

1 Town, Grand Cayman, unlawfully and maliciously wounded Andrew
2 Santangelo Lopez, with intent to cause him grievous bodily harm.

3 2. The trial in this case began on the afternoon of the 16th January 2013 and, at
4 the close of the Crown's case on the 21st January 2013, counsel on behalf of
5 the Defendant made a no case to answer submission.



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7 ***SUBMISSIONS FROM THE DEFENCE***

8 3. Defence counsel made this no case to answer submission pursuant to s.137 of
9 the Criminal Procedure Code (2010 Revision) and the classic principles of
10 Lord Lane in *R v. Galbraith* 73 Cr. App R. 124.

11 4. For the record, s.137 of the Criminal Procedure Code 2010 reads:

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

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24 5. Lord Lane in *R v. Galbraith* 73 Cr. App. R. 124 stated:

25 “1. *If there is no evidence that the crime alleged has been*
26 *committed by the Defendant there is no difficulty – the*
27 *Judge will stop the case.*

28 2. *The difficulty arises where there is some evidence but it*
29 *is of a tenuous character, for example because of*

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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."*

6. Defence counsel relied on the second limb of Lord Lane's classic dicta in **R v. Galbraith** where he states:

"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."

Counsel for the Defendant therefore submits that the evidence in this case is of a tenuous character because of its inherent weakness and vagueness.

7. Counsel for the Defendant went on to rely upon paragraph 2(a) where Lord Lane stated:

"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."



- 1 8. Defence counsel submits:
- 2 i. The entire Prosecution case depends on the identification of the
- 3 Defendant by its chief witness, Andrew Lopez, who is also the victim of
- 4 the attack, and submits that this witness' evidence cannot be relied upon
- 5 because the lighting was poor and the Complainant was stabbed from
- 6 behind – making him unable to turn around and properly observe his
- 7 attacker.
- 8 ii. Defence counsel highlights the fact that there is no other evidence to
- 9 support Mr. Lopez's evidence of identification.
- 10 iii. There is no evidence of the Defendant being at the scene – either from
- 11 other persons who were nearby or from CCTV footage.
- 12 iv. There are no clothes or any other evidence to corroborate Mr. Lopez's
- 13 identification of the Defendant.
- 14 9. Defence counsel concedes that this identification is by way of recognition of
- 15 the Defendant by the Complainant, in that, the Complainant identifies the
- 16 Defendant, and his alleged attacker, as someone he knew as "Pott" for over
- 17 ten years and someone who had confronted him and threatened him only one
- 18 week earlier.
- 19 10. Defence counsel submits that mistakes can occur based on recognition.
- 20 11. Defence counsel submits that the identification of the Defendant relies solely
- 21 on the evidence of Mr. Lopez and is not supported by any other evidence. In
- 22 particular, Mr. Tonner submits that RCIPS Investigating Officer, Stacy Ann

1 Stewart, could not produce her notes to prove that the Complainant, Andrew
2 Lopez, had given her a physical description of the Defendant whilst he was
3 in hospital on the 25th August 2012.

4 12. Defence counsel submits that there is no physical description of the
5 Defendant because the victim did not get a good look at his attacker, as the
6 lighting in the area was poor, and the Complainant was attacked from behind.

7 13. In addition, Defence counsel submits that although there were a number of
8 people at the scene, nobody has come forward to give evidence of
9 identification of the Defendant. No clothing has been seized to link the
10 Defendant to the attack. There is no forensic evidence to support Mr. Lopez's
11 identification of the Defendant and, there is no CCTV footage of the attack
12 on Mr. Lopez.

13 14. Defence counsel concludes that there is no evidence that the Defendant was
14 even at the location on the night in question.

15 15. Defence counsel submits that the fact that Mr. Lopez picks out the
16 Defendant's photo as number 7 on the photo spread does not corroborate Mr.
17 Lopez's initial identification of the Defendant as the attacker.

18 16. Defence counsel also relies upon the dicta of the former Lord Chief Justice,
19 Lord Widgery in *Regina v. Turnbull* [1977] Q.B. 224, and in particular, his
20 statement at paragraph H on page 229 where he states:

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1 20. The Prosecution submits that the victim has known the Defendant as “Pott”
2 or Justin for approximately 10 years. Mr. Ward highlights the fact that the
3 victim has detailed the circumstances in which he knows the Defendant, and
4 there has been no challenge to the fact that he knows the Defendant as “Pott”
5 or Justin. Accordingly, Mr. Ward says it cannot be said that the victim is not
6 familiar with the Defendant or does not know his identity.

