

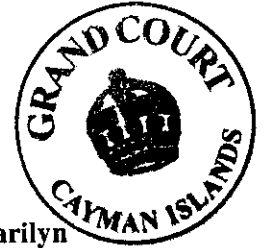
1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE

INDICTMENT NO: 84/10

3
4 THE QUEEN

5
6
7 V

8
9 LEONARD ANTONIO EBANKS



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11
12 **Appearances:**

Mr. Trevor Ward and Ms. Marilyn
Brandt for the Crown

13
14
15 Mr. Martin Heslop Q.C. instructed by
16 Ms. Lucy Organ of Samson and
17 McGrath for the Defendant

18
19 **Before:**

The Hon. Mr. Justice Charles Quin

20 **Heard:**

5th – 21st September 2011

21
22 **RULING ON NO CASE TO ANSWER SUBMISSION**
23
24

25 1. The Crown has charged the Defendant in this trial, Leonard Antonio Ebanks,
26 with murder contrary to s.181 of the Penal Code (2007 Revision) and the
27 particulars of the offence are that the Defendant, on the 8th day of September
28 2010, at 177 Birch Tree Hill Road, Grand Cayman, Cayman Islands,
29 murdered Tyrone Burrell.

30 2. Leading counsel on behalf of the Defence, Mr. Martin Heslop Q.C., has
31 made a submission of no case to answer, pursuant to s.137 of the Criminal
32 Procedure Code 2010, and the classic principles of Lord Lane in *R v.*
33 *Galbraith* 73 Cr. App. R. 124.

1 3. For the record, s.137 of the Criminal Procedure Code 2010 reads:

2 *“When the evidence of the prosecution witnesses has been*
3 *concluded the Court may before or after considering any*
4 *statement or hearing any evidence of the accused, invite first the*
5 *prosecution and thereafter (at its discretion) the Defence to*
6 *address it upon the question of whether there is sufficient*
7 *evidence before the Court to warrant conviction of the accused*
8 *or any or more of several accused of the offence charged or any*
9 *relevant offence and if either before or after hearing the address*
10 *by the Defendants, it considers there is no such evidence, it shall*
11 *discharge the accused concerned and enter a verdict of not*
12 *guilty with respect to such accused.”*

13

14 4. Lord Lane in *R v. Galbraith* 73 Cr. App. R. 124 stated:

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

18 2. *The difficulty arises where there is some evidence but it*
19 *is of a tenuous character, for example because of*
20 *inherent weakness or vagueness or because it is*
21 *inconsistent with other evidence.*

22 a. *Where the Judge concludes that the prosecution*
23 *evidence, taken at its highest, is such that a jury*
24 *properly directed could not properly convict on*
25 *it, it is his duty, on a submission being made, to*
26 *stop the case.*

27 b. *Where however the prosecution evidence is such*
28 *that its strength or weakness depends on the*
29 *view to be taken of a witness' reliability, or*
30 *other matters which are, generally speaking*
31 *within the province of the jury, and where on*
32 *one possible view of the facts there is evidence*
33 *on which the jury could properly come to the*
34 *conclusion that the Defendant is guilty, then the*
35 *Judge should allow the matter to be tried by the*
36 *jury.”*

37

1 5. Mr. Heslop relies on both limbs of the *Galbraith* doctrine. In addition Mr.
2 Heslop cites the case of *R v. Shippey* [1988] Crim. L. R. 767 and Mr. Justice
3 Turner’s decision where he stated:

4 *“His Lordship found that he must assess the evidence and if the*
5 *witnesses’ evidence was self-contradictory and out of reason and all*
6 *commonsense then such evidence is tenuous and suffering from inherent*
7 *weakness.”*

8
9 The Defence invites the Court to adopt this reasoning and submits that on the
10 evidence before this Court the case for the prosecution is not capable of
11 belief.

