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

Indictment No: 37/08

REGINA

V.

TYRONE EBANKS

Appearances:

Candia James for the Crown
John Furniss for the Defendant

Before: **Hon. Justice Quin**

Heard: **10th, 11th and 12th of November 2009**

RULING IN NO-CASE SUMBISSION

1. Counsel for the Defendant has made a no-case submission in relation to both counts of the Indictment.

2. Counsel for the Defendant submits that the police were wrong not to conduct the usual identification parade. Counsel submits that it is in breach of paragraph 2.3 of the Code of Practice D to the Police and Criminal Evidence Act 1984 in the United Kingdom, which states: "Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents, unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents."

3. Counsel also submits that the confrontation identification which took place in the Central Police Station should not be admitted because (i) the Defendant was on his own surrounded by police officers (ii) only the witness (the Complainant) was present (ii) the Defendant was wearing the #13 shirt (iv) the Defendant was visibly in custody in the hands of the police.

4. Counsel for the Defence also submits that the Complainant's evidence that the man had scarring on his cheeks is also not admissible and not supported by any other evidence from the Crown, and could only have come from the confrontation in the police station.

5. Counsel argues that the scarring does not accord with the note or evidence from WPC Kerry Tatum, nor did the witness tell PC Ian McDonald about the scarring. Counsel argues that the unfortunate consequences of the confrontation identification make the witness' evidence on the scarring unreliable.

6. Counsel argues that the identification evidence in any event is wholly unreliable for the following reasons:

    i. The Complainant did not know the Defendant
    ii. The Complainant could not see the Defendant under the tree at the exit to the Caribbean Club
    iii. The Complainant was struck on the nose a the entrance to the Caribbean Club, which must have impaired her vision
    iv. The Complainant was looking at the Security Guard who was coming to assist her and not at the Defendant.

7. The cumulative effect of this evidence means that it is unreliable and dangerous to allow this identification evidence to go to a jury or to a judge as a Tribunal of Fact.

8. Counsel for the Defendant argues that there is no other evidence other than this unreliable ID evidence to link the Defendant with the attempted robbery.

Count II

9. Defence Counsel submits the evidence of John Herring contained in his statement dated the 19th of April 2008 is inherently unreliable, in that he describes a man who is approximately 5 feet 10 or 11 inches. Mr Herring stated that he is 6 feet 3 inches and this man, the burglar, was not his height.

10. Furthermore, Mr Herring said he was wearing jersey and shorts, yellowish in colour, "but I can't recall which is..."

11. Counsel for the Defendant says that the Defendant is 6 feet 6 inches. On the CCTV he came into Water's Edge without pants and, clearly when he was arrested there was a strong odour from the fact that he had recently defecated and faeces were found on his clothes and later on his shirt.

12. Defence counsel submits that Mr Herring would have referred to such an odour if the Defendant had been the person in #35 Water's Edge condominiums.

Crown Counsel in Response

ID Evidence

13. Crown counsel submits that the ID evidence is strong enough to go to the jury and that it passes the test in *R v. Galbraith*.

14. The Crown submits that the ID evidence of the accused by the Complainant is cogent and compelling evidence. If, however, there are any weaknesses, there are also some strengths and this is a matter for the jury or a Tribunal of Fact and does not come anywhere near the Galbraith threshold:

    i. The Crown submits that the witness observed the assailant for almost a minute;
    ii. The witness was face to face with the accused;
    iii. There were street lights and the condominium's parking lot's lights;
    iv. There was nothing to obstruct the Complainant's view of the accused;
    v. There was the extremely distinctive clothing of the assailant wearing a #13 Jersey.

15. A few hours later, albeit in an accidental confrontation, the witness identifies the accused again.

16. The witness also identified the accused in Court.

17. In support of this ID evidence PC Kerry Tatum sees the Defendant a short time before the incident, in the vicinity of the attempted robbery, wearing a #13 football jersey.

18. The Defendant was described by the witness in evidence as a tall man – taller than she was. She could see when he came up to her that he was wearing a shirt with the #13 on it, like a football jersey. He was fairly light-skinned and had a kind of scarring on the cheeks.

19. To support this PC Andrew Grevitt said he received a report that there was a clear-skinned Caymanian man with bad facial skin.

20. The Crown submits that even if one omits the scarring the face of the accused, that is not fatal to the clear identification of the Defendant.

21. The Crown submits that the witness described the Defendant as over 6 feet tall, light-skinned, very distinctive clothing and, the Crown further submits that it is reasonable to expect that the image of the person who attacked the Complainant would be imprinted on the Complainant's mind.

