

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

3 **INDICTMENT NO: 51/09**

4
5 **THE QUEEN**

6
7 **V**

8
9 **PATRICK MCFIELD**
10 **OSBOURNE DOUGLAS**
11 **BRANDON LESLIE EBANKS**

12
13 **Appearances:**

14 **For the Crown:**

15 **Solicitor General, Ms Cheryll Richards Q.C.**
16 **Crown Counsel, Ms Trisha Hutchinson**

17 **Defence Counsel:**

18 **Mr. Trevor Burke Q.C. and Mr. Ben Tonner of**
19 **Samson and McGrath for Patrick McField**

20
21 **Mr. Alistair Malcolm Q.C. and Mr Clyde Allen for**
22 **Osbourne Douglas**

23
24 **Mr. Nicholas Rhodes Q.C. and Mr. Nicholas Dixey of**
25 **Mourant for Brandon Leslie Ebanks**

26 **Before:**

Hon. Justice Charles Quin

27 **Heard:**

30th August to 9th September 2010

28
29 **RULING ON DEFENCE'S NO CASE TO ANSWER SUBMISSION**

30
31 1. All three Defendants through their leading counsel have made submissions of no
32 case to answer, relying on Lord Lane's classic dicta in *R v. Galbraith* 73 Cr.
33 App. R. 124.

34
35 2. I now set out Lord Lane's classic dicta in *R v. Galbraith* 73 Cr. App. R. 124 CA
36 in which he stated:

1 “(1). If there is no evidence that the crime alleged has been committed by the
2 defendant there is no difficulty – the Judge will stop the case. (2). The
3 difficulty arises when there is some evidence but it is of a tenuous character,
4 for example, because of inherent weakness or vagueness or because it is
5 inconsistent with other evidence. (a) Where the Judge concludes that the
6 prosecution evidence, taken at its highest, is such that a jury properly
7 directed could not properly convict on it, it is his duty, on a submission being
8 made, to stop the case. (b) Where, however, the prosecution evidence is such
9 that its strength or weakness depends on the view to be taken of witness’s
10 reliability, or other matters which are generally speaking within the province
11 of the jury and where on one possible view of the facts there is evidence on
12 which the jury could properly come to the conclusion that the defendant is
13 guilty, then the Judge should allow the matter to be tried by the jury.”

14

15 3. As leading counsel for Mr. McField, Mr. Burke, stated when he started his
16 address, there would be a significant measure of overlap and repetition in the
17 submissions for the three defendants although it is important for the Court to
18 consider each submission separately in relation to each Defendant.

19

20 4. Mr. Burke on behalf of Patrick McField also prays in aid Mr. Justice Turner’s
21 observations in **R v. Shippey** [1988] Crim. L. R. 766 to remind the Court that the
22 requirement to take the prosecution case at its highest does not mean “*picking out*
23 *all the plums and leaving the duff behind.*”

24

25 5. Leading counsel for McField states that the judge should assess the evidence, and
26 if the evidence of the witnesses upon whom the prosecution depended was self

1 contradictory and without reason and all common sense, then such evidence was
2 tenuous and suffered from inherent weakness. Counsel submits that this is the
3 case in relation to the evidence against Mr. McField.

4

5 6. Mr. Burke, like Mr. Malcolm on behalf of Osbourne Douglas, and Mr Rhodes on
6 behalf of Brandon Ebanks, sets out a number of inconsistencies and
7 contradictions in the Crown case from which I will try to select the more
8 significant examples.

9

10 a. Mr. Burke relies on the fact that there is evidence from Ms Wright and
11 Ms Logan that 13 shots were fired at the scene, whereas the other Crown
12 evidence, and in particular, the Crown's witness, Leon Connolly, would
13 suggest that there were only 5.

14 b. Five bullet casings are found in a different area from where the two eye
15 witnesses say they saw two defendants produce the guns and start
16 shooting.

17

18 c. The eye witnesses refer to punching, kicking and fighting, and yet there
19 is no medical evidence in relation to the deceased to support such an
20 alleged assault.

21

22 d. Witness Wright describes the clothing of the deceased as including a
23 baseball-type cap with a dollar sign in sequins. Yet no baseball cap was
24 ever recovered from the scene, despite a most thorough examination.

25

1 e. Crown witness Marcus Manderson attributes words to the deceased to
2 identify a third party not before the Court, which again contradicts the
3 Crown's evidence and undermines the eye witness evidence.

4
5 f. There is a complete lack of forensic evidence linking McField to the
6 crime.

7
8 7. Mr. Malcolm, leading counsel on behalf of Osbourne Douglas relies on the fact
9 that the only evidence against his client comes from Ms. Wright, which he breaks
10 down into three parts. First her evidence as to what she saw on the porch;
11 Secondly, her evidence as to what she saw by the laundry; and, Thirdly, by
12 subsequent events.

13
14 8. Mr Malcolm highlights the fact that Ms Wright could only see what the man she
15 alleged to be Osbourne Douglas' eyes, and therefore she could not visually
16 identify him. Although Ms. Wright said that she recognized the voice of the
17 Defendant, Osbourne Douglas, Mr. Malcolm submits that this is inherently weak
18 and less reliable than visual identification. Mr. Malcolm points out that the
19 Crown did not implement a voice identification procedure as set out in the **R v.**
20 **Hersey** [1998] Crim. L. R. 281 and highlights a number of features of Ms.
21 Wright's identification to demonstrate its inherent weakness.

22
23 9. Mr. Malcolm, like Mr. Burke, points to several inconsistencies and submits that
24 if they are as a result of a faulty recollection, then the evidence could only be
25 described as poor.