12
13 6. In addition, Mr. Heslop relies on the English Court of Appeal decision of *R*
14 *v. Pryer* [2004] EWCA Crim 1163 and the judgment of Lord Justice Hooper
15 where he stated that *Shippey* is no more than another case on the facts, and
16 earlier stated at paragraph 28 of his judgment:

17 *“What is a trial judge being asked to do when a submission of no case*
18 *has been made either at the close of the prosecution case, or, as*
19 *sometimes happen, after all the evidence in the case has been given? He*
20 *has a task to perform which is stated simply and clearly in Galbraith:*

21 *“Could a reasonable jury properly directed be sure of the*
22 *defendant’s guilt on the charge which he faces.””*

23
24

No Case to Answer on Judge Alone Trials

25 7. The Court has received considerable assistance from the case law from
26 Northern Ireland where non jury Judge Alone trials have been in existence
27 for “scheduled terrorist offences” since the Diplock Report of 1973.

1 8. In the Northern Ireland Court of Appeal decision in *Chief Constable v. Lo*
2 [2006] NICA 3, the then Lord Chief Justice, Lord Kerr, stated at paragraph
3 13:

4 *“In our judgment the exercise on which a magistrate or judge sitting*
5 *without a jury must embark in order to decide that the case should not be*
6 *allowed to proceed involves precisely the same type of approach as that*
7 *suggested by Lord Lane in the second limb of Galbraith but with the*
8 *modification that the judge is not required to assess whether a properly*
9 *directed jury could not properly convict on the evidence as it stood at the*
10 *time that an application for a direction was made to him because, being*
11 *in effect the jury, the judge can address that issue in terms of whether he*
12 *could ever be convinced of the accused's guilt. Where there is evidence*
13 *against the accused, the only basis on which a judge could stop the trial*
14 *at the direction stage is where he had concluded that the evidence was so*
15 *discredited or so intrinsically weak that it could not properly support a*
16 *conviction. It is confined to those exceptional cases where the judge can*
17 *say, as did Lord Lowry in Hassan [1981] 9 NIJB that there was no*
18 *possibility of his being convinced to the requisite standard by the*
19 *evidence given for the prosecution.”*

20

21 9. Lord Kerr went on to state at paragraph 14:

22 *“The proper approach of a judge or magistrate sitting without a jury*
23 *does not, therefore, involve the application of a different test from that of*
24 *the second limb in Galbraith. The exercise that the judge must engage in*
25 *is the same, suitably adjusted to reflect the fact that he is the tribunal of*
26 *fact. It is important to note that the judge should not ask himself the*
27 *question, at the close of the prosecution case, 'do I have a reasonable*
28 *doubt?'. The question that he should ask is whether he is convinced that*
29 *there are no circumstances in which he could properly convict. Where*
30 *evidence of the offence charged has been given, the judge could only*
31 *reach that conclusion where the evidence was so weak or so discredited*
32 *that it could not conceivably support a guilty verdict.”*

33

34 10. Leading counsel for the Defendant submits that if the prosecution case is
35 taken as its highest against the Defendant it provides no basis for a
36 conviction because there is a fundamental flaw in the prosecution evidence
37 which is fatal to the case. Mr. Heslop submits that the evidence of the two

1 key witnesses, Arlene Whyte (“Ms. Whyte”) and Nora Ebanks (“Ms.
2 Ebanks”), demonstrates that the Defendant could not physically have done
3 the killing by reference to the time and location, described by those two
4 witnesses, of the defendant in relation to the shooting.

5 *Defence Submissions on Ms. Whyte’s Evidence*

6 11. The Defence submits that the evidence of Ms. Whyte establishes the
7 following:

8 A. That between 2 and 5 seconds after seeing the Defendant Ms.
9 Whyte heard the gunshot that killed Tyrone Burrell;

10 B. That having regard to where Ms. Whyte last saw the Defendant,
11 and the time gap between the loss of view of the Defendant and
12 the gunshot, it is physically impossible for the Defendant to have
13 travelled from where Ms. Whyte last saw him, to the shooting,
14 and then for the Defendant to fire the shot;

15 C. That Ms. Whyte’s answers on timing (in A. above) are not
16 qualified and are undiminished and they stand in evidence as
17 between 2 and 5 seconds as accurate;

