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IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 25/11

THE QUEEN
V
JOHAN ASTON JOSEPHS



Appearances: Ms Elisabeth Lees for the Crown
Ms. Fiona Robertson of Samson and McGrath for the Defendant

Before: The Hon. Mr. Justice Charles Quin

Heard: 20th -21st November 2012

RULING ON NO CASE TO ANSWER SUBMISSION

1. At the close of the Crown’s case, counsel on behalf of the Defendant made a no case to answer submission based on the classic test of *R v. Galbraith* 73 Cr. App R. 124.

2. In particular, 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.”

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

1 *“Where the judge concludes that the prosecution evidence taken at its*
2 *highest is such that a jury, properly directed, could not properly convict*
3 *on it, it is his duty, on a submission being made, to stop the case.”*

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

8 *“When, in the judgment of the trial judge, the quality of identifying*
9 *evidence is poor, as for example when it depends solely on a fleeting*
10 *glance or on a longer observation made in difficult conditions, the*
11 *situation is very different. The judge should then withdraw the case from*
12 *the jury and direct an acquittal, unless there is other evidence which*
13 *goes to support the correctness of the identification.”*

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15 5. Defence counsel submits:



16 i. The entire Prosecution case depends on the veracity of the witness,
17 Gregory Johnson (“Mr. Johnson”), who is also the victim of the attack,
18 and submits that this witness’ evidence is discredited in the extreme, due
19 to the many differences between his *viva voce* evidence in Court and his
20 statements given to the police in the period immediately following the
21 incident in 2010.

22 ii. Defence counsel highlights the fact that there is no other evidence to
23 support Mr. Johnson’s evidence of identification.

24 iii. There is no evidence of the Defendant being at the scene – either from
25 other persons who were nearby or from CCTV footage.

26 iv. There are no clothes or any other evidence to corroborate Mr. Johnson’s
27 identification of the Defendant.

1 6. For the sake of completeness I confirm that the Defendant is charged on this
2 Indictment with two counts. On Count 1 the Defendant is charged with
3 possession of an imitation firearm, contrary to s.18(6) of the Firearms Law,
4 with the particulars being that the Defendant, on the 14th day of September
5 2010 at Eastern Avenue, George Town, Grand Cayman, had with him an
6 imitation firearm with intent to commit a robbery. On Count 2, the Defendant
7 is charged with robbery, contrary to s.242 of the Penal Code, with the
8 particulars of the offence being that the Defendant, together with an
9 unknown person, on the 14th day of September 2010, at Eastern Avenue,
10 George Town Grand Cayman, stole cash in the amount of C\$400.00 and a
11 few US dollars, the property of Gregory Johnson, and at the time of so doing,
12 and in order to do so, put him in fear of being then and there subjected to
13 force.

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1 *SUBMISSIONS FROM THE DEFENCE*

2 7. Defence counsel submits that Mr. Johnson's alleged identification of the
3 Defendant was made in extremely difficult conditions.

4 8. Lighting: It was after dark and the area in question was extremely dark. The
5 nearest street light – the street being at the front of the building which Mr.
6 Johnson was at the back of – was on the opposite side of the road and well
7 away from where Mr. Johnson claims the alleged robbery took place.
8 Therefore, any light coming from the street to the back of the premises would
9 have been reduced significantly because the building which Mr. Johnson was
10 at the back of would have blocked out the street light.

11 The Defence points to the fact that there is no lighting in the narrow lane
12 which leads from the street to the back of the premises where the
13 Complainant was allegedly robbed.

14 Furthermore, Defence counsel submits that the outside light affixed to the
15 eaves of building on the premises on the other side of the fence at the back of
16 the building where the robbery took place may not have been on and, even if
17 this light had been on, the light was poor.

18 Defence counsel also submits that the Complainant would have been looking
19 at the robber with the light behind the robber, and therefore the light would
20 have been behind the robber's head, with no light shining on to the robber's
21 face – which would make his identification poor.



1 9. Short duration of the incident: Defence counsel submits that this all
2 happened in a very short space of time – nothing like the three-minute
3 timeframe that the Complainant initially said it took. In fact, the
4 Complainant, when asked about this 3-minute timeframe by Defence counsel
5 said that he used 3 minutes as an estimate but, in any event, the duration of
6 the robbery was a short period of time.

7 10. Many things to focus on: Defence counsel submits that the Complainant was
8 distracted because there multiple things happening almost at the same time
9 which were: (a) he was grabbed from behind unexpectedly in a dark area (b)
10 there were two men robbing him; (c) he was looking at the gun in the hand of
11 one of the robbers; (d) he had the other robber searching him and taking the
12 wallet from him, removing the money from it and tossing the wallet on the
13 ground (e) watching the two men making their getaway. Therefore Defence
14 counsel submits that Mr. Johnson was distracted by the gun, being searched
15 for his wallet and the removal of the money and, consequently, his
16 identification evidence was poor.

