REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. P 042 of 2015

Between

The State

Appellant

And

Kerry Samad

Respondent

****

JUDGMENT

PANEL: A. Soo-Hon J.A.
R. Narine J.A.
M. Mohammed J.A.

APPEARANCES: Mr. Travers Sinanan for the Appellant
Mr. Richard K. Mason for the Respondent

DATE DELIVERED: 12th April, 2017.

Delivered by: The Honourable Madam Justice Alice Yorke-Soo Hon J.A
(M. Mohammed J.A. concurring)

Introduction

1. This is an appeal by the State under ***section 65e (1) (A)*** of the ***Supreme Court of Judicature Act*** **Ch 4:01** as amended by the ***Administration of Justice Act (Miscellaneous Provisions) Act*** **1996** against the decision of a trial judge to uphold a no case submission which resulted in the acquittal of the respondent.

Background of Facts

2. On the 5th of February, 2003 the respondent, a police officer, alongside other police officers, went to the premises of Bernard Albarado (the deceased) at #5 George Street, Cunupia for the second time that evening to execute a second search warrant. At the time, the respondent was armed with an uzi sub machine gun.

3. The evidence for the prosecution was that the respondent, upon arriving at the opening of a shed at the back of the house shouted, "*Doh move, ah go shoot, ah go f***king shoot*". The deceased was seated at a table with his back facing the respondent. There were several other persons in the shed. The deceased was then shot.

4. Three of the persons present at the scene gave different versions as to the deceased's position when he was shot. The deceased's wife, Sharon Albarado, testified that at the time that the deceased was shot, he was standing and facing in her direction. When she heard the explosion the respondent was holding the firearm at waist height. Abigail Antoine testified that the deceased was in the process of getting up when he was shot by the respondent whilst Shiva Hosein stated that the deceased was sitting. All three witnesses stated that the respondent did not trip or fall when the firearm was discharged. As to the

position of the firearm when the respondent fired the shot, Sharon Albarado testified that it was at waist height, Shiva Hosein testified that the respondent held the firearm just above his waist and Abigail Antoine testified that it was at shoulder level. After being shot, the deceased got up, walked through a corridor of his house and then collapsed. He was subsequently taken to the Chaguanas Health Facility where he was pronounced dead.

5. A post mortem examination conducted by Forensic Pathologist Dr. des Vignes revealed that the bullet entered the left side of the deceased's body and moved in an upward trajectory through his body and lodged itself in the knob of a washing machine which was located approximately 1.1 metres off the ground and to the right of the deceased. The pathologist also pointed out that the deceased was about 183cm or 5' 11" tall. The bullet entered his body 68cm from the top of his head and 115cm from the base of his body. The exit wound was 54cm from the top of the deceased's head and 129cm from the base. Under cross examination Dr. des Vignes noted that if the bullet was discharged at about 150cm above ground level, it could not have entered the body at 115cm above ground level. He stated that the firearm had to be lower than 115 cm at the time the shot was fired and it would have to be tilted slightly at an angle of less than 45 degrees.

6. The evidence of police armourer, Senior Superintendent Brebnoir was that the uzi firearm did not malfunction. He explained that there were three safety features in the firearm which were independent of each other namely, the safety lever, the grip safety and the safety ratchet. He stated that if the safety lever was not in one of the firing positions that is, "R" or "A", the weapon would not fire. If the grip safety was not depressed then one could not cock the firearm or pull the trigger. If the safety ratchet was engaged, the weapon would also not fire. Superintendent Brebnoir explained that it was not possible for the firearm to be accidentally discharged when it was on the rapid or single firing mode, as the firing block would be cocked back. If the individual carrying the weapon stumbles and depresses the grip safety it could not be classified as an accident as individuals are trained not to have a finger on the trigger guard. According to Superintendent Brebnoir, if all the systems were in place as it relates to firing and someone stumbles, the possibility existed that the weapon would fire. In such a situation the safety retracting ratchet would not be

engaged, the cocking lever would be fully forward, the grip safety would be depressed and the safety lever had to be on "R" or "A". A person stumbling with the firearm so engaged may possibly grip a little harder and their finger may go into the trigger thereby discharging the firearm.

