP v Varlack [2008] UKPC 56, at para. 22, as an accurate statement of the law."

[17] For the purpose of our case at bar I will quote the second paragraph of the two passages, which in my view, directly deals with the crux of circumstantial evidence in a no case submission.

"I would re-state 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 and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. 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 reasonably open were drawn, a reasonable mind could not reach a conclusion 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."

[18] A follow up to the statement of the law pronounced by King CJ (supra) Mendes JA at page 8, para. 16 had this to say, which I find, I dare say, is a clear elucidation of the principles stated above:

"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 directed might, on another view of the evidence, convict – see ***Varlack*** *para 24. This emphasises two points. The first is that the question is not what inferences the Court itself thinks can or cannot be drawn. The question in all cases is what inferences a reasonable jury properly directed might draw. The second is that where a reasonable jury could draw two inferences from the evidence, one consistent with guilt and the other with innocence, it is not for the trial judge to decide which inference is to be preferred."*

[19] Again on the domestic scene, at the Supreme Court level, the written ruling of the Honourable Chief Justice Kenneth Benjamin in **The Queen v Nicoli Rhys** provides me with further guidance. The Chief Justice was sitting in trial without a jury. A no case submission at the end of the prosecution's case was made by Rhys' Counsel. At page 4 (which is part of paragraph 5) the learned Chief Justice had this to say on the role of a judge sitting without a jury:

> *"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 [judge] 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."

[20] A judge sitting in a trial without a jury therefore has two functions, that is to say, judge of the law and judge of the facts. On the judge's role in relation to the facts what Chief Justice Benjamin said, at para. 13, is a very useful reminder:

"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."

[21] I have critically examined the prosecution's case; I accept these pieces of evidence revealed in the prosecution case:

(1) Witness Chaplin, in his written statement dated 8 May 2011, said that he saw Triston Gordon shoot a dreadman from the back who was riding a bicycle on Lakeview Street.

(2) A dreadman was seen at the Accident and Emergency Ward at the Karl Heusener Memorial Hospital on that same day by the investigator – Sergeant Alejandro Cowo: "He had a wound to the back of his head."

(3) Sergeant Cowo, having seen the dreadman he went to Lakeview Street in front of Mike's Auto Parts. There he saw indication of blood. He saw a bicycle and other items on the scene.

(4) Doctor Sanchez who performed the post mortem examination on the body of Kenyon Plunkett deposed to that he saw an entry wound which was "beneath angle of the right joint which exited on the left side of the neck."

(5) Sergeant Cowo stated in evidence that Lavern Olivera (who testified in the trial) identified the body as Kenyon Plunkett to him and to doctor Sanchez.

(6) It is remarkable that on the 28 April 2011 Sergeant Cowo transmitted information to the foot patrol and mobile patrol to be on the lookout for Triston Gordon, alias, "Heads" the same name and alias witness Kyle Chaplin had given in his written statement to the police on 8 May 2011.

[22] On the circumstantial evidence adduced on behalf of the Crown and having considered the submissions of each Counsel, I am satisfied that the Crown have established a prima facie case. Consequently, I call on the accused to answer the case.

Dated this 15th day of April 2013.

(ADOLPH D. LUCAS)
JUSTICE OF THE SUPREME COURT