

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

3
4 INDICTMENT NO: 0087/2011-B
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6
7 THE QUEEN

8
9 V

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11 JEFFREY ALEXANDER BARNES
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13
14 **Appearances:**

Mme DPP, Cheryl Richards, Q.C., and
Crown counsel Jenesha Bhoorasingh-
Simpson for the Crown

17
18 Mr. John Furniss for the Defendant
19

20 **Before:**

The Hon. Mr. Justice Charles Quin

21 **Submissions heard:**

25TH and 26th March 2013
22

23 **RULING ON PRE-TRIAL MEDIA PREJUDICE SUBMISSIONS**
24

25 1. Prior to the empanelling of jurors before the commencement of the trial by jury on
26 the 25th March 2013, the Defence made an application for the Court to request
27 media material from three media houses, for review in order to support of a further
28 application to stay proceedings against the Defendant due to adverse pre-trial
29 publicity in three news publications in October-November 2011, October 2012 and
30 on the 6th to the 7th March 2013.

31 2. The Defence made an application for the Court to order the immediate delivery up
32 of all the media reports related to this Defendant, including the video of the
33 Cayman 27 television news clip of the 6th and the 7th March 2013. The Court
34 acceded to the application.

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intercourse did not consent to it and, at the time he knew that the said Cleopatra Jamieson did not consent to the intercourse.

(c) **Count 3: Rape**, contrary to s.127(1) of the Penal Code (2010 Revision). The particulars of the offence are that Jeffrey Alexander Barnes, on the 20th day of October, 2011, at #43 Seymour Drive, Apt. #56 Palm Suites, Grand Cayman, Cayman Islands, had unlawful sexual intercourse per anus with Cleopatra Jamieson, who, at the time of the intercourse did not consent to it and at the time he knew that the said Cleopatra Jamieson did not consent to the intercourse.

5. On the 17th February 2012 the Defendant pleaded **not guilty** to these three counts now on **Indictment 87/11-B**.



INDICTMENT 87/11-A

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6. The submissions now made for my consideration also relate to charges against this Defendant on another Indictment – **Indictment 87/11-A**.

7. On **Indictment 87/11-A** (registered as Indictment No. 0088/2011² in JEMS) the Defendant is charged with three counts as follows:

(a) **Count 1: Abduction**, contrary to s.219 of the Penal Code (2010 Revision). The particulars of the offence are that Jeffrey Alexander Barnes, on the 29th day of October, 2011, at Shamrock Road, George Town, Grand Cayman, Cayman Islands, by force compelled Vivienne Walker to go from a bus stop on Shamrock Road to an area in Prospect.

Count 2: Rape, contrary to s.127(1) of the Penal Code (2010 Revision). The particulars of the offence are that Jeffrey Alexander Barnes, on the 29th day of October, 2011, at Admirals Landing, Prospect, Grand Cayman, Cayman Islands, had unlawful sexual intercourse per vagina with Vivienne Walker, who at the time of the intercourse did not consent to it and, at the time he knew that the said Vivienne Walker did not consent to the intercourse.

² Both Indictments referred to in this Ruling are distinct and separate Indictments. It is their separateness and differences that are essential elements of the Defence’s submissions on the errors made by Cayman 27 in mixing the information from one Indictment with the information belonging to the other Indictment. It is therefore herein noted that the Indictment Numbers used by the JEMS system for these Indictments – Ind. No. 87/11 and Ind. No. 88/11 – more appropriately distinguish these Indictments as different, separate and distinct, as opposed to the most commonly used reference with the same number ‘87’ for both Indictments – 87/11-A and 87/11-B. The fact is, letters are often dropped or unwittingly applied incorrectly when these cases are under discussion or are being noted – thereby leaving much room for confusion or error. It is my view that a different number (and not letters added to the end of the same number) should be used for a separate/different indictment.

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(c) **Count 3: Attempted Rape**, contrary to s.127(1) of the Penal Code (2010 Revision). The particulars of the offence are that Jeffrey Alexander Barnes, on the 29th day of October, 2011, at Admirals Landing, Prospect, Grand Cayman, Cayman Islands, attempted unlawful sexual intercourse per anus with Vivienne Walker, who at the time of the intercourse did not consent to it and, at the time he knew that the said Vivienne Walker did not consent to the intercourse.

8. On the 6th March 2013 the Defendant appeared before the Grand Court pursuant to an application **to vacate a guilty plea made on the 22nd October 2012** in relation to **Indictment 87/11-A**, to one of not guilty and his application was adjourned to a later date.



