

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

3 **IND. NO: 52 of 2022**

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5 **R**

6
7 **v.**

8
9 **FERNANDO MOTA MENDES**



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12 **Appearances:**

**Ms. Toyin Salako Crown Counsel for the
Prosecution**

**Ms. Lee Halliday-Davis of Brady Law for the
Defence**

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18 **Before:**

The Hon. Mr. Justice St John-Stevens, (Actg.)

19 **Hearing Date:**

17th February 2023

20 **Delivery of Judgment:**

17th March 2023

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23 **HEADNOTE**

24 *Criminal Law – Section 85A (9) of the Criminal Procedure Code*
25 *– Application to Dismiss.*
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28 **JUDGMENT ON AN APPLICATION TO DISMISS**
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- 1 1. This Defendant, Fernando Mota Mendes, was transmitted to the Grand Court in relation
2 to a total of 12 counts.
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- 4 2. The defence on behalf of the defendant has submitted an application to dismiss those
5 counts.
6
- 7 3. The Court has had the benefit of reading detailed written submissions which were
8 augmented by oral submissions on the 17th February 2023.
9
- 10 4. For completeness, the application from counsel on behalf of the defendant, Mrs. Lee
11 Halliday-Davis, is dated the 6th February 2023. In response, the document from the
12 Prosecution is dated the 17th February and the application was heard on that date.
13
- 14 5. During the course of the oral submissions the ambit of the application was significantly
15 reduced as the Crown accepted that there was insufficient evidence to proceed on eight
16 (8) Counts – Counts 1, 2, 3, 4, 5, 6, 8, & 10. Therefore, four (4) Counts remained on the
17 indictment – those being Counts 7, 9, 11 and 12.
18
- 19 6. Count 12 was, in fact, a general deficiency Count. At paragraph 63 of the Crown’s
20 written submissions the following was stated:
21
22 *“Count 12 will be amended to reflect the Crown’s decision in respect to*
23 *counts 1, 2, 3, 4, 5, 6, 8 and 10.”*
24
- 25 7. Before I outline briefly the factual matrix, I make it clear that, because of the extensive
26 written submissions I don’t intend to rehearse all the detail.
27
- 28 8. But what is clear and incontrovertible at this stage is that the Court must reflect on the
29 position in relation to the submission of insufficient evidence on an application to
30 dismiss. The law is well settled in that respect.
31
- 32 9. In terms of an application of that law, the *Criminal Procedure Code* (2021 Revision)
33 s.85A(9) provides as follows:



1 14. Accordingly, the Court reminds itself that the test is not whether every jury properly
2 directed would convict but it is whether a jury properly directed could, on all evidence
3 at this stage. This test is analogous to *Galbraith* and the principles flowing from that.

4
5 15. In terms of the facts of this case, they can be briefly set out for the purposes of this
6 Judgment.

7
8 16. In 2019 Denise Robbins and another individual purchased the Pink Beach House located
9 at 972 Rum Point Drive, North Side. It transpired that after that they decided to lease or
10 rent that property.

11
12 17. In 2019 this defendant was introduced to Denise Robbins who had been the owner. The
13 Defendant assisted in leasing or renting that property.

14
15 18. There came a point in time when Denise Robbins, the owner of the property, asked the
16 defendant, Mr. Mendes, to consider taking on the cleaning and maintenance of the Pink
17 House. The owner Denise Robbins agreed to that, as did the defendant. There was no
18 form of contact. However, he was required, the prosecution say, to inform the owners
19 and direct any possible rental through Karen Anderson who had been the previous
20 owner.

21
22 19. The original counts on the indictment were a number of counts in relation to dishonestly
23 obtaining money or cash by falsely representing that he, the defendant, was entitled to
24 the rental income from the Pink Beach House over a period. Those Counts were
25 carefully reconsidered by the Prosecution, and it was ultimately accepted by the
26 Prosecution that there was insufficiency of evidence in relation to the eight (8) counts I
27 have already set out in this Judgment¹.

28
29 20. The prosecution submits, however, that there is still sufficient evidence in relation to the
30 remaining 3 substantive counts and the count relating to a general deficiency count,
31 which would be amended to read “*the sum of \$10,000*” rather than the original figure.
32



¹ Please refer to paragraph 5.



1 21. As set out helpfully in Ms Halliday-Davis' response on 21st February after the oral
2 submissions, I note:

3 *“Following the submissions by the prosecution on Friday, the case is now reduced*
4 *to the following propositions.*

5 1. *That Ms Robbins, in the WhatsApp message dated 6th April 2021, withdrew*
6 *all permission from the defendant to deal with the Pink Beach House.*

7
8 2. *That the defendant acted dishonestly when he described himself to the*
9 *person who was going to rent that property as the owner, and thereafter*
10 *intended to permanently deprive the owners of rental income.”*

11
12 22. What became clear during the course of oral submissions is that one of the WhatsApp
13 messages was effectively the tipping point in this case – in the sense that the Crown
14 accepted that, before that date, this defendant had been entitled to act on behalf of the
15 owners in terms of renting the property.

