**COMMONWEALTH OF THE BAHAMAS CRI/vbi/72/3/2017**

**In The Supreme Court**

**Criminal Side**

B E T W E E N

**THE QUEEN**

**vs**

**ALLEN ADDERLEY THOMPSON**

**Before: The Honourable Mr. Justice Gregory Hilton**

**Appearances: T’Shura Ambrose along with Tabitha Frazier for Department of Public Prosecution**

 **Moses Bain for the Accused.**

**Hearing Date: 22nd July, 2022**

**RULING ON NO CASE SUBMISSION**

 **[Criminal Law – No case Submission – Assault with intent to Rape – Housebreaking – Identification Evidence – Whether quality of identification evidence sufficient to leave case to the Jury]**

**HILTON, J.**

1. The Accused is charged with Assault with intent to rape: Contrary to Section 6 (c) of the Sexual Offences Act Chapter 99. The particulars allege:

 ***“ That you Allen Adderley Thompson on Sunday, 29th January, 2017, at New Providence did assault Dornell Cornish, a female with intent to commit Rape”.***

2. The Accused is also charged with Housebreaking Contrary to Section 362 of the Penal Code Chapter 84: The particulars allege:

 “***That you Allen Adderley Thompson on Sunday, 29th January, 2017, at New Providence, did break and enter the dwelling house of Dornell Cornish, situated Yellow Elder Gardens, with intent to commit a felony therein.”***

3. The Accused pleaded Not Guilty on his arraignment and the Prosecution commenced the trial on 18th July, 2022. At the close of the Prosecution’s Case, Counsel for the Accused made a submission of No Case to Answer pursuant to Section 170 (1) of the Criminal Procedure Code.

4. Counsel for the Accused submitted that the case should be withdrawn from the Jury because the Prosecution’s evidence is tenuous, inconsistent and inherently weak. Counsel for the Accused submitted that the case should be withdrawn from the Jury in accordance with Part “A” of the second limb of ***R. v. Galbraith*** ***(infra).***

5. Counsel for the Accused also submits that the case should be withdrawn from the Jury because the identification evidence was poor, unreliable and not of a quality that should be left to the Jury under the principles of ***R. v. Turnbull (infra)***

6. Counsel for the Crown submitted that the evidence adduced by the Crown is sufficient to support the charges and that on one possible view of the facts there is evidence (not withstanding there may be some inconsistencies on which the Jury properly directed could properly come to the conclusion that the Accused is guilty.

7. Counsel for the Crown also submitted that the quality of the identification evidence was not poor and the case should be left to the Jury to determine if it was accurate or reliable and that the Prosecution’s evidence falls within Part “B” of the second limb of ***R. v. Galbraith*** in that its strength or weakness depends on the view to be taken of the witness’ credibility which is generally within the province of the Jury.

**THE LAW**

8. The guiding principles when the Court is presented with a submission of “No Case To Answer” at the close of the Prosecution’s case are set out in ***R. v. Galbraith [1981] 1WLR 1039 at page 1042 B-D where Lord Lane C.J. Stated***.

“How then should a judge approach a submission of “No Case?”

 (1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case.

 (2) The difficulty arises where there is some evidence but it is of tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence,

 (a) Where the judge comes to the conclusion that the prosecution’s evidence taken at its highest is such that a jury properly directed could be properly convict upon it, it is his duty, upon a submission being made to stop the case.

 (b) Where, however, the Crown’s evidence is such that its strengths or weakness depends on the view to be taken of a witness’s reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the Defendant is guilty, then the judge should allow the matter to be tried by the jury. There will of course, as always in this branch of the law be borderline cases. They can safely be left to the discretion of the Judge”.

9. In ***DPP v. Varlack [2008] UKPC 56***, a case emanating from the British Virgin Islands, the Privy Council, in the judgement delivered by Lord Carswell succinctly restated the Galbraith principles as follows at paragraph 21:

 “The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on the evidence find the charge in question proved beyond reasonable doubt.

 The Canonical Statement of Law, as quoted above is to be found in the judgement of ***Lord Lane CJ in R. v. Galbraith*** ***[1981] 1WLR 1039, at 1042***. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the Defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the Judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.”

