IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 17 OF 2007

(Ind 101/06)

(C#5666/06)

BETWEEN:

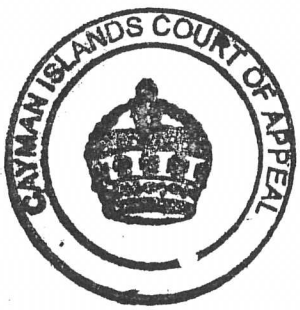
THE ATTORNEY GENERAL — **Appellant**

AND

RAQUEL LILLIAN MILLER — **Respondent**

Before:

The Hon. Mr. Justice Forte, President (Acting)
The Hon. Mr. Justice Mottley, Justice of Appeal
The Hon. Mr. Justice Vos, Justice of Appeal



Heard and Judgment delivered: 2 December 2008
Reasons released: 25th March 2009

Appearances: Nicola Moore, Crown Counsel for the Appellant and Edward Renvoize of Samson & McGrath for the Respondent.

MOTTLEY, J.A.

Reasons for Judgment

[1] On 13 July 2007 Raquel Miller, the respondent, was acquitted on a charge of burglary following a direction to that effect by Levers J consequent upon the Judge accepting a submission that the respondent did not have a case to answer.

[2] Miller had been charged with the offence of burglary contrary to section 237(1)(b) of the Penal Code (2005) Revision in that, on 10 April 2006, having entered the building known as Micro Matrix, Centennial Tower, West Bay as a trespasser, she stole the sum of CI$5,691 and US$274.99 the property of Express Remittance Services (Cayman) Ltd. ("Express Remittance Services").

[3] Miller was employed by Micro Matrix which is owned by Sandra Catron. Micro Matrix carried on business which included money transfer facilities under a franchise from Express Remittance Services. Access to the premises of Micro Matrix was gained by the use of a key and by disarming an alarm using the code 1815. The safe was then opened with a key, and the money in the sums of CI$5,691 and US$274.99, representing the takings for the Saturday, was taken from the Safe. No signs of forced entry were found. The alarm showed that the Code 1815 was used at 1.01am.

[4] Miller commenced her employment in March 2006. She was trained by Jeanine Thyne who was then in the process of leaving her employment with Micro Matrix. As part of that training Miller was shown the work she was required to perform. That training included disclosure by Thyne of the code 1815 that Miller was required to use to disarm the burglar alarm. Thyne also

gave this code to another employee. The other employee however did not have a key to the premises. Catron who had her own code to disarm the alarm was not aware of the 1815 code. Another employee, Gabriella Diaz, knew both codes, but did not have a key to the premises. The only employee who knew the 1815 code and who had a key to the premises was Miller.

[5] A search of Miller's house was conducted by the police. It was during that search the sums of CI$1,850 and US$266 were found wrapped in a news paper which bore the date of the weekend the burglary was committed. When asked to give an explanation for this money, Miller said it belonged to her and she has been saving it from January 2006. A receipt which was discovered at her home showed that, in the days following the burglary, Miller purchased a laptop for CI$1,149 and an ipod valued at CI$349. During the course of the prosecution's case, statements were read to the jury which raised an alibi for Miller.

[6] The case for the prosecution rested entirely on circumstantial evidence. At the close of the case for the prosecution a submission was made that Miller did not have a case to answer. This submission was based on the test laid down by Lord Lane, Chief Justice in **Regina v. Galbraith [1981] 1W.L.R 1039**.

[7] The judge in accepting the submission reminded herself that the case against the defendant was based on circumstantial evidence. She reviewed the evidence and concluded:

> "It is not a question of credibility, but it is dangerous to let it go to the jury where it would be equally reasonable for that jury to find that there was a possibility that some other person could have done this crime. The evidence is weak and vague in that the police failed to conduct searches on others."

[8] On appeal, counsel for the Attorney General submitted that the judge misapplied the test set out in Galbraith's case and wrongly determined that the defendant had no case to answer. Counsel argued that the judge reversed the Galbraith test by indicating that, where one possible view of the facts was that the defendant was not guilty, it would be dangerous to leave the case to the jury.

[9] The duty of a judge when ruling on a no case submission made on behalf of a defendant where the prosecution relies entirely on circumstantial evidence was recently dealt with by the Privy Council in **Director of Public Prosecution v. Selena Varlack Privy Council Appeal [2008] UKPC 56.**

That judgment was delivered on 1 December 2007, the day before the hearing of this appeal. Neither side referred the Court to it.

[10] In Varlack's case, the prosecution relied on circumstantial evidence to establish that she "participated in a joint unlawful enterprise which contemplated the death of or which resulted in the death of the victim and the death was an event which she could have foreseen as a probable consequence of the unlawful enterprise". In her ruling, Joseph-Olivetti J indicated that she had no doubt that a compelling prima facie case based on circumstantial evidence had been made out against Varlack. The judge went on to hold:

> "The questions raised by her Counsel on the reliability or otherwise of the Crown's evidence and the inferences to be drawn from it and the weight to be given to it are all matters for the jury. The evidence, albeit circumstantial, is not so tenuous neither has it been so discredited as to warrant the case being taken from the jury. The evidence is such that a reasonable jury properly directed might on one view of the evidence convict. The no case submission accordingly fails."

[11] Varlack was convicted. On appeal the Eastern Caribbean Court of Appeal in allowing her appeal held that the judge should have withdrawn the case from the jury on the ground that there was no case for Varlack to answer.

