

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

INDICTMENT NO: 33/08

3
4
5 THE QUEEN

6
7 V

8
9 KEITH BRIAN ORRETT
10 BRIAN EMMANUEL BORDEN
11 BJORN CONNERY EBANKS
12 KEITH ROHAN MONTAQUE
13



14 **Appearances:**

Crown Counsel –
Ms Trisha Hutchinson and Ms Candia
James

18 Defence Counsel –
19 Mr. John Fox and Mr. James Stenning of
20 Stenning & Associates for Keith Brian
21 Orrett;

22
23 Mr. Nick Hoffman instructed by Priestleys
24 for Brian Emmanuel Borden;

25
26 Mr. Nicholas Dixey of Mourant for Bjorn
27 Connery Ebanks;

28
29 Mr. Ben Tonner of Samson & McGrath for
30 Keith Rohan Montaque

31
32 **Before:**

The Hon. Mr. Justice Charles Quin

33 **Heard:**

21st - 23rd April 2010

34
35 **RULING ON DEFENCE'S NO CASE TO ANSWER SUBMISSION**

- 36
37 1. The First Defendant, Keith Orrett, through his counsel, Mr. John Fox, has made a
38 no case to answer submission, submitting that the prosecution, throughout the
39 course of this trial which began on the 15th February 2010, has not established
40 possession of the two firearms by Keith Orrett under the Firearms Law.
41

1 2. The Second, Third and Fourth Defendants, namely Brian Borden, Bjorn Ebanks and
2 Keith Montaque have all made submissions through their respective counsel that
3 there is no case to answer on the evidence presented by the Crown.



4
5 3. Section 137(1) of the Criminal Procedure Code states:
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7 *“When the evidence of the prosecution witnesses has been concluded the court*
8 *may, before or after considering any statement or hearing any evidence of the*
9 *accused, invite first the prosecution and thereafter (at its discretion) the*
10 *defence to address it upon the question of whether there is sufficient evidence*
11 *before the court to warrant conviction of the accused, or any one or more of*
12 *several accused of the offence charged or any relevant offence and if, either*
13 *before or after the address by the defence, it considers there is no such*
14 *evidence it shall discharge the accused concerned and enter a verdict of not*
15 *guilty with respect to such accused.”*
16

17 4. Counsel for the Second, Third and Fourth Defendants rely upon Lord Lane’s
18 classic dicta in **R v. Galbraith** 73 Cr. App. R. 124 CA in which he stated:

19
20 *“(1). If there is no evidence that the crime alleged has been committed by the*
21 *defendant there is no difficulty – the Judge will stop the case. (2). The difficulty*
22 *arises when there is some evidence but it is of a tenuous character, for example,*
23 *because of inherent weakness or vagueness or because it is inconsistent with*
24 *other evidence. (a) Where the Judge concludes that the prosecution evidence,*
25 *taken at its highest, is such that a jury properly directed could not properly*
26 *convict on it, it is his duty, on a submission being made, to stop the case. (b)*
27 *Where, however, the prosecution evidence is such that its strength or weakness*
28 *depends on the view to be taken of witness’s reliability, or other matters which*
29 *are generally speaking within the province of the jury and where on one*
30 *possible view of the facts there is evidence on which the jury could properly*
31 *come to the conclusion that the defendant is guilty, then the Judge should allow*
32 *the matter to be tried by the jury.”*
33

34 5. Mr. Fox, defence counsel for the First Defendant, Keith Orrett, submitted that the
35 Crown has not led sufficient evidence that the First Defendant had effective custody
36 and control of the firearms as charged in the indictment. Mr. Fox relies on the

1 Northern Ireland Court of Appeal case of *R v. McKenzie* [2005] NICA 7 and the
2 judgment of Lord Justice Nicholson at page 7 in which he states:



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4 "...the Prosecution has to prove that the Appellant had in his actual or
5 potential physical control the prohibited weapon, voluntarily assented to such
6 control and had knowledge of its nature."
7

8 6. Mr. Fox further submits on the facts that although Keith Orrett accepts that he saw
9 a co-accused with a shotgun on the sofa, Keith Orrett was not aware of the second
10 shotgun until the police arrived and discovered it. Furthermore, Keith Orrett did not
11 know that firearms were brought on to the premises and did not consent to the
12 same.

13
14 7. Mr. Fox also submits that there was no DNA linking the First Defendant, Keith
15 Orrett, to the either of the firearms and, as Keith Orrett did not have custody or
16 control of the weapons, he could not have had possession of them.

