

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

3  
4 INDICTMENT NO: 14/18

5  
6  
7 THE QUEEN

8  
9 v.

10  
11 ODAIN LLOYD EBANKS  
12  
13  
14



15 **Appearances:**

16 Patrick Moran, Deputy Director of Public  
17 Prosecutions for the Crown

18 Ms. Amelia Forsuhene of Brady Attorneys for  
19 the Defendant

20 **Before:**

Justice Marlene I. Carter (Actg.)

21 **Judge Alone Trial:**

22 19<sup>th</sup>, 20<sup>th</sup>, 24<sup>th</sup>- 26<sup>th</sup> October 2018

23 **Delivery of Decision:**

24 28<sup>th</sup> November 2018  
25  
26

27 **HEADNOTE**

28 *Criminal Law – Robbery, Possession of Firearm with Intent -*  
29 *Identification and DNA Evidence - Trial by Judge Alone -*  
30

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33 **VERDICT JUDGMENT**  
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1 **INDICTMENT**

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3 1. The Defendant was set to be tried on an amended indictment<sup>1</sup> containing five (5) counts as  
4 follows:

- 5 i. **ROBBERY** contrary to s.242(1) of the Penal Code (2017 Revision);  
6 ii. **POSSESSION OF A FIREARM WITH INTENT**<sup>2</sup> contrary to s.18(6) of the  
7 Firearms Law (2008 Revision);  
8 iii. **UNLAWFUL USE OF FIREARMS** contrary to s.208 of the Penal Code (2017  
9 Revision);  
10 iv. **POSSESSION OF A PROHIBITED WEAPON** contrary to s.79 of the Penal  
11 Code (2017 Revision)  
12 v. **HANDLING STOLEN GOODS** contrary to s.260 of the Penal Code (2017  
13 Revision)

14  
15 2. At the commencement of the trial the Crown advised that it did not intend to offer any evidence  
16 on Count 5 of the Indictment. The Defendant is therefore discharged with regard to Count 5  
17 of the Indictment. The trial proceeded on the other four counts of the amended indictment.

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19 3. The Defendant elected trial by Judge Alone pursuant to s.129 of the Criminal Procedure Code  
20 (CPC) of the Cayman Islands.



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<sup>1</sup> Amended indictment dated 24<sup>th</sup> September 2018. On the original/first indictment, dated the 21<sup>st</sup> March 2018, the Second Count was "Possession of Unlicensed Firearm contrary to s.15(1) and 15(5) of the Firearms Law (2008 Revision) ... which was not under and in accordance with the terms of a Firearm's User's (Restricted) Licence).  
<sup>2</sup> See Footnote #1.

1 **THE LAW ON JUDGE ALONE TRIALS**

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4 4. The Cayman Islands Court of Appeal (CICA) has given some guidance on the duties of a Judge  
5 in a Judge Alone trial. In *K. Richards v R*<sup>3</sup> Rowe JA, stated:

6 *“When a trial judge sitting alone has advised himself to the applicable*  
7 *principles of law, and given himself any necessary warning, he must*  
8 *indicate clearly in his judgment his reasons for acting as he did in order*  
9 *to demonstrate that he has acted with the requisite degree of caution in*  
10 *mind and has therefore heeded his own warning. No specific form of*  
11 *words is necessary for this demonstration, what is necessary is that the*  
12 *Judge’s mind upon the matter should be clearly revealed.”*  
13

14 5. In *Randy Martin v R*<sup>4</sup>, Mottley JA stated as follows:

15 *“A judge sitting in a criminal case without a jury, in rendering his decision*  
16 *and giving his reasons for so concluding is not required to review every*  
17 *fact and to detail each argument on which the prosecution and defence*  
18 *rely as if he were summing up to a jury. The judge must set out the*  
19 *conclusion reached and make clear the reasons for arriving at that*  
20 *conclusion. He is required to have regard to any difficult or unusual*  
21 *points of law and to show how those points of law has in any way impacted*  
22 *the conclusion that he has reached.”*

23  
24 6. As in all criminal trials the burden is on the Crown to prove beyond reasonable doubt that the  
25 Defendant is guilty of the offences for which he is charged on the Indictment. There is no  
26 burden on the Defendant to prove that he is innocent. The Defendant has no obligation to prove  
27 that he is not guilty, or to explain the evidence offered by the Prosecution.  
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<sup>3</sup> 2001 CILR 496

<sup>4</sup> CICA Crim. Appeal No. 2/2010 (Ind. 27/2009)

1 7. I will not review every single detail of the evidence, but I will address my mind to the important  
2 or prominent aspects of the evidence in deciding the critical issues in this case. I will not decide  
3 every single point that has been raised – only such matters that will enable me to determine  
4 whether the charges on the indictment have been proved.

5  
6 8. I remind myself that I am not to speculate about things or matters that are not covered by the  
7 evidence. I must have regard only to the whole of the evidence that has been presented at trial  
8 and form my own judgment about that evidence. The questions of fact at issue on this trial are  
9 for me to determine.

10  
11 9. I must consider all of the evidence in this case and if after having done so, I have any reasonable  
12 doubt as to whether the Defendant is guilty or not, I must resolve that doubt in favour of the  
13 Defendant and find him not guilty of the offences for which he is charged.

14  
15 10. On the other hand, if having considered the evidence I am satisfied so that there is no reasonable  
16 doubt in my mind, and I am sure of the guilt of the Defendant, then it will be equally my duty  
17 in law to find him guilty as charged.



1 **THE CASE FOR THE CROWN**

2  
3 11. The Crown’s opening statement set out the context in which the indictment was brought against  
4 the defendant. