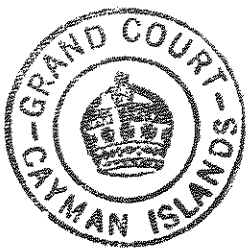
IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 37/2013

THE QUEEN

v.

- E -



Appearances:	**Ms. Laura Manson with Mrs. Aliyah McCarthy, for the Crown**
	Ms. Fiona Robertson of Samson and McGrath for the Defendant
Before:	**The Hon. Mr. Justice Charles Quin**
Trial:	**28th to the 31st July 2014**
No Case Submission Heard:	**31st July 2014**

RULING ON NO CASE TO ANSWER SUBMISSION

PREAMBLE

1. Section 31 of the Criminal Procedure Code (2013 Revision) states:

> *"31. (1) After a person is accused of a rape offence, no matter likely to lead members of the public to identify a woman as the woman against whom the offence is alleged to have been committed shall be published in a written publication available to the public or be broadcast, except as authorised by a direction of the court."*

Therefore, for the avoidance of any doubt, in any report of this matter, no words or descriptions shall be used which could identify the alleged victim by name, age, address, educational institution(s) or otherwise. This also means that none of the civilian witnesses shall be identified by name, age, address, institution(s), or otherwise.

THE INDICTMENT

2. The Defendant is charged with the following offences:

i. *Rape*: Contrary to s.127(1) of the Penal Code (2010 Revision). The particulars of the offence are that Mr. E, on the 7th day of November 2012 [redacted], in Grand Cayman, had unlawful sexual intercourse with [redacted] a female without her consent.

ii. *Indecent Assault*: Contrary to s.132(1) of the Penal Code (2010 Revision). The particulars of the offence are that Mr. E, on the 7th day of November 2012 [redacted], in Grand Cayman, indecently assaulted [redacted] a female.

3. Section 127 of our Penal Code reads as follows:

"*127. (1) A man who rapes a woman or another man is guilty of an offence.*

(2) A man commits rape if -

(a) he has unlawful sexual intercourse (whether vaginal or anal) with another person who at the time of intercourse did not consent to it; and

(b) at the time he knows that the other person does not consent to the intercourse or he is reckless as to whether the other person consents to it.

(3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

(4) If, at a trial for a rape offence, the jury has to consider whether a man believed that the person was consenting to sexual intercourse, the presence or the absence of reasonable grounds for such belief is a matter to which the jury is to have regard in conjunction with any other relevant matters in considering whether he so believed.

(5) In subsection (4) -

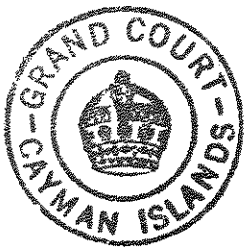
"rape offence" means a rape or attempted rape, or aiding, abetting, counselling or procuring rape or attempted rape, or incitement to rape.

(6) For the purposes of this section, a person is deemed not to have consented to sexual intercourse if that person's acquiescence is obtained-

(a) by threat of force or use of force;
(b) by means of threats or intimidation of any kind;
(c) by fear of bodily harm;
(d) by means of false representations as to the nature of the act; or,
(e) in the case of a married woman, by personating her husband.

(7) On a trial for rape, the jury may find the accused guilty of -
(a) sexual intercourse with a girl under the age of twelve years;
(b) sexual intercourse with a girl under the age of sixteen years;
(c) indecent assault on a person;
(d) administering drugs to obtain or facilitate intercourse; or
(e) common assault.

(8) The use in this Law of the word "man" without the addition of the word "boy" or vice versa shall not prevent the provision applying to any person to whom it would have applied if both words had been used and similarly with the words "woman" and "girl".



SUBMISSIONS FROM THE DEFENCE

4. The trial by Judge Alone in this case began on the morning of the 28th July 2014 and on the afternoon of the 31st July 2014, at the close of the Crown's case, counsel on behalf of the Defendant made a no case to answer application.

5. Defence counsel made the submission that the Defendant has no case to answer on both counts of the Indictment.

6. Defence counsel makes this no case to answer submission pursuant to s.137 of the Criminal Procedure Code (2010 Revision) which reads:

> *"When the evidence of the prosecution witnesses has been concluded the Court may before or after considering any statement or hearing any evidence of the accused, invite first the prosecution and thereafter (at its discretion) the Defence to address it upon the question of whether there is sufficient evidence before the Court to warrant conviction of the accused or any or more of several accused of the offence charged or any relevant offence and if either before or after hearing the address by the Defendants, it considers there is no such evidence, it shall discharge the accused concerned and enter a verdict of not guilty with respect to such accused."*

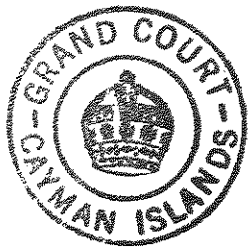
7. Defence counsel, in making this application, also relies on the classic principles of Lord Lane in ***R v. Galbraith***[1] which state:

> *"How then should the judge approach a submission of "no case"?*
>
> 1. *If there is no evidence that the crime alleged has been committed by the Defendant there is no difficulty – the Judge will 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.*

[1] 73 Cr. App R. 124/[1981] 1 WLR 1039

a. *Where the Judge concludes that the prosecution 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 prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' 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 the 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.*"



8. At this stage, having heard the evidence in this case presented by the Crown, and, before proceeding to outline the submissions placed before me for consideration, I remind myself that, as the Defendant has elected trial by Judge Alone rather than trial by Judge and Jury, I adopt the dicta of Lord Lowry in ***R v Hassan & Ors***[2] which is cited in ***Chief Constable v. Lo***[3] :

> "*My own impression is therefore important which would not be relevant in a trial held with a jury: if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution there can be no justification for allowing the trial to continue.*"

To put it another way, as Lord Kerr said at paragraph 13 of ***Lo***:

> "*Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the Judge can say, as did Lord Lowry in* ***Hassan****, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.*"

Lord Kerr went on to state at paragraph 14:

[2] [1973] NIJB
[3] [2006] NICA 3

> *"The proper approach of a judge or a magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in* ***Galbraith****. The exercise the Judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the Judge should not ask himself the question, at the close of the prosecution case, "Do I have a reasonable doubt?" The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the Judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."*

9. Defence counsel submits that there is no case to answer on two grounds:

   i. There is insufficient evidence of either offence having been committed by the accused;

   ii. The Crown's evidence has been so thoroughly discredited that no court could rely upon it in finding the Defendant guilty.

THE CROWN'S CASE

10. The Crown's case is that the Defendant had unlawful sexual intercourse with the female in question without her consent and, in relation to Count 2, the Defendant indecently assaulted the female with Exhibit #2 – the grey plastic tube.

11. Crown counsel properly accepts that there is no direct evidence of the essential elements of the offences. The Crown concedes that the female Complainant is unable to say how these offences were carried out by the Defendant against her because she had, of her doing, taken a drug which negatively affected her mind and her memory. Furthermore, nobody saw what happened.

12. However, Crown counsel submits that the following evidence leads to the inescapable conclusion that the Defendant has a case to answer on both counts:

i. The last memory the complainant has prior to the time she believes the incident took place is being affected by the drug (the Mollie/Ecstasy pill) she had taken along with the Defendant and beginning to feel dizzy;

ii. The only person in the living room with her just prior to the alleged incident is the Defendant (her younger sister had been put to bed);

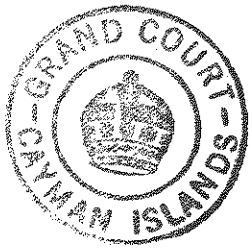
iii. After the alleged incident takes place the Complainant wakes up with no panties and with discomfort in her vagina;

iv. After waking up, going to the refrigerator and seeing the Defendant, the Complainant said the Defendant said "*how much fun it was last night, the pill was amazing*." Although the Complainant could not recall the exact words the Defendant used, she said that he left her with the clear impression that he was saying that they had sex;

v. The hickey she had on her neck when she woke up – with no evidence that the hickey was there before that;

vi. The Defendant "grooming" the Complainant by:

A. Giving her the big glass of the alcoholic drink after they took the Mollie – though it is accepted by the Crown and the Complainant that the Defendant did not force her to take the Mollie because, as she said, "*I did want to try it*" after they had spoken about the Mollies "*a couple of weeks before the incident*";



B. Always supplying her with alcohol on different occasions;

C. Suggesting to the Complainant and her best friend, whilst at the beach, that they could all make money out of nude photos of the girls and following this up by taking photos without their permission;

13. Crown counsel submits that the aforesaid portions of evidence lead to the conclusion that there is a case for the Defendant to answer on both counts.

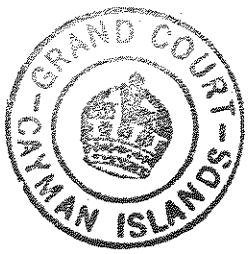
14. In order for the offence of Rape to be made out the Crown must prove beyond all reasonable doubt that:

A. The Defendant "E" penetrated the Complainant's vagina with his penis.

B. That the Complainant did not consent to sexual intercourse;

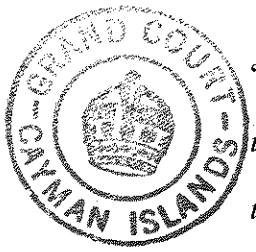
C. The Defendant did not believe that the Complainant was consenting or that any belief on the part of the Defendant that the Complainant was consenting was not a reasonable belief.