1 *THE CAYMAN 27 TELEVISION REPORT OF THE 6TH MARCH 2013*

2 9. On the evening of the Defendant's appearance in Court on the 6th March 2013, at
3 approximately 8:02 p.m. a news item appeared on this television station.

4 10. The report showed the Defendant arriving at Court in handcuffs.

5 11. The text of the report itself was conveyed by in-studio and out-of-studio presenters
6 and contained details of the other Indictment 87/11-A

7 12. The Court understands that the clip of film and the article were broadcast again on
8 the morning of the 7th March 2013 and remained on the television company's
9 website until 12 noon on the 7th March 2013, when it was removed as a result of
10 communications from the Director of Public Prosecutions.

11 13. The television report was factually incorrect in the following ways:

12 (a) It created the impression that at the hearing of the 6th March 2013 the
13 Defendant had admitted to abducting and raping a 49-year old woman

14 (b) It stated that the Defendant had made a formal application to switch his
15 not-guilty plea to guilty. In fact the opposite was true. The Defendant
16 was making a formal application to switch his guilty plea to not guilty
17 on Indictment 87/11-A

18 (c) It stated that the Court heard "the graphic details" of the case. In fact
19 the Court heard no such thing.

20 (d) It stated that the Defendant was due back for sentencing in this case in
21 April, but the text made no reference to the Defendant now seeking to



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plead not guilty, and that if he were successful, a contested trial would take place.

(e) It stated that the Defendant is awaiting a forthcoming trial for a different sexual assault case at the end of the month.

14. Mr. Furniss, counsel on behalf of the Defendant, submits that the TV clip is also prejudicial – making it plain to the viewer that the Defendant has pleaded guilty when in fact he had actually applied to vacate his guilty plea.



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INTERNET NEWSPAPER ARTICLES

15. In addition, the Defence and the Prosecution agreed a bundle of newspaper articles from two media houses which generally related to Indictment 87/11-A. The articles presented material which the Defence describes as highly prejudicial.

16. Several of these news pieces refer to the Defendant as a “rapist” “sexual predator” and “sex fiend”, whilst, more often than not, placing the article beside a photograph of the Defendant.

17. Most of the articles appeared between late October and early November 2011, but there were a few news pieces relating to his guilty plea and then his application to vacate the plea – which appeared in October 2012.

18. The DPP concedes that many of the news articles – particularly the ones in 2011 – were prejudicial, although the later articles were, in her view, more restrained.

19. Defence counsel submits that the recent inaccurate Cayman 27 television article and news article on its website resurrects the earlier prejudicial internet news articles published by two other media houses, to such an extent that the Defendant will be unable to have a fair trial before a jury in this case.



THE DPP'S POSITION

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20. Ms. Richards submits that it is still possible for the Defendant to have a fair trial.

21. Ms. Richards submits that, although the Cayman 27 report of the 6th and 7th of March 2013 is inaccurate, it does not include any emotive language or opinion. It is a factual report, albeit, inaccurate report.

22. Ms. Richards submits that the nature of the Cayman 27 news clip is not such that it would pose such a risk that it could not be overcome by the trial process.

23. Ms. Richards argues that some of the previous articles – particularly those in late 2011 cross the line and did present a risk of prejudice. However, the DPP submits almost 18 months have passed since those articles were published and the tone of the more recent articles in October 2012 and later is much more restrained.

24. The DPP submits that when one observes the facts:

- i. that 9 of the news articles were some 18 months ago in 2011;
- ii. that 3 were in 2012 – with one on the 23rd October and the other on the 13 November

should one leave aside the Cayman 27 news report, these other news articles are far enough back that any prejudicial effect is whittled away.

25. The DPP submits that the Cayman 27 news clip of the 6th March 2013 does not relate to this case. Any risk of prejudice can be cured by directions to jurors from the Court to ignore anything they may have heard or seen or read. The jurors would, of course, be reminded that they must make every effort to abide by their oath.



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Furthermore, the DPP submits that the Judge will order the Jurors to put out of their minds any form of speculation and to concentrate entirely on the evidence presented in the Court.

26. In summary, the DPP submits that the trial process can protect the integrity of the jury and the risk presented by the spectrum of news reports is not so grave as to prevent the Defendant from receiving a fair trial.



1 *ANALYSIS AND CONCLUSION*

2 27. The question I must ask myself is whether, in light of the small jurisdiction of the
3 Cayman Islands, the news report aired on Cayman 27 on the evening of the 6th
4 March 2013 until noon on the 7th March 2013 will prejudice the minds of a jury in
5 this trial for Indictment Number 87/11-B so as to prevent the Defendant having a
6 fair trial.

