BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 3 OF 2008

BETWEEN:

THE QUEEN

and

BRIAN WALTERS

Appearances:

Mrs Grace McKenzie, Principal Crown Counsel, Ms Tamia Richards, Senior Crown Counsel and Mr Myron Walwyn, Crown Counsel for the Prosecution
Dr. Joseph S. Archibald QC, Ms Anthea Smith and Mr Duane Jean Baptiste of J.S. Archibald & Co for the Defendant

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2008: April 16
2008: April 17, May 30

RULING ON NO CASE SUBMISSION

[1] **HARIPRASHAD-CHARLES J:** On 25 March 2008, the Director of Public Prosecution preferred an indictment containing one count of murder against the Defendant, Brian Walters, now 16 years of age. At the time of the alleged incident, he was 15. He is charged with the murder of 16 year old Akimo Williams on a date unknown between 6 and 14 August 2007 at Road Town in the Island of Tortola in the Territory of the Virgin Islands.

[2] On his arraignment, Mr Walters pleaded not guilty and a jury was duly empanelled to try the case. The case proceeded to trial. The Prosecution called 13 witnesses. At the close of their case, Learned Queen's Counsel, Dr Archibald who appeared for Mr Walters made a submission of no-case to answer.

[3] The submission was premised, firstly, on the discrepancy between the opening address by the Prosecution and the evidence subsequently adduced and secondly, that the evidence of the main witnesses for the Prosecution, namely Basil Prescott, Dowlyn Daley and Detective Chief Inspector Thomas Murray was wholly unsatisfactory to be left to be considered by the jury because it is tainted by weaknesses, inconsistencies, untruths, conflicting statements and improbabilities.

[4] In support of his submission of no case to answer, Learned Queen's Counsel, Dr Archibald relied on a litany of judicial authorities and on guidelines 1 and 2 (a) as set out by the English Court of Appeal in the landmark case of **R v Galbraith**[1]. Lord Lane CJ said (at p 1042B-D):

> 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 a 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 evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case**"[emphasis added].

[5] The Prosecution countered the submissions of Learned Queen's Counsel relying on Guideline 2(b) of **Galbraith** which states:

> "**Where however the prosecution evidence is such that the strength or weakness depends on the view to be taken of the 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 upon 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."**

[1] [1981] 1 WLR 1039.

Galbraith in perspective

[6] The Learned Authors of **Blackstone's Criminal Practice 2002** at Section D14. 27 advanced the following propositions as representing the position that has now been reached on determining submissions of no case to answer:

> "(a) If there is no evidence to prove an 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. The judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict on it, then 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.
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> (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 (whether in the witness's evidence viewed by itself or between him and other prosecution witness) are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case (and in the absence of other evidence capable of founding a case) the judge should withdraw the case from the jury."

[7] These principles are well-established and have been accepted by the Judicial Committee of the Privy Council as authoritative. The principles have been applied in many cases throughout the English-speaking Commonwealth. In **Daley v R**[2], an appeal from Jamaica, the Privy Council acknowledged (at p 90) that it has for many years been recognised that "the trial judge has power to withdraw the issue of guilt from the jury if he considers that the evidence is insufficient to sustain a conviction." The Board recognised that while the judge had the power to intervene on his own motion, more commonly a formal submission on this basis is made by counsel for the defence at the close of the prosecution case.

[8] In **Taibo v the Queen**[3], a case emanating from Belize, the Privy Council found that there were serious weaknesses in the case for the prosecution, but that they were not

[2] [1993] 4 All ER 86, PC
[3] (1996) 48 WIR 74

necessarily fatal. They also found that the case against the appellant "was thin and perhaps very thin". They nonetheless stated that the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt, if there is, the judge is required to allow the trial to proceed.

[9] In **Crosdale v R**[4] , a decision of the Privy Council from Jamaica, Lord Steyn at page 285 stated as follows:

> "A judge and a jury have separate 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 the jury. Lord Devlin 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):-
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> > "…there is in truth a fundamental difference between the question 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 it 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 men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together."

