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

JUDGMENT

[1] The accused, Triston Gordon, was arraigned on 9 April 2013 for the crime of murder. The indictment reads:

> "Triston Gordon, on 28th day of April 2011, in Belize City, in the Belize District, in the Central District of the Supreme Court, murdered Kenyon Plunkett."

The accused pleaded not guilty to the indictment.

[2] The crime of murder is defined by section 117 of the Criminal Code, Chapter 101 of the Substantive Laws of Belize, Revised Edition 2003, thus:

> "*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…*"

[3] The day after the arraignment of the accused the trial commenced by a judge sitting without a jury. This new 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. This amending Act took effect as from 1 August 2011 by virtue of Statutory Instrument No. 79 of 2011.

THE PROSECUTION'S CASE:

[4] The learned Crown Counsel Ms. Kaysha Grant called six witnesses to prove the case for the Crown against the accused. Sergeant of Police No. 327 Alejandro Cowo attached to Criminal Investigation Branch (C.I.B.), Eastern Division, Belize City, deposed to that on Thursday, 28 April 2011 at 11:35am having received certain information he visited the Accident and Emergency Unit at the Karl Heusner Memorial Hospital. There he saw a male person "with apparent gunshot wound to the back of his head". He was still alive. From the Karl Heusner Memorial Hospital he proceeded to Lakeview Street, in Belize City, in front of Mike's Automotive. In the middle of Lakeview Street he observed some items which could have assisted in the identification of the person who was shot there: a bicycle and a slipper on top of it, blood stains, also a .40 Aguila brand shell in the drain. Mr. Barrington Montero, Scenes of Crime Technician, testified that on the instructions of Sergeant Cowo he photographed the scene and took possession of

the items which were found at the scene. The Sergeant received additional information which caused him to make checks at the C.I.B. Office and from his research he informed the police foot patrol and police mobile units to be on the lookout for Travis Gordon also known as "Heads".

[5] The following day, 29 April 2011, Sergeant Cowo attended at Karl Heusner Memorial Hospital morgue to witness the autopsy on the body of Kenyon Plunkett which was performed by doctor Hugh Sanchez. The body was identified by Ms. Lavern Olivera, godmother of the deceased, as that of Kenyon Plunkett. Ms. Olivera testified to that effect. Inferentially, the injured person who Sergeant Cowo saw at the Accident and Emergency Ward was the same deceased person whose body was identified, in his presence, by Ms. Olivera at the morgue. When the Sergeant was giving evidence in relation to the injured person he had mentioned that the deceased name was Kenyon Plunkett, the name given to him by a family member. He informed the Court that no statement was recorded from that family member and was not a witness in the case. I ruled such evidence as hearsay.

[6] Doctor Hugh Sanchez testified that he is a medical doctor and holds a Bachelor of Medicine and Bachelor of Surgery (MB,BS.) degree; followed by residency whereby a degree in Pathology was conferred on him. Both degrees he obtained from the University of the West Indies, in Jamaica. Since his graduation he has been working with the Ministry of Health for 16 years. He is a registered medical practitioner, he has testified in Courts before for about 160 times and he has conducted post mortem examinations for over 1,600 times. I accepted the doctor as an expert witness in the discipline of Pathology.

[7] The doctor stated, on oath, that on 29 April 2011, about 8:45am he conducted post mortem examination on the body of Kenyon Plunkett. He confirmed that the body was identified by Ms. Lavern Olivera. His examination revealed a single gunshot entry wound beneath the angle of the right jaw and it exited on the left side of the neck in a posterior location. The injury was associated with the brain being markedly similar with the evidence of bleeding along the base of the brain stem and cerebellum – a baby brain in the bottom to which is attached the spinal cord. He opined that the cause of death was traumatic shock due to gunshot injury to the neck.

[8] The combined testimony of Doctor Hugh Sanchez and of Lavern Olivera proved beyond a reasonable doubt that Kenyon Plunkett is dead and that he died of harm.

[9] The Prosecution who ought to have a good eye-witness in the person of Kyle Chaplin did not come up to proof. He did not associate himself with the contents of a statement he had dictated to Sergeant Cowo on 8 May 2011. Inspite of the statement being read over to him, in the absence of the jury, by the Assistant Marshal, he merely recalled giving the statement to the police in which he said that he was at home. He failed to remember other contents of the statement.

[10] By virtue of section 71 of the Evidence Act, Chapter 95 of the Substantive Laws of Belize, Revised Edition 2000, the learned Crown Counsel applied for the witness to be treated as a hostile witness. Mr. Kyle Chaplin's manifested behaviour in the witness box for being adverse to the prosecution I had no difficulty in granting the application. Consequently, Ms. Grant cross-examined Mr. Chaplin. This exercise also proved fruitless. The witness was adamant in not

remembering of what he dictated in the statement. Earlier, when pressed by Ms. Grant in relation to the contents of the statement he said that he cannot read.

