

18/11/09

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CRIMINAL SIDE  
HOLDEN AT GEORGE TOWN

Indictment No: 37/08

REGINA

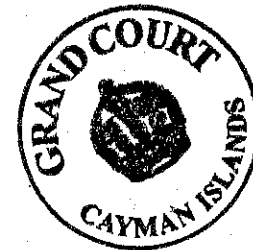
V.

TYRONE ROSWELL EBANKS

Appearances:

Candia James for the Crown

John Furniss for the Defendant



Before: Hon. Justice Quin

Heard: 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> of November 2009

JUDGMENT

1. The Defendant, Tyrone Roswell Ebanks, ("the Defendant") is charged with two Counts on this Indictment, namely attempted robbery, contrary to Section 242 of the Penal Code, and burglary, contrary to Section 243 of the Penal Code. The particulars of Count I are that the Defendant, on the 19<sup>th</sup> day of April 2008, on West Bay Road, Grand Cayman, attempted to steal a handbag from Agata Kalicki ("the Complainant") and used force in order to do so. The particulars related to the second Count on the Indictment are that the Defendant, on the 19<sup>th</sup> of April 2008, entered #35 Water's Edge condominium, West Bay Road, Grand Cayman, as a trespasser and stole one briefcase and one laptop, the property of John Herring.

2. Section 242(1) of the Penal Code states that a person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subject to force.
3. Section 243(1)(b) states that whomever having entered any building or part of a building as a trespasser steals or attempts to steal anything in the building or that part of it is guilty of the offence of burglary.
4. The Defendant has pleaded not guilty to both counts and has elected trial by judge alone.

#### **First Count – Attempted Robbery**

5. The Complainant had gone from Calico Jack's on the West Bay Road to a friend's house in West Bay, where she had had a fight with her boyfriend and decided to go home on her own. She recalls walking down the West Bay Road and seeing a man in the bushes by the Caribbean Club. She said he was initially about 15 feet away from her. Whilst she could not, at first, see his features, she noted that he was a lot taller than her and that he was wearing a bluish-green shirt. She said the man said something to her but she ignored him and kept on walking. The next thing she remembered was that the man followed her and grabbed her outside the entrance to the Caribbean Club.
6. Asked what part of the man's body was she able to see, the Complainant said "I was looking at his face. He was right in my face and we were face to face." The Complainant

said the man was taller than her and he was wearing a football jersey with #13 on it.

She described him as fairly light skinned, with scarring on his cheeks.

7. The Complainant said she was able to see the man clearly. There were street lights on the road and the Caribbean Club had lights in its parking lot. She described the area as fairly bright.
8. The Complainant then recalled the man who attacked her saying "why did she ignore him." She said she recalled trying to get the man to calm down. She said she kind of pushed his chest away and said "okay, what did you want to say" He said get your hand off me. Then he grabbed hold of her bag. She said "no, hold on, no hold on," and then he punched her in the nose and then in the head.
9. The Complainant said the timeframe in which he grabbed her and spun her around to demand her bag took approximately a minute. She said when he started punching her she yelled "stop" and "help" and screamed at the top of her lungs. She recalled a security guard coming from the Caribbean Club.
10. In cross examination she told counsel for the Defence, Mr Furniss, that the man was approximately 2 feet or 2 ½ feet – one arm's length – away from her.
11. The security guard obviously frightened the man away and the police were called.
12. Shortly after 2 a.m. WPC Kerry Tatum arrived on the scene and saw that the Complainant was bleeding from her nose, with swelling and bruising between her eyes and on her nose. WPC Tatum reassured the Complainant, who, according to WPC

Tatum, described her attacker as over 6 feet tall, with low straight hair and wearing a green football jersey with the #13 on it.

13. The Complainant said (in examination in chief) that she described the assailant to the police as 6 feet tall, light skinned. In answer to Crown Counsel the Complainant said she had told the police about the scarring on her assailant's cheek.

14. There is a small discrepancy here because WPC Tatum does not recall that, nor did PC Ian McDonald, who took the Complainant from the hospital to the police station, recall that.

15. However, Officer Andrew Grevitt, who was on duty that night, received a report that the attacker was 6 feet tall, clear-skinned Caymanian with bad facial skin. Neither WPC Tatum nor PC McDonald recall the Complainant giving them the description in relation to the scarring on the assailant's cheeks.