[10] Our Eastern Caribbean Supreme Court has applied the principles propounded in Galbraith on many occasions: see **Attorney General v Spicer**[5], **The Queen v Roy**

[4] (1995) 46 WIR 281
[5] Criminal Appeal No. 6 of 2001 (BVI) Judgment delivered on 14 January 2001

Smith[6], **The Queen v Willis Todman**[7], **The Queen v Berton Smith**[8] and **The Queen v Lorne Parsons et al**[9]. In dealing with the task that a judge is required to undertake when he is considering a submission of no case to answer, Rawlins J (as he then was) in **The Queen v Berton Smith** stated:

> "This task requires the balancing of the roles of the judge and jury. On one hand, a judge should be careful not to usurp the purview of the jury who are the judges of the facts. On the other hand, the Court is duty bound to safeguard accused persons from conviction on facts, which are so precarious, unsafe or insufficient that injustice would result."[10]

[11] In **Attorney General v Spicer**, Singh JA outlined the evidence that was led by the Crown in respect of one of the appellants, Spicer. The evidence related to (1) his friendly association with the deceased and the other accused; (2) the fact that they all socialized together; (3) that they were together on the night of the murder; (4) they left together to meet someone that night in the general area where the deceased was found and about the same time she was killed; (5) that sand associated with his shoes was, according to Professor Pye, highly probable to have come from the general area where the deceased body was found; (6) that there was a blood spot on the shirt that he admitted wearing on the night of 14 January 2000; (7) that he was in charge of a house where unused tampons were found similar to the brand of the tampons found in the deceased hand bag, a house that Lois McMillen would visit; (8) that he was part of a discussion with Benedetto to make taxi driver "Solo" unavailable for police investigation; (9) that his fingernails were cut low; (10) that he told a lie to the police as to why his shoes were wet and sandy and (11) that despite his close association with the deceased family, he made no contact with them upon hearing of the death.

[12] Singh JA also considered the forensic evidence that was adduced at the trial. One Forensic Scientist found tiny or miniscule blood stains on the appellant's shirt but two other forensic Scientists found that the stain proved negative for presence of blood.

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[6] BVI Criminal Case No. 10 of 1997. Judgment delivered on 2 December 1997.
[7] BVI Criminal Case No. 8 of 2003, Judgment delivered on 11 July 2003.
[8] BVI Criminal Case No. 18 of 2003, Judgment delivered on 17 December 2003.
[9] BVI Criminal Case Nos. 2,3 &4 of 2004. Judgment delivered on 13 February 2004.
[10] See paragraph 10 of the judgment.

DNA may not have been related to the blood at all and what was detected could have been transferred by mere touching and the evidential strength of the finding was extremely limited. A biological examination of the appellant's shoes showed nothing associated with the deceased and only a mere speck of sand was found inside one of his shoes.

[13] Singh JA held:

> "Taking the evidence at its highest, I agree with the conclusion of Benjamin J. The forensic evidence of the blood and sand did not reach the standard required in a criminal case, and, without that evidence, the other circumstances became meaningless in the context of the offence ….. For these reasons, I conclude that Benjamin J carried out a proper filtering process and did not err when he upheld the submission of no case to answer."

[14] Moore J in **R v Roy Smith** upheld a no case submission made by Dr Archibald QC. He concluded that the evidence led at the trial established the essential ingredient of the offences charged in the indictment and the case should in normal circumstances be left to the jury. He then stated that he had a residual duty to consider whether the evidence is inherently weak or tenuous. He further concluded that the evidence in the case was so weak and tenuous that no reasonable jury properly directed could convict on it. The weakness of the evidence arises from sheer improbability of what Brewley (the complainant) had said, from the internal inconsistencies in his evidence and from its being of a type which the accumulated experience of the Courts has shown to be of doubtful value. He added that the case for the Prosecution therefore fails the **Galbraith** test.

