IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN GRAND CAYMAN

INDICTMENT NO: 89/2008

13-10-09

THE QUEEN

-V-

JOSUE ALEXANDER CARILLO PEREZ

CORAM: **ANDERSON J. (Acting)**

Appearances: Mr. Trevor Ward and Mrs. Jenesha Bhoorasingh-Simpson of the Attorney General's Department for the Crown; Mr. Anthony Akiwumi for the Defence.

Heard: 14th, 18th, 21st to 25th, 28th September to 2nd, 5th to 9th and 13th October 2009.

RULING

1. The accused has been indicted on a charge of murder. The indictment in its particulars of the indictment states that the accused at some time between the 16th of May and the 20th of May 2008, murdered Martin Gareau. Notwithstanding that this trial has taken place without a jury at the election of the Defendant, it still behooves the judge to ensure the proper exercise of the discrete functions of judge and jury which the judge sitting alone must carry out, and give effect to them, consistent with the principles of law and justice. Accordingly, and in those circumstances, I remind myself that as jury, I must look at the evidence in its

totality and that in order to render a verdict of guilty, I must be satisfied in my role as jury, that the Crown has established its case beyond a reasonable doubt and to the extent that I am sure that this accused is guilty of the particular offence for which he has been charged.

2. One must therefore start with a definition of terms before going on to consider the evidence.

3. The offence of Murder is committed where a person by a deliberate or voluntary act, intentionally kills another. In order to amount to murder, the killing must be:

a) The result of a deliberate or voluntary act, that is to say it must not be by accident. An accidental killing is no offence;

b) Intentional, that is to say, the act which results in death must have been done with the intention either to kill or to inflict really serious bodily injury.

4. Of course, there are circumstances in which even a deliberate or intentional killing is not necessarily murder. So for example, a deliberate and intentional killing done as a result of legal provocation is not murder but manslaughter and such killing s done in lawful self-defence is no offence at all.

4. The prosecution must prove all the elements of the offence. So it must prove:

a) The death of the deceased named;

b) That it was the accused who killed him;

c) By a voluntary or deliberate act, i.e. not by accident;

d) That the accused intended either to kill the deceased or to inflict really serious bodily injury to him. This intention MUST be proved like any other fact. Notwithstanding the need to prove intention it must be borne in mind that "Intention" is not capable of positive proof. The only practical way of proving a person's intention is by inferring it from his words or conduct. Thus, in the absence of evidence to the contrary, a jury is entitled to regard the accused as a responsible person capable of reasoning. In order to discover his intention, therefore, in the absence of expressed intention, one must look at what a person did and ask, whether as an ordinary responsible person, he must have known that death or serious bodily injury would result from his actions. If one finds that the accused must have so known, then one may infer that the accused person intended the result and this would be satisfactory proof of the intention required to establish the charge of murder. It must be borne in mind that it is the actual intention that the jury is trying to ascertain and so anything relevant to that determination must be carefully considered. I have set out the foregoing ingredients of the charge of murder despite being conscious of the particular circumstances of this case and the nature of the evidence

adduced. For whatever the evidence, it is clear that the discrete ingredients of the offence must be proved and the onus for proving that remains on the Prosecution.

Burden and Standard of Proof

6. I remind myself that the burden of proving that the defendant is guilty is, and always remains, on the prosecution. It never shifts. Concomitant with that proposition is the proposition that the defendant does not have to prove anything. In this case, the defendant has chosen to give evidence and his evidence is to be assessed like any other evidence. He does not have to convince you of the truth of his evidence. It is for the prosecution to prove guilt so that I can be sure that this accused committed this crime.

7. At the commencement of the trial in his opening address, counsel for the Crown opened to the fact that the crown would be relying on circumstantial evidence in the absence of direct evidence of the accused having committed this brutal murder. In that regard, it has adduced evidence of fingerprint experts and an expert in foot impressions. In relation to both, the defence sought to have the evidence excluded either on the basis that the methodology in either case ought not to be regarded as scientific or on the basis that the purported experts were not experts who should be allowed to give evidence on the ultimate issue as to whether fingerprints were those of the defendant or whether foot impressions

were those of the defendant. In both cases I denied the applications and ruled that the evidence was admissible. I pause here to note that with respect to the evidence of the fingerprints experts, Clare Hasart and William McKay, the court was satisfied as to their expertise. I also reiterate for the purposes of this judgment that as I have ruled on the preliminary application to exclude fingerprint evidence, despite recent high profile cases in which misattribution has led to questioning the reliability of the fingerprint methodology, it remains an important and credible weapon in the arsenal of law enforcement, and its continued acceptance even with the abandonment of numeric standards in many jurisdictions, attests to this.

8. The circumstantial evidence of foot impressions, while I am satisfied that it is also well established as a useful tool for comparison and elimination purposes is, even on the evidence of the expert Robert Kennedy, less exact. Its hypothetical underpinnings would seem only to allow for one of two conclusions upon the comparison of foot impressions: it could not be that the compared impressions were from the same person or it COULD be that they are from the same person. It is also relevant that at the end of his evidence, Mr. Robert Kennedy would say that the comparison provided support, as opposed to support for the view that the socked impression at the crime scene could have been made by the person from whom the inked impression had been taken, namely the accused. In the circumstances where so much of the case against the accused turns on circumstantial evidence, I adopt the view expressed by Henry L.J. in the

unreported case of R v Stephens and Clarke (95/1758/82) that one should in summing up to a jury give a full direction on this type of evidence. Although I also function as jury in this case, I believe that it is correct to set out the direction so that no legitimate argument may be raised that the full implications of the evidence being circumstantial had not been considered.

9. The Crown has, as I have said, indicated that is relying on circumstantial evidence in this case. Most often a jury is asked to find some fact proven by direct evidence. For example, there may be reliable evidence from a witness who saw a defendant commit a crime. There may be as well, a video recording of the incident which clearly demonstrates his guilt, or there is reliable evidence of the defendant himself having admitted to it. These are all good examples of direct evidence against him.

10. On the other hand, it is often the case that direct evidence of a crime is not available, and the crown relies exclusively on circumstantial evidence to prove guilt. In such cases, the crown is relying upon the evidence of various circumstances relating to the crime and the defendant, that they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is to be remembered that it is not necessary for the evidence to provide an answer for all the questions raised in a case. Indeed, it would be an unusual case where a jury could say: "We know everything that there is to know

about this case". However, the evidence must lead to the sure conclusion that the charge which the defendant faces, has been proved against him.

11. It is clear that circumstantial evidence can be powerful evidence, but it is important that it be examined with care. In my function as jury, I must also consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on the basis of circumstantial evidence I must consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.

12. Finally, I need to remind myself that I have to be careful to distinguish between arriving at conclusions based upon reliable circumstantial evidence and mere speculation. While it is possible to draw reasonable inferences from given facts, no one is allowed to speculate.

13. The evidence which has been led before this court over the course of the last few weeks, is still fresh in my mind and I do not propose to rehearse in detail what every witness said, nor is it crucial that I should do so. However, it would not be wise to pronounce a verdict without at least getting out of the way those facts which are not in any dispute.

14. The deceased was Martin Gareau. His body was identified to the pathologist doing the autopsy by his cousins, Gilles and Guy Langlois. The lifeless body of the deceased was discovered sometime after 7:00 a.m. on morning of Tuesday May 20, 2008 by his cousins Gilles and Guy Langlois at his residence at 109 Sea Spray Drive in Beach Bay, Bodden Town, Grand Cayman. He had failed to turn up for work or answer his telephone and out of concern, Gilles Langlois had asked his brother Guy Langlois to visit the premises at which the deceased resided in order to check on the situation there. The deceased had been last spoken to by one of the cousins at around 1:00 p.m. on Sunday May 18, 2008 and was expected to join along with other members of the family on that evening, at a family gathering to celebrate the birthdays of some family members including that of the deceased.