18 D. That she, Ms Whyte, formed the view at the time that the
19 Defendant could not have done the shooting because he was
20 going in the opposite direction from where the shot was fired and
21 in effect the timeline was too short and, accordingly, it is
22 difficult to see how a reasonable tribunal could conclude
23 otherwise;

1 E. That the Defendant could not have gone around the house
2 between 2 and 5 seconds via the three possible routes, which are:
3 (a) between the truck and the side of the house to where the
4 deceased was found; or (b) between the truck and the boat; or (c)
5 right around the boat and shoot the deceased. In this regard the
6 Defence relied on photograph #12 to show that it was a “tight
7 squeeze” to get between the house and the truck.

8 12. The Defence submits that the evidence of Ms. Ebanks establishes the
9 following:

10 A. That if this witness’ evidence is correct, the Defendant could not
11 physically have been the killer;

12 B. That the time between Ms. Ebanks hearing the noise and seeing
13 the Defendant at the cesspit, was only 10 seconds – as described
14 by her in her evidence in chief;

15 C. That in cross examination, in response to Mr. Heslop, Ms.
16 Ebanks said the timeframe (referred to in b.) was “a couple of
17 seconds.”

18 D. That the Defendant was not running and was not out of breath,
19 and she did not see him with a gun when she saw him “a couple
20 of seconds” after the gunshot.

21 E. That the Defendant could not have got from the scene of the
22 shooting of Tyrone Burrell to the cesspit in the timeframe
23 described and named by Ms Ebanks.

1 18. When asked, in examination in chief, how long after she saw the Defendant
2 disappear did she hear the gunshot, Ms. Whyte said around 5 seconds. When
3 asked to repeat the time she said:

4 *“... 5 seconds, around 5 seconds.”*

5 19. Under cross examination from Defence counsel Ms. Whyte was asked
6 whether she heard the shot around 5 seconds after “you saw Toneo” and she
7 said, “yes.” Questioned further by Defence counsel, she was asked whether
8 she would disagree or agree if he said it was 2 to 3 seconds after seeing the
9 Defendant that she heard the shot, she said she would not disagree, but
10 added:

11 *“I just estimate it at 5 seconds.”*

12 20. The Defence relies on the submission that Ms. Whyte’s answers are not
13 qualified and are undiminished and they stand in evidence as between 2 and
14 5 seconds as accurate – with the conclusion being that the Defendant could
15 not have run around from the mango tree to shoot Tyrone Burrell beside the
16 red truck.

17 21. It is clear that Ms. Whyte’s 5-second estimate was only an estimate. She did
18 not refer to the existence of any watch on her wrist or kitchen clock or any
19 other time piece. Accordingly, it is open to the tribunal of fact to consider
20 this estimate as one that could have been less or more than 5 seconds.

21 22. In addition, from the view of the locus on Wednesday the 14th September
22 2011, and from some of the photographs, but in particular, photograph 107, it
23 is my view that it is quite possible for the assailant, and indeed the victim, to

1 pass through the gap between the house and the red truck. Indeed, leading
2 counsel for the Defence frankly conceded that it was not impossible for a
3 person to get through the gap between the truck and the house. In addition
4 Ms. Whyte said it was quite possible to walk right around the house and get
5 to the area where the boat was located.

6 23. Ms. Whyte said in her evidence that she had never known the Defendant not
7 to come to the premises and not come in and say hello, so she thought it
8 strange that the Defendant dropped his bicycle and hastily went towards the
9 mango tree and out of sight. What is clear is that Ms. Whyte stated on a
10 number of occasions, in answer to questions from leading counsel for the
11 Defence, that she considered the Defendant's behaviour to be strange and
12 unusual just before she heard the shot. Ms. Whyte said the Defendant would
13 always stop, come in and say hello or what's going on.

14 24. Ms. Whyte confirmed in her evidence that the Defendant did not return to the
15 house that night, and did not return to pick up his bicycle after she heard the
16 shot which killed Tyrone Burrell.

17 25. I should add that I have no recollection of Ms. Whyte ever indicating that she
18 formed the view that the Defendant could not have done the shooting
19 because he was going in a direction which was opposite to the direction from
20 which she later heard the gunshot, and because the time difference between
21 seeing him and the gunshot was too short.