[15] In **The Queen v Willis Todman**, d'Auvergne J relied on **The State v Gomes**[11] amongst several cases dealing with no case submissions. She held that the evidence led establishes the ingredients of the three offences charged in the indictment and that prima facie cases have been made out. There is therefore a case to answer on all three counts. She added that Counsel for the accused placed much emphasis on

[11] 59 WIR 479

contradictory statements made by different witnesses but in her judgment, the issue of credibility is a matter for the jury.

The standard of proof

[16] On a no case submission, the question to be decided by the trial judge is whether a properly directed jury 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 have established the ingredients of the offence beyond a reasonable doubt. This is never a determination for a judge to make on an indictable trial. It remains the function and prerogative of the jury, who is the tribunal of fact.[12]

[17] Rawlins J aptly stated the principle in **The Queen v Berton Smith** as:

> "The statement does not assert that the trial judge should determine whether the evidence at the "no case" stage provides proof of guilt beyond reasonable doubt. Rather, the Court is enjoined to decide whether the evidence has the potential to lead to a conviction beyond a reasonable doubt."

[18] In **The Queen v Lorne Parsons and others**[13] Joseph-Olivetti J had this to say:

> "The judge does not have to consider whether the Crown have proved the case beyond a reasonable doubt as if the judge is required to do so then that will amount to an usurpation of the jury's functions which, it follows, is strictly to be guarded against. "The real question is to decide whether there is sufficient evidence on which a reasonable jury properly directed might convict." Per Chancellor Massiah in **R v Mitchell [1984] 39 WIR 185** quoted by Singh JA in **William Labrador**. "

[19] Contrary to the tenacious submissions made by Learned Queen's Counsel, Dr Archibald, it is plain that the burden on the Prosecution at this stage is different from the burden they have at the end of the trial to satisfy the jury of the defendant's guilt beyond a reasonable doubt. My role at this stage is merely to consider whether there is sufficient evidence to establish the Prosecution's case.

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[12] Commonwealth Caribbean Criminal Practice and Procedure by Dana S. Seetahal
[13] BVI Criminal Case No. 9 of 2005, Judgment delivered on 23 June 2006

The opening address

[20] A good starting point is to set out the opening address of Counsel for the Prosecution, Ms Richards. She said:

> "This is a part of the trial in which we are allowed to open the case to you to give you a preview of this trial, what is it about as well as to introduce the parties that are involved to you."

[21] Dr Archibald vehemently criticized the above opening statement saying that this is not what the opening is for. He submitted that *"the opening is to tell the jury the leading facts on which the Prosecution will rely to prove the case for the Prosecution. It has always been so stated and the purpose is so the jury may see if there is any discrepancy between the opening statement of counsel and the evidence afterwards adduced in support of them. This is not what happened in this case."*

[22] Learned Queen's Counsel also faulted the opening address as being flawed in that it did not mention that "*Mr Walters used a knife or had a knife or that he inflicted on the deceased, Akimo Williams the injury with a knife or that he inflicted the injuries because she did not use the word injuries on Akimo with a knife or anything to that effect and that was the state of the case for the Prosecution at the opening."*

[23] **Blackstone's Criminal Practice 2002**, Section D14.1 on Opening Speech states:

> "There is little direct authority on what should or should not be said by prosecuting counsel in his opening address to the jury. By convention, he explains the legal elements of the offence charged and outlines the evidence he proposes to call. He also explains to the jury the burden and standard of proof. The extent to which counsel deals in detail with points of law that may arise during the trial or possible defences open to the accused is a matter for his discretion, depending on the circumstances of the particular case….If counsel deals with a matter of law it is usual to remind the jury that matters of law are ultimately for the judge, and that counsel's remarks should therefore be disregarded insofar as they differ from the judge's directions."

[24] In **Taibo's** case, Counsel for the Prosecution made certain opening statements. The Court found that the evidence did not measure up to the promise that those

statements held out. The Court found that there were major discrepancies between the evidence and the opening address. Yet, the Board did not consider it fatal.