10. In ***Blackstone’s Criminal Practice 2010 at D15.56*** the following principles were advanced are representing the position that has now been reached on determining submission of No Case to answer:

 “(a) If there is no evidence to prove as essential element of the offence, a submission must obviously succeed.

 (b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.

 (c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value.

 (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases ***(such as Shippey [1988] Crim LR 767)*** where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to process on that evidence alone.”

11. In ***Crosdale v. R [1995] UKPC 1***, a decision of the Privy Council emanating from Jamaica, Lord Steyn, in considering the question: whether, where the defence applies to make a no case submission in the absence of the jury it is right for a Judge to refuse the application and to hear the submission in the presence of the jury? Lord Steyn stated in paragraph 20:

 “20. A judge and a jury have separated but complementary functions in a jury trial. The judge has a supervisory role. Thus the judge carries out a filtering process to decide what evidence is to be placed before the jury. Pertinent to the present appeal is another aspect of the judge’s supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to jury. Lord Devin in Trial by Jury, the ***Hamlyn Lectures, (1956, republished in 1988)*** aptly illustrated the separate roles of the judge and jury. He said (at page 64):-

 “… there is in truth a fundamental difference between the questions whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is…. The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve (12) men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together to make the verdict.”

12. While the principles outlined in Galbraith indicate that issues of credibility and reliability are generally matters for the jury; In relation to identification cases the following principle was laid down in ***R. v. Turnbull [1977] QB224*** where at ***229 Lord Widgery CJ*** instructed as follows:

 “In our judgement when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even through there is no other evidence to support it……… When in the judgement of the judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there was other evidence which went to support the correctness of the identification.”

13. Instruction on how to deal with these two seeming contesting principles (on a No Case Submission application) is given in the Bahamas Court of Appeal case of ***Leavon Williamson v R. No 34 of 1995*** where the court stated at page 4 as follows.

 “The appellant was not represented by counsel at the trial. The learned trial judge was therefore denied the benefit of submissions at the end of the case for the Prosecution, seeking the withdrawal of the case from the jury, and was left unassisted to make the proper choice between implementing the guidelines in ***R. v. Galbraith*** and as important principle in ***R. v. Turnbull***. Galbraith precludes a judge from encroaching upon the province of the jury and withdrawing the case from them based on his own assessment that the prosecution’s evidence is unworthy of credit. Turnbull required withdrawal of a case where identification is the decisive issue and the quality of the identifying evidence is poor. In applying this limb of the Turnbull principles in a fit case, the trial judge in fact imposes on the identification evidence, his own assessment of it quality.”

14. Similar instructions were offered ***in Brown and McCallum v. R (unreported) Court of Appeal, Jamaica, Supreme Court Criminal appeal, Nos 92 and 93/2006*** at para: 35 where Morrison JA stated:

 “[35] So that the critical factor on the no case submission in an identification case, where the real issue is whether, in the circumstances, the eye witness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the “ghastly risk” ***(as Lord Widgery CJ put it in R. v. Oakwell [1978] 1WLR32, 36-37)*** of mistaken identification. If the quality of that evidence is poor (or the base to slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual functions of the jury, in keeping with Galbraith, to sift and to deal with the range of issues which ordinarily go to the credibility of witness, including inconsistencies, discrepancies, any explanations proffered, and the like.”

15. When reviewing the above authorities it is clear that a judge should be careful not to usurp the role of the jury who are judges of the facts. However, a judge is duty bound to ensure that Accused persons are safeguarded from conviction on the facts which are insufficient or precarious and so that injustice would not result.

**THE EVIDENCE**

 16. On the evidence presented in this case there is little dispute that the home of Dornell Cornish was broken into and a man with a knife threatened to kill her if she did not submit to have sex with him. The issue to be determined is whether the identification of the Accused as that man is prima facie established and should be left to the jury.