17
18 8. Mr. Hoffman, defence counsel for the Second Defendant, Brian Borden, relies on
19 the second limb of the *Galbraith* decision. Mr. Hoffman reminds the Court that the
20 confession of the First Defendant, Keith Orrett, cannot be used against his client or
21 the other two Defendants. Mr. Hoffman submits, that unlike the First Defendant,
22 Keith Orrett, Brian Borden has not admitted any knowledge of the firearm. Mr.
23 Hoffman also submits that there is no evidence that Brian Borden had custody or
24 control or knowledge of the firearm – the subject of Count II. The only evidence is
25 the DNA evidence which, Mr. Hoffman submits, at its height, can only mean that
26 Brian Borden may have touched the gun.

27



1 9. Mr. Hoffman submits that Mr. Noppinger's evidence has been severely undermined
2 by the fact that Exhibit 5 is his third report. Mr. Hoffman points to the fact that Mr.
3 Noppinger did not recognize his mistakes until they were brought to his attention by
4 Defence counsel in a *voire dire*. In addition, Mr. Hoffman submits that the match
5 probabilities are too low and that together with the fact that Mr. Noppinger's
6 credibility has been undermined means that this position cannot be cured no matter
7 how careful the direction to a jury may be.

8
9 10. Mr. Hoffman further submits that there is a high likelihood of contamination, by
10 virtue of the fact that the vital exhibits were handled by a number of police officers,
11 including police officers who had searched the Second Defendant, Brian Borden
12 and the Third and Fourth Defendants. Accordingly, Mr. Hoffman submits that the
13 DNA evidence is minimal, Mr. Noppinger's credibility has been undermined, and,
14 there is in fact a real risk of contamination, and therefore when one looks at the
15 Crown's case at its highest, it is such that a jury, properly directed, could not
16 properly convict upon it.

17
18 11. Mr. Dixey, counsel for the Third Defendant, Bjorn Ebanks, adopts all of Mr.
19 Hoffman's submissions. Mr. Dixey also submits that the DNA evidence is poor. It
20 is a mixture. It is low template, and it is difficult to interpret. Furthermore Mr.
21 Dixey also highlights the fact that Mr. Noppinger has made mistakes.

22
23 12. Mr. Dixey submits that, that the police evidence is externally and internally
24 inconsistent in the recovery of the firearms and handling of the suspects.

25

1 13. Additionally, Mr. Dixey submits that the house was an “open house” and therefore
2 many other persons had opportunities to place the two firearms in the attic. Further,
3 Mr. Dixey submits that the Crown is unable to say when the two firearms were
4 placed in the attic.

5
6 14. Mr. Tonner, counsel for the Fourth Defendant, Keith Montaque, also adopts Mr.
7 Hoffman’s submissions, and states that while Keith Montaque’s simple presence at
8 #4 Town Hall Court may be relevant, it is not enough. Mr. Tonner highlights that,
9 unlike Keith Orrett, there is an absence of admission on Keith Montaque’s part and
10 one is left with only poor DNA. Mr. Tonner highlights the fact that the DNA is in
11 miniscule amounts and that the ratio random tests are not accurate and cannot be
12 relied upon.

13
14 15. Mr. Tonner also raises the question of contamination. He submits that if Mr.
15 Noppinger is provided with contaminated evidence then all the scientific results are
16 fundamentally flawed, regardless of what steps Mr. Noppinger may take to prevent
17 contamination in his own laboratory.

18
19 16. In conclusion Mr. Tonner submits that Mr. Noppinger’s findings have little
20 probative value. Mr. Tonner also submits that Mr. Noppinger has not done
21 sufficient testing to include the possibility of relations, and further, there is a
22 manifest risk of contamination on the evidence.



1 17. In relation to Keith Orrett's application the Crown submits that the First Defendant,
2 Keith Orrett, rented and occupied the premises in which the two firearms were
3 discovered. The Crown submits that he exercised dominion and control over these
4 premises.

5
6 18. The Crown highlights the fact that initially Keith Orrett, when confronted, said that
7 he knew nothing about the guns. In fact he said that he had never been up in the
8 attic and he does not know who put the guns there. After twenty-four (24) hours
9 reflection Keith Orrett accepts that he saw one gun in the premises. The Crown
10 submits that the First Defendant had knowledge, custody and control.

11
12 19. The Crown relies upon the fact that after Keith Orrett had knowledge of the gun in
13 his premises he proceeds to cook food, watch movies and drink with the other
14 Defendants and he did nothing to alter the position of the gun remaining in his
15 presence and in his apartment.

16
17 20. The Crown relies upon the case that Mr. Fox cited – *Attorney General v. Scoog*
18 [2003] CILR 316. Although this was a misuse of drugs case, the principle can be
19 drawn in that, in the *Scoog* case, as the Court of Appeal held, it was unnecessary to
20 prove that the Defendant had control over the drugs, provided she exercised control
21 over the apartment, in which she knew her boyfriend was storing drugs for supply.
22 Justice Rowe at page 328 paragraph 28 stated in conclusion that the Magistrate was
23 correct, in that, she was entitled to find that the Defendant had actual knowledge of
24 possession by another of a very large quantity of ganja on the premises and took no
25 proper steps to try to prevent the criminal acts from occurring on her premises.



