

14-12-11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION
INDICTMENT NO. 20/2011



REGINA
V
DEVON ANGLIN

IN OPEN COURT

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

THE 14TH DAY OF DECEMBER 2011; 14TH DECEMBER 2011

APPEARANCES:

Ms. Cheryl Richards QC, Director of Public Prosecution and
Ms. Elizabeth Lees, Crown Counsel for the Crown

Mr. Dorian Lovell-Pank QC instructed by Ms. Lucy Organ of
Samson & McGrath for the defence

RULING ON NO CASE SUBMISSION

1. As Mr. Lovell-Pank submits, the sole issue of fact in this case is the correctness of the identification of the person who shot and killed Carlo Webster on the night of 9th September 2009 at the Next Level night club on West Bay Road, Grand Cayman.
2. In simplified terms, the test that applies to the present question of whether the defendant has a case to answer is whether the prosecution has put sufficient reliable evidence before the Court so that a jury, properly directed, could conclude that the defendant is that person.

3. The full legal statement of the test as to whether a defendant has a case to answer remains as classically explained in *R v Galbraith* 73 Cr. App. R. 124 CA and I think it is necessary to cite it in full for present purposes: (per Lord Lane CJ at p 127):

“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty – the judge stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weaknesses 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.”

4. Here there is, of course, no separate jury so what Limb (b) of *Galbraith* must be taken to mean is that if on one possible view of the facts there is evidence on which I, as the tribunal of fact, could convict, then I should allow the case to proceed by calling upon the

defendant to answer and then to consider the case as a whole, including any evidence that the defendant may decide to put before the Court in his defence.

5. Here, as I understand Mr. Lovell-Pank's submissions (while he cited Limb (b)), he is saying that this case comes within Limb (a) because he is saying that the state of the prosecution's evidence is such that a jury properly directed, could not properly convict on it.
6. And in this regard, by reliance on the case of *R v Shippey* [1988] *Crim. L. R.* 767, he warns that the expression "*the prosecution's case taken at its highest*" does not admit of an approach that would simply allow the Court to pick out and rely upon the "plums" of the prosecution evidence, while rejecting the duff. This must, of course, as a matter of both principle and common sense, be correct because those aspects of the witness' evidence that may be described as inconsistencies or contradictions are as much a part of what the witness has sworn to be true as those parts that would be relied upon to support the Crown's case.
7. But that said, Limb (a) of *Galbraith* must be reconciled with Limb (b) where the latter advises that where the strength or weaknesses of the prosecution case 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, the matter should be left to the jury. I emphasise the words "*where on one possible view of the facts*" because here, as careful and analytical as Counsel has been in his treatment of the seeming inconsistencies in Witness E's evidence and contradictions

in Witness B's evidence, these are all, essentially, matters that go to the issue of the reliability of those witnesses.

8. What Counsel submits in effect, is that those inconsistencies and contradictions are so far-reaching and irreconcilable, as to render the evidence of those witnesses so unsafe that no jury properly directed could properly convict by reliance on their evidence.
9. I find myself unable to agree.
10. I find that the issues raised rather place the question of the examination of the evidence of these witnesses into Galbraith Limb (b). The issues raised are issues about the reliability of those witnesses and at this stage all I think I need say is that on a certain view or views of their testimonies, there is evidence before this Court on which a jury properly directed could properly convict.

As to Count 2: Attempted Murder

11. The question that arises in relation to Count 2 is whether, as it involves an allegation of an attempt to murder Christopher Solomon resulting from fatal shots fired at Carlo Webster, Count 2 could in law be proven based on the transferred malice of the defendant directed at Webster to Solomon.
12. The question of the various mental states of the defendant as it may relate to the offences charged in Counts 1 and 2 of the Indictment, undeniably presents a difficult problem.
13. The problem involves the interpretation of the particular mental element required for the particular offence.
14. The identity of the victim is not a material detail as far as most offences against the person are concerned, and therefore the accused's intention to injure A can be transferred so as to make the accused liable for an injury accidentally inflicted on B. This principle

was applied to the offence of manslaughter in *R v Mitchell* [1983] QB 741, where the accused assaulted a man A, aged 72, causing him to fall on an even more elderly woman B, aged 89, ultimately causing her death. Mitchell's conviction for the manslaughter of the elderly woman was upheld by the Court of Appeal on the basis that the mens rea of the act which had been calculated to cause harm to A could be manslaughter if it in fact killed B."