16
17 23. That position was arrived at because the owner of the property, in her first statement,
18 denied that the defendant had any authority whatsoever to rent the property or have any
19 dealings with the rent. However, following that, the owner made a subsequent statement
20 resiling from that position, saying that it was clear from a WhatsApp message dated the
21 6th April at 18:50 when she told the defendant in that message that *‘from now on we just*
22 *need to send everyone through Karen. Me included. I will speak to Karen and let her*
23 *know that I will hopefully accommodate her and her friends etc.’*

24
25 24. The Crown says from that point on it is clear to the defendant that he had no authority
26 to hold himself out as having the permission of the owner to rent the property, however,
27 nonetheless, thereafter, he continued to do so and kept those monies from it as reflected
28 in those counts.

29
30 25. In terms of whether he held himself out to be the owner is again an issue that was
31 considered during the course of legal argument.

32



1 26. Terrence McGlashan who made a statement at page 33 of the bundle, said that when he
2 had dealings with the defendant, the defendant told him that he had purchased the house
3 in 2020. And, at the 2nd page, he said that Mr. Fernando Mendes throughout, portrayed
4 himself as the owner of the Pink House. Mr. McGlashan said that at no point did the
5 defendant ever say that he was the cleaner or property manager. He negotiated the lease,
6 and he had no authority to do so.

7
8 27. That Lease, which is set out at page 156 of the bundle, was also subject to scrutiny by
9 the parties and the Court.

10
11 28. That Lease sets out the agreement between “*Guardian Properties/Mr. Fernando*
12 *Mendes, the owners, Kelly McGlashan, the tenants.*” That (set out in that way) clearly
13 would be open to interpretation, that is, whether the comma after Fernando Mendes and
14 his company, Guardian Properties, implied that the defendant and or his company were
15 the owners. It is noted that “owners” is recorded in the plural form.

16
17 29. So that was the tipping point of the application and the basis of the concessions by the
18 Crown.

19
20 30. In the further written submissions by Ms. Halliday-Davis dated 21st February, I have
21 been greatly assisted by the other emails and documents in the bundles, which the
22 defense say, put a different gloss on the Crown’s contention that this defendant was
23 holding himself out as the owner, and/or taking monies from the rental and not paying
24 back the owner, and that this was done without her knowledge. I have considered these
25 documents and emails carefully.

26
27 31. It is also of note that in relation to Counts 9 & 11 again, the submissions are that the
28 property was damaged and no one ever lived there. I take account of all those matters
29 set out in that second document from the Defence.

30
31 32. The Prosecution’s response is that the contention and interpretation in those documents,
32 the tipping point of the 6th April WhatsApp message, the documents supplied or alluded
33 to by the defense, the interpretation of those messages between the defendant and the
34 prosecution witnesses, the involvement of the defendant, whether the defendant was

1 authorized after that date to act, the circumstances under which the defendant accepted
2 payments and, whether they were paid to the defendant and through to Ms Robbins, are
3 all, in fact, matters for the jury to consider and to determine their position in the case.

4
5 33. That Mr. McGlashan's evidence, they say, is clear as to what he was told about the Pink
6 House; the defendant was holding himself as the owner of that property and therefore
7 authorised to enter into a rental agreement with him and also to advertise and enter into
8 an agreement with Mr. Cano and Mr. Ballantyne. Those agreements post the 6th April,
9 which I described as a tipping point, are for the jury, the Crown say.

10
11 34. The Court, having considered all the written and oral submissions carefully, finds that
12 there is sufficient evidence in relation to those counts and the general deficiency count,
13 for the case to proceed against the defendant, that is on Counts 7, 9, 11, & the general
14 deficiency count – i.e. Count 12. I conclude that the representations made by the Defence
15 are for the jury as, properly directed, it is open to the jury to find that it was clear to the
16 defendant that he had no authority to lease that property.

17
18 35. Therefore, I conclude as follows:

- 19
20 a. The application by the defence is upheld, but only in terms of the Crown accepting
21 the insufficiencies of the evidence in the eight (8) counts identified – i.e. Counts 1,
22 2, 3, 4, 5, 6, 8, & 10.
23 b. The application by the Defence is rejected in relation to Counts 7, 9, 11 & 12.

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25
26 **Dated this the 17th March 2023**



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29 **Justice St. John-Stevens**
30 **Acting Judge of the Grand Court**