1 all four Defendants were present. Furthermore, the evidence is that the attic was in
2 an extremely dirty and dusty state and yet the firearms and the towel in which the
3 Remington firearm were discovered were clean and without dust or dirt. The Crown
4 submits that it could be reasonable for the jury to infer that the two firearms had
5 been placed there recently.

6
7 26. Mr. Dixey, counsel for the Third Defendant, Bjorn Ebanks, relied on the case of *R*
8 *v. Sciamonte* Indictment 94 of 2008. This case involved, so far as I am aware, the
9 discovery of a firearm in the back of a motor vehicle. As I read it, the only evidence
10 against Mr. Sciamonte was DNA evidence matching that of Mr. Sciamonte. There
11 was no evidence that he was in the motor vehicle when the firearm was discovered.
12 There was no evidence that he had ever been in the motor vehicle or had any
13 connection with the said motor vehicle. In the case before me we have DNA
14 matching the Third Defendant, Bjorn Ebanks, on the Beretta but, unlike *R v.*
15 *Sciamonte*, we also have the Third Defendant in the premises when and where the
16 Beretta was found. This same evidence also exists against the Second and Fourth
17 Defendants and, in my view, the facts in *R v. Sciamonte* are different and therefore
18 it can be distinguished.

19
20 27. The Crown has led evidence that Officer Leslie drove in a marked police car to the
21 front of #4 Town Hall Courts. Sgt Groves and Officer Stewart were at the back of
22 the apartment. Officers Borden and Leslie were at the front of the apartment for
23 approximately one and a half hours and were joined by other police officers
24 including Sgt. Prendergast. The evidence is that Officer Borden and Officer Leslie
25 knocked on the door with a lot of force and Officer Borden shouted in a very loud
26 voice “Armed police with a search warrant!” This was done repeatedly as the



1 police remained outside the premises. Eventually Keith Orrett, Bjorn Ebanks and
2 Keith Montaque and another man appeared and were taken out and secured. A short
3 time later Sgt. Groves and Officer Stewart went around to the front door and
4 shouted out “Occupants of the apartment come out, armed police” They shouted
5 this repeatedly and loudly. In addition, there is evidence that they shouted “armed
6 police come out show your hands.” Again, although this was repeated numerous
7 times, nobody else appeared.
8

9 28. The Crown’s evidence is that Sgt. Groves and Officer Stewart searched downstairs
10 and then the back bedroom upstairs, the bathroom, the landing, and then outside the
11 front bedroom, where, yet again, they shouted for any occupants to come out. They
12 then came upon the Second Defendant, Brian Borden, lying in the bed, pretending
13 to be asleep with another man. The evidence is that Brian Borden was fully clothed.
14

15 29. I have carefully considered the evidence and the submissions of counsel for the
16 Second, Third and Fourth Defendants. There is DNA evidence matching these three
17 Defendants. Although it is argued by the Defence that it is weak DNA evidence, in
18 my view it is relevant and it is a matter for the jury to consider with careful
19 directions, as to expert evidence and the inherent weaknesses of DNA.
20

21 30. It may well be that there are other persons in the Cayman Islands with the same
22 DNA, but the evidence before this Court was that there were only nine (9) people in
23 Keith Orrett’s apartment over the weekend in question. Furthermore, although there
24 is no evidence that the other persons or the police officers were tested for DNA,
25 these three Defendants were present in the house with two shotguns and DNA on
26 the firearm matches their DNA. In my view, this is evidence that can be clearly



1 understood and, at the end of the day, it is for the jury to consider its relevance and
2 what weight to attach to it.

3 31. Furthermore, all Defendants showed a strong disinclination to show themselves and
4 appear at the front door. In the case of the Second Defendant, Brian Borden, it
5 appears that he is lying in the bed in the middle of the day, fully dressed in street
6 clothes, whilst officers are outside the apartment for an hour and a half. Officers
7 Borden and Leslie knocked loudly and called the occupants out, and shouted they
8 were armed police officers with a search warrant. It seems quite incredible to me
9 that the Second Defendant and his companion, despite the numerous “callouts”
10 from different police officers, at different stages remained in the house for this
11 length of time and did not appear. This is a factor for the jury to consider.

12 32. In my view, looking at all the evidence, there is a case for each of the Defendants to
13 answer, and looking at each of the four Defendants and the charges they face, there
14 is, on one possible view of the facts, evidence upon which a jury could properly
15 come to the conclusion that they are guilty. Therefore it is my view that this matter
16 should be allowed to go to the jury.

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20 Dated this 23rd day of April 2010

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24 **The Hon. Mr. Justice Charles Quin**
25 **Judge of the Grand Court**