7 28. It is accepted that this Court has the discretion to order a stay of this trial if it finds
8 that there has been such publicity in relation to the case that a fair trial is not
9 possible.

10 29. The 2013 edition of Archbold quotes the authority as being *R v. Reade* Unreported
11 CCC October 15, 1993 where Garland J. stayed a prosecution for this reason. As
12 Archbold states at paragraph 4-85:

13 *“His Lordship commented that the phrase “abuse of process” was something of*
14 *a misnomer in circumstances where no blame could be attached to the*
15 *prosecution.”*

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17 30. In *R v. Kray & Ors* 1969 53 Cr. App. R. 412 the Court held:

18 *“the mere fact that a previous trial ending in a verdict adverse to the Defendant*
19 *has been reported at length in the press including fair comments on the*
20 *evidence should not ordinarily provide a case of probable bias or prejudice in*
21 *jurors on a later trial of the Defendant.”*

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23 31. Mr. Justice Lawton, (as he then was), stated on page 2:



1 “The reporting of trials which take place in Open Court is an important part of
2 the functions of a newspaper, and it would, not to be in the public interest, in
3 my judgment, if newspapers desisted from reporting trials, and from reporting
4 verdicts and sentences in those trials, merely because there was some
5 Indictment still to be dealt with. What is more, the mere fact that a newspaper
6 has reported a trial and a verdict was adverse to a person subsequently
7 accused ought not in the ordinary way to produce a case of probable bias
8 against jurors empanelled in a later case.”

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10 32. In the Privy Council case of *Montgomery v. H. M. Advocate and Ors* [2003] 1
11 A.C. 641, three Defendants were charged with the murder of a young man of Asian
12 origin. A great deal of publicity was given to the case throughout the Scottish media
13 and a campaign group was formed to press for the Defendants to be brought to trial.
14 The Defendants raised the submission that as a result of the extent of the pre-trial
15 publicity it would be impossible for them to have a fair trial as required by Article
16 VI of the European Convention for the Protection of Human Rights and
17 Fundamental Freedoms 1953.

18 33. Lord Hope of Craighead stated in his Judgment at paragraph F on page 666:

19 “...the volume of the material is very considerable and the tabloid and
20 broadsheet newspapers and television broadcasts in which it appeared have a
21 wide circulation throughout Scotland. When account is taken of the types of
22 print media involved and the times of day when the television news items were
23 broadcast, it can be assumed that the coverage which had been given to this
24 case was observed and absorbed by, at one time or another, most of the adult
25 population.”

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27 On page 667 paragraph B Lord Hope went on to consider the exercise of risk
28 assessment as described by Schiemann L.J. in *AG v. MGN Ltd.* [1997] 1 All E R
29 456 at 461:

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1 “ (8) In making an assessment of the likelihood of the publication coming to the
2 attention of potential juror the court will consider amongst other matters (a)
3 whether the publication circulates in the area from which the jurors are likely
4 to be drawn and (b) how many copies circulated. (9) in making an assessment
5 of the likely impact of the publication on an ordinary reader at the time of
6 publication the Court will consider amongst other matters; (a) the prominence
7 of the article in the publication, and (b) the novelty of the content of the article
8 in the context of likely readers of that publication. (10) In making an
9 assessment of the residual impact of the publication on a notional jury at the
10 time of the trial, the Court will consider, amongst other matters, (a) the length
11 of time between publication and the likely date of trial, (b) the focusing effect of
12 listening over a prolonged period to evidence in a case, (c) the likely effect of
13 the Judge’s directions to the jury.”

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15 34. Lord Hope went on to state:

16 “...And the risk assessment exercise requires account to be taken of the factors
17 including the measures available to the trial judge that may be expected to
18 reduce residual impact.”

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20 35. Lord Hope stated at paragraph E on page 667:

21 “The common law test which is applied where pre-trial publicity is relied upon
22 in support of a plea of oppression, is whether the risk of prejudice is so grave
23 that no direction by a trial judge, however careful, could reasonably be
24 expected to remove it. The question was first expressed in these terms by the
25 Lord Justice General (Emslie) in *Stewart v. HM Advocate* 1980 JC 103, at page
26 109. In that case the question was whether there was a substantial risk of
27 prejudice to the accused where an attempt had been made to interfere with a
28 juror during the trial and the other jurors knew of the attempt. He adopted the
29 same wording when he described in *Stuurman v. HM Advocate* 1980 JC 111 at
30 page 122 the special circumstances in which the High Court of Judiciary has
31 power under the common law to intervene to prevent the Lord Advocate from
32 proceeding upon an Indictment: “The special circumstances must indeed be
33 such as to satisfy the court that, having regard to the principles of substantial
34 justice and of fair trial, to require an accused to face trial would be oppressive.
35 Each case would depend on its merits and where the alleged oppression is said
36 to arise from events alleged to be prejudicial to the prospects of fair trial the
37 question for the Court is whether the risk of prejudice is so grave that no
38 direction of the trial judge, however, careful, could reasonably be expected to
39 remove it.”