These three essential elements are to be proved beyond all reasonable doubt for a tribunal of fact to convict a Defendant for the offence of rape.



COUNT 1

15. The evidence before the Court for this count is very similar to, if not exactly the same as, the evidence I outline further below in relation to Count 2. However, I do note that the most significant point for the Complainant in relation to this charge is her evidence that, when she went to the kitchen the morning after the alleged incident the Defendant told her they had sex. When asked what exactly the Defendant said to her the Complainant said:



"I don't recall exactly but I do recall him making it clear we had sex that night... I just remember him saying how fun it was last night and the pill was amazing."

The Complainant said she could not recall what the Defendant actually said about sex.

16. There is also the Complainant's evidence that she saw a hickey – a love bite – on her neck that morning, which was not there before. The significant evidence before the Court in relation to this point is that:

i. Based on the evidence from the Complainant's mother, the Complainant's younger sister told her mother that she slept in the Complainant's bed with the Complainant for some part of the night and the Complainant had wet the bed;

ii. The Complainant's communication with her best girlfriend about the incident stated "we fucked" but never included the word rape.

iii. The Complainant, by her own evidence, has been caught by her mother in the past with a male in her bedroom;

iv. The Complainant, though young, has had sex on previous occasions

v. The Complainant knows what it is to "leak" – as in pass out unconsciously, due to too much alcohol and or drugs in her system.

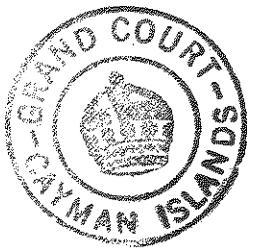
17. One stark example of conflicting evidence is that on the night in question the Complainant said she took the Ecstasy tablet at approximately 8:30 p.m. Her evidence is that, within ½ hour to an hour, the tablet began to kick in – leading to a total black out on her part somewhere around 9:30 pm. However, despite the fact that the Complainant said that the Defendant told her to put her phone away there is clear evidence that her phone was in active use from 9:20 p.m. until 12:14 a.m. the following day. There were 13 separate communications, including one at 11:08 p.m. saying "*That was my friend.*" This is more consistent with the Defendant's suggestion that she was out with at least one friend, and not consistent with her passing out earlier that evening.

18. On the evidence presented throughout the course of this trial there is no direct evidence that the Defendant ever had sexual intercourse with the Complainant by inserting his penis into the Complainant's vagina.

19. The fact that the Complainant complains that her vagina felt sore when she woke up at 10 a.m. on the day following the alleged incident does not necessarily lead to the conclusion that the Defendant raped the Complainant.

20. Furthermore, the Crown has not proved that the Complainant did not consent to the act, if indeed it ever took place.

21. Accordingly, on my review of the evidence presented to the Court, I come to the conclusion that the evidence, taken at its highest, in relation to Count 1, is such that a jury, properly directed, could not properly convict upon it and therefore, it is my duty upon a submission being made to stop the case in relation to the first Count.



COUNT 2

22. When I address Count 2 - the charge of Indecent Assault – I have to consider largely the same evidence as was presented in relation to Count 1. Again, there is no evidence, other than the Complainant complaining of discomfort in her vagina.

23. The allegation is that the Defendant sexually assaulted the Complainant with Exhibit #2.

24. The evidence, as above, is that the Complainant, who was not under the age of 17 years at the time of this incident, was living alone with the Defendant, who was her stepfather, for several weeks whilst her mother was overseas – with her younger sister also staying in the house.

25. The evidence is that the Complainant, of her own free will, had taken a Mollie (an Ecstasy pill), had shots of vodka and tequila, and had accepted a long glass of an alcoholic beverage – which the Complainant called a mixed drink – from the Defendant.

Her evidence is she was not forced to take the shots of vodka and tequila and said, she had "*more than one*" of these shots but she could not recall the exact number. Her evidence is that she was not forced to drink the alcohol or take the Mollie. In live evidence the Complainant, when asked "*Had you spoken about Mollies before*?' responded:

> "*Yes, a couple of weeks before the incident. He asked me if I would ever try it... he said it would make you stay up all night and feel on top of the world.*"

It is clear that the Complainant had fully decided in her own mind to take the Mollie as, by her own account, the Defendant had "*shown*" her the tablet many hours before in the car with her sister in the back seat. By her own evidence the Complainant said she and the Defendant worked out that they would take the tablet – after putting her little sister to bed.