The Respondent's Case

7. The case for the respondent was that the shooting was accidental. The respondent stated that upon arrival at the premises, he was given certain instructions and prepared his firearm for a potentially hostile situation by placing it on "R" and "bringing the firing block all the way back". He then ran down the driveway of the house and stopped outside a covered shed, which was approximately 3 feet away from the entrance. He announced his presence and held the firearm to his front with the nozzle facing down and the rear slightly above his chest. The strap on the firearm ran from his left shoulder across his chest, under his right arm, and across his back. A second strap was attached to the strap across his chest and then to the firearm.

8. According to the respondent, the deceased was seated at the table with his back facing him. Another man who was present at the premises then ran from the left side of the covered area and grabbed a bag from the table. The respondent attempted to give chase to the man but his boot came into contact with a piece of wood embedded in the concrete, causing him to he trip and fall. As he was falling, he realised that he was going to hit the table and in an effort to break the fall, he relaxed the grip on the front of the firearm. Whilst going down, the firearm went to the front of his face. He grabbed the firearm and the strap snapped. There was then a loud explosion and the firearm discharged a round before the respondent fell to the ground. As a result of the fall he sustained injuries. After the fall, the respondent realized that the deceased had been shot. He followed the deceased along a corridor to assist him. The deceased was lifted and placed into a police jeep and taken to the Chaguanas Health Facility.

The Judge's Ruling on the No Case Submission

9. At the close of the case for the respondent, a submission of no case to answer was made, which the judge upheld. In her ruling, she relied on the approach to no case submissions as set out both in the case of ***R v Galbraith***[1] and in ***Blackstone's Criminal Practice 2016***[2] and indicated that the Court was empowered to consider whether the prosecution's evidence was too inherently weak or vague for any sensible tribunal to rely on it.

10. The judge then went on to analyze the evidence before her and found that the State's case concerning the trajectory of the bullet was impossible based on the evidence of its witnesses and carried the inherent danger of inviting the jury to speculate about the accused's waist height. She also found that it was inappropriate to ask the jury to find that the accused's waist was approximately 110cm from the ground without any evidential basis. Further, the State did not establish that the nozzle of the firearm was lower than the accused's estimated waist height.

11. The judge was not persuaded with the prosecution's submissions that (i) it was open to the jury to reject the evidence of its witnesses who had all given evidence that the accused was standing when he shot the deceased or that (ii) the jury could infer that the respondent was in a crouched position when he had fired the shot since he had been trained to enter a hostile situation in a crouched position. For the prosecution to ask the jury to reject the evidence of its own witnesses would be improper.

12. In considering the evidence of Superintendent Brebnoir, the judge found it to be defective and lacking support for the undisputed trajectory of the bullet and noted that in determining whether the evidence was inherently weak or vague or inconsistent, the court was required to consider both the quality and reliability of the evidence as opposed to its legal sufficiency and this involved an assessment of the evidence.

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[1] [1981] 2 All ER 1060
[2] (paras D16.57 and D 16.59)

The Appeal

Prima Facie Case

13. The first ground of appeal is that the judge was wrong in law to withdraw the case from the jury while the second ground challenged the judge's ruling that a prima facie case had not been made out. These grounds were taken together.

14. Counsel for the appellant, Mr. Travers Sinanan, submitted that the judge was wrong to uphold the no case submission because a prima facie case had been established. He contended that there was ample evidence to negative the respondent's defence of accident upon which a reasonable jury properly directed could convict. He submitted that the strength or weakness of the prosecution's case depended on the reliability of the three main prosecution witnesses whose evidence was that the respondent never stumbled and fell, that he pointed the firearm at persons standing in the shed, that he held the firearm at waist height, just above waist height or shoulder level and that the deceased was standing erect or sitting or about to get up when he was shot by the deceased. Mr. Sinanan submitted that these were matters which ought to have been left for the jury's determination because on any one possible view of the evidence in its entirety, they could properly conclude that the respondent was guilty.

15. Mr. Richard Mason for the respondent submitted that the three eye witnesses for the prosecution gave contradictory testimonies which were flawed and insufficient to establish the manner in which the deceased met his death. He further submitted that the position of the firearm given by the witnesses in their sworn testimonies were not in keeping with logic when coupled with the injuries sustained by the deceased and with the projectile being embedded at a height of 100-110cm in the knob of the washing machine. The absence of the State's evidence to explain the trajectory of the bullet resulted in the fact that the case was without any evidence to negate the defence of accident.