15. It is also the evidence that a post mortem examination was performed on the body by Forensic pathologist, Bruce Allen Hyma, Chief Medical Examiner of Miami, Dade County, Florida in the United States of America on the 21st day of May, 2008, a day after the body had been discovered. Dr. Hyma has conducted over 4,000 autopsies in his career during the course of which he has operated in Miami Dade County, the Turks and Caicos Islands and the Cayman Islands. He reported that he found injuries that consisted of blunt and sharp trauma. He noted a cluster of wounds on the right side of the scalp and beneath those wounds the skull had a depressed fracture that covered about a five inch area. The skull beneath those injuries was "crushed and depressed". Bones from that facture site

had been "driven into the brain. Fracture lines continue from the fracture site to the base of the skull on the right side and to the back of the skull". The pathologist opined that "the crush injury to the skull resulted from multiple impacts by an object or objects to the right side of the head. That injury is not from a fall but from multiple impacts. These multiple injuries were the fatal wounds". There were other areas of blunt trauma injuries noted on the chest and the extremities of the deceased. It was the opinion of the pathologist that the deceased died from "multiple blunt and sharp force injuries". It was also his testimony that death would have occurred sometime between 24 and 72 hours before. Given his findings in relation to the level of lividity and decomposition, he would rule out the possibility of death having occurred more than 72 hours before.

16. Apart from Dr. Hyma, the Prosecution also adduced evidence of two fingerprint experts, Clare Hasart and William Mackay who offered the opinion that the two fingerprints found at the scene of the murder were those of the accused man. It will be opportune here to recall that at the commencement of the trial, the defence had made an application that the court rule as inadmissible, the fingerprint evidence. After full argument on this issue I ruled that the evidence was admissible. It is also to be noted that the defence had as well, made an unsuccessful application to exclude the evidence of one Robert Kennedy, in relation to a comparison of socked foot impressions lifted from the crime scene with inked barefoot impressions of the feet of the defendant. The evidence of

Mr. Kennedy was that, based upon the methodology which he uses for comparison of foot impressions, it would be his view that the person whose barefoot impression was provided, i.e. the defendant, could have made the socked impression with which he had been provided.

17. The crown also sought to adduce from the defendant himself when he gave evidence that he had been short of money having lost his job in February 2008 when he was dismissed by his then employers, CUC. While it was recognized that the crown does not have to provide a motive, it nevertheless proffered this evidence as being an important consideration in the court coming to a decision on the guilt of this accused.

18. The crown also sought to establish that the accused had the opportunity to commit this heinous act. In that regard, the cross examination of the accused when he gave evidence was directed at demonstrating that there was an unaccounted for period of about two (2) hours on that fateful Sunday afternoon when the defendant's whereabouts were unknown. According to the defendant, he had remained at his sister Jenny Miller's house from the time he had finished washing cars until he went to pick up his girl friend Yesenia Perez at between 3:00 p.m. and 4:00 p.m. According to Jenny however, there was a period of about two (2) hours when she did not see him and thereafter when she did see him he was in wet clothes having gone to the beach nearby.

19. There was another apparent inconsistency in the accounts given by the accused. In one of his statements to the police, he had stated that his brother in law had dropped him off to pick up his sister Melissa's car. In his testimony before this court he had stated that he had had Melissa's car from about the Friday and that he had gone to pick up Yesenia in that car. The fact is that there is no evidence which contradicts the evidence of the accused, his girl friend Yesenia Perez and the sister of the accused, Melissa, about his movements from the time he picked up Yesenia at about 4:00 p.m. on Sunday until he and Yesenia checked out of the Marriot Courtyard Hotel (into which they had checked in that Sunday afternoon) on Tuesday morning, and for which stay, the accused agreed he had paid cash.