Asked why did she take the Mollie when the Defendant "showed" it to her earlier that day, which was weeks after the first conversation, the Complainant responded:

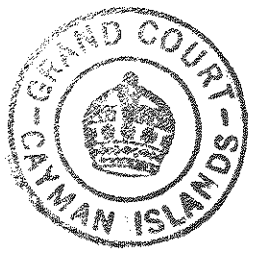
> "*Because I did want to try it with someone I felt safe with.*"

26. After taking the tablet and drinking some of the alcohol, she recalls that, for about an hour after she, along the Defendant, were just hanging out in the living room in relaxed positions on separate couches, which were in an 'L' shape – she was listing to music on YouTube and she said the Defendant was "*...playing Madden football.*" She said this went on for about half an hour, then she began to:

> "*...feel dizzy and lightweight. I almost could not stand. I was feeling weak and very dizzy. I was dancing in circles. I don't remember the name of the music.*"

27. She said after that she felt the Defendant come up behind her:

> "*... and wrap his arms around my shoulders ... it was like a hug... like he was holding me up. But then....it felt like both of us were dancing. I felt like I was going in and out of consciousness... blacking out... I felt my knees were weak like I couldn't stand. Then I remember us dancing and then blacking out.*"



The Defendant's evidence is that she does not recall anything else after that point until she woke up the next morning at 10 a.m., when she said she woke up dressed in the same tank top she wore the night before, wearing no panties/knickers. She said that when she woke she was still feeling dizzy and:

> "*... my head was pounding. As I got out of bed I stumbled and my vagina felt sore.*"

28. She said that when she went to bathroom she noticed she had a hickey on her neck.

29. In relation to the Complainant's sore vagina and Exhibit #2 that it is alleged was used by the Defendant on the Complainant the evidence is that it was the Complainant's mother who told the Complainant that the item could be very significant and that was why the item was eventually taken to the police.

30. There is no evidence of the Defendant's DNA on Exhibit #2 and there is no other independent evidence that the Defendant used Exhibit #2 to sexually assault the Complainant.

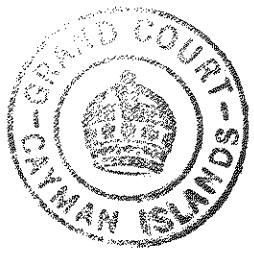
31. There is no evidence from the Complainant that the Defendant used Exhibit #2 to sexually assault her.

32. The fact that the Complainant complains of discomfort in her vagina on the following day does not necessarily lead to the conclusion that the Defendant sexually assaulted the Complainant with Exhibit #2.

33. There is no direct material evidence of the Defendant sexually assaulting the Complainant with Exhibit #2 – save and except for the Complainant complaining of a discomfort in her vagina.

34. Adopting the ***Galbraith*** test, when I consider the prosecution evidence in relation to Count 2, taken at its highest, I find that a jury, properly directed, could not properly convict upon it, and, therefore, it is my duty, upon a submission being made to stop the case.

35. There is insufficient evidence to prove beyond all reasonable doubt that the Defendant sexually assaulted the Complainant as alleged in Count 2.



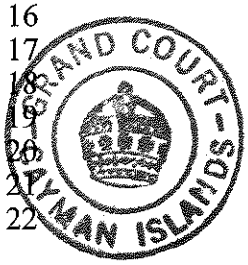
JUDGE ALONE TRIALS

36. I turn now to the Law in relation to Judge Alone Trials as they relate to a no-case-to-answer submission.

37. I accept the submission of Defence counsel that there are inexplicable lies and inconsistences in the Crown's evidence. As Lord Lowry stated in ***R v Hassan & Ors:***

> *"if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution there can be no justification for allowing the trial to continue."*

38. When I review the significant amount of Crown evidence that has been discredited by Defence counsel's cross examination, and by the inconsistences which arose from different Crown witnesses during their evidence in chief, I remind myself of Lord Kerr's words at paragraph 14 in Lo:



> *"It is important to note that the Judge should not ask himself the question, at the close of the prosecution case, "Do I have a reasonable doubt?" The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the Judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."*

39. Adopting the dicta in ***Lo*** and ***Hassan*** I find that there are no circumstances in which I can properly convict the Defendant on both counts. There is simply insufficient evidence which could conceivably support a guilty verdict in relation to Counts 1 and 2 and, accordingly, I accede to the Defendant's application.

40. Accordingly I enter a verdict of Not Guilty on both counts on the Indictment, and the Defendant is hereby acquitted.

41. I must say: This has been a very sad case and, I have no doubt that Crown's witnesses and their families were genuinely upset, as must have been the Defendant and his family. What is particularly sad is that the Complainant has been using ganja from the age of 15 years old, and that she has become a frequent user of this illegal drug. I take this opportunity to warn the Complainant that if she continues to take ganja and experiment with drugs such as Ecstasy, more trouble is inevitable for her.

42. I also add that I am grateful to both counsel for the professional manner in which they conducted this case. There should be no criticism of Crown counsel who presented the evidence competently and fairly. In addition, there should no criticism of PC Wilson who carried out a thorough and proper investigation.

Dated this the 1st day of August 2014

GRAND COURT - CAYMAN ISLANDS

Honourable Mr. Justice Charles Quin Q.C.
Judge of the Grand Court