7 21. Turning to the circumstances of the identification evidence, Mr. Ward states
8 that Mr. Lopez had a good opportunity to see the face of the Defendant.
9 According to Mr. Lopez the Defendant was only one foot away when he
10 turned around and recognised him. Mr. Ward highlights the fact that Mr.
11 Lopez looked upon the face of the Defendant and there was nothing to
12 obstruct his view. In addition, Mr. Ward stresses the fact that the Defendant
13 was so close to Mr. Lopez that, not only did he hear him say, “*Where is your*
14 *mouth now?*” – a reference to an incident just over a week earlier when the
15 Complainant took away purportedly stolen scooters from the Defendant’s
16 relatives – but he saw the Defendant’s mouth as he was saying the words.
17 The Crown relies upon the fact that the Complainant could see the mouth of
18 the Defendant as he spoke to the witness.

19 22. Accordingly, the Crown does not accept that the identifying evidence by the
20 Complainant of the Defendant is poor, nor does the Crown accept that the
21 identification was made in difficult conditions.

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1 *ANALYSIS AND CONCLUSION*

2 23. In order to decide upon this application it is necessary for me to examine the
3 quality of Mr. Lopez's identifying evidence.

4 24. Defence submits that because of the low light, the speed of the attack and the
5 fact that Mr. Lopez turned his back, he could not have got a good look at the
6 Defendant. Mr. Ward disagreed with this submission.

7 25. Mr. Lopez said that he felt a stab in his back and he turned around and he
8 saw "Pott." He saw him from his waist up to his head. Mr. Lopez also said
9 that "Pott" was "*right there and right in front of me.*"

10 26. Mr. Lopez described the light poles and said that they were lit up and "the
11 guys were playing dominoes" in an area close to where he was standing. Mr.
12 Lopez said he had known Pott for about 10 years – from their time in school
13 when they would end up in the suspension unit together. Mr. Lopez said he
14 also remembered Pott riding his dirt bike down at the marl pit behind CUC.

15 27. Mr. Lopez told the Court that he sees the Defendant around and he knows the
16 Defendant lives behind where he works in Central Plaza and, he is sure that it
17 is the Defendant who attacked him.

18 28. Mr. Lopez said the Defendant's attack on him related to the issue between
19 them from the week prior – an argument about scooters.

20 29. Mr. Lopez said that in trying to get away from the Defendant's repeated stabs
21 he tripped over a piece of cement, but the Defendant kept pulling his shirt

1 and kept stabbing him. Mr. Lopez said he never got a chance to get away and
2 the Defendant stayed on him, attacking him.

3 30. After the Complainant received the stab wounds, he then saw the Defendant
4 run back towards the Sea Inn.

5 31. Mr. Lopez described the incident as lasting some 25-30 seconds and the
6 Defendant was wearing a black shirt and a white cap. He said nothing was
7 obstructing his view. When asked by Defence counsel why he did not give
8 any description of the Defendant in his statement he said, "*Because I know*
9 *who it was.*"

10 32. It was suggested to Mr. Lopez that there is no description in his statement
11 because he did not get a good look at his attacker. Mr. Lopez replied that he
12 did in fact get a good look. He knew him as Pott, but at the time he had
13 forgotten his name.

14 33. I note that the only other evidence describing the lighting at the scene was
15 from Zoan Marin, the Scenes of Crime employee, who described the lighting
16 at the scene of the crime to be "*fairly bright*" from her examination on the
17 29th August 2012.

18 34. Having reviewed this evidence I accept that there is an absence of supporting
19 evidence of Mr. Lopez's identification of the Defendant on the night in
20 question.

21 35. However, having reviewed the evidence given by Mr. Lopez I cannot
22 describe the quality of the identifying evidence as poor, nor could it ever be



1 described as a fleeting glance. 20 to 25 seconds is a long period of
2 observation.

3 36. The evidence adduced by the Crown is that the attacker stabbed Mr. Lopez
4 and Mr. Lopez saw him face to face with nothing obscuring his view.

5 37. It is clear that this incident happened at night, but there was street lighting,
6 and Ms. Marin described the street as “fairly bright.”

7 38. I do not find that the identification evidence is poor, nor made in conditions
8 so difficult that the Complainant could not have seen and identified his
9 assailant.

10 39. Accordingly, I cannot conclude that the prosecution evidence taken at its
11 highest is such that a jury, properly directed could not properly convict on it.
12 Furthermore, I find that the prosecution evidence depends on the view to be
13 taken of Mr. Lopez’s reliability, and on one possible view of the facts, there
14 is evidence upon which a jury could properly come to the conclusion that the
15 Defendant is guilty.

16 40. Accordingly I dismiss the application and order that the trial is to continue.

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18 **Dated this the 22nd January 2013**

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