16. The Complainant, however, did say in cross examination that she was not sure whether she told PC McDonald about the scarring. She recalled that he was writing everything she said down. She said "yes I probably should have" but she could not recall exactly. She was explaining things and PC McDonald was writing them down.

17. The Complainant was treated at the hospital and then Officer McDonald took her from there to the police station in order to take her statement.

18. On arrival at the police station PC McDonald noted that a prisoner was being brought into a police station and there exercised a degree of caution. After the prisoner had been brought in to the station he then took the Complainant into the police station.
19. The Complainant then said the Officer, PC McDonald, was leading her through the doors that go into the police station and then took her to a room where there was a man, who looked like the man who attacked her earlier, standing around in the corner of the room. She said she was startled and she walked back out. When PC McDonald said, "Is that him?" and she said yes.
20. In her evidence to the Court the Complainant said that the man, her assailant, had been wearing the same shirt that he had been wearing at the time of the attack. It was the same football jersey, although this time he was not wearing any pants.
21. In examination in chief the Complainant said she saw her assailant from the front.
22. The Complainant was asked in Court if she saw the assailant would she be able to recognise him. She said yes. Asked whether he was in the courtroom, the Complainant identified the Defendant.

### **The Defendant's case on Count 1**

23. The Defendant chose not to give evidence and rely on his questions and answers submitted. He accepted in his interview with PC McDonald that he was wearing a Miami Dolphin jersey, a green white and orange jersey. He also said it was old and that it has the #13 on it all around. The Defendant said that he probably did pass the Caribbean

Club condos, but he did not remember seeing a young lady or calling out to a young lady and, furthermore, had no recollection of attacking a young lady.

24. The Defendant said that he had been drinking, using drugs, and furthermore, he was seeing all kinds of things and heard all trains blowing and laughter – “all kinds of stuff” in his head.

25. The Defendant is denying the charge.

26. In addition counsel for the Defendant highlights the discrepancy regarding the scarring. Counsel highlights the fact that the Complainant told the police – PC Grevitt – about the scarring, but neither PC Tatum nor PC McDonald had any recollection of the Defendant making that statement mentioning the scarring.

27. Furthermore, defence counsel has said that there should have been an identification parade and that the identification evidence is unreliable. The Defence submits that the Complainant was trying to avoid being hit and was looking at the Security Guard and therefore it was more like a fleeting glance identification.

## **Count II**

28. The Crown's case is that on the CCTV footage at Water's Edge there is evidence that that Defendant entered the Water's Edge at approximately 2:26 a.m. on the morning of the 19<sup>th</sup> of April 2008. Furthermore the CCTV evidence shows John Herring, the owner of Apartment Number 35 Water's Edge Road, West Bay Road, coming out of the main entrance at 2:38 a.m.

29. Mr Herring in his statement dated the 19<sup>th</sup> of April 2008 stated that at about 2:30 a.m. he was awakened by the lights. They were turned on his bedroom. He said he "looked up and saw a man about 5 feet 10 or 11 inches tall." He, Mr Herring, stated "I am 6 feet 3 inches tall and this man is not my height." Mr Herring's statement said that "the man I saw in his room was of fair completion, medium built, with straight hair, who was wearing a jersey and shorts which were yellowish in colour."
30. Although the CCTV did not show the Defendant leaving the Water's Edge, he was next picked up by Officer Grevitt outside the Villas of the Galleon on the West Bay Road trying to thumb a lift. He was wearing the #13 football jersey, but nothing else, and he was carrying a silver-coloured laptop, which turned out to be Mr Herring's laptop.
31. PC Grevitt said there was a strong smell of faeces on the Defendant.
32. Shortly afterwards PC McDonald found the Defendant's belongings on the Water's Edge compound and they are Exhibit 1, which included the Defendant's key, wallet, driver's licence #290101, a CINICO card and a cell phone belonging to the Defendant. The Defendant accepts that these are his items.
33. At the Beachcomber, which is the neighbouring condominium to the Water's Edge, PC McDonald secured the Defendant's sneakers and shorts. The shorts had faeces on them. These were Exhibit 2.
34. For sake of completeness: The Miami Dolphin jersey which the Defendant was wearing when he was arrested, and in the police station, is Exhibit 3.