17 11. Multiple versions of the incident from the Complainant: Defence counsel
18 submits that the Complainant admitted in Court that he has made a lot of
19 mistakes in his evidence.

20 Defence counsel points to the fact that:

21 i. In one interview the Complainant stated that the gun came from behind
22 the robber, whereas in his evidence in Court the Complainant said the
23 gun was pulled from the robber's waist.



1 ii. The Complainant at one point said that the gun was produced before the
2 request for the money and then, on another occasion, he said the gun was
3 produced after the request.

4 iii. The Complainant told the police that the robber had low cut hair, but in
5 his evidence before the Court he said the robber was wearing a wave cap
6 and therefore he could not see the robber's hair.

7 iv. The Complainant told the police that the robber with the gun was 5' 8" in
8 height and thin, and yet, the Complainant told the Court that the robber
9 was a tall thick man.

10 v. The Complainant told the police in his statement some days after the
11 alleged robbery that he did not know the robber's name and yet, in Court,
12 he said that he got the robber's name on the same night immediately after
13 the robbery. Additionally, the Complainant also said in Court that, at the
14 time of the robbery he knew the alleged robber as "Johan" but he did not
15 know his surname.

16 Defence counsel submits that the evidence has too many inconsistencies to
17 be relied upon and the Complainant has made a number of significant
18 mistakes.

19 12. A case of Recognition: In relation to the Crown's submission that this is a
20 case of recognition, the Defence submits that the Complainant did not know
21 the Defendant's name and had not seen him for two years. The
22 Complainant's knowledge of the Defendant was from as far back as when he,
23 the Complainant, worked in the canteen at George Hicks School and the

1 Defendant was a student at the school and he recalled seeing the Defendant
2 there. The Defence submits that the Complainant admitted that he did not
3 know the Defendant well enough to have conversed with him and, even
4 though he, the Complainant, would see students come through the canteen
5 three times per day, there was a very large number of students and his contact
6 with the Defendant was “limited.”

7 13. Delay in going to the police: Defence submits that, the fact that the
8 Complainant did not go to the police for two days after the alleged robbery
9 demonstrates that the Complainant was uncertain of the identity of the
10 robber. Indeed, in his first statement to the police the Complainant admitted
11 to the police, “*I just don’t know his right name.*” Defence therefore submits
12 that the Complainant’s claim that he recognised the Defendant does not sit
13 well with the other evidence he has given to the Court; added to this, there
14 are the discrepancies in the Complainant’s description of the alleged robber
15 to the police.

16 14. Not calling for help: The Defence submits that the Complainant has said that
17 there were other people “around” when he was allegedly robbed. The
18 Complainant also said that someone he knew was at the end of the lane.
19 Additionally, the Defendant said that whilst he was at the back he had been
20 talking with someone next door. The Defence submits that even with all
21 these persons in close proximity, the fact that the Defendant did not call for
22 help reduces his credibility that he was robbed there by the Defendant.
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1 15. In addition, the Defence submits that the Complainant's first descriptions to
2 the police were extremely vague and, contrary to what he told the Court in
3 his evidence on the 20th and 21st of November 2012.

4 16. In conclusion, the Defence submits that the Complainant is mistaken and the
5 fact that he visited the Defendant's parents in order to properly identify him,
6 along with the many other inconsistencies in his claims, supports this
7 submission.



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1 *THE CROWN'S SUBMISSIONS*

2 17. The Crown resists the application by the Defence and in particular relies on
3 the portion of Lord Widgery's Judgment in *R v. Turnbull* at paragraph B on
4 page 229 where he states:

5 *"In our judgment when the quality is good, as for example when the*
6 *identification is made after a long period of observation, or in*
7 *satisfactory conditions by a relative, a neighbour, a close friend, a*
8 *workmate and the like, the jury can safely be left to assess the value of*
9 *the identifying evidence even though there is no other evidence to*
10 *support it: provided always, however that an adequate warning has been*
11 *given about the special need for caution."*(This portion is referred to in
12 paragraph 14-6 of the 2012 Edition of *Archbold*.)

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14 18. The Crown submits that the Complainant's view of the robber is not a
15 fleeting glance. The witness himself said the incident lasted three minutes
16 and he was "*penetrating*" the robber, meaning he was focusing his attention
17 on the robber.

18 19. The Crown relies upon the fact that the distance between the Complainant
19 and the robber was short, and further, that the Complainant said he was
20 certain that the Defendant was the robber.

21 20. The Crown submits that the fact that the Complainant admitted his many
22 mistakes shows him to be an honest and credible witness and that he was
23 sure that the robber was the Defendant.



1 *ANALYSIS AND CONCLUSION*

2 21. On the evening of the 20th November 2012 counsel, the Defendant, the
3 Complainant and I, went, along with RCIPS officers and Court staff, to view
4 the crime scene after dark, in similar conditions as on the 14th September
5 2010.

