



IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 19 and 20 of 2018

IND.110/2016 & IND 109/2016

SC#06041/2016 & SC#06042/2016

BETWEEN:

MADEINYS EBANKS-POL

ADRIAN ADELA GEA

Appellants

- and -

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon C Dennis Morrison, Justice of Appeal

Date of Hearing: 4th September 2020

Appearances: Mr. Keith Myers, Attorney at Law for both Appellants
Mr. Scott Wainwright, Office of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 4th September 2020 and Approved for Release 3rd February 2021

Rt. Hon Sir John Goldring, President

1. On 23 March 2018, both Applicants were convicted of robbery by Acting Justice Hellman following a judge alone trial. The Applicant Adrian Gea was acquitted of possession of an imitation firearm. On 22 June 2018, each was sentenced to 12 years' imprisonment. Each seeks leave to appeal against conviction and sentence. Mr Myers, who represents them both, has indicated that his stronger point in the appeal relates to sentence.

The facts

2. On the morning of Wednesday, 18 November 2015, at about 10:45AM, an armed robbery took place at Mitzi's Fine Jewelry store on West Bay Road in Grand Cayman. Jewellery to the value of some CI \$516,000 was stolen.
3. The Applicant Ms. Ebanks Pol was a former employee of Mitzi's. On 13 November 2015, some five days before the robbery, she had been dismissed for theft. She and Adrian Gea, the other Applicant, were close friends. It was the Crown's case that she was the lookout when the robbery took place. Its primary case was that Adrian Gea, armed with a firearm, entered the shop and took the jewellery. The Crown did postulate an alternative approach in response to a question from the Court, namely, as the judge put it in para.5 of his judgment, that:

"... if the Court cannot be satisfied that Mr Gea was the robber, it can be satisfied that he played some part in the robbery, albeit that if he was not the robber his precise role is unknown."

4. However, the judge was sure that Adrian Gea was the robber. We shall approach the case on that basis. It was also the Crown's case that another or others may well have been involved. The judge, in his conclusions, agreed.
5. As we relate the facts, it will become apparent there was overall a powerful circumstantial case against each of these Applicants. We cannot accept, as Mr Myers has submitted, these convictions were in any way unsafe.
6. The store assistant, Ms. Ebanks Dixon, was present inside the store when a male came in. It was, as we have said, about 10:45AM. She described him as being five foot five or five foot six inches tall, with a light complexion, in his early thirties and clean shaven. He was wearing a black woollen tam on his head.
7. Very shortly after entering the door, the man said, "*This is a holdup*". He had by now pulled the tam over his face to create a mask. He appeared to be holding a firearm. He bound Ms. Ebanks Dixon's hands and feet to a chair in the back room with duct tape. Her mouth was also bound.
8. When some customers came in, the man told Ms. Ebanks Dixon to get rid of them. She was untied for that purpose and went to deal with them. That took 15 or 20 minutes. While doing so, Ms.

Ebanks-Pol observed a small light blue car in the parking lot facing the store. There was a dark haired female lying down in the back of the car looking up towards the store. That female was wearing dark glasses. At trial, it was accepted that Ms. Ebanks Pol was the female in the back of the vehicle. It was also accepted the vehicle (a 'Tivoli') had been rented by her.

