

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS  
ON APPEAL FROM THE GRAND COURT**

**CICA (Crim.) CACR029/2013 (Tamasa)  
IND 66/12B  
C03588/2012  
CACR027/2013 (Burton)  
IND 66/12A  
#03587/2012  
CACR029/2014 Application (Ryan Edwards)  
IND 53/2013  
#05716/2013**

**BEFORE**

**THE RT HON SIR JOHN CHADWICK, PRESIDENT**

**THE HON ELLIOTT MOTTLEY, JUSTICE OF APPEAL**

**THE RIGHT HON SIR BERNARD RIX, JUSTICE OF APPEAL**

**BETWEEN**

**H.M THE QUEEN**

**Respondent**

**and**

**DAVID JOSEPH TAMASA**

**ANDRE NICHOLAS BURTON**

**Appellants**

**Appearances:** James Curtis QC & Ms. Lucy Organ of Samson & McGrath for the Appellant Tamasa; Anthony Akiwumi (Stuarts) & M Facey-Clarke for the Appellant Burton; and Paul Keleher QC & Ms Keva Reid of McKinney Reid for the Applicant Edwards.  
Simon Dennison QC & Tricia Hutchinson –Crown Counsel for the Director of Public Prosecutions.

**Transcript of oral judgment 21 November 2014  
Approved and released 12 January 2015**

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**RULING  
ON APPLICATION FOR A RETRIAL  
(WESTSTAR ROBBERY)**

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**Sir John Chadwick, President**

1. For the reasons which we will put in writing and hand down as soon as convenient, we will allow the appeal of David Tamasa in appeal 29 of 2013 (the Weststar appeal). We dismiss the appeal of Andre Burton against conviction in respect of the Weststar robbery; and we dismiss the pro forma application for leave to appeal out of time made on behalf of Ryan Edwards in connection with that robbery. As I have said, our decision is based on reasons which are to be put in writing and handed down; but again it is appropriate that I should state briefly why we have reached the conclusion that the appeal of one of the appellants should be allowed and that the appeal of the other should be dismissed.
2. Towards the end of his judgment in the Weststar case, the judge - who was sitting alone without a jury - referred to telephone calls which had been made by the chief prosecution witness Mr. Marlon Dillon in the period leading up to and following the robbery. The judge said that the history of contact between Dillon and the others, and the movements of the mobile telephones from West Bay down to George Town at the time of the robbery, supported Mr. Dillon's account that the four defendants were participants in the robbery; and he went on to say that he had looked for areas in which Mr. Dillon had been consistent throughout.
3. The evidence of the telephone calls obtained from the service providers showed a call from Mr. Tamasa's telephone through the Red Bay mast at 14:33: that is to say, approximately 20 or 25 minutes before the robbery, at a time when if Mr. Dillon's account was correct, Mr. Tamasa was in Mr. Dillon's car travelling down the Estherly Tibbetts highway somewhere north of Camana Bay. The evidence showed, also, a telephone call from Mr. Mignott's phone through the Linford Pearson mast in the southern part of the island. The judge held that, in the case of Mr. Mignott, that call was not capable of being reconciled with Mr. Dillon's account. It was on that basis that he acquitted Mr. Mignott at the trial of the Weststar robbery.
4. But the judge did not take the same view in relation to the call from Mr. Tamasa's phone through the Red Bay mast. He said this, at paragraph 72 of his judgment:

“I have considered the extent to which Tamasa's phone being locked on to Red Bay undermines the position if I am otherwise sure that Tamasa was part of the robbery. I raised during the evidence that the sector of the mast pointed

towards the north and the crime scene and although when the coverage survey was carried out no signal was picked up north of the airport. I take the view on the evidence that it is not impossible for that phone to be locked on to a mast which was facing north”.

5. There was no evidence which could support that judge’s finding on that point. There was no evidence as to whether it was possible or impossible for a mobile telephone which was in a car on the Estherly Tibbetts Highway, some point north of Camana Bay, to be in contact with the Red Bay mast, which is in the vicinity of the Hurleys supermarket roundabout. It was explained to us by Mr. Dennison QC, for the prosecution, that in fact the evidence to which the judge referred in that passage was the evidence of Mr. Dillon that the telephone call had taken place while Mr. Tamasa was in his car; but that is to adopt the evidence of the witness whose evidence needs supporting as support for his own evidence. The reasoning is circular; and is flawed.
6. For that reason, we are not satisfied that the judge's reasoning can be supported on that point; or that there was any proper basis on which the judge could reach a conclusion in the case of Mr. Tamasa which differed from the conclusion that he reached in the case of Mr. Mignott.
7. In our view, the judge erred in law in making a finding of fact for which there was no evidence. In those circumstances, we are satisfied that the appeal of Mr. Tamasa should be allowed in the Weststar case. There is no comparable lack of reasoning in relation to Mr. Burton; and so in that case we do not take the view that the appeal should be allowed.
8. The position of Mr. Edwards who was convicted of aiding and abetting the principal robbers in the Weststar robbery was, in effect, that if the appeals of both Mr. Burton and Mr. Tamasa were allowed, then his appeal should also be allowed because the persons with whom he was said to have aided and abetted had not been found to be guilty of the crimes with which they were charged. In the circumstances that we do not allow the appeal of Mr. Burton, that ground falls away and we do not give leave for Mr. Edwards to be joined in the appeals relating to the Weststar robbery.

...

9. The Crown seeks an order for a retrial in relation to Mr. Tamasa, whose appeal has been allowed. We do not think it appropriate to order a new trial in the Weststar case. The reason why we take that view is that Mr. Tamasa's appeal was allowed for much the same reason as that which led to the acquittal of Mr. Mignott at trial. In order to retry Mr. Tamasa in the Weststar case, it would, in our view, be necessary for the Crown to seek to repair the gap in its evidence which we have identified in relation to contact with the Red Bay mast. We don't think that it would be appropriate or fair to give the Crown that opportunity in the West Bay case and in particular in circumstances that it would look strange in the circumstances that it could not do so in relation to Mr. Mignott, so no retrial in the Weststar case.
  
10. So we allow the appeal of Mr. Tamasa and - as we are required to do by section 9(2) of the Civil Appeal Law - we quash his conviction in respect of the Weststar robbery and we direct that a judgment and verdict of acquittal be entered in the case of that conviction.

Chadwick P

Mottley JA

Rix JA