16. Mr. Mason also submitted that to allow the case to go to the jury would have been an invitation to the jury to speculate that the respondent held the firearm in a position which would result in the injuries sustained by the deceased and the projectile to be embedded in the washing machine at a height of 100-110 cm.

Law and Analysis

17. A review of the law regarding no case submissions must begin with Lord Lane's CJ seminal decision in ***R v Galbraith***[3] where he explained the approach which a judge ought to adopt. At page 1062 he stated as follows:

> *"(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 Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength 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."*

[3] [1981] 2 All ER 1060

18. The authors of ***Blackstone's Criminal Practice 2016*** outline what is referred to as the proper approach to a no case submission at paragraph D 16.59 as follows:

> *"The following propositions are advanced 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.*
> *(c) If however, the evidence is so weak that no reasonable jury reasonably 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 court has shown to be of doubtful value. (especially in identification cases which are considered in D 16.60)*
> *(d) The question whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey 1988 Cr 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 be improper for the case to proceed on that evidence alone.*

19. In ***Sangit Chaitlal v The State***[4], Bernard JA in delivering the judgment of the Court of Appeal quoting from Luckhoo JA noted that in upholding a no case submission there was: *"an overriding discretion vested in the judge in the fair administration of a jury trial to ensure that justice did not miscarry"*[5] Bernard JA also expressed the

[4] 1985 39 WIR 295
[5] Ibid at page 311

view that in "*in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there is no miscarriage of justice."* [6]

20. Where there is no evidence that the crime had been committed by the defendant the judge's task is quite simple, he naturally withdraws the case from the jury. However, where there is some evidence but it is tenuous either because it is vague or inherently weak or inconsistent with the other evidence in the case or the judge concludes that the prosecution's case taken at its highest is such that a jury properly directed could not properly convict on it, then the judge must stop the case. This is in keeping with the judge's duty to ensure that a miscarriage of justice does not occur. In performing this task the judge is called upon to consider both the quality and reliability of the evidence. This, by its very nature, requires him to assess the evidence in order to determine whether it is inherently weak, vague or inconsistent with other evidence.

21. The main issue for the jury's determination in this case was whether the deceased met his death accidentally. The evidence of the respondent was that he stumbled and fell whilst holding the firearm and that it was discharged accidentally. Even though Superintendent Brebnoir did not consider the shooting to be accidental because all the systems were in place for firing and the holder of the weapon would have pulled the trigger, he did conclude that if someone stumbled and fell there existed the possibility that his finger may go into the trigger and the firearm would discharge. The evidence of the pathologist was that the bullet moved in an upward trajectory, entering the body of the deceased at 68 cm from the top of his head and exiting at 54 cm from the top of his head and embedded itself in the knob of a washing machine 111 cm above the ground. At the time that the firearm was discharged, it had to be lower than 115 cm and tilted slightly at an angle less than 45 degrees, making it impossible for the respondent to be facing the deceased.

22. The appellant's case was that the respondent never stumbled and fell and that the firearm could not have been discharged accidentally. The evidence of both Sharon Albarado and Shiva Hosein was that the respondent held the firearm at waist height while Abigail

[6] Ibid at page 312

Antoine stated that the respondent held the firearm at shoulder level. Antoine also said that the deceased was sitting when he was shot, Hosein said that the deceased was in the process of getting up whilst Albarado said he was standing in an erect position.

23. It is clear from the prosecution's case that on any version of the position of the deceased and the position in which the respondent held the firearm when it was discharged left the prosecution's case short of an explanation which was consistent with the pathologist's evidence as to the manner in which the deceased sustained his injuries.

24. At the end of the day the jury would have been faced with the following options:

(1) If they accepted the case for the respondent which was supported by the evidence of the pathologist then they were bound to acquit.