20. The crown submitted that the circumstantial evidence of the estimated time of death, the unexplained or conflicted explanations as to the defendant's whereabouts for a period on Sunday afternoon; the payment for hotel and other expenses in cash when the defendant admittedly had financial problems and the evidence of the defendant's fingerprints at the scene and a foot impression which could be his, taken at the same place, all combine to provide the evidence from which the court could draw irresistible inferences so that it was sure that the defendant had killed the deceased.

21. For the defendant it was submitted in closing submissions that the crown had failed to provide any direct evidence linking the defendant with the crime. In that regard, the defendant's counsel challenged the credibility of the fingerprint

evidence as well as the evidence on the foot comparison of socked foot impression with the inked barefoot impression of the defendant's feet. It was submitted that the fingerprint evidence should be discounted as inherently unreliable and it was even suggested that the fact that the accused man had been at the deceased's house about three (3) weeks before the murder, a fact which was established by the evidence, could have accounted for his print being found at the crime scene. Thus, for example, defence counsel valiantly, but unsuccessfully, sought to get either or both of the experts, Hasart and MacKay, to concede that the there was a substance which seemed to overlay the ridges on the exhibits RP22 and RP 23, the fingerprint exhibits, and that accordingly the print pre-existed the substance. It was the evidence of the experts that the print was a "stamped" mark which indicated the substance was on the finger when it came into contact with the surface from which the print was lifted.

22. It was also submitted that there was no value in the conclusion of Robert Beniah Kennedy that the comparison "supported" the view that the socked impression could have been made by the accused. This was in circumstances where the witness accepted as an expert, indicated that he could support that hypothesis but could not "strongly" support it in view of the lack of clarity of the exhibits that he had to compare.

23. The defendant's counsel also asks in his closing submissions that consideration be given to the fact that there was no DNA match with the DNA of the accused

among the numerous samples and swabs sent for DNA testing. It was also to be noted that Dr. Hyma had said in his testimony, subject to a number of variable factors, he would expect signs of rigor mortis to fade between 18 to 24 hours after death. It was the evidence of D/S Codner that when on Tuesday 20th May, 2008 she assisted the funeral home personnel to take the body away and in order to place bags over the hands of the deceased, there was some resistance as she tried to straighten out the arms. As the witness Dr. Hyma had stated, the only way to give a precise time of death would be to have someone present when a person dies. But given his evidence as aforesaid, a jury would be entitled to take the resistance noted by D/S Codner into consideration in arriving at their verdict.

24. Acting in my capacity as jury, I have to give serious consideration to the presence of a defendant's fingerprints at the scene of a crime as this would be normally powerful evidence of his presence there. Where the crown relies upon fingerprint evidence as a substantial plank in the chain of circumstantial evidence linking the accused with an offence, it is necessary to warn the jury and I so warn myself, that fingerprint evidence is evidence of opinion, that the evidence is not conclusive, and that it is for the jury to determine guilt or otherwise in light of all the evidence.

25. I would wish to state that nothing that has been stated in this case or in this summing up is to be interpreted to cast any doubt upon the validity or admissibility of fingerprint evidence and indeed foot impression comparisons

where properly executed, being accepted as good evidence as a matter of law. I also want to say that while the officers involved with the investigation appear to have followed the processes which they understood to be guiding their actions, it would seem to me that there is a need to document some of the protocols which govern for example the way exhibit evidence moves between offices and officers, for example the Scenes of Crimes Office and the Fingerprint Office, and out of the office to consultants to the department. Everything must be done to ensure the continuity of the security of evidence and the integrity of the processes.

26. The court also heard evidence from several other witnesses including Detective Constable Ronnie Pollard, Detective Sergeant Marcia Codner, and Detective Inspector Kim Evans. All had various levels of involvement in the investigation of the crime with Detective Evans having the role of Senior Investigating Officer and the Deputy Senior Investigating Officer being Sergeant Dwayne Jones. The involvement of these persons was in terms of the collection of evidence at the crime scene, the interviewing of persons of interest in relation thereto and ensuring so far as it was within their respective roles and positions, the integrity of the investigative process. In that regard, I say that some of the evidence led by the defence about the failure to hold an identification parade and the evidence of Mr. Fraser Hughes were of no assistance in the determination of this matter. Nor was there in my view any evidential value derived from the evidence of Constable Von Dante Leslie.