[11] The learned Crown Counsel advanced to another stage of the process. She applied, pursuant to section 73A of the Evidence Act, as amended by Act No. 6 of 2012, for the admission of Kyle Chaplin's statement into evidence. Section 73A provides:

> *"73A Where in a criminal proceeding, a person is called as a witness for the Prosecution and –*
>
> *(a) he admits to making a previous inconsistent statement; or*
>
> *(b) a previous inconsistent statement made by him is proved by virtue of Section 71 or 72,*
>
> *the statement is admissible 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."*

[12] Act No. 6 of 2012, which comes into effect on 24 July 2012, furnishes a drastic change in terms of the value of evidence of a witness who is deemed hostile by the Court. After proof that the statement was made by a witness and he is cross-examined by the prosecutor and he insists that he cannot remember making it, or refuses to admit the signature on it is his, the previous inconsistent statement, on the application of the prosecutor, "is 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." Formerly, jurors were directed that a witness' previous statement which is inconsistent with his testimony at trial the

previous statement does not constitute evidence on which they can act: **R v Golder, Jones and Porritt [1960] 3 All E.R. 457**.

[13] By the application of section 73A of the Evidence Act, the statement made by Kyle Chaplin and recorded by Sergeant Cowo on 8 May 2011 was tendered and admitted into evidence and its contents were read aloud by Sergeant Cowo in open Court.

[14] In the statement Kyle Chaplin mentioned the name of the accused as Triston Gordon also known as "Heads". He said that sometime after 11:00am on 28 April 2011, he was in the company of Triston Gordon. They rode on their respective bicycles and went to the house of Ellis Meighan in Belize City from where Triston Gordon obtained cannabis. At that house, "Triston pulled out from inside his pants waist a big black gun and a magazine on it." He continued that they (Chaplin and Gordon) went into an alley where they smoked the cannabis. Triston Gordon told Chaplin, in effect, that he was going to deal with somebody who had violated him. On enquiring of him who was the person, Gordon replied, "de dread weh do mechanic by Ben." Chaplin advised Gordon that he should not do so. Gordon asked, "if I will watch his back and I told him no".

[15] It is useful to quote the remaining contents of the statement in which Kyle Chaplin described the actions of Triston Gordon, and to discern the role played by Chaplin before, at the time of and after the incident:

"I then saw him jumping on his green ladies bicycle and began to ride on Banak Street towards Lakeview Street. I followed him and he rode into Lakeview Street and he stopped at the corner of Lakeview Street and Banak Street. I stopped beside him and at the same time I noticed that the dreadman Mechanic was riding a bicycle on Lakeview Street coming towards us. He was coming way from 123rd

area. I then saw the dreadman riding his bicycle in an alley where some trucks park which is beside Ben Shop. I then saw Triston jumped off his bicycle and ran towards the dread man direction. At this time I stayed at the corner of Banak and Lakeview St. speaking to a female who asked me how was my wife. I saw Triston approaching the dread man I saw him pulling out the black gun from his pants waist then saw Triston shooting the dread man from behind. At this time the day was clear and bright and nothing was obstructing my view. There was no one else in the area and the only person who run behind the dread man is Triston. Shortly after I heard the loud bang I saw Triston coming running out of the alley straight to me and pushing the black gun in his pants waist. He pick up his bicycle and rode into Banak Street and went into the alley where we had earlier smoked the weed. I was still talking to the female and she told me "buoy it is best we go cause police will soon come". I rode to the alley likewise and there I meet Triston and he said to me "bouy betta u no seh nothing or I will kill u". I told him "I noh di seh nothing". After Triston shot the dread man and he came running he was frighten, shaking and his eyes were open big. We both rode our bicyle on Banak Street and then went to May Flower. Upon reaching infront of my yard Triston took off his white shirt and threw it on the garbage box and he had on a black T-shirt under it. We went inside the yard and he met my aunt Sonia and he told her that he had just shot someone but did not know if the person was dead. My aunt told him that it is best to go from there and he left still looking frighten. Since then I have not seen him."

[16] For the identification of the accused for the shooting death of Kenyon Plunkett the Crown relied on Sergeant Cowo receipt of certain information and consequently his research which led him to relay messages to the foot patrol and mobile patrol units to be on the lookout for Triston Gordon also known as

"Heads". These activities were done on the 28 April 2011, about ten days before the recording of the statement from Kyle Chaplin. Sergeant Cowo testified to him having received certain information he checked the rogues' gallery at C.I.B. and from that record he discovered the name Triston Gordon also known as "Heads". The disclosure of that piece of evidence was prejudicial to the accused. I am, though, able to discard from my mind such evidence, which I did.