15. A more restrictive approach was however taken more recently by the House of Lords in *AG's Reference (No. 3 of 1994)* [1998] AC 245 where it was held that the doctrine of transferred malice could not be extended to create liability for murder from an intentional infliction of grievous bodily harm upon a pregnant woman which later resulted in the death of her child, subsequent to the child having been born alive. It seems that such a situation could give rise to liability for manslaughter, apparently without the need for the doctrine of transferred malice on the basis that death was the result of an unlawful act, but it was not murder. However, as the editor's of *Blackstones Criminal Practice 2012* observe (at para A2.14), this decision implies a policy decision of their Lordships not to extend any further the rule that liability for murder can arise from an intention to inflict grievous bodily harm rather than a specific intention to kill. And so the logic of this decision would not necessarily preclude liability for murder of the child, where the initial attack on the mother was with intent to *kill* her.
16. This decision of the House of Lords also reinforces the principle that the *mens rea* for one offence cannot be transferred so as to make an accused liable for a different offence, even if the two offences happen to share similar terminology in their definition. This is illustrated by the long-standing decision of *Pembliton* (1874) LR 2 CCR 119; where the

accused threw a stone at a crowd of people but missed and broke a glass window behind the crowd. His intention was found to be to hit the people, but not the window. Although he could have been convicted for malicious wounding had he hit someone, his conviction for malicious damage to property was quashed since that was a separate offence with its own separate *mens rea* of the independent offence of malicious damage.

17. If, however, two separate offences have precisely the same *mens rea* then the problem disappears. This is because proof of the *mens rea* of one automatically involves proof of the *mens rea* of the other: *Blackstones (op. cit, ibid)*.
18. The doctrine of transferred malice is also accommodating of the further doctrines of recklessness and foresight of the natural and probable consequences of one's actions.
19. Indeed, the essence of the doctrine of transferred malice is the absence of intention to harm the ultimate victim while being reckless as to whether or not the harm aimed at the intended victim might instead, or in addition, cause harm to another victim.
20. By the application of the doctrine, an accused will therefore be held liable if harm results to another as the natural and probable consequences of his actions, provided though, that the harm that results is of the same kind intended for his immediate victim.
21. That is, as I understand it, what is meant by the transfer of malice or *mens rea* from one offence to another. This is also why as I understand his submissions, Mr. Lovell-Pank conceded that a Court for wounding with intent as applied to the wounding of Christopher Solomon would stand instead of that of attempted murder which is charged. The intention to do grievous bodily harm would have thus been common both to that wounding Count and to the Court 1 murder.

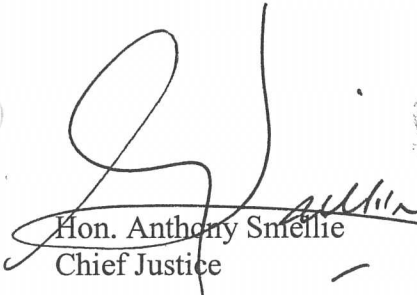
22. The issue therefore ultimately hinges on precisely what is required by the mens rea of the particular offences charged.
23. Here, the *mens rea* of murder is the intention to kill or to cause grievous bodily harm. Proof of either of those two intentions will found a charge for murder if death results.
24. The intent rather than the consequences is the essence of any crime of attempt, whether at common law or under statute. The prosecution must prove that the defendant acted with the specific intent to commit the particular crime which was attempted. Thus, although murder may be committed by someone who intends only to cause grievous bodily harm, attempted murder requires nothing less than an intention to kill. See Whybrow (1951) 35 Cr. App. R. 141.
25. In this respect, the case law provides – (R v Fallon [1994] Crim. L. R. 519), for example – it may suffice to direct the jury to decide (a) whether the defendant shot at his victim deliberately; and (b) if so, whether the defendant was shooting to kill.
26. On the facts of this case, it is clear that a jury would have to be directed – subject only to the question of transferred malice as it relates to Count 2 – in precisely those terms having regard to the actions of the gunman.
27. The question as it relates to the mens rea of Count 1 is thus precisely the same as it relates to the mens rea of Count 2 – was the intention that of the intention to kill? If a jury properly directed could come to no other conclusion, then it would be open to the jury to conclude that the offence of attempted murder of Christopher Solomon is proven.
28. It is by virtue of the doctrine of transferred malice that a jury is allowed to find that such an intention may be transferred from one intended victim (here Carlo Webster) to another

(here Christopher Solomon) for the purpose of convicting of an offence involving the same intention as against that other.

29. For these reasons, and difficult of application though the principle may be, I am satisfied that the defendant could, as a matter of law, be convicted on Count 2 of the present indictment.

30. I therefore find that there is a case to answer in this Count as well.

31. On the basis of that finding, I need not consider the further question whether the defendant could be convicted for the offence of wounding with intent of Christopher Solomon, in the absence of a specific Count to that effect on the indictment and on the basis only that the evidence discloses such an offence. I therefore decline to do so.


Hon. Anthony Smellie
Chief Justice



December 14 2011