35. The Defendant is pleading not guilty and he said he has no recollection of ever entering Mr Herring's apartment. He further said that the he found the Toshiba laptop that was found on him on a wall.

36. The Defendant does accept that Exhibit 1 and Exhibit 2 are his property, but denies the charge.

37. I have reviewed the evidence in this case and have listened to the live witnesses, namely the Complainant, Agata Kalicki; WPC Tatum; PC Grevitt; and, PC McDonald. I have also read the statement of John Herring. I have also reviewed the Defendant's questions and answers and I have looked at the Exhibits in this case.

38. The Defendant has exercised his right to remain silent and to choose not to go into the witness box. This means that he has chosen not to contradict the live evidence against him, nor to provide any explanation in relation to the evidence.

39. In this case I sit as a judge alone. This means that I am both a judge of the law and a judge of the facts.

40. The case has been brought by the prosecution and it is trite law that it is the prosecution that has the duty to prove the guilt of the Defendant. There is no duty on the Defendant to prove his innocence. This burden of proof remains with the prosecution throughout the case. The prosecution must produce evidence to satisfy the Tribunal of Fact of the guilt of the Defendant, so that the Tribunal of Fact, in this case, myself, feels sure that the Defendant is guilty. To put it another way, the prosecution must prove the case against

the Defendant beyond all reasonable doubt. If there is a reasonable doubt the Court must find the Defendant not guilty.

41. The prosecution must place before the Court cogent and reliable evidence to prove beyond all reasonable doubt that Tyrone Roswell Ebanks is guilty of attempting to steal a handbag from Agata Kalicki and of using force in order to do so. Furthermore the prosecution must place before the Court cogent and reliable evidence that Tyrone Roswell Ebanks entered #35 Water's Edge Condominiums as a trespasser and stole one briefcase and one laptop – the property of John Herring.

42. In relation to the first Count the case against the Defendant depends largely on the correctness of Agata Kalicki's identification of the Defendant, which the Defendant alleges to be mistaken.

43. I must warn myself of the special need for caution before convicting the Defendant in reliance on the evidence of the identification by Agata Kalicki. A witness who is convinced in her own mind may, as a result, be a convincing witness but may nevertheless be mistaken. Accordingly, I have to carefully examine the circumstances in which the identification by the complainant was made. For example, the questions I should ask myself are:

- a. How long did she have the person she says was the Defendant under observation?
- b. At what distance?
- c. In what light?

- d. Could anything have interfered with the complainant's observation of her attacker?
- e. Had Ms Kalicki ever seen the Defendant before?

44. In addition the Defence says that the identification in the police station was regrettable and similarly it is undesirable to allow identification in the Courtroom, which is tantamount to a dock-identification. However, in this case the Complainant had already identified the Defendant as her assailant at the police station to PC McDonald before identifying the Defendant in the courtroom.

45. Of course it would have been much better if the confrontation had not occurred in the police station and if the Defendant had been subject to an identification parade in keeping with the normal procedure. However, it is clear that this was an accidental confrontation. I accept that there was a minor discrepancy between the Complainant's account and PC McDonald's account.

46. I have to take into account that the Complainant had a particularly stressful evening. She had had an argument with her boyfriend and, on walking home alone, at a very late hour, she was subject to a brutal attack, whereby she was punched on the nose and in the head – all taking place on a public road. She then received treatment at the hospital and this identification of the Defendant took place whilst she was in the police station.

47. What is noteworthy is that the Defence is not suggesting that this confrontation was either planned or orchestrated by PC McDonald or any other police officer.

opportunity to make a true identification (or there was other supporting evidence) and the trial judge gave an appropriate warning to the jury.

53. The Complainant comes across as a very honest and reliable witness. I have carefully examined her evidence.

54. On her account the Complainant first saw the Defendant at the exit of the Caribbean Club when he was approximately 15 feet away from her. She saw him when he grabbed her at the entrance to the Caribbean Club. This incident lasted approximately a minute. There was good lighting from both the street and the Caribbean Club. The Complainant's evidence is that she could see the Defendant quite clearly. The Complainant's identification of the Defendant could not be described as a fleeting glance. In fact, in response to cross examination her assailant was only 2 to 2 ½ feet away from her, so they were face to face. Her description of him is detailed, in that he is over 6 feet tall, clear-skinned and with scarring on his face and, of course, there is the Miami Dolphin #13 shirt, which the Defendant accepted as an old shirt that he has had for some time.