9. Approximately five minutes later, Ms. Ebanks Pol entered the store wearing dark glasses. Ms. Ebanks Dixon knew her. Ms. Ebanks Pol asked where Mitzi Callan, the store proprietor, was. That is something which the robber had previously also asked. She was told that Mitzi was not present and asked to leave, which she did. She was described as looking upset and nervous.
10. Ms. Ebanks Dixon returned to the back of the store. The man instructed her to provide the cash, which she did. He then smashed the showcases with a crowbar. He placed several items of jewellery into a backpack. Glass was all over the floors and the shelves. He left.
11. Ms. Callan came back at about 12:45 pm. She called the police. A police helicopter was deployed. A small, also light blue car was spotted being driven at speed and erratically a short distance from the scene. This vehicle was not the Tivoli driven by Ms. Ebanks Pol. It was a Chevrolet Spark vehicle being driven by Mr. Gea.
12. The Chevrolet was owned by Williams Rodriguez, the brother of Ms. Ebanks Pol. The day before the robbery, she had asked him if she could borrow the vehicle. He agreed. On the morning of the robbery, at 7:39 am, Ms. Ebanks Pol contacted her brother and inquired what type of fuel the vehicle used.
13. The police intercepted Mr. Gea in the Chevrolet. He claimed he had found the keys and stolen it. That of course was untrue.
14. The vehicle was on false plates. The true plates were recovered from under the carpet in the boot. The false plates had been taken from a Honda vehicle linked to Ms. Ebanks Pol. That Honda vehicle, minus those plates, was later found at her home. When the Chevrolet was searched, a number of incriminating articles were discovered. They included a black hoodie, a pair of gloves, a black and grey Puma backpack, and a black mask.
15. We should add, at some time after 12:00 noon a witness called Kelly Darling saw a light blue car with a woman in it by the shop. The judge found that was Ms. Ebanks Pol in her hire car, although it is right to say Ms. Kelly failed to identify the hire car when shown a number of different vehicles.

That woman was looking at Mitzi's. She asked to use Ms. Darling's phone. She said her phone had run out of credit. Ms. Darling refused. She noticed there were two other phones in the vehicle.

The DNA Analysis

16. The items recovered from the Chevrolet were submitted for DNA analysis.

The Gloves

17. The gloves had a partial multiple source DNA profile obtained. Both Applicants were linked to that profile. Assuming four contributors, and based on the Hispanic population, it was estimated to be 33 million times more likely to observe the multiple source DNA profile if Mr. Gea and three unknown individuals were contributors, rather than four unknown, unrelated individuals.
18. It was also estimated to be 1.8 million times more likely to observe such a multiple source DNA profile if Ms. Ebanks Pol and three unknown individuals were contributors, as opposed to four unknown, unrelated individuals.

The Mask

19. Present on it was some bodily fluid. The stain could be seen by an alternative light source. A partial multiple source DNA profile was obtained from this swab on the mask. Both applicants were linked to the profile obtained. Assuming four contributors and based on the same population as previously referred to, it was estimated to be 2.3 million times more likely to observe that profile if Mr. Gea and three unknown individuals were contributors than if four unknown, unrelated individuals were.
20. And as far as Ms. Ebanks Pol was concerned, it was estimated to be 150,000 times more likely.

The Black Hoodie

21. A partial multiple source DNA profile was obtained from that. It was not possible to make any meaningful comparison between this partial DNA profile and those obtained from the Applicants. It was, however, possible to obtain a profile from a swab from the inside of the hood, the neck, and cuff areas of the hoodie. Assuming three contributors, again on the same basis, it was estimated to be 310 million times more likely to observe the partial multiple source DNA profile if Mr. Gea and two unknown contributors were contributors, rather than three unknown, unrelated individuals.
22. Assuming four contributors, and again on the same basis, it was estimated to be 13 million times more likely that such a profile would be observed if Ms. Ebanks Pol and three unknown individuals were contributors, as opposed to four unknown, unrelated individuals.

23. There was also glass comparison evidence. The judge placed particular reliance on this. Glass fragments were recovered from the shoes and clothing of Mr. Gea. They were also recovered from the driver's side foot-well of the vehicle that he had been driving when arrested. They were compared with a fragment of the scene of the robbery.
24. Mr. Bommarito was the forensic scientist who gave evidence. He described his findings in terms of different levels of association.
25. As material to this case, Level II association was a level from which items were consistent in observed and measured physical properties and/or chemical composition and shared atypical characteristics which would not be expected to be readily available in the population of this evidence type: in other words, unusual. Level III association was an association in which items were consistent and originated from the same source because of their similar physical and chemical composition. And Level IV was similar, but related to items which were more common, and therefore the evidence was of less cogency.
26. Mr. Bommarito found there was a Level II association between a glass fragment from the driver's side foot-well of the vehicle and samples from the scene; a similar association between a fragment from Mr. Gea's left foot and known sample of the scene; a Level IV association between a glass fragment from Mr Gea's trousers and samples from the scene; a Level III association between a fragment from the black hoodie and sample at the scene.
27. There was a second glass fragment from the hoodie which could be eliminated as that from the scene.
28. There was expert evidence called by the defence. Joanne Pryke disputed Mr. Bommarito's findings.
29. It was on 24 November 2015, at about 11:30PM, that a witness called Jessica Ragsdale was at a condominium in Rum Point when she observed a woman leaning against the wall outside. That woman was Ms. Ebanks Pol. She was dirty and wet, crying and distressed. She had some minor injuries. She claimed she had been kidnapped.
30. By this time, Ms. Ebanks Pol was wanted for the robbery. She was arrested next morning.
31. She was found to have some minor soft issue injuries to her leg and face.