17. The relevant evidence is summarizer as follows:

 a) Inspector Lawrence Smith testified that he was the administrative officer responsible for the Crime Scene Investigation Unit at C.I.D. He read the contents of the statement of former officer 2179 Jermaine Stubbs who was no longer on the police force. The statement indicated that on 29th January, 2017 Officer Stubbs visited an alleged crime scene at #130 Melvern Road, Yellow Elder Gardens and that he observed the residence of Dornell Cornish and on the western side of the house he saw a pair of black slippers, a brown short pants, a white shirt, a chrome car jack and a screw driver. The statement said the bars on the western window appeared to be pried. Inside the house he saw suspected blood stains on the bedroom door, floor, bed and a northern wall. He photographed the scene and downloaded the photos to the compact disc (C.D.). Inspector Smith testified that he viewed the C.D. and downloaded the images and complied a photo album of the photos which was tendered in the trial.

 b) Dornell Cornish testified that on 28th January, 2017 she came home from work and went to bed. She woke up around 4:45 a.m. on Sunday 29th January, 2017 to use the bathroom and at that time she checked all of her exterior doors and windows which were locked and intact. She said her electricity was off from October, 2016. So at that time of 4:45 a.m. she had to use a flashlight to use the bathroom. She testifies that she woke up again around 5:45 a.m. on 29th January, 2017 and a man was in her bed. He had a knife and threatened to kill her saying “All I want is the “crabby.” She said she struggled and fought with him for almost an hour and she was cut on both her right and left hands and bitten in her back by the man during the struggle. She said she eventually got the knife away from the man who then ran and jumped through her western front room window which was pried open. She said the man was a stranger to her. She testified that she was scared during the ordeal which lasted for almost one hour. She testified that a park was behind her house and the park light shone in her bedroom and at 5:45 a.m. dawn was breaking so she was able to see the man’s face clearly for almost an hour. She testified that on 31st January, 2017 she attend an I.D. Parade and picked out the Accused as the man who assaulted her and threaten to rape her. Under cross-examination she accepted that certain statements in her written statement of 29th and 31st January, 2017 were different from what she testified to in Court, such as her “throwing the knife outside” in her sworn evidence whereas the written statement has “throwing the knife aside” and the name of her tenant being “Trevor” in her sworn evidence whereas the name of “Trent” is in her written statement, and sworn evidence testifying of that the door adjourning her house to her tenant’s apartment was not locked but in her written statement it had where that door was locked and she had to let Trevor in with a key. Her testifying that she did not give blood samples at the hospital. Her explanation was that a number of things in her written statement do not look right. She denied Defence Counsel’s suggestion that she was not telling the truth in her sworn testimony. She also denied Defence Counsel’s suggestion that she could not recognize the assailant because it was too dark.

 c) Trevor Stubbs testified that in January, 2012 he was a tenant of Dornell Cornish living in an apartment adjoining her house in Yellow Elder, Gardens. He said that around 5:30 a.m. he heard sounds and screaming from Dornell saying “someone in the house with a knife trying to rape me.” He said after sometime the adjourning door was opened by Dornell and he pulled it open and took her on his side and out the front door of his apartment and told her to go to the neighbor and call the police. He said she was bleeding profusely. He said he stayed there until the police came. Under cross-examination he said he could not enter Dornell’s side through the adjoining door because she has to open it from her side. He side he looked around the yard but did not see anyone. He said he saw the car jack and clothes under the western bedroom window and saw that the bars on that window were pried open. He said the police came shortly after 6:30 a.m. and that they took a statement from him.

 d) Sgt. 2672 Desmond Roll testified that on 29th January, 2017, he was attached to C.I.D. and on reviewing information, went to #130 Melvern Road in Yellow Elder Gardens and spoke to Dornell Cornish and after he made other enquires in the area, he went to #74 Bethel Avenue, Stapledon Gardens where he saw and arrested the Accused Allen Thompson and cautioned him for Attempted Rape and Causing Harm.

 e) A.S.P. Keino Demeritte testified that on 31st January, 2017 after receiving instructions he escorted Dornell Cornish into the I.D. Parade room where she was spoken to by A.S.P. Taylor and viewed a lineup of men and she picked out the person in the #5 position.

 f) A.S.P. Wakita Taylor testified that on 31st January, 2017, she conducted an I.D. Parade with respect to Allen Thompson the Accused for offences of Burglary and Attempted Rape. She said she spoke to the Accused and read him his rights with respect to his participation in the I.D. Parade. She said he consented to participate in the I.D. Parade, which was made up of nine (9) persons with similar characteristics as the Accused. She testified that Dornell Cornish was brought in and she identified the Accused Allen Thompson in position #5 as the person who assaulted her. She identified the Accused as the person picked out by Ms. Cornish. Under cross-examination she denied Defence Counsel’s suggestion that the I.D. Parade was not conducted voluntarily with the Accused.