27. At the end of the day the evidence has to be looked at in its totality against the offence for which the accused is charged. Stripped to its bare essentials, the case for the crown is that sometime between Sunday May 18, 2008, at around 1:23 p.m. when the deceased spoke to his cousin, and Tuesday morning when the body was discovered, the deceased was brutally murdered by the defendant because he was in need of money. Accepting the evidence of Dr. Hyma that the extent of lividity indicated that the body was in the position in which it was found for at least eight (8) to twelve (12) hours, that fact would narrow the window for this murder to a period ending around midnight on the Monday May 19, 2008.

28. In looking at the detailed account of the injuries outlined by Dr. Hyma, it is a clear inference that the deceased was severely beaten by his assailant or, one may be entitled to wonder, assailants. The pathologist said he was six feet one inch tall (6'1") and weighed over two hundred pounds. His cousin had described him as strong and able to do the work of two men. There was some evidence that the investigators had suspected that the assailant or assailants had probably received an injury during the attack. There was no evidence led in this court however which indicated a struggle between the deceased and his assailant or assailants. Without seeming to speculate, it is clearly open to a jury to consider the circumstances in which an attack of such brutality could have been carried out with no other evidence except the two latent fingerprints, the subject of the expert evidence of Clare Hasart and William MacKay, being found on the scene. Further, I accept that as the cases of ***Culpepper v The State*** [2000] W.I.R. 421

and ***Langan v. HM Advocate*** 1989 J.C. 132 indicate, a single print is sufficient to lead to a conviction even in cases of murder. It seems clear that if the fingerprint evidence is accepted, and I harbour no reasonable doubt that it is good evidence, the one thing which would be certain is that the accused was in the premises at some time before the blood of the deceased was totally dry. I note in this connection the evidence of DS Codner, that in order to ensure that blood is absolutely dry, one uses a hair dryer to make absolutely sure.

29. Is it possible to extrapolate from that presence that the accused murdered the deceased? That is the question.

30. Let me say that when the defendant gave evidence, there were areas where his testimony was less than credible. And it was not helped by the testimony of Jenny Miller, his sister who says she did not see him for two (2) hours until she saw him wet and purportedly returning from the beach. His inconsistent recollection about whether he had told the police that he was going to the beach and whether he drove his sister Melissa's car to pick up his girl friend or was driven to her home by his brother in law do not serve his case well. Nor is there any substantial basis for the defence counsel's suggestions that the deceased and the accused were "good friends". They had apparently met in March and on the evidence had met on probably three other occasions. It may be that the deceased's interest in Maria De La Rosa would have been a basis for their relating to each other, given that the girl friend of the accused shared accommodation with

Maria. But it seems to me to require a quantum leap to any conclusion of a fast friendship between the two men. But as I have noted before, there is, no duty on a defendant to prove anything. It is for the prosecution to prove its case to the extent that a jury can be sure. Anything less must result in an acquittal.

31. The theory that this vile act, some amount of tidying up and the disposal of the instruments used to inflict the wounds, took place, possibly within the two (2) hour time frame on that fateful Sunday afternoon with the intention of robbing the victim who we are told had been paid on the Friday and had cashed his cheque on the Saturday is plausible. In passing, it should be noted that there was no evidence led about the defendant having had money, except that he apparently cashed his cheque on the Saturday. It may be that the defendant may be aware of, and may even have participated in the circumstances of the death of the deceased. It is not my role to speculate and I won't. Plausibility, however, is not an adequate basis for a criminal conviction and certainly the standard is enhanced when the charge is one of murder. It is to the charge that is laid and the evidence that is adduced, that a jury must look to determine whether there is proof, beyond a reasonable doubt, so that it can be sure that the defendant is indeed guilty of the crime charged. It is to be remembered that the particulars in the indictment are that "Josue Alexander Carillo-Perez on a day unknown between the 16th and 20th of May 2008 at 109 Sea Spray Drive, Beach Bay, Bodden Town, Grand Cayman, murdered Martin Gareau". It is implicit in these particulars of the offence that it

was the act of the accused. For the particulars do not recite that he did it in concert "with other person or persons unknown".

