IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0065/2016

THE QUEEN

V

~~MATTHEW ANTHONY WHITTAKER~~
&
WAYNE ALPHONSO BELLAFONTE

Appearances:	**Mrs. Nicole Petit for the Crown**
	Mr. James Stenning of Stenning & Associates for WHITTAKER
	Mrs. Laura Larner of McGrath Tonner for BELLAFONTE
Before:	**Hon. Mr. Justice Malcolm Swift (Actg.)**
No-Case Submissions heard:	**12th April 2017**
Submissions in Reply heard:	**13th April 2017**
Decision handed down:	**13th April 2017**

HEADNOTE

Criminal Law —Charges of Possession of Unlicenced firearm and ammunition – No-case-to-answer submission – *Second limb of Galbraith – Multiple-source DNA profiles.*

RULING ON NO-CASE TO ANSWER SUBMISSION

1. At the conclusion of the Crown case it has been submitted to me by the defence that there in no case to answer in accordance with limb 2 of the well-known case of ***Galbraith***[1] which states:

> "*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.*
>
> *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.*"

2. The Defendant is charged with unlawful possession of an unlicensed firearm and six rounds of live ammunition on the 7th May 2016. It is admitted that the Defendant had no firearms licence and that the weapon recovered by the Police was a firearm. The issue in the case is whether the Defendant was in possession of it at the relevant time.

[1] 1981 1 WLR 1039

1 3. In short the argument is that the evidence is inadequate to go to the jury because the
2 DNA evidence suggests that other persons in addition to the Defendant handled the
3 firearm, because the Crown cannot exclude indirect transfer of the Defendant's DNA
4 onto the firearm and because there is no other evidence capable of proving that the
5 Defendant was in possession of the firearm on the 7th May 2016. It is argued that, at its
6 highest, the DNA evidence can only suggest that the Defendant had the firearm in his
7 possession at some time in the past and that the rest of the evidence is circumstantial
8 and insufficient by itself to establish possession. The Prosecution says these are all
9 matters for the jury.

10 4. A brief summary of the facts in evidence at the end of the Prosecution case will suffice
11 for present purposes.

12 5. After the Defendant had been involved in an altercation outside Fete Nightclub, the
13 Police attended the scene. The Defendant was detained and handcuffed. He seemed to
14 be keen to get to his pants knee pocket where, it turned out, he had a set of car keys.
15 He indicated to the Police that those keys were for an adjacent parked Ford car. The
16 Police realised the keys were for a Honda and found that they fitted a blue Honda
17 parked two car spaces away. The Honda belonged to the Defendant's mother. The
18 photographs show the car to have been in poor condition externally and internally with
19 ripped seats. The Defendant was to subsequently say in interview that he had not
20 driven the car that night and that his cousin Matthew Whittaker had been the driver
21 throughout.

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It soon became apparent however that the Defendant was intending to abandon his account in interview because there was unchallenged evidence from another cousin, Aundrey Whittaker, that the Defendant had been the driver throughout the night and that the passengers in the car had been the Whittakers and one Lorenzo White. The Defendant did not disclose the identities of those passengers when asked by the Police to do so. The Police saw through the windscreen that there was a firearm partly hidden under the driver's seat. They did not open the car. It is not entirely clear whether the car was locked when the Police arrived. The Defendant had the firearm pointed out to him through the windscreen but he denied all knowledge of it. A firearms officer attended the scene, had no contact with the Defendant, opened the car and, using double latex gloves, removed the firearm and placed it in a firearms box. It was taken to the Police Station to be made safe (it was loaded) by the same officer using fresh gloves. It was photographed and secured in its box using plastic ties one of which was put through the trigger guard. The Defence has submitted that there were opportunities for indirect transfer or redistribution of DNA material not only during the exhibit collection process but also earlier when the firearm was in the car.

6. DNA matching that of the Defendant was found within mixed partial profiles recovered from swabs taken from inside the trigger guard area and the handle of the firearm and from the driver's door handle, the steering wheel and the gear-knob of the Honda. Put shortly, the evaluation calculations effectively exclude anyone else in the Cayman Islands as having deposited the DNA. The random match probability ratios were very high indeed even when parents or children of the Defendant were factored into the calculations. It is unnecessary to set out the calculation results here as they are clearly set out in the various reports of the Prosecution expert Angela Tanzillo-Swarts and accepted as correct by the defence.

7. It was accepted by the Prosecution expert that indirect transfer or redistribution can occur so that it is possible for the Defendant's DNA to have been indirectly transferred onto the firearm from elsewhere before it was seized and isolated or redistributed around the firearm in the course of forensic handling once present there. Ms. Tanzillo-Swarts was of the view that direct contact was more likely in this case. It is important however to note that, at the close of the Prosecution case, the possibility of indirect transfer of DNA was in evidence solely as a possibility capable of occurring. There was no evidence of any circumstances capable of supporting such indirect transfer save for the evidence of the firearm being found on the floor carpet partly under the driver's seat of the Honda.