In so doing the Court of Appeal "substituted their own view of what inferences could properly be drawn rather than focusing on those which a jury could legitimately draw".

[12] Lord Carswell pointed out that the Court of Appeal did not apply the correct "test of determining what inferences a reasonable jury properly directed might draw, as those which they themselves thought could or could not be drawn". Lord Carswell set out the approach to be adopted when a no case submission is made in circumstances where the prosecution case is based on circumstantial evidence. His Lordship referred to the basic rule set out in Galbraith's case that "the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question beyond reasonable doubt". Lord Carswell went on to state:

> "21. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.
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> 22. The principle was summarised in such a case in the judgment of King CJ in the Supreme Court of South Australia in **Questions of Law**

Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1, 5 in a passage which their Lordships regard as an accurate statement of the law:

> "It follows from the principles as formulated in *Bilick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence ... He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reaonab1e doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence...
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends

upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

A similar statement appears in a recent judgment of the English Court of Appeal, Criminal Division in *R v. Jabber* [2006] EWCA Crim 2694, where Moses LJ said at paragraph 21:

"The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same

as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

Cf *R v. Van Bokkum* (unreported) 7 March 2000 (EWCA Crim, 199900333/Z3), para 32; *R v. Edwards* [2004] EWCA Crim 2102, paras 83-5; Blackstone's *Criminal Practice,* 2008 ed, para D15.62."

[13] The approach adopted by Levers J was wrong. It is for this reason that the Court considers that it is necessary to bring to the attention of judges the correct approach when ruling on a no case submission where the case for the prosecution is based on circumstantial evidence. This Court adopts the approach set out in Varlack's case above and recommends that judges should be guided accordingly.

[14] However, the final determination of this appeal does not turn on this issue, but on the contention by counsel for the respondent that the Attorney General has no right to appeal in these circumstances. Counsel submitted that the Attorney General could only appeal to the Court of Appeal against a judgment of the Grand Court on a question of law alone. He relied on the

provision of section 28(1) of the Court of Appeal Law (2006 Revision) which provides as follows:

> "28(1) Where an accused person tried on indictment is discharged or acquitted by a trial judge sitting alone or by a jury (where such jury has been directed to do so by the trial judge) or is convicted of an offence other than the one with which he is charged, the Attorney General or the complainant may appeal to the Court of Appeal against the judgment of the Grand Court on any ground of appeal which involved a question of law alone."

[15] The meaning of the term "a question of law alone" engaged the attention of the Privy Council in **Justice Raham Smith v. The Queen [2000] 1 W.L.R. 1644**. In that case, the trial judge ruled that Smith did not have a case to answer and directed the jury to find Smith not guilty. This ruling involved the weighing of evidence as the judge was required to form a view on whether the circumstantial evidence raised a prima facie case against the defendant. On appeal to the Court of Appeal in Bermuda on the ground that the judge had erroneously concluded that the evidence was insufficient, the Court allowed the appeal and ordered a retrial. On further appeal to the Privy Council, the appellant took the point that the Crown did not have the right to

appeal because of the provisions of section 17(2) of the Court of Appeal Act 1964 of Bermuda. This section provides as follows:

> (2) Where:
>
> (a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged; or
>
> (b) an accused person tried before a court of summary jurisdiction is acquitted and an appeal to the Supreme Court by the informant has not been allowed; or
>
> (c) an accused person whose appeal to the Supreme Court against conviction by a court of summary jurisdiction has been allowed,
>
> the Attorney-General or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

These provisions are set out in extenso in order to show that the provisions of section 28(1) of the Court of Appeal Law (2006 Revision) of the Cayman Islands and Section 17(2) of the Court of Appeal Act 1964 of Bermuda are pari in materia.

[16] At p 1651 of the judgment Lord Steyn identified the question to be determined in that appeal as:

> "…..one of statutory construction of the words in section 17(2) which allows an appeal by the Attorney General against a judge's decision discharging a defendant in respect of 'a question of law alone'."

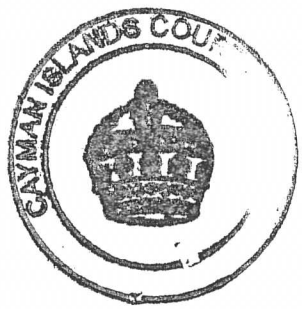
[17] His Lordship in construing the provision of section 17(2) concluded at p. 1653:

> "After all, the legislature has expressly confined an appeal by the Attorney-General to a ground of appeal involving a question of law *alone.* The narrow scope of section 17(2) is further underlined by the provision that in section 17(2) a question of mixed law and fact is excluded from the scope of the words "a question of law alone."

[18] In this case, the Attorney General is seeking to appeal against the ruling by Levers J who accepted the no case submission. Levers J carried out an assessment of the circumstantial evidence led by the prosecution and, as stated previously erroneously, came to the wrong conclusions. It is from that assessment and erroneous conclusion that the Attorney General now seeks to appeal. In order to show that Levers J fell into error it would be necessary for

this Court to review her assessment of the evidence which was conducted by the judge. Clearly this would involve a question of fact and law. Section 28(1) prohibits this.

[19] In the circumstances, this Court accepts the submission of counsel for the respondent that the Attorney General is not entitled to appeal in this case. Consequently, the appeal of the Attorney General is dismissed.



Forte, P. (Acting)

Mottley, JA

Vos, JA