32. Mr. Gea was interviewed under caution. He made no comment in relation to the vast majority of questions put to him.
33. Ms. Ebanks Pol was also interviewed. She stated that on the morning of the robbery she had gone to Mr. Gea's house to drop off her brother's Chevrolet for Mr. Gea to use.
34. At around midday, she had gone to the jewellery store to collect her salary cheque, and as she was about to drive away, an unknown male got into the vehicle, threatened her with a firearm and ordered her to drive. She was taken to an address in West Bay where she was held. She was moved from place to place. She was ultimately released in the Rum Point area.
35. Ms. Ebanks Dixon attended an identification parade. She did not pick out the Applicant Adrian Gea, albeit she had said in her witness statement that she thought she would be able to; neither did she provide a detailed description of the mask. She said that the robber spoke with a Caymanian accent. Adrian Gea speaks with a Spanish or Cuban accent. These are matters relied upon by Mr. Myers.
36. Neither of the Applicants gave evidence.

The judge's findings

37. The judge set out the facts and his findings comprehensively. He set out his reasoning in detail. We need only refer to some aspects of what he said.
38. The judge said Mr. Gea, some 20 minutes after the robbery, was close, driving erratically and at speed. He was in a vehicle belonging to Ms. Ebanks Pol's brother and with false plates. The clothing recovered from the vehicle was broadly consistent with Ms. Ebanks Dixon's description of the clothing worn by the robber. He said it was a reasonable inference that they were connected to Mr. Gea.
39. The judge accepted the DNA evidence. He said (paragraph 227):

"Absent a satisfactory explanation of Mr. Gea, and notwithstanding his previous good character, on the strength of the foregoing evidence I am satisfied so that I am sure that when the Chevrolet Spark was spotted by the police helicopter Mr. Gea was or had recently been engaged, or was preparing to engage, in some criminal enterprise."

40. He said, perhaps rather generously, that that was not sufficient to link him with the particular crime. He referred, among other things, to Ms. Ebanks Dixon's evidence that the robber spoke with a Caymanian accent and, unlike Mr. Gea, was clean shaven. He referred to the fact that analysis of Mr. Gea's phone revealed that six calls were made at the material time, whereas the evidence from Ms. Ebanks Dixon was that there were two calls made, although (paragraph 229):

"...the prospect of the robber making six calls is not so inherently implausible as to exclude the possibility that he was Mr Gea and is not something from which I derive much assistance one way or the other."

41. As to the evidence of Ms. Ebanks Dixon, he said:

"It is notorious that even confident eyewitnesses can and do make mistakes, and Ms. Ebanks Dixon was recalling events which took place more than two years ago. During the robbery, she would have been under a great deal of stress. Nonetheless, she had a good opportunity to observe the robber over a prolonged period. Her evidence on these points cannot lightly be discounted. That is why the forensic evidence about the glass is so important." (paragraphs 230 and 231).

42. The judge went on to say that he accepted the prosecution expert evidence about the association between the glass fragments in the car and those at the scene of the robbery. He concluded (paragraph 231) that:

"Absent a satisfactory explanation from Mr. Gea of how the glass might have got onto the vehicle mat and his shoe, I could then safely conclude that he was present in the jewellery store when the cabinets were smashed and was therefore the robber, notwithstanding the evidence of Ms. Ebanks Dixon and (for what it is worth on this point) the telephone evidence."