8. In interview, apart from implicating Matthew Whittaker as the Honda driver, the Defendant denied all knowledge of the firearm and yet, in a post-interview phone call to DS Stewart, he told her that the firearm was "for Matthew" and that he had not touched it but it was close to him (that latter statement was disputed in cross-examination).

9. Accordingly there was evidence of DNA material matching the DNA of the Defendant on the firearm and particularly inside the trigger guard, the firearm was found under the driver's seat and there was evidence that the Defendant was the driver – a fact he had disputed in interview. The Defendant had sought to mislead the Police about which car his keys fitted and had indicated a nearby Ford as his. He had sought to implicate Matthew Whittaker as the driver and later as the possessor of the firearm. His assertion that he had no knowledge of the firearm was undermined by his admissions to DS Stewart.

1 In short this was all circumstantial but nevertheless probative evidence upon which a
2 properly directed jury could properly conclude that the Defendant was in possession of
3 the firearm. It would subsequently be for the Defendant to give evidence, if he so
4 chose, to explain his actions and words as being consistent with innocence.

5 10. I was referred to a number of reported and unreported cases:

6 i. ***R v Jacobs***[2] where the UK Court of Appeal held that knowledge of a firearm does
7 not equate to possession (not a DNA case);

8 ii. ***R v Whorms***[3] (Defendant driving car containing 2 other men when firearm was
9 found under the front passenger seat – the Defendant's DNA alone was found on
10 the firearm) in which the Court stated that matters of indirect transfer of DNA
11 material were matters for the jury but that fatal to the conviction was the judge's
12 failure to direct the jury that, before they could convict the Defendant, they must
13 be sure that the firearm was not in fact in the possession of the front seat passenger
14 against whom there was some evidence of previous involvement with similar
15 firearms, a shell case of the same calibre as the firearm found at his home and
16 gunshot residue on his clothing. If such a direction had been given, the conviction
17 would have been safe;

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[2] [2002] EWCA Crim 610
[3] CICA [unreported] Appeal No 19 of 2008

iii. ***R v Osbourne Douglas***[4] (a first instance decision of Henderson J. allowing a no case submission where the Defendant's DNA was found on a firearm in the possession of another man on arrest and there was an opportunity for indirect transfer to have occurred at the time of arrest – there was no other circumstantial or direct evidence of possession by the Defendant and the judge held that the DNA evidence alone did not suffice for a conviction);

iv. ***R v Ebanks and Boothe***[5] (a case which turned on its specific "peculiar" facts including a lack of any direct connection between the particular Defendant and the firearm and a lack of evidence that the DNA may have been deposited on the occasion charged);

v. ***R v Miller and Brown***[6] (a first instance decision in which the Defendants were asleep in a car in which a firearm wrapped in a T shirt was found in the passenger seat footwell. The DNA recovered from firearm and T shirt did not match the Defendants. There was no other evidence of individual or joint possession of the firearm by the Defendants because they could not be proved to have known it was there nor could it be proved that the firearm was in full view of either or both Defendants. The judge described that latter fact as crucial to his decision).

11. I have not been greatly assisted by the above cases which seem to me to turn on their individual factual matrices.

[4] [unreported] CI Ind. No 81 of 2012
[5] [unreported] Beswick J. 10th September 2012
[6] [unreported] Quin J. 7th December 2014

1 12. The Prosecution has however referred me to the recent case in the CICA of ***R v W. J. McLaughlin and K. R. Montaque***[7]. In that case single source DNA profiles matching the DNA of the Defendants were found on 2 firearms located under a bed in bedroom occupied by the Defendant KRM. WJM was the son of the owner of the house and occupied an adjacent bedroom. The CICA adopted the definition of possession in ***Sullivan v Earl of Caithness***[8] which held that a person can be in possession where the firearm was kept under that person's control or at his behest at a location other than his home (i.e. physical custody or control was not a pre-requisite of the offence of possession). After citation of authorities, the CICA also held that high match probability DNA evidence can be direct evidence of possession, the case against ***K. R. Montaque*** was DNA linking him to both firearms together with his occupation of the bedroom where they were found and of a living room where ammunition was found and the case against ***W. J. McLaughlin*** was DNA linking him to one firearm together with evidence that he occupied the adjacent bedroom and also had access to the living room. The case was held not to have been susceptible to a submission of no case to answer.

13. Mrs. Larner has valiantly argued that DNA found on weapons in cars should be treated as a special case especially where, as here, there were multiple source DNA profiles and other men travelling in the Honda. I note however that the principal fellow traveller implicated by the Defendant (Matthew Whittaker) was exonerated by DNA testing in that the profiles found did not match his.

[7] [Ind. No 22 of 2015]
[8] [1976] 62 Cr App R 105]

14. I am completely satisfied that these are all issues to be determined by the jury and that this is not a case to which limb 2 of ***Galbraith*** applies. A properly directed jury can properly convict on this evidence.

Dated this the 13th day of April 2017

Honourable Mr. Justice Malcolm Swift (Actg.)
Judge of the Grand Court