1 36. On page 673 at paragraph G Lord Hope referred to the New Zealand Law
2 Commission which suggested that the impact of pre-trial publicity and of
3 prejudicial media coverage during a trial even in high profile cases is minimal. New
4 Zealand Law Commission Preliminary P No. 37, November 1999 found that:

5 *“The lapse of time since the last exposure may increasingly be regarded, with*
6 *each month that passes, in itself as some kind of a safeguard. Nevertheless the*
7 *risk that the widespread, prolonged and prejudicial publicity that occurred in*
8 *this case will have a residual effect on the minds of at least some members of*
9 *the jury cannot be regarded as negligible. The principle safeguards of the*
10 *objective impartiality of the tribunal lie in the trial process itself and the*
11 *conduct of the trial by the trial judge. On the one hand there is the discipline to*
12 *which the jury will be subjected of listening to and thinking about the evidence.*
13 *The actions of seeing and hearing the witnesses may be expected to have a far*
14 *greater impact on their minds than such residual recollections as may exist*
15 *about reports about the case in the media. This impact can be expected to be*
16 *reinforced on the other hand by such warnings and directions as the trial judge*
17 *may think it appropriate to give them as the trial proceeds, in particular when*
18 *he delivers his charge before they retire to consider their verdict.”*

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20 37. In the English Court of Appeal case of **R v. Abu Hamza** [2007] Q.B. 659, the Judge
21 at first instance rejected on three occasions an application for a stay on a ground of
22 abuse of process. Hughes J. (as he then was) referred to 600 pages of newspaper
23 reports, articles and comments spanning the period from 2003 to 2005. Hughes J.
24 had held it was not fair to hold the trial in the immediate aftermath of the London
25 bombings and adjourned the case a year from the most intense publicity.

26 38. Lord Phillips, the President of the English Court of Appeal at that time, set out at
27 paragraph 98 the steps that the Judge said he would need to take in order to counter
28 the effects of adverse publicity:

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“It will remain likely as it seems to me that any trial will have to be approached on the basis that the jurors will, or certainly may, remain generally aware that this is a defendant who is object of intense publicity and of a campaign against him, although I doubt that they will recall, as a lawyer interested in the case might recall, the details of specific allegations such, for example, as those made at the time of the extradition request in mid-summer of 2004. That will mean that the jury must be warned carefully about how they are to approach the case. What exactly needs to be said to them will fall to be considered after submissions by the parties and at the time and particularly in light of any submissions made on behalf the Defendant, but I record now that I would expect it to go significantly beyond a formulaic injunction to put out of their minds anything they have read in the papers. It seems to me likely that it would need to involve a careful explanation of the difference between their task in the sifting and the valuation of the evidence, on the one hand, and indiscriminate hostile labelling of a suspect by the public commentators, on the other hand. It may, if the defendant so wishes, be possible to refer to an example or two of public comment which is known to have been entirely baseless. I have considered, but do not take the view that the defendant is put in an impossible position in deciding how far to refer to and to seek to confront the publicity that there may have been, although of course I accept that he may, as many defendants do, have decisions of some delicacy to make in the course of a trial.”

39. Lord Phillips noted at paragraph 99:

“The judge, [Hughes J.], concluded that he was satisfied that with proper direction a jury would be able to bring impartial judgment to the case and to decide whether, despite being labelled by some as a public enemy, the defendant really did commit the offences with which he is charged.”

40. Lord Phillips went on to state at paragraph 103:

“The judge was correct to conclude that the adverse media publicity attendant upon the events that had occurred between 2000 and the bringing of charges against the appellant in October 2004 had put at risk the fairness of this trial. The challenge posed to the judge of taking appropriate steps to neutralise the effect of these matters by appropriate directions and guidance in the course of his summing up was considerable. The task was an exacting one. The judge was confident that he would be able to discharge it. We have concluded that his assessment of the position was correct. The circumstances did not require the judge to stay the prosecution on the ground that there could not be a fair trial.”