 g) The final witness was Sgt. 3585 Ashley Black the investigator. She testified that on 30th January, 2017 she received information regarding a burglary and assault complaint and a suspect Allen Thompson who was in custody. She said she interviewed the Accused who denied committing the offences and gave an alibi. She said after receiving additional information she charged the Accused with the offences and she identified the Accused as the person she charged. Under cross-examination she said she visited the complainant’s home prior to interviewing the Accused. She said she took the Complainant to the hospital to have blood samples drawn from her. She said she made enquires and the Accused alibi did not pan out. She said she was unaware whether any dusting for fingerprints were done on the house and windows of Dornell Cornish’s home or on any items recovered by the police from the scene. She said she did not know who the car jack and screwdriver were handed over to. She denied Defence Counsel’s suggestion that the investigation was not thorough.

**ANALYSIS**

18. Counsel for the Accused has submitted that based on the inconsistencies and discrepancies in the evidence of Dornell Cornish both internally and when compared with other witnesses testimony that the evidence of Dornell Cornish is so weak and improbable that any reasonable tribunal would be forced to the conclusion that the witness is untruthful and as she is the sole person to identify the Accused as the assailant it would not be proper for the case to proceed on her evidence alone and the case should be withdrawn from the jury.

19. Counsel for the D.P.P. has submitted that while there may be some discrepancies and inconsistencies in the evidence all of the essential ingredients of the offences have been prima facie established and it should be left to the jury to determine whether the Accused is guilty or not guilty after considering the evidence.

20. On the issue of visual identification. In accordance with the guidelines outlined in Turnbull when identity is an issue the Judge should direct the jury (and I would add, on a No Case Submission, the Judge should be alert) to examine closely the circumstances in which the identification by the witness came to be made. How long did the witness have the assailant she says is the Accused under observation? At what distance? In what light? Was the observation impeded in anyway? Had the witness ever seen the Accused before? How long elapsed between the original observation and the subsequent identification. Did the witness give a description to the police of the Accused?

21. On the evidence of Dornell Cornish she testified that the incident lasted for almost one hour. Beginning at around 5:45 a.m. on the morning of 29th January, 2017. She testified that she was fighting and struggling with the assailant the entire time and he was face to face with her. She says at 5:45 a.m. The sun was just beginning to rise but that there was light shining in her bedroom from the park light just behind her house. She said that the man’s face was not masked and nothing impeded her view of his face. She attended an I.D. Parade two (2) days after the incident. The description she gave to the police was of a short, slim male with an afro (which was not dissimilar to the general description of the accused). There is no other evidence to support the identification of the Accused by Ms. Cornish and the Accused in his Record of Interview denied that he was at the complainant’s residence and denied committing the offences.

22. In my view the quality of the identification evidence in this case, while not great or ideal, cannot be characterized as poor. The identifying witness had the assailant under observation at very close range (face to face) for almost an hour while the lighting may not have been good at 5:45 a.m., certainly by after 6:00 a.m. the lighting would have improved sufficient for the witness to see the assailant’s face (which was not masked) for a lengthy period.

**CONCLUSION**

23. What is clear on a submission of “*No Case To Answer*” is that the question to be answered by the Judge is whether a jury, properly directed, could convict on the evidence adduced by the Prosecution at the close of their case. The Judge does not have to find at this stage that the Prosecution has established their case beyond a reasonable doubt.

24. In my view, having reviewed the evidence as outlined above and the law and legal guidelines set out earlier, I find that, despite the inconsistencies, the evidence connecting the Accused to this offences is not tenuous or inherently weak and that on one possible view of the facts the jury on being properly directed could properly convict on it.

 They may fine that Dornell Cornish may be lying or mistaken about whether the door adjourning her house to the tenant’s apartment was locked or that she had forgotten that she had given blood samples at the hospital, but they may still be sure that she saw the Accused as the assailant who assaulted her and tried to Rape her in her house.

25. I find that the identification evidence led is sufficient to be left before the jury to weigh whether it is credible or reliable and as a result the submission of No Case To Answer is dismissed and the matter will proceed for a determination by the jury.

**Dated this 25th day of July, 2022**

**Gregory Hilton**

**Justice of Supreme Court**