6 22. The area where the robbery allegedly took place is particularly dark. One has
7 to walk along a narrow dirt path between the building on one side and a fence
8 on the other – an area that has been referred to as a “lane”. At the end of this
9 “lane” there is very small backyard.

10 23. The only streetlight was far away from the back yard, at the front of the
11 building and on the opposite side of the road from the building in question.
12 There is no evidence of any lights in the backyard area itself, and the only
13 light came from a building behind the backyard area in question where the
14 alleged robbery took place.

15 24. In addition, as can be seen from photographs 6 and 7 – Exhibit 1 – the area is
16 extremely dark, which makes identification of any object or person difficult.

17 25. I also take into account the distances between the Complainant and his
18 alleged robbers which were measured during the visit to the crime scene. On
19 any view, these are not great distances and persons in that small backyard
20 area would have been close to each other. However, as the visiting team
21 stood closely together in that area, I agree with the submission by the
22 Defence that there was difficulty with identification and there would have

1 been difficultly if one were, in fright, and, in a matter of only a few minutes,
2 trying to make a precise identification of the robber.

3 26. When I consider all the evidence from the Complainant, the photographs
4 from the Scenes of Crime Officer and the viewing of the crime scene, it is
5 my view that the conditions for identification can only be described as very
6 difficult conditions. There is no light in the immediate area. The only light
7 comes from the neighbouring property and that, itself, is obscured by the
8 foliage on the tree.

9 27. When I examine the evidence on behalf of the Crown there is a distinct
10 absence of any corroborating evidence which would support the correctness
11 of Mr. Johnson's identification of the Defendant as the robber.

12 28. In addition, I am troubled by the differences in the descriptions of the robber
13 contained in the Complainant's statement to the police two days after the
14 event, and his evidence before this Court some two years and two months
15 later.

16 For example, in his evidence to the police the Complainant stated that the
17 robber was of a thin built, with low hair, and he was around 5' 8" to 5' 9"
18 tall. Whilst, in his evidence to this Court, the Complainant stated that the
19 robber was tall, of a thick set built and was wearing a cap. These are three
20 material inconsistencies which, far from supporting the correctness of the
21 Complainant's identification, clearly undermine it.

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1 29. The Crown relies on the fact that the Complainant's identification of the
2 Defendant is one of recognition. The Complainant said that the Defendant
3 knew him and he knew the Defendant. There is no evidence that the
4 Complainant ever talked with the Defendant or spent any time with the
5 Defendant.

6 The Complainant only really remembers the Defendant as being one of
7 several hundred students at a school at which he worked in the canteen.

8 The Complainant also states that his most recent view of the Defendant was 4
9 years ago in 2008, when he saw the Defendant parked near to the car parts
10 place and go across the road to the Corner Restaurant. The Complainant did
11 not speak with him. The Complainant also said he saw the Defendant
12 "*earlier this year*" at or close to the Corner restaurant.

13 To quote Lord Widgery's dicta referred to in paragraph 17: The defendant
14 was not a relative or a neighbour or a close friend or a workmate or the like.
15 In all the circumstances I find his evidence regarding his knowledge of the
16 Defendant was weak and inconsistent.

17 30. In Court the Complainant said he found out the alleged robber's name on the
18 night of the robbery, but in his statement to the police two days after the
19 incident, he said, "*I just don't know his right name.*"

20 31. The Complainant's evidence relating to the robbery and to his claimed
21 recognition of the robber himself, is vague and inconsistent.

22 32. I am bound by the dicta of Lord Widgery where he states:

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“The judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.”

33. I can find no other evidence to support the Complainant’s identification. There is no CCTV evidence or evidence from any other witnesses. There is also no forensic evidence and there is a complete absence of evidence to support, what in my view is poor identification evidence in difficult conditions.

34. Accordingly I conclude that the Prosecution evidence, taken at its highest, is such that a jury, properly directed, could not properly convict on it.

35. Consequently, and following the classic dicta of Lord Lane in *Galbraith*, I find that in these circumstances it is my duty to accede to the no case submission made by the Defence.

36. For the sake of completeness, I rely, as this is a trial by Judge Alone, on the dicta of Lord Lowry in *R v Hassan & Ors* [1973] NIJB where he states:

“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.”



1 37. I find that in no circumstances could I entertain the possibility of my being
2 convinced beyond reasonable doubt by the evidence given by the
3 Prosecution, and therefore there is no justification in allowing the trial to
4 continue.

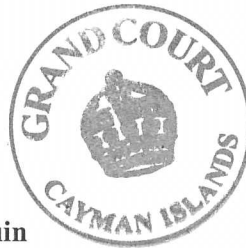
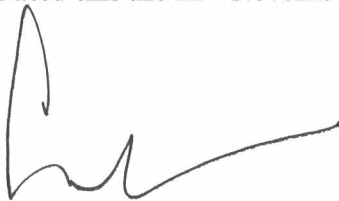
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8 **Dated this the 22nd November 2012**

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12 **Honourable Mr. Justice Charles Quin**
13 **Judge of the Grand Court**