43. The judge acquitted Adrian Gea on Count 2 on the basis that he could not be satisfied that the firearm was an imitation as opposed to a genuine firearm. That seems to us to have overlooked s.2 of the Firearms Act (2008 Revision), which provides:

"Imitation firearm means anything which has the appearance of being a firearm, whether or not it is capable of discharging any shot, bullet or other missile".

44. On the judge's findings, he should have convicted on Count 2.

45. The judge set out his reasoning again, in similar detail, when convicting Ms. Ebanks Pol.

46. He found that she was the person seen by Ms. Darling outside the shop, that she was lying on the backseat of her car and raising her head to look up. She had supplied the Chevrolet and its false number plates. There was the DNA evidence linking Ms. Ebanks Pol to the items to which we have

referred. There was evidence of a telephone conversation of some 17 minutes and 33 seconds at 9:55, shortly before the robbery, which, as the judge put it, then assumed a potentially sinister significance.

47. He rejected the account of the kidnapping on a number of different bases. It assumed a kidnapping very shortly after leaving the retail store. However, Ms. Darling saw her outside in the car. The account was implausible. She was apparently able to use her cell to call a taxi company, and some days later, to make a call in order to pay a water bill. The judge concluded that the interview she gave to the police did not simply consist of lies, but audacious lies. The judge also referred to the fact that her account was not tested in cross-examination. He concluded, so that he was sure, that Ms. Ebanks Pol was the lookout during the robbery.
48. In the grounds of appeal against conviction, Mr. Myers makes a number of points.
49. Firstly, he complains of the alternative basis upon which the Crown, as he put it, advanced its case. We do not agree. The Crown's primary case was absolutely clear. The convictions were on that basis. We can see no possible unfairness. At no time could the Applicants or the First Applicant, have been uncertain as to the primary case against them or him.
50. Secondly, Mr. Myers made a number of points in his written submissions.
51. Mr. Gea was not identified in the identification parade, albeit Ms. Ebanks Dixon saw him for a long time. She did not describe the mask in the sort of detail to be expected. There was the inconsistency in the accents. The DNA evidence might innocently have got on to the items. There was no jewellery or any weapon in the Chevrolet. If he had he been the robber, it is surprising that the Applicant was still so near the scene of the robbery when first seen by the police. It was highly unlikely that the Applicant would have made the calls found on his cell phone. Ms. Ebanks Dixon spoke only of two calls.
52. As to Ms. Ebanks Pol, Mr. Myers submitted that she was never identified as making any threat when in the shop. No jewellery was recovered from her; neither was a firearm. Her conversation with Ms. Darling when outside was inconsistent with being the lookout at a robbery. Her behaviour and appearance when found after the kidnapping was inconsistent with someone involved in a robbery. So too was the fact she had suffered some injury. There was nothing incriminating as far as she was concerned in the DNA evidence. It was her brother's car. It might have been his or a

relative's DNA. The glass evidence was similarly irrelevant to guilt. She gave a detailed account when interviewed.

53. It is worth underlining what this court said in respect of judge alone trials in the case of *Ramoon and Douglas* (CILR 34 and 35 of 2016). In that case, the conclusions of the judge in a judge alone trial were being attacked. In dismissing the appeals against conviction, and the court referred to the comments of Lord Hughes when giving the opinion of the Privy Council in *R v Crawford* (2015) UKPC 44, at para. 9. They bear repetition:

"There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of the trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in The Hontestroom (1927) AC 37, at 47 48:

"What then is the real effect on the hearing in the Court of Appeal of the fact that the trial judge saw and heard the witnesses?

... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at...

.....

The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone, with, of course, appropriate consideration being given to the different standard of proof".

54. We of course accept there were some inconsistencies between Ms. Ebanks Dixon's description of the robber and Mr. Gea. As the judge observed, it would not have been most surprising if, having been subjected to what must have been a most terrifying incident, which carried on for some time, her recollection of the detail of events was not reliable. Moreover, having to give evidence some two years after those events could not have helped. However, the evidence in respect of these two Applicants was cogent. It came, in short, to this:

1. They were close friends.

2. Ms. Ebanks Pol knew the shop, its layout and contents. She knew Mitzi. She had been dismissed shortly before the robbery.
 3. At the time of the robbery, she was outside lying on the back seat of a car and looking up as a lookout. When she came into the shop, as had the robber, she asked where Mitzi was.
 4. As the judge was entitled to conclude, far from being kidnapped as she claimed, she remained outside with her hire car. She sought to use someone else's phone when there appeared to be two other phones in that car.
 5. Shortly after the robbery, Adrian Gea was driving Ms. Ebanks Pol's brother's Chevrolet with false plates. Their source was the Honda at Ms. Ebanks Pol's home. Mr. Gea falsely claimed he had stolen the Chevrolet. It had, in fact, been borrowed by Ms. Ebanks Pol the previous day, not long before the robbery. She had enquired of her brother what fuel it used.
 6. On the day of the robbery, not long before it, Ms. Ebanks Pol had a 17 minute conversation on her telephone.
 7. When the Chevrolet was stopped, it contained a robber's kit. There was implicating DNA evidence. There was implicating glass evidence. Mr. Gea lied to the police when stopped.
 8. On the day of the robbery, Ms. Ebanks Pol did not return home. She gave an implausible account that she had been kidnapped.
 9. Neither Applicant gave evidence. The judge was entitled to hold that against them, having correctly set out the right approach.
55. We do not accept these convictions are in any way unsafe. The judge was entitled on this strong evidence to convict. We refuse leave to appeal.

Sentence

56. In his sentencing remarks, the judge rightly described the offence as extremely serious. It had far reaching consequences for the victims. Each of the Applicants was highly culpable. It involved the production of a firearm or imitation firearm. He concluded that this was a Category 2 offence under the robbery guideline.

57. The judge referred to the high value of the jewellery, none of which had been recovered and the psychological harm caused to Ms. Callan and Ms. Ebanks Dixon. Ms. Callan said that Ms. Ebanks Dixon was no longer able to trust anyone. Ms. Callan herself no longer felt able to keep the store open. She had to have counselling and was still in counselling. Ms. Ebanks Dixon told the probation officer that:

"I still panic, especially when I work in the evenings. I could have been killed. Only thing going through my mind was my four children."

58. The judge said that there was no issue as to the possible range if imprisonment; it was 7 to 14 years. He concluded there were a number of aggravating factors. The offence was premeditated, it was prolonged, it involved a mask, false license plates and a firearm or imitation firearm, although the judge rightly said did not treat that as an aggravating factor, it already having been taken into account when assessing culpability.

59. As for Ms. Ebanks Pol, he said there were two specific aggravating features. She was a former employee; there was, therefore, a breach of trust. She had recently committed another offence, namely a theft against the same employer.

60. The judge observed that neither Applicant showed any remorse.

61. As to mitigation, the judge said that he was taking into account Mr. Gea's previous good character. He said that he accepted that Ms. Ebanks Pol's judgment and moral compass were impaired under the influence of financial pressure and clinical depression. They were made worse as a result of having lost her job. She too was previously of good character. They both, until this robbery, had lived a good and useful life. He referred to the fact that Ms. Ebanks Pol was the single mother of two teenage children and looked after her mother; that the offending was out of character. He expressed some scepticism as to the view of the probation officer that Ms. Ebanks Pol had a low risk of re offending.

62. He said that he regarded them both as equally culpable.

63. In his submissions, which covered quite a wide area, Mr. Myers submitted that the judge was in error to take into account the firearm in the way that he did in passing sentence, he having found the Applicant Adrian Gea not guilty in respect of count 2. We do not agree. The judge was entitled to take it into account that the robber, as part of the joint enterprise, went into the shop with either

a firearm or imitation firearm. For the judge was sure of that. Indeed, his uncertainty as to whether it was real or an imitation led to the acquittal on count 2.

64. It is submitted on behalf of Adrian Gea that insufficient account was taken of his good character, that he was unlikely to re-offend.
65. It is submitted on behalf of Ms. Ebanks Pol that insufficient account was taken of her depression, of the fact that she was caring for her mother and was the single mother of children. The view of probation officer is relied upon too.
66. In our view, there is no basis to impugn these sentences. For the reasons carefully expressed by the judge, this was a very serious offence. We have no doubt that the judge, in all the circumstances, was entitled to impose the sentences he did. There was of course no mitigation as a result of pleas of guilty.