(2) If they rejected the respondent's case then they were bound to return to the prosecution's case and be satisfied beyond reasonable doubt so that they were sure that the deceased not only met his death at the hands of the respondent but that he did so in the manner set out by the prosecution. Taking the prosecution's case at its highest, if they were to accept the evidence of the three prosecution witnesses that it was the respondent who killed the deceased and that he never stumbled and fell, then the prosecution would have only partly proved their case because the accounts of their witnesses left the medical evidence "out in the cold". There was no evidence consistent with that of Dr. des Vignes as to how the deceased sustained the injuries that he did. As the medical evidence was undisputed, the jury was bound to act upon it. Therefore, the prosecution failed in discharging both the burden and standard of proof placed upon them. In the circumstances the jury would have been duty bound to acquit the defendant.

25. In either case, the jury was bound to acquit the respondent. The inherent weakness in the prosecution's case was its inability to prove how the upward trajectory of the bullet which

caused the death of the deceased was consistent with the eye witnesses' account of the shooting incident.

26. The judge carefully assessed the quality and reliability of the evidence in order to determine whether it was inherently weak or vague or inconsistent with other evidence in the case. In the exercise of that duty she found that there was an inherent weakness in the prosecution's case which arose from the sheer improbability of the three eye witnesses' account when matched with the medical evidence. The failure of the prosecution to establish the evidential support for the trajectory of the bullet led the judge to conclude that the case was "wholly lacking". We agree with the judge's reasoning that the case for the prosecution made the accepted trajectory of the bullet impossible on all the direct evidence presented.

27. In our view therefore, the judge carefully followed the approach to no case submissions and loyally applied the test laid down in ***Galbraith.*** The prosecution's case, taken at its highest, would not allow a properly directed jury to convict upon it. It was therefore the duty of the trial judge in the fair administration of a jury trial to ensure that no miscarriage of justice occurred and the judge was therefore correct to withdraw the case from the jury in keeping with her said duty. We therefore find no merit in these grounds of appeal.

Substituting Her own Conclusions

28. Counsel for the appellant submitted that the judge misdirected herself in law when considering the prosecution's case by substituting her own conclusions for that which the jury was entitled to reach. In particular he referred to the following two instances:

1. *"That no witness for the prosecution got it right with respect to the position of the deceased when he was shot and the position of the weapon when it was fired."*[7]

2. *"The positions of the weapon as stated by Hosein and Antoine are incompatible with the trajectory of the bullet. The position of 'waist height' stated by Albarado, even if accepted to be 110 cm as proposed by the prosecution, will still not support the bullet path."*[8]

29. It was submitted that those words were definitive words making value judgments and pronouncements on the facts which were within the sole remit of the jury and accordingly, the judge had usurped their function.

30. Counsel for the respondent submitted that at no time did the judge substitute her conclusions for that which the jury was entitled to reach. The statement made by the judge that "*no witness for the prosecution got it right…"* was made on the undisputed evidence of the trajectory of the bullet. No evidence from any sole witness or combination of witnesses was capable of negating the defence of accident. In respect of the statement dealing with the position of the weapon, Mr. Mason submitted that the statement was based on the logical consideration of the state of the evidence and the incompatibility of the viva voce evidence of the eye witnesses as against the actual evidence of the injuries of the deceased and the damage found on the washing machine.

Law and Analysis

31. It is wrong for a trial judge to substitute his own conclusion for that which the jury is entitled to reach. To usurp the jury's function would be an unpardonable error. In ***R v Gian and Another***[9] the court reasoned that it was not the judge's function to choose

[7] Page 28 lines 28-32 Judge's Ruling
[8] Page 29 line 1-5 Judge's Ruling
[9] [2009] EWCA Crim 2553

between evidence that was powerfully in favour of the defendant and evidence that was powerfully in favour of the prosecution. That function remained solely within the province of the jury. Where the jury is confronted with competing circumstances it is their task to make a choice. In ***Gian,*** Moses LJ stated:

> *" The fact that it [the jury] was faced with a choice does not afford any basis upon which the judge should have withdrawn that choice from them, still less a basis upon which the court would be entitled to substitute its own conclusion for that which the jury was entitled to reach".*[10]

32. We are of the view however, that the judge did not substitute her own conclusions for those which the jury was entitled to reach. It is clear that her words referred to the evidence in respect of its three main prosecution witnesses. In the first instance, when the judge said *"no witness for the prosecution got it right",* what she was undoubtedly referring to was the fact that none of the prosecution witnesses were able to give an explanation consistent with the evidence of the pathologist with respect to the trajectory of the bullet. In the second instance the judge was referring to the incompatibility of the prosecution's evidence concerning the position with which the respondent was said to have held the firearm and the trajectory of the bullet. These are not value judgments or pronouncements but simply an assessment of the evidence highlighting the "sheer improbabilities." We therefore disagree with these submissions and dismiss this ground of appeal.