[17] Kyle Chaplin was not asked by the learned Crown Counsel to identify the accused in the prisoner's dock. The Crown Counsel apparently was apprehensive that Chaplin, if he were asked, would have refused to point at the accused or would have denied knowing the accused. However she should have done so. If the witness had refused to identify the accused the Court, from Chaplin's demeanour, would have been in a position to assess whether or not the accused is the person who Chaplin made reference to as Triston Gordon and who was engaged in the shooting at the back direction of the dreadman.

[18] The identification of the accused by Kyle Chaplin cannot be left to implication. The judgment in **James Holland v Her Majesty's Advocate, Privy Council DRA No. 1 of 2004**, delivered on 11 May 2005 is a case in point. Lord Hope of Craighead, at paragraphs 7 and 8 advised:

> 7. *"In Bruce v H M Advocate, 1936 JC 93, a number of witnesses who were asked to speak to certain facts in connection with the indictment spoke of "the accused James Bruce". But they were not asked directly to identify in court the person to whom they were referring in their evidence. At p 95 Lord Wark said that, as a matter of practice, the identification of the accused by witnesses who are speaking to the facts should, in every case, be a matter of careful and express question on the part of the prosecutor; see also Wilson v Brown, 1947 JC 81, where witnesses said that they knew the licence holder but were not asked to identify the accused as that person. In Stewart v H M Advocate, 1980 SLT 245, 251, Lord Justice General Emslie re-affirmed what he described as the general rule of practice, that where*

the Crown sets out to prove that a particular person is the perpetrator of a crime the identification of the accused as its perpetrator must not be left to implication.

8. *If this rule is to be applied correctly, the accused – in whose favour, after all, the rule has been devised as a matter of fairness – must accept the fact that witnesses for the Crown may be asked from time to time during the trial to confirm that he is the person to whom they are referring in their evidence. This includes witnesses who were responsible for the conduct of any identification parade as well as those in whose case, because they knew the accused, the holding of a parade was thought to be unnecessary. The general rule and the practice of asking witnesses to confirm that the person in the dock, or which of them if more than one, is the person to whom they are referring go hand in hand. It would not be possible to abandon the practice without departing from the rule too."*

[19] The linkage of the body on whom Doctor Hugh Sanchez performed the post mortem examination on 29 May 2011 to the person supposedly shot by the accused at Lakeview Street, in Belize City, is also left to implication; but the evidence is scanty to make the inference. There is no evidence to indicate when and from where the now deceased Kenyon Plunkett was taken to the Karl Heusner Memorial Hospital. Indeed the items found at the scene and the photographs of the body could have lent to the identification of Kenyon Plunkett as the person who was shot in the area where suspected blood, a bicycle, a slipper and a .40 expended shell were found. The relatives of Plunkett should have been asked to identify the bicycle and slipper as to ownership. Kyle Chaplin on 8 May 2011 when he gave the witness statement should have been shown photographs of the body of Plunkett. In support of Kyle Chaplin's testimony that the dreadman did mechanic work at Ben Mechanic Shop it would have been easy for the investigator to make inquiries of someone at the mechanic shop whether Kenyon Plunkett worked there and when was the last time he was seen. Further, probably one of the employees

of Karl Huesner Memorial Hospital could have assisted in providing information in terms of the person/s and motor vehicle who brought Kenyon Plunkett to the hospital. The importance of connecting an injured person with that of the deceased is reflected in the judgment of **R v Florence Bish (1978) 16 JLR 106**. At page 108 Honourable Justice of Appeal Rowe said:

> *"This appeal does not turn on any of the facts outlined above. There was admittedly an encounter between the applicant and a man but in order to support the charge of murder the prosecution had a duty to prove that the man whom the applicant wounded died as a result of those injuries."*

And later at page 109 Rowe J.A. continued:

> *"Throughout his summing up the learned Chief Justice repeatedly drew the jury's attention to the necessity to be satisfied that the man on whom the doctor performed the post-mortem examination was the man who received the stab at Barry Street."*

[20] Pertaining to the two ingredients of (i) the unlawfulness of the harm and (ii) the specific intention of the shooter to kill Kenyon Plunkett the evidence provides no legal justification whatsoever for the killing of the Rastaman, presumably Kenyon Plunkett. In terms of the specific intention to kill, from all the surrounding circumstances, which include the instrument used – a firearm, the area of the body where he was shot – at the neck and statement made by the accused to Kyle Chaplin of his intention and motive to deal with the dreadman, I infer that whoever shot Kenyon Plunkett he intended to cause his death.