[25] In the present case, the opening address, when critically analysed, appears unblemished and in conformity with the legal principles on the subject matter. Briefly, in opening the case, Ms Richards told the jury that on 6 August 2007, there was the usual "Rise and Shine" Tramp in Road Town. Some people call it "J'Ouvert". The tramp began early in the morning and there was a top band playing. It made its way from Purcell to the Waterfront. There were a series of fights amongst some young boys and the police stopped the tramp. In the fights, two teenagers were seriously injured and both later died. The Prosecution's case is that, based on direct as well as circumstantial evidence, Mr Walters murdered Akimo Williams on the fateful morning in question.

[26] Fundamentally, Ms Richards outlined the evidence upon which the Prosecution relied and explained the nature of the charge to the jury. She reminded the jury of the burden and standard of proof and the ingredients of the offence of murder. She also admonished them that matters of law are ultimately for the judge and that counsel's remarks should therefore be disregarded insofar as they differ from the judge's directions. She gave some general directions on the oath they took and the inviolability of that oath. Overall, Ms Richards performed commendably.

[27] In my judgment, there is nothing with respect to the opening address that provided sufficient ground for withdrawing the case from the jury.

The case for the prosecution

[28] The case for the Prosecution consisted of the direct evidence of Basil Prescott and the circumstantial evidence of many witnesses including Dowlyn Daley, Jemma Pond, Detective Constable Vernon Lacroque, Pathologist Emma Lew and Detective Chief Inspector, Thomas Murray. In addition, two tape-recording cassettes reduced to a 29-page interview between law enforcement officers and Mr Walters as well as an

unsigned witness statement from Mr Walters were tendered as part of the Prosecution's case.

(a) Evidence of Basil Prescott

[29] Basil Prescott, aged 18 is a close friend of the deceased, Akimo Williams. His evidence, if accepted, is that on the morning in question, he was going to J'Ouvert in Road Town. He left his house and arrived in town around 3.00 a.m. He "linked up" with some of his friends and then followed the truck to Purcell. "Jam" started. In the "jam", he saw the deceased. They were together at some point in time but as the "jam" kept moving towards the Waterfront, they kept moving and eventually parted company. Later, he saw the deceased again on Main Street. When Prescott saw him, the deceased was running towards the direction of Humtums Ghut. Prescott ran behind him and spoke to him. He saw scratches on the face of the deceased. He tried to talk him out of "it" but he would not listen to him. So Prescott lifted him and dragged him up to Clover's and Circles. Prescott was talking to the deceased for a while. Later, he saw Wattley and Wattley's people coming down from Waterfront side and he saw that they were "hyping up". He said "hyping up" meant "they trying to get touch. Say like I crack you a slap. You get hype up. I want to hit you. I want to do you something." At that time, Prescott was by Clover's chilling out but the deceased was not around at that time.

[30] Shortly afterwards, he saw the deceased by Vanterpool with a stick so Prescott rushed there and the next thing "fight start." The deceased took the first swing at Wattley with the stick but it missed. He tried to hold back the deceased as somebody was holding back Wattley. But the deceased eventually forced his way out and he let him go. Suddenly, Prescott's head got burst. As a result, he felt "bazzardly" and fell to the ground. After 2 to 3 minutes, he got up. He did not see the deceased or Wattley so he ran behind Bolo's. When he got there, he saw Wattley lying on the ground with 'blood all over his body.' Wattley was on the ground with his face up so the blood came down to his shoulders. Prescott took off. He ran by Simply Delicious. He felt tired because his head was bleeding. Then someone held him from behind. When he looked back,

he saw it was the deceased. He noticed that the deceased was holding his neck but according to him, he "looked safe." Prescott then said to the deceased: "cuz, you alright?" The deceased answered "yeah man." He asked him again and this time, the deceased answered "Brr…stabbed me." He asked him a third time but he did not answer. The deceased started to bleed from his neck. Prescott took out his shirt and tried to stop the blood which was gushing out. He put pressure on the neck but according to him, "it was too much blood so I needed another shirt". Prescott then pulled the deceased to the other side of the road in front of the St. William's Catholic Church. The deceased spoke to him a final time and said "Basil, I gone." Prescott said "his tongue was longed out." Eventually, the ambulance came and the deceased was taken to Peebles Hospital. Prescott also went in the ambulance. According to Mr Rudolph Lewis, the EMT, on the way to the hospital the deceased was conscious and talking but he was bleeding profusely. At the hospital, the deceased was taken straight to the operating theatre where he was medically examined and treated by Dr Marcos. Two days later, he was flown to Miami for further and better treatment. The deceased died there on or about 14 August 2007.