26

1 10. Mr. Malcolm submits that, accordingly, the evidence comes within the approach
2 adopted by the Lord Chief Justice in R v. Turnbull [1977] 2Q.B. 224 where he
3 stated:

4
5 *“When, in the judgment of the trial judge, the quality of the identifying*
6 *evidence is poor, as for example when it depends solely on a fleeting glance*
7 *or on a longer observation made in difficult conditions, the situation is very*
8 *different. The judge should then withdraw the case from the jury and direct*
9 *an acquittal, unless there is other evidence which goes to support the*
10 *correctness of the identification.”*

11
12 11. Mr. Malcolm suggests that either the witness, Ms. Wright, is unreliable, or if that
13 is not so, then she is inventing the evidence, which makes the matter significantly
14 worse. In any event, Mr. Malcolm submits that the case should not be allowed to
15 go to the jury in light of the poor identification evidence of Cindy Wright. Mr.
16 Malcolm submits that there are too many weaknesses in the voice identification.
17 In addition, Mr. Malcolm submits that Cindy Wright’s eye witness identification
18 is weak and her evidence from the gap beside the Laundromat was only a fleeting
19 glance, and a fleeting glance from a side view of the Defendant, Osbourne
20 Douglas.

21
22 12. In summary, Mr. Malcolm submits that the poor identification evidence, together
23 with the inconsistencies, and the lack of supporting evidence, makes it a case that
24 should be withdrawn from the jury.

25

1 13. Mr. Rhodes, leading counsel on behalf of Brandon Leslie Ebanks, adopts many
2 of Mr. Burke and Mr. Malcolm’s submissions, but adds, in his argument: “...the
3 evidence of the two identification witnesses is wholly inconsistent with itself and
4 with the other evidence in this case. Specifically it is contradicted by the
5 evidence of scenes of crime examination and the scientific evidence arising there
6 from, and therefore, no jury properly directed upon the evidence in this case
7 could safely convict the Defendant Brandon Leslie Ebanks.”

8

9 14. Like his colleagues, Mr. Rhodes highlights in his skeleton argument a number of
10 inconsistencies between Ms. Wright and Ms. Logan and some inconsistencies
11 between their evidence and the Scenes of Crime and forensic evidence produced
12 by Zoan Marin, Dr. Hyma, Allan Greenspan, and Kevin Noppinger.

13

14 15. In addition, Mr. Rhodes submits that the purported identification of Brandon
15 Ebanks by Ms. Logan is contaminated by the fact that Ms. Wright had provided
16 his identity, and therefore there is a real danger that, although Ms. Logan may be
17 an honest witness, she is making an honest but very serious mistake.

18

19 16. Mr Rhodes, like his colleagues, submits that in the circumstances, no jury
20 properly directed upon the evidence adduced in this trial could safely convict Mr.
21 Ebanks of the murder of the deceased.

22

23 17. In her response the Solicitor General submits that the quality of the identification
24 evidence in the instant case is not poor and does not fall within the category of
25 evidence which is required to be removed from consideration by the jury. In fact
26 the Solicitor General submits that the identification is strong because it is a case

1 of recognition by the witness, Ms. Wright, who knew all three men before the
2 material time. Furthermore, the Solicitor General argues that Ms. Wright's
3 observation was unobscured and she had a significant period of time to observe
4 the three men in question. Accordingly, the Solicitor General submits that this ID
5 evidence could never be accurately described as a fleeting glance.

6
7 18. The Solicitor General does acknowledge that there are inconsistencies between
8 the evidence of Ms. Wright and Ms. Logan, but that, she submits, is a matter for
9 the jury. The Solicitor General frankly concedes that there are some areas of
10 discrepancy in relation to the number of shots, the lighting, and, the physical and
11 eye witness evidence, but, she submits that these are all matters for the jury.

12
13 19. Ms Richards, in fact, also points to the fact that much of the evidence of the two
14 eye witnesses tends to support each other. They both saw the three men confront
15 the deceased at the porch, and they both saw two of the men each draw a gun and
16 point them at the deceased.

17
18 20. Accordingly, the Solicitor General submits that there is significant and material
19 agreement on what happened at the material time.

20
21 21. Having examined and assessed the identifying evidence of Ms. Wright and Ms.
22 Logan, I cannot come to the view that "the quality of the identifying is so poor or
23 is so slender as to be unreliable and there is no other evidence in support of
24 identification" so that I should withdraw the case from the jury.

25

1 22. The Crown's evidence depends upon the reliability of the two eye witnesses, and
2 other matters, which, in my view, are within the province of the jury and where,
3 on one possible view of the facts there is evidence upon a which a jury could
4 properly convict, and therefore I should not prevent the case going to the jury.

5

6 23. It is my view that, although there are several inconsistencies and discrepancies
7 within the Crown evidence, these are matters which, with proper directions, can
8 be safely left for the jury. There will have to be careful directions on a number of
9 issues such as eye witness and voice identification evidence. At the appropriate
10 time I will invite all four counsel to give me their suggestions relating to these
11 directions. If all counsel think it appropriate, I can always consider providing the
12 jury with a written route or steps to verdict.

13

14 24. In my view, looking at all the evidence before me, there is a case for each of the
15 three Defendants to answer and looking at each of the three defendants and the
16 charge they face, there is, on one possible view of the facts, evidence upon which
17 a jury could properly come to the conclusion that they are each guilty.

18

19 25. Therefore, I order that this matter should be allowed to go to the jury.

20

21

22 **Dated this the 9th day of September 2010**

23

24

25 **Quin J.**
26 **Judge of the Grand Court**