Medical and Scientific Evidence

33. Mr. Sinanan submitted that the judge used the medical evidence and scientific opinion of the pathologist in respect of the trajectory of the bullet to negative or cast doubt on the prosecution's case with respect to the reckless and grossly negligent act of the respondent. He submitted that when there is a dispute relating to expert evidence, for instance, two competing versions as to the cause of death or injury, it remains a question for the jury

[10] Ibid at paragraph 38

even when the experts disagree. In such circumstances it is for the jury to decide between the experts by reference to all the available evidence and it is open to the jury to accept or reject the evidence of the experts on either side. In this case there was no dispute as to the cause of death and it was accepted that the respondent had discharged the firearm. The pathologist gave evidence of the position of the firearm if the deceased would have been viewed as standing up. He said that the firearm would have been behind the deceased to the left and somewhat below the level of the entrance hole, and tilted somewhat upwards. Under cross-examination, defence attorney postulated different scenarios and the pathologist gave different answers which were based on possibilities and probabilities but which were not answers that were definitive or conclusive. It was therefore wrong for the judge to withdraw the case from the jury but to direct them instead to consider the expert evidence in context of all other relevant evidence and make judgments based upon realistic and not fanciful possibilities.

34. Mr. Mason for the respondent submitted that the evidence of three eye witnesses, with respect to the position in which the respondent held the firearm and the position of the deceased when the explosion was heard, failed to provide a logical explanation for the injuries sustained by the deceased. The scientific evidence of the pathologist completely ruled out the possibility of the eye witnesses' account as being true. The judge was therefore correct in exercising her judicial discretion to stop the case.

Law and Analysis

35. In cases where the direct evidence conflicts with scientific evidence, the case of ***Kapildeo v Mandal v State of Bihar***[11] is instructive in helping to resolve this conflict. In that case, all the eye witnesses stated that the deceased was injured by a firearm. However, the medical evidence indicated that there were no firearm injuries on the deceased. The court stated at paragraph 11:

[11] [2007] INSC 1194

"*It is now well settled by a series of decisions of this Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witness has to get primacy as medical evidence is basically opinionative… <u>But when the court finds inconsistency in the evidence given by the eye-witnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in different perspective by the courts.</u> [Emphasis added]. In Mohinder Singh v. The State, (1950) SCR 821 (at page 828), this Court said :- "In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and <u>in the manner in which they are alleged to have been caused. [</u>Emphasis added] It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In Mani Ram and Ors. v. State of U.P., 1994 Supp(2) SCC 289 (in para 9), this Court held:*

> *"It is well settled by long series of decisions of this Court that <u>where the direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with the medical evidence this is a most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained it is sufficient not only to discredit the evidence but the entire case</u>. ". [Emphasis added]*

36. In ***The State v Keith Diaz***[12] Archie J (as he then was), in addressing the discretion of a judge to withdraw a case from the jury, noted that whether the prosecution's evidence displayed inherent weakness or was exposed during cross examination, the overriding

[12] Cr No. 151/99

consideration was what was in the best interests of justice. Ultimately, the question was whether a conviction could logically and reasonably be sustained upon the evidence before the court. If it does, then the interest of justice requires that the matter be left for the jury to decide. On the other hand, if it does not, then the case must be stopped.[13]

37. In that case, an eye witness (Ramlogan) gave evidence that the accused inflicted a stab wound in a downward motion of the arm from above the head upon the deceased. The medical evidence however spoke of a fatal wound with an upward track. The prosecution suggested that the jury could accept the evidence of the pathologist as to the direction of the stabbing motion, reject the evidence of the witness as to the direction of the stabbing but accept that the witness' evidence in so far as he said that he saw the accused stab the deceased. Archie J rejected this proposition and stated:

> *"Ramlogan's credibility is not divisible in any such artificial manner. Inherent in the assertion that he saw a stabbing is the allegation that he witnessed a particular action done in a particular manner. If the jury rejects the downward stabbing, then they are left with no evidence as to exactly how it occurred and are forced to imagine an action that would be consistent with Dr. Chandulal's findings. Dr. Chandulal's evidence is an integral part of the case; without it there is no cause of death.*
>
> *The State cannot stop halfway and say that they established that the deceased died from a stab wound and there is evidence from Ramlogan that the accused stabbed the deceased.*
>
> *The State must establish that the stab which the accused inflicted, is the one which killed the deceased. In other words, Dr. Chandulal must testify to death from a particular stab wound. The stab wound of which he testified has a*

[13] The State v Keith Diaz

characteristic, its upward track, which without further explanation or speculation is not compatible with Ramlogan's evidence.

38. Archie J opined that the prosecution must properly prove their case. The prosecution was not allowed to prove one part of their case and forsake the other part, leaving the jury to merely speculate. He could not envisage any proper direction which would warn against speculation but leave open a reasonable guilty verdict based on the evidence and directed the jury to return a verdict of not guilty. Archie J felt compelled to withdraw the case from the jury because of the prospect of leading the jury to speculate. For, if the jury had accepted the medical evidence they would have had to reject the evidence of the eye witness which would then provide no proper evidence of who caused the attack upon the deceased since the evidence of the other eye witness had been so severely discredited.

39. It is a fundamental principle of law that in any criminal trial, the burden is on the prosecution to establish its case beyond reasonable doubt. It is therefore the prosecution's duty to prove the injury inflicted on the deceased was caused with the weapon and in the manner in which they have alleged it to have been caused. Where the direct evidence is not supported by the medical evidence, this is considered a most fundamental defect and unless such defect can be reasonably explained, it is open to discrediting the entire case.

40. In this case, the direct evidence and the medical evidence are in violent conflict. The medical evidence as to the manner in which the deceased met his death is that the bullet entered in the left side and moved in an upward trajectory through the body and lodged itself in the knob of a washing machine located to the right of the deceased at approximately 1.1 metres off the ground. The bullet entered the body at 115 cm from its base. The pathologist, Dr. des Vignes clearly stated that if the bullet was discharged at about 150cm above ground level, it could not have entered the body at 115cm above ground level. He stated that the firearm had to be lower than 115 cm at the time the shot was fired and it would have to be tilted slightly at an angle less than 45 degrees.

41. The direct evidence of the witnesses put the deceased in three different positions at the time of the shooting. According to their testimony he was sitting[14], standing[15] or in the process of getting up.[16]

42. Sharon Albarado testified that the respondent held the firearm at waist height. There is no evidence as to the height of the respondent and the respondent's evidence was that he tripped and fell at the time of the shooting. Superintendent Berbnoir's evidence was that if all the systems were in place as it relates to firing and someone stumbled and fell, it is possible that the firearm would discharge.

43. Dr. des Vignes was the sole medical expert whose evidence was uncontroverted. "The duty of experts is to furnish the judge and the jury with the necessary scientific criteria testing the accuracy of their conclusions so as to enable them to form their own independent judgment by applying the criteria to the facts proved in evidence".[17] Hence experts do not decide cases and juries are not always bound to accept the evidence of an expert not even an uncontroverted one where such evidence is intrinsically weak and does not attain the level of satisfaction required.

44. While juries are not bound to accept the evidence of an expert, they are bound to act on evidence and not on their own intuition. In ***R v Adams*** [18], the trial judge directed the jury to disregard the medical evidence of the expert and to form their own opinion. The board considered this to be a serious misdirection. In ***R v Bailey***[19], the court held that where there is unchallenged medical evidence, the jury must act upon it and since there was nothing to cast doubt on the medical evidence, it was not open to the jury to reject it. Lord Parker CJ stated:

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[14] See the evidence of Shiva Hosein at page 64 of the Transcript of Proceedings dated 24th November 2015
[15] See the evidence of Sharon Albarado at page 29 of the Transcript of Proceedings dated 17th November 2015.
[16] See the evidence of Abigail Antoine at page 58 of the Transcript of Proceedings dated 20th November 2015
[17] Per Lord President Cooper in *Davie v Edinburgh Magistrates,* 1953 S.C. 34 at 40
[18] PC (1972) AC 100
[19] (1961) Cr. L. R. 828