THE DEFENCE:

[21] The accused gave a brief statement from the dock. After he mentioned his name as Triston Gordon, his occupation and address, he stated:

"I used to see Kyle Chaplin. I used to go at Sharrie's house now and then. On that day, that is, 28 April 2011, I did not see Kyle Chaplin because I was not around. Later on that day I heard that someone got shot on Lakeview Street. I was not around."

[22] In short, the accused is saying that he was not at the scene of the crime when Kenyon Plunkett was shot. It is well known that an accused is not required to prove he was elsewhere at the time of the commission of the crime. The burden is on the Crown to prove beyond a reasonable doubt that the accused was at the scene of the crime and that he is the person who shot and killed Kenyon Plunkett.

[23] It is the submission of Crown Counsel that the Crown has proved all the elements of the crime of murder. On the identification of the accused she said that it is contained in the written statement of Kyle Chaplin.

[24] In terms of the linking the person, according to Kyle Chaplin, who the accused shot at on Lakeview Street to the body of Kenyon Plunkett the learned Crown Counsel relied on Sergeant Cowo's evidence whereby he saw Kenyon Plunkett at the Karl Heusner Memorial Hospital, him going to Lakeview Street where he saw a bicycle, slipper and apparent blood stains on the ground and the finding of a .40 empty shell and finally he witnessed the post mortem examination on the body of Keyon Plunkett. Further, Ms. Grant placed reliance on the doctor's findings: the cause of death of Kenyon Plunkett was "spinal shock due to gunshot injury to the neck".

[25] Mr. Welch learned defence Counsel in his closing address recited the main portions of Kyle Chaplin's witness statement. He expressed the view that there are inferences that can be reasonably drawn: (i) Chaplin was not telling the truth and (ii) because of the manner he placed himself on the scene he is an accomplice. In such a case, the learned defence Counsel continued, Kyle's statement needs caution before being acted on by the judge and the reason for such caution should be given.

[26] Mr. Welch contended that apart from the written statement of Kyle Chaplin there is no evidence to implicate the accused with the death of Kenyon Plunkett. Further, there is no evidence to link the body of Kenyon Plunkett to the dreadman who was supposedly shot on Lakeview Street on 28 April 2011.

[27] Finally, the defence Counsel addressed the live issue of the identification of the accused. He argued that Kyle Chaplin did not identify the accused as the killer of Kenyon Plunkett.

[28] The evidence of Kyle Chaplin is much to be desired. Apart from him being deemed a hostile witness, inherent by his written statement I find that he is an accomplice and consequently he has an interest of his own to serve. He knew that Triston Gordon had a gun; Gordon told him that he was going to deal with someone who had violated him (Gordon) yet Chaplin accompanied Gordon to the place, according to him, where Gordon shot at the dreadman in the back direction. I make reference to *section 93 (3) (b) of the Evidence* Act that provides the manner in which evidence of witnesses who have their own interest to serve ought to be treated by the judge. The paragraph of the section and subsection *provides:*

> *"(3) Where at a trial on indictment-*
>
> *(a).....*

(b) an alleged accomplice of the accused gives evidence for the prosecution, the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution."

[29] I have given myself the caution pertaining to the contents of Kyle Chaplin's evidence. It is dangerous to convict the accused on the unsupported evidence of Kyle Chaplin because he had reason for lying. He did not want to give the slightest hint that he was an abettor to the shooter. He refused to accept the contents of his written statement recorded by Sergeant Cowo on 8 May 2011. I find that his testimony, by his witness statement, is not reliable. My findings is not in contradiction with the provision of section 73A of the Evidence Act as amended, see paragraph 11 above. The mere fact that a witness statement is inconsistent with the witness's testimony, despite the wording of the section, is not an entitlement for a judge to readily accept the statement as true. The judge is required to assess the statement and all the circumstances and to decide whether or not the statement is true.

[30] At the stage of a no case submission the Prosecution have to establish that at least a prima facie case has been made out for an accused to answer. However, when the Prosecution and the defence have closed their respective cases the standard of proof is elevated. It is proof beyond a reasonable doubt. In this case, as the judge of the law and of the facts, having heard all the evidence of the Crown and the brief statement of the accused I must be sure of the guilt of the accused.

[31] I find that the Crown have not proved the guilt of the accused beyond a reasonable doubt.

[32] I find the accused not guilty of murder and of any other crime.

[33] The accused is discharged.

Dated: **23rd** day of **April 2012**

(ADOLPH D. LUCAS)
Justice of the Supreme Court