22 26. My recollection is that Ms. Whyte's statement that the Defendant could not
23 have killed Tyrone Burrell was said in a completely different context, that is,
24 when she was asked about the confessions the Defendant had made to her.

1 Ms. Whyte said that she did not take the first confession about a murder he
2 had previously committed seriously and thought that the Defendant could not
3 have committed such a murder because he was such a friendly boy and she
4 had such a good rapport with him. It was in that context, after Defence
5 counsel said to Ms. Whyte:

6 *"...[but] you are law abiding and a good Christian, surely you wanted to*
7 *tell the police that?"*

8 And Ms. Whyte replied:

9 *"...I was so shooked up.... I was not in the frame of mind....I did not*
10 *think 'Tonio would really shoot that guy.'*

11 Accordingly, from my review of Ms. Whyte's evidence she did not come
12 to any conclusion, or even suggest, that it was impossible for the
13 Defendant to get round the back to the house to shoot Tyrone Burrell.

14 27. From my viewing of the locus – 177 Birch Tree Hill Road – and the exhibits,
15 I cannot say that it is impossible for the Defendant or anyone else to get
16 around the back of the house in 5 or slightly more seconds. Therefore I
17 cannot find that there is evidence to conclude that it would be physically
18 impossible for the Defendant to travel from where Ms. Whyte last saw him to
19 where Tyrone Burrell's body was found.

20 28. I now turn to Ms. Ebanks's evidence, of seeing the Defendant ten seconds or
21 a couple of seconds after hearing the noise. Again, leading counsel for the
22 Defendant frankly conceded that, in the Caribbean and indeed elsewhere, "a
23 couple" does not necessarily mean "two."

1 29. It is clear, from the photographs in the albums and from the aerial
2 photograph that the terrain was much less overgrown than on the day of the
3 view.

4 30. In addition, having carefully reviewed the oral evidence of the Crown
5 witnesses, the exhibits, and recalling the view of the locus, I cannot conclude
6 that it would have been impossible for the Defendant to get from the boat at
7 the back corner of the house to the cesspit in Archie Ebanks's yard in 10
8 seconds or even less.

9 31. I have reviewed the evidence of the Crown witnesses, including the evidence
10 of the Defendant's confession to Ms. Whyte, the exhibits, the view and the
11 submissions of both counsel, and I find that I do not come to the conclusion
12 that the prosecution evidence, taken at its highest, is such that a jury, or a
13 tribunal of fact, properly directed, could not properly convict upon it.

14 32. In addition, submissions made by the Defence on the evidence of both Ms.
15 Whyte and Ms. Ebanks are, in my view, matters which are generally
16 speaking within the province of the jury, or in this case, the tribunal of fact.
17 And, where on one possible view of the facts there is evidence upon which a
18 jury or tribunal of fact could come to the conclusion that the Defendant is
19 guilty, then I should allow the matter to continue and be the subject of
20 addresses from both counsel.

21 33. To put it another way, and with particular reference to the case law in
22 Northern Ireland, I am not asking myself the question at this stage of the
23 proceedings: "*Do I have a reasonable doubt?*" but rather, I am asking
24 myself the question: "*Am I convinced that there are no circumstances on*

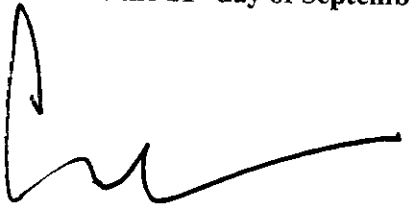
1 *which I can possibly convict?"* Having reviewed the evidence I cannot say
2 that I am convinced that there are no circumstances on which I can possibly
3 convict. In addition, I cannot find that the evidence is so weak or so
4 discredited that it could not conceivably support a guilty verdict.

5 34. Accordingly, I find that there is a case to answer and I order the trial to
6 continue.

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9 **Dated this the 21st day of September 2011**

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Honourable Mr. Justice Charles Quin
Judge of the Grand Court