32. In that regard, I take cognizance of the fact that in the Trinidad case of Culpepper, the window during which the murder must have been committed was a few hours. Here, the window was almost two (2) days. I ask myself whether bearing in mind all the evidence that has been elicited, whether any reasonable doubt remains. Can I be sure that the accused murdered the deceased accepting the evidence which has been led? In answering that question, I return to the foundations of our jurisprudence and the bedrock of our Common law system.

33. The great English jurist William Blackstone is alleged to have said: "Better that ten guilty persons escape, than that one innocent suffer". It is undoubtedly true that he was not the originator of this conceptual framework. However, the ratio 10:1, now known as the "Blackstone ratio," expresses the classic Anglo-American ideas of the presumption of innocence and (insofar as the statement speaks of "guilt," "conviction," "imprisonment," and the like) the burden of proof "beyond a reasonable doubt" that prevails in criminal law, certainly among countries that have followed the Common law system of jurisprudence.

34. It is therefore to that jurisprudential bedrock that I return and seek refuge. In some Civil Law jurisdictions there are verdicts of "Not Proven" in relation to a particular defendant. That is a concept which is alien to the Common Law in its

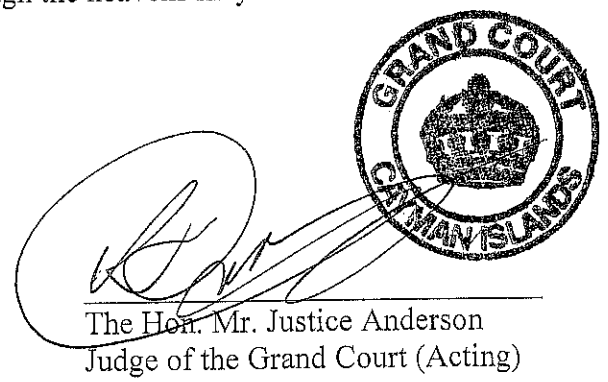
robust insistence on the prosecution having to satisfy the burden of proof to the required standard. Regrettably, however much I may believe that there is a possibility that the accused may have been involved in this most dastardly act, I cannot say "I am sure" that he murdered Martin Gareau, and must accordingly return a verdict of "Not Guilty".

35. I hope that as these proceedings end, it will not be considered inappropriate to make the following observation. It seems clear that in these Islands, as indeed in other small societies worldwide, the unstoppable imperative of the Global Village and the inevitability of being caught up in the new paradigm where the old order of relative peace and tranquility has changed yielding place to a new more crass and unyielding crime and violence, we are witnessing the end of the Age of Innocence. Martin Luther King Junior in a speech on April 4, 1967 said:

> We are now faced with the fact, my friends, that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history, there is such a thing as being too late. Procrastination is still the thief of time. Life often leaves us standing bare, naked, and dejected with a lost opportunity. The tide in the affairs of men does not remain at flood -- it ebbs. We may cry out desperately for time to pause in her passage, but time is adamant to every plea and rushes on. Over the bleached bones and jumbled residues of numerous civilizations are written the pathetic words, "Too late." There is an invisible book of life that faithfully records our vigilance or our neglect. Omar Khayyam is right: "The moving finger writes, and having writ moves on; nor all your Piety nor Wit Shall lure it back to cancel half a line, Nor all your tears wash out a Word of it".

35. Caymanians must resolve at this time that they will not allow the monster of crime to intimidate and overwhelm them. But that resolve must remain ever

rooted in an abiding commitment to the principle that while wrongdoing must be turned back, justice must be done though the heavens may fall.



Dated 13th October 2009

The Hon. Mr. Justice Anderson
Judge of the Grand Court (Acting)