> "*This Court has stated on many occasions that of course juries are not bound by what the medical witnesses say, but at the same time they must act on evidence, and if there is nothing before them, no facts and no circumstances shown before them which throw doubt on the medical evidence, then that is all that they are left with, and the jury in those circumstances must accept it.*"

45. In our view, the jury was bound to accept the unchallenged evidence of Dr. des Vignes since there was no conflicting medical evidence offering a choice. Where there is a dispute in the expert evidence, such as two competing versions, we agree with Mr. Sinanan that in such a situation the matter is best left for the jury to decide which version they would accept, if any. However, that was not the case here. There was only the undisputed evidence of Dr. des Vignes nor was there any direct or circumstantial evidence from the prosecution compatible with the medical evidence as to the manner in which the deceased was killed. This created a material defect in the prosecution's case for it fell short of proving its case in its entirety. The difficulty was that while the prosecution was able to prove that the respondent fired the shot which killed the deceased, there was no evidence consistent with the expert evidence that the bullet moved in an upward trajectory through the deceased's body at an angle of less than 45 degrees and that it was fired from a height below 115cm off the ground. If the jury accepted the medical evidence, then the only conclusion open to them was that it was consistent with the case for the respondent and therefore he would be entitled to an acquittal. If they rejected the medical evidence, there would be nothing short of speculation to explain how the deceased met his demise and it would also be open to the jury to acquit the respondent. There is nothing to cast doubt on the medical evidence and it is not open to the jury to test it. We therefore hold that the judge did not use the medical evidence to cast doubt on the prosecution's case. On the contrary, the lack of evidence to support the undisputed trajectory of the bullet made the prosecution's case vague and inherently weak and that by itself cast doubt on the case. By withdrawing the case from the jury, the judge acted in the best interest of justice and did not usurp the jury's function.

The Armourer's Evidence

46. Mr. Sinanan submitted that the judge erroneously rejected the appellant's case by failing to consider the evidence in its entirety. In so doing, the judge failed to properly consider the independent expert evidence of the police armourer as it related to the firearm used by the respondent at the time of the shooting. Mr. Sinanan submitted that that was material evidence that ought to have been left to the jury in light of all the other evidence of the prosecution's witnesses, in particular, the evidence that the respondent never stumbled and fell at the time of the shooting and that he was standing and pointing the weapon at the persons in the shed.

47. Mr. Mason submitted that the appellant's case was carefully considered in its entirety and pointed particularly to the instances in which the judge dealt with the evidence of the armourer.

48. The evidence of Superintendent Brebnoir was that he checked the firearm assigned to the respondent on the night in question and found that it was in good working order. He pointed out three safety features which were independent of each other. The safety lever, the grip safety, and the safety ratchet which must first be disengaged for the firearm to be used. He confirmed that the safety features were in proper working order. Superintendent Brebnoir said that the manufacturers of the firearm designed it in such a way so as to disallow an accidental discharge. However, if someone fell with the firearm in his hands and all the systems were in place for firing the weapon, then the possibility existed that it could be discharged. The possibility existed that they would grip a little harder and a finger may go into the trigger. This would not be an accident because all the systems for firing were in place and the holder of the weapon must have pulled the trigger. The respondent on the other hand contended that the shooting was accidental. He fell and the weapon was discharged, not by his own wilful act of pulling the trigger but was facilitated by the fall and this was accidental.

49. We agree with Mr. Sinanan that where there are issues of fact to be resolved then those are matters solely for the jury's determination and the judge in such circumstances must be careful not to usurp the jury's function.

50. However, before getting to the stage of inviting the jury to consider the evidence, the prosecution must have established a prima facie case. The difficulty for the prosecution is that they were unable to pass this first hurdle as set out above, because there was a material defect in that they were unable to produce any evidence to support the trajectory of the bullet and explain the exact manner in which the deceased met his death. In fact, the evidence of the three eyes witnesses was inconsistent with the evidence of the pathologist.

51. In the circumstances we conclude that this was not a proper case to send to the jury since the prosecution failed in its duty to establish a prima facie case. Accordingly, we find this ground to be without merit.

Disposition

52. For the reasons given above, the appeal is dismissed.

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A. Yorke-Soo Hon, J.A.

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M. Mohammed, J.A.