[31] Later that same day of 6 August 2007, Prescott said that he saw Mr Walters at Peebles Hospital. Mr Walters was there with his mother and he was making noise. He heard Mr Walters say "I should have kill he." The Prosecution's case is that Mr Walters was referring to the deceased because at that time, the deceased was still alive.

[32] The case for the Prosecution is that Prescott said that the deceased said to him "Brr…stabbed me" and it sounded to him like "Brian stabbed me." Dr Archibald QC objected vehemently to Prescott proffering any interpretation to the word "Brr.." which he said, is a matter for the jury. Indeed, I need not protract the submission of no case to answer any further as in Learned Queen's Counsel's own words, the case should go to the jury for their determination of this discrete issue. However, if I am wrong to send the case to the jury, I shall deal with all the other matters which were raised.

[33] In addition, on this issue, the case of **Ronald Turnbull and R** was cited as authority for the proposition that such a matter should be left for the jury to decide. In that case, various witnesses gave diverse evidence as to what they heard the deceased said. One said "Ronnie Tommo', another "Robbo" and "Tommo". The matter went to the jury and the judge summed up in these words:

> "…you must not base your decision upon guesswork or speculation and it may be that you come to the conclusion here that you can only accept these words, if they were uttered, namely "Ronnie Tommo" as an identification of Ronald Turnbull if you can reject the word "Tommo" as being in some way surplusage, something that you cannot or to which you cannot attribute any meaning and, as I say, if you feel able to say: Well we can safely ignore that word and rely upon the name Ronnie – that again is a matter entirely for you. It is for you to answer that question, if he said Ronnie Tommo, was that an identification of Ronald Turnbull, or again is the matter too uncertain for you to rely upon it?"

[34] On appeal, the Privy Council held that the learned judge could not direct the jury as to what meaning or importance they were to give to "Ronnie Tommo". He was merely suggesting to them, as was within his province, that their approach to it was to treat "Tommo" as surplusage and rely on "Ronnie". But he made it quite clear to them in the last sentence where he said: "It is for you to answer that question, if he said Ronnie Tommo, was that an identification of Ronald Turnbull?"

[35] The Privy Council held that it was a matter entirely for the jury and the judge must give adequate directions in the circumstances.

[36] Applying **Ronald Turnbull**, it follows therefore, that the evidence of Prescott that the deceased said "Brrr… stabbed me" is a matter for the jury to decide: (i) whether indeed, the deceased uttered those words and (ii) whether "Brr.." was an identification of Brian Walters. In essence, this is what the Prosecution is alleging. However, these are matters for the jury and if I were to decide them, then I will be usurping their function as judges of the facts.

[37] Having carefully filtered the evidence of Prescott and although, I think, a properly directed jury could seriously questioned Prescott's credibility because of conflicting

evidence particularly in regard to the statements he made to the police, I do not think that it is within my purview to withdraw the case from the jury. The jury, as judges of the facts, will have to decide whether he is credible or not. If the jury believes Prescott, they will still have to determine for themselves whether "Brr…" is an identification of Mr Walters.

Circumstantial evidence

[38] The Prosecution contended that there is sufficient evidence on which the guilt of Mr Walters can be proved, in whole or in part, by the drawing of certain inferences from circumstantial evidence.

[39] The Prosecution relied on a number of circumstances particularly (1) the conduct of Mr Walters on the morning of the incident when he was involved in a battery of fights; (2) his presence at the scene of the incident; (3) conflicting evidence which he gave about his clothes; (4) the evidence of Dowlyn Daley to the effect that he saw Mr Walters that morning with an object in his hand and (5) the distribution of the blood on Mr Walters' tee shirt.