55. In my view this is clear, reliable identification, and I am left in no doubt whatsoever that it was the Defendant who assaulted the complainant and who tried to take her handbag from her on the 19<sup>th</sup> of April 2008 at the Caribbean Club.

56. I come now to Count II.

57. It is clear that the Defendant is picked up by the police holding Mr Herring's laptop. The Defendant maintains that he found this on a wall. It is also clear that the Defendant

48. It seems clear on the evidence before the Court from the Complainant and PC McDonald that this was an accidental confrontation.

49. It is also clear on both their accounts that the complainant was taken by surprise, but also, on both their accounts, had absolutely no hesitation or uncertainty in identifying the Defendant as the man who attacked her just an hour to two hours earlier. On the evidence before me the Complainant's identification of the Defendant at the police station as the man who had attempted to rob her a few hours earlier was entirely spontaneous and unequivocal.

50. We do not have the equivalent provisions of the Police in Criminal Evidence Act 1984 in the UK however, it is the practice and procedure in the Cayman Islands, in cases of identification, to hold identification parades.

51. In the case of *R v. Thomas Daniel O'Brien* 2003 EWCA Crim. 1370 a similar identification problem arose in the failure to keep witnesses separate and to have identifications conducted independently. The English Court of Appeal agreed with the trial judge that there had been no breach of the Code on the basis that events simply moved too fast for any other practicable course to have been followed. In many respects this case before me is similar to the *Thomas O'Brien* case.

52. In another case *Ramesh Ramdat v. The State* 1991 46 WIR the Court of Appeal in Guyana held that where the accused was not previously known to the witness the proper course to be followed was (if possible) to hold an identification parade; but the omission to hold such and to rely instead on identification at the police station or in the dock would not necessarily result in the quashing of a conviction if the witness had ample

entered the Water's Edge complex as a trespasser. Furthermore, it is clear that the Defendant's belongings, including personal items like his driver's licence, CINICO card and wallet were recovered from the Water's Edge complex.

58. It is my duty to study and examine the evidence against the Defendant on each count.

Mr Herring stated that he looked and saw a man about 5 feet 10 or 11 inches tall. Mr Herring stated that he was 6 feet 3 inches tall and that this man was "not my height". Furthermore he did not recall any #13 jersey.

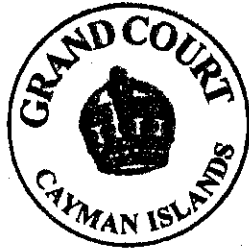
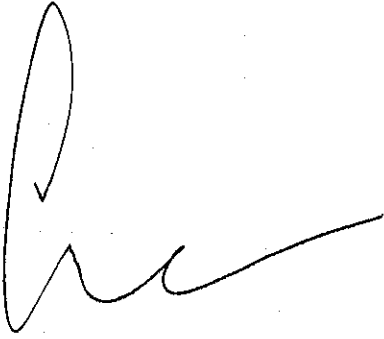
59. We know that the Defendant was not wearing any trousers. And we also know from PC Grevitt and from PC McDonald who were with the Defendant shortly after, that the Defendant had a strong smell of faeces. Mr Herring is adamant that the man he saw was some 8 inches shorter than the Defendant and further, there is no identification of the #13 jersey nor is there any recollection of faeces or the smell of faeces.

60. I have no doubt whatsoever that the Defendant was up to no good. There would appear to be no lawful reason why he should be entering the Water's Edge complex at 2:26 a.m. Regrettably Mr Herring has not been a witness so he has not been able to assist the Court with any clarification of the identification evidence contained in his statement. However, Mr Herring's clear identification of a man some 8 inches shorter than the Defendant, and without the #13 jersey or the smell of faeces leave me with a reasonable doubt in relation to this count.

61. Accordingly, on the evidence before me, the Crown has not discharged its obligation to adduce evidence, so that I could be sure that the Defendant entered #35 Water's Edge and stole the briefcase and laptop belonging to Mr Herring.

62. Accordingly, this Court finds the Defendant guilty of Count I but not guilty of Count II

Dated this 18<sup>th</sup> day of November 2009



**Quin J**  
**Judge of the Grand Court**