1 41. At paragraph 90 Lord Phillips referred to the English Court of Appeal decision in
2 **Re Barot** [2006] EWCA Crim 2692 and the decision of Sir Igor Judge (as he then
3 was), in which he made the following statement which the Court of Appeal
4 endorsed:

5 *“There is a feature of our trial system which is sometimes overlooked or taken*
6 *for granted. The collective experience of this constitution as well as the*
7 *previous constitution of the court both when we are in practice at the bar and*
8 *judicially has demonstrated to us time and time again that juries up and down*
9 *the country have a passionate and profound belief in and commitment to the*
10 *right of a defendant to be given a fair trial. They know that it is integral to their*
11 *responsibility. It is, when all is said and done, their birthright; it is shared by*
12 *each one of them with the defendant. They guard it faithfully. The integrity of*
13 *the jury is an essential feature of our trial process. Jurors follow the directions*
14 *which the judge will give them to focus exclusively on the evidence and to*
15 *ignore anything they may have heard or read out of court.”*

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17 42. Lord Hope’s decision in the Privy Council case of Montgomery was considered by
18 the English Court of Appeal in **Regina v. Abu Hamza** [2007] Q.B. 659. At
19 paragraph 92 Lord Phillips gave the decision of the full Court, which also appears
20 in the head note and stated:

21  *“The fact that adverse publicity may have risked prejudicing a fair trial is no*
22 *reason for not proceeding with the trial if the judge concludes that with this*
23 *assistance, it will be possible to have a fair trial. In considering this question it*
24 *is right for the judge to have regard to his own experience and that of his fellow*
25 *judges as to the manner in which juries normally perform their duties.”*

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27 43. In the case now before the Court it is accepted by the DPP that there was prejudicial
28 material which was published by two media houses in October and November
29 2011. There was less and more restrained coverage for a few days in October 2012
30 and then there is the offending Cayman 27 television news report on the 6th and 7th
31 March 2013.

1 44. It is my view that the effect of the 2011 news reports, and more restrained news
2 reports in 2012 will have been greatly diluted by the passage of time, so that there
3 will be little, if any, residual prejudicial impact on the jury selected to hear this
4 case.

5 45. The Court understands that the Cayman 27 news report was aired on the evening of
6 the 6th March 2013 and on the morning of the 7th March 2013 and further, that the
7 same report stayed on the media house's website until the 7th March 2013.
8 Accordingly there has been a lapse of time of almost 3 weeks since it was last
9 broadcast.

10 46. I have decided to follow the English Court of Appeal decision in *R v. Abu Hamza*
11 and find that the fact that this broadcast on the other case was aired almost three
12 weeks before this trial is no reason for not proceeding with this trial. I conclude
13 that with the Court's assistance it is still possible for the Defendant to have a fair
14 trial.

15 47. With considerable guidance from the Privy Council and the English Court of
16 Appeal in the case law cited above, and, with the help of both the DPP and Defence
17 counsel the Court can take steps to ensure that the risk of any prejudice to the jurors
18 selected will be reduced to a minimum.

19 48. The Court can discuss with the DPP and Defence counsel the appropriate directions
20 to be given before any evidence is heard and in the Judge's Summing Up to the
21 Jury. For example, before any evidence is heard the Court can direct the jury to
22 ignore anything they may have read, seen or heard and come to a verdict solely on
23 the evidence which they have heard in Court.



1 49. The discipline of listening to, and thinking about, the evidence during the trial, in
2 my view, will have a greater impact on the jurors' minds than any possible residual
3 recollection as might exist about reports about the other case in the media.

4 50. In my charge to the jury I can include the standard directions which will include
5 ordering the jurors to put out of their minds any form of speculation, and to
6 concentrate exclusively on the evidence presented in the courtroom. Furthermore,
7 there will be the most important standard direction to remove any feelings of
8 sympathy for the Complainant or prejudice against the Defendant.

9 51. It is my experience that Grand Court jurors follow the directions of the judges of
10 this Court, particularly when those directions coincide with the submissions of both
11 counsel for the prosecution and the defence.

12 52. It is my view that the trial process in the Grand Court can reasonably be expected to
13 remove any prejudice and so ensure that the Defendant has a fair trial.

14 53. For all the aforesaid reasons I do not find that that the risk of prejudice is so grave
15 that the trial process, along with the directions and instructions from the trial judge,
16 would not be able to remove any risk of prejudice and allow for a fair trial for the
17 Defendant.

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19 Dated this the 27th March 2013

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21 **Honourable Mr. Justice Charles Quin**
22 **Judge of the Grand Court**