Conduct of the defendant

[40] The Prosecution submitted that on the morning in question, Mr Walters was in gang fights involving boys from Humtums Ghut and boys from Sea Cow's Bay. They say that in the tape-recorded interview, he admitted that he participated in a battery of fights. In most of the fights, he appeared to be protecting his deceased uncle, Jeremy Wattley. The Prosecution next contended that the photographs taken by Mr John Black, a freelance photographer, showed Mr Walters participating and displaying an aggressive behaviour and: that he certainly was not an angel of peace. In addition, he admitted to hitting Prescott on the head with a beer bottle. The Prosecution submitted that there may be different inferences to be drawn from this but one such inference that the jury might reasonably draw is that Mr Walters was not a peacemaker but that he was actively involved in fights on the morning in question.

Presence at the scene

[41] The Prosecution argued that in the tape-recorded interview to the police, Mr Walters places himself at the scene where the deceased was found suffering from the fatal injuries. The Prosecution's evidence is that Mr Walters witnessed when the deceased used a piece of wood to hit his uncle on his head. He saw when the deceased ran away. He gave chase. He ran to Kadirs and saw the deceased all the way ahead of him in the vicinity of Colombian Emeralds. He never lost sight of the deceased nor did he see anyone else chasing or attacking him.

[42] The Prosecution submitted that the deceased was seen in the vicinity of Simply Delicious suffering from a wound to his neck – the fatal wound. They say that this evidence should be juxtaposed with the evidence of Dr Lew who said that such a wound, if left untreated, the victim would die within minutes because as the victim is losing blood, he gets fainter and fainter and would eventually collapse altogether. The Prosecution's case is that the deceased was stabbed between Bolo's and Simply Delicious where he was seen suffering from the injuries. According to the Prosecution, if the statement of Mr Walters is to be believed, it meant that the deceased ran back from Columbian Emeralds to Simply Delicious where he was found. They say that that evidence is incredible based on the evidence of Dr Lew. Nonetheless, they say that these are all matters for the jury as judges of the facts.

[43] The Prosecution opined that there is sufficient evidence on which the jury can find that there was opportunity for Mr Walters to perpetuate the attack on the deceased.

Conflicting evidence of clothes

[44] The Prosecution submitted that Mr Walters gave three different accounts of what happened to the clothes he was wearing on the day of the alleged incident. The evidence adduced by the Prosecution is that on 6 August 2007, Detective Constable Vernon Larocque collected a witness statement from Mr Walters at Rodus Building. He was there with his mother. In the statement, he said "when I went to the hospital, I was only wearing my pants. I do not know where my shirt was." The Prosecution contended

that this evidence must be considered against the evidence of Mr Prescott who said that when he saw Mr Walters at the hospital, he was wearing a white tee shirt which was torn.

[45] The Prosecution submitted that Officer Larocque testified at this trial that on 8 August 2007, he and Officer Primo visited the residence of Mr Walters at Humtum's Ghut. Mr Walters' mother was also present. Officer Larocque inquired about the clothing that Mr Walters was wearing on the morning in question. He said that the pants were by his father, Brian Walters Sr, and his shirt got lost in the J'Ouvert.

[46] On 25 September 2007, when Mr Walters was interviewed by Detective Chief Inspector Thomas Murray, he said that he took off all of his clothes and left them right on the ground in the hospital parking lot.

[47] The Prosecution submitted that these three different accounts are matters to be left to a jury so that they can test his credibility.

The evidence of Dowlyn Daley

[48] Learned Queen's Counsel, Dr Archibald submitted that the evidence of Dowlyn Daley adds nothing to the case because he never said that he saw Mr Walters with a weapon or a knife in his hand. What Mr Daley said is that on the said morning in question, he saw Mr Walters where his uncle was lying. He was very emotional and he tried to calm him down. At the time, he saw Mr Walters with an object in his hand but did not see what it was because he was holding it behind his leg. Although Mr Daley did not see the object, he was certain that it was not a cell-phone or a piece of paper.