Identification at the Police Station

22. The Crown counsel accepts that there are two different accounts:

    i. The Complainant's account: PC Ian McDonald took her from the hospital to the station. PC McDonald was leading her through the doors into the police station and then took her to a room where there was a man that looked like the man that "attacked me earlier; he was kind of standing around, in the corner of the room, so I kind of started, and I walked back out of the room and the officer said, was that the man, and I said, yes that was him." The Complainant said he was wearing the same shirt as she had seen him wearing – that is the same football shirt with the #13.

ii. PC McDonald's account: He took the Complainant to the police station, saw another prisoner being taken into the police station, and exercised some caution outside the police station by waiting in the line for a prisoner to be processed. Officer McDonald said he was taking the Complainant through the entrance and was going to take her to the CID room. As they entered the area to the left there was a door and the door was open. There was a police officer standing there and there was a gentleman in a jersey standing beside the policeman. The Complainant then said to PC McDonald, "That's the man who just tried to rob me and punched me." Officer McDonald then took the Complainant to the CID room.

23. The Crown submits that to support PC Ian McDonald: There was PC Kerry Tatum who had the accused in a custody suite, and she did not see PC McDonald or the Complainant. And, similarly, PC McDonald did not see PC Tatum.

24. PC Tatum said that when she was in the room with the accused he was highly verbal, and at one stage threw his watch down and took off his shirt and said he was going to make a complaint against the police.

25. The Crown submits that PC McDonald's account is more likely, and that, again, it is matter for the jury or the judge as a Tribunal of Fact, and that this evidence should be admitted and allowed to go to the jury.

26. On Count II the Crown submits that there may be deficiencies in the ID evidence of Mr Herring regarding the Defendant's height and the yellow shorts.

27. The Crown submits that there is very strong circumstantial evidence to link the Defendant to Count II:

    a. The accused entering the Water's Edge building at 2.26 a.m. He enters the elevator.

    b. The strongest piece of evidence is that the accused was arrested with Mr Herring's stolen laptop in his possession, and the Crown relies on the doctrine of recent possession, in that there can be no other reasonable explanation other than that he entered Mr Herring's apartment and stole the laptop.

Ruling

Police ID Evidence

28. It is regrettable that the police did not carry out the usual ID parade. However, when one considers the evidence, clearly PC McDonald did exercise a degree of caution when approaching the police station.

29. However, on PC McDonald's evidence and on the Complainant's evidence they had only just arrived into the police station when the confrontation occurred, and, there is no evidence whatsoever that PC McDonald orchestrated or, somehow planned the confrontation.

30. The only conflict occurs when the witness said that the Defendant was in a room, whereas PC McDonald said that the Defendant was in an open area.

31. However, on both their accounts it would appear that the Complainant was taken completely by surprise, but there was no hesitation that this was the man who had assaulted her just a few hours earlier.

32. Although we do not have the equivalent legislation to the Police and Criminal Evidence Act 1984 of the UK, it is good police practice to ensure that the ID parade is conducted. In this case the witness' unexpected but clear identification, to some extent, rendered an ID parade somewhat unnecessary.

33. However, the question I have to ask myself is: Is the evidence before me of a tenuous character because of, for example, inherent weakness or vagueness or because it is inconsistent with other evidence.

34. I am guided by the classic dicta of Lord Lane CJ in *R v. Galbraith* [1981] 1 WLR:

> "Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury, properly directed, could not properly convict upon it, it is his duty, upon a submission being made, to stop the case."

35. I have to consider the evidence in this case, and it is my view that when one looks at the Crown's case, at its highest, I cannot find that a jury properly directed would not, or could not properly convict upon it.

36. Furthermore, when I examine the prosecution evidence in relation to both counts and look at its strengths and weaknesses, I have to say that most of the matters raised by the Defence are within the province of the jury or, in this case, with me as a Tribunal of Fact. In addition, when I review the evidence in relation to both counts there is on one possible view of the evidence and facts, there is evidence on both counts upon which a jury could properly come to the conclusion that the Defendant is guilty.

37. Accordingly, I believe I should allow both counts to be tried by the Tribunal of Fact and for the case to continue.

38. We do note here the UK Police and Criminal Conduct Act 1984 so, going back to the question of identification I refer to the case of the Court of Appeal in Guyana in *Ramesh Ramdat v. The State* 1991 46 WIR 201 Justice J A George:

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

39. Accordingly it is my view that there is sufficient evidence before this Court to allow this case to continue.

Dated this 13th day of November 2009

GRAND COURT
CAYMAN ISLANDS

Quin J
Judge of the Grand Court