[49] The Prosecution submitted that firstly, the jury will have to decide whether they believe Mr Daley because of his familiarity with Mr Walters' immediate family and secondly, they will have to decide whether the object was in fact a knife. The Prosecution submitted that a reasonable jury, properly directed, might on one view, come to the conclusion that Mr Daley is lying when he said that he did not see the object and that

the object was in fact, a knife. Nevertheless, they insisted that these are matters for the jury.

The distribution of blood on Mr Walters' clothes

[50] The Prosecution submitted that the evidence of Jemma Pond and Dr Lew is significant in this regard. Ms Pond testified that she saw Mr Walters on the other side of the street by a telephone post crying. She noticed that he had on a white tee shirt and a pair of black pants. Remarkably, she noticed blood at the front of his shirt. She observed blood on his stomach area and on the chest. On the top area of the tee shirt, there was spotted blood and at the bottom part, a large area of blood.

[51] The Prosecution submitted that Ms Pond's evidence has to be considered in light of the evidence of Dr Lew. In her expert testimony, Dr Lew stated that, usually when an artery is severed, because the blood is under high pressure, the blood has a tendency to spurt out as opposed to drip or drain out.

[52] The Prosecution's case is given the height of the deceased; being 6 feet tall, when the blood spurted out, it fell on the upper part of the body of a shorter person like Mr Walters. The blood spurted out in drops as opposed to a large portion of blood. They say that this bit of evidence coincides with Ms Pond's evidence as to the distribution of the blood on the shirt of Mr Walters and that one of the reasonable inferences that the jury could come to, if they believed Ms Pond's evidence and Dr Lew's expert testimony is that the blood on the upper part of Mr Walters' shirt was the blood of the deceased which spurted out on Mr Walters' clothes and the large area to the bottom of the shirt is the blood of his deceased uncle.

[53] The Prosecution relied upon these various five circumstances relating to the crime and Mr Walters which they say when taken together will lead to the sure conclusion that it was Mr Walters who committed the crime.

[54] It is important to bear in mind that, with circumstantial evidence, one must view all the circumstances as a whole and not to seek to test the weight of each individual circumstance by itself.[14] And the Prosecution do not have to establish that the only inference which can be drawn from the circumstances relied on is the inference of guilt. It is sufficient if one of the possible inferences is that of guilt. The inferences to be drawn from all the circumstances disclosed by the evidence are always a matter for the jury.

[55] The Learned Authors of **Blackstone's Criminal Practice 2002** relied on **Bokkum**[15] In that case Tuckey LJ stated:

> "Read literally the passage in *Moore* [a reference to the decision of the Court of Appeal in *Moore* (20 August 1992 unreported)] would mean that in any case dependent on circumstantial evidence the judge would be required to withdraw the case from the jury if some inference other than guilt could reasonably be drawn from the facts proved. We do not think that the Court intended to say this and if it did it is contrary to what was said in *Galbraith*. The approach suggested may be appropriate in a case such as *Moore* where the inference of guilt is sought to be drawn from a single fact, but this is much more difficult in a case such as the instant case where the Crown rely on a combination of facts. The judge will, of course, withdraw the case if he considers that it would be unsafe for the jury to conclude that the defendant is guilty on the totality of the circumstantial evidence adduced, but if he concludes that it is open to them to convict then *Galbraith* requires the judge to leave the decision to them."

[56] Learned Queen's Counsel argued that no murder weapon was found either on Mr Walters' person or at his premises. I note that **R v Onufrejczyk**[16] decided that in a murder case, even the fact of death and the manner of death can be proved by circumstantial evidence. In that case, there was no body, not even the trace of a body and no evidence as to the manner of death yet the defendant was convicted of murder and the conviction upheld. In **Christopher Remy v The Queen**[17], the Court of Appeal upheld the trial judge's decision on conviction and sentence of death by hanging. In

[14] R v Mullings and anor [2004] EWCA Crim. 2824.
[15] Judgment of the Court of Appeal in England, Judgment delivered on 7 March 2000 (unreported).
[16] [1995] 1 QB 388.
[17] Criminal Appeal No. 6 of 2002 [Saint Lucia] –judgment delivered on 22 September 2003 [unreported].

this case, there were no eye witnesses and no weapon was found. The case was based wholly on circumstantial evidence.

[57] In my view, the contradictory statements with regards to the clothes that Mr Walters were wearing, his presence at the scene where the deceased was seriously injured, his chasing of the deceased, Dr Lew's evidence of the nature of the wound to the neck and the manner in which the blood would have spurted out, the drops of bloodstains seen by Ms Pond on Mr Walters' shirt and the evidence of Mr Daley, if accepted, that Mr Walters had a thin object in his hand; in my view is evidence upon which a reasonable jury could properly come to the conclusion that Mr Walters is guilty. It seems to me that in all these matters, I would be usurping the function of the jury if I do not allow these factual matters to be tried by them. It must be emphasized that at this stage, the Prosecution are not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the Prosecution.

[58] **Galbraith** is authority for the principle that where the prosecution evidence is such that the strength or weakness of the case depends on the view to be taken of the 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 upon 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.

Detective Chief Inspector Murray

[59] Dr Archibald QC challenged the evidence of Detective Chief Inspector Thomas Murray was being unreliable and inconsistent with the evidence of other witnesses. He submitted that during the interview, it was put to Mr Walters that he was chasing the deceased but he said that he stopped the chase without catching the deceased. It was put to Mr Murray, by way of cross-examination, whether he had evidence that the deceased was chased by several persons to which he answered in the affirmative. Dr Archibald next submitted that the evidence of Prescott contradicted that of Mr Murray

in respect of whether there was a crowd of people when the deceased appeared with the injuries on his body.

[60] In the present case, it cannot be denied that there were occasions when the evidence of one witness for the prosecution contradicted the evidence given by another witness, for example, Prescott and Mr Murray's evidence as identified by Dr Archibald QC. However, it is very rare that two persons seeing or telling about an event that occurred can subsequently be able to describe it with the same details and this is why we have jury trials. At the end of the day, the jurors will have to use their collective experience in assessing the credibility of these witnesses.

Lies of the Defendant

[61] Another aspect of the Prosecution's case is that Brian Walters lied to the police about the clothes he was wearing on the morning of the incident. They say that the three contradictory statements to the police are matters for the jury.

[62] 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 proceed on that evidence alone.

[63] The attribution of guilt or innocence to Mr Walters' alleged prevarications in respect of the clothes he was wearing on the morning in question is a matter entirely for the jury and certainly not for the trial judge.

Conclusion

[64] What is clear from the authorities is that the judge at this stage must only be satisfied that there is a prima facie case for Mr Walters to answer. Applying the principles enunciated in **Galbraith** and having considered the prosecution evidence in its totality, it is difficult to see how Learned Queen's Counsel could have premised his submissions on Guideline 1. As to Guideline 2 (a), I am of the view that the evidence

adduced by the Prosecution is not so tenuous or unconvincing nor is it so discredited as to justify the case to be taken away from the jury. On the contrary, the Prosecution have established a compelling prima facie case against Mr Walters based on the evidence of Mr Prescott and the circumstantial evidence as outlined above. The question raised by Learned Queen's Counsel as to the reliability or otherwise of the Prosecution evidence and the reasonable inferences to be drawn are matters for the jury in their purview as judges of the facts. In **The State v Gomes**[18], the Court held that:

> "A judge sitting with a jury, however, must be careful not to be too anxious to save a jury from themselves by relieving them of the responsibility and the right to make their own assessment of the perceived weakness in the prosecution's case…."

[65] In my judgment, a properly directed jury might on one view of the facts, come to the conclusion that Mr Walters is guilty. It is in these premises, that the submission of "no case to answer" fails and I will overrule it.

Indra Hariprashad-Charles

High Court Judge

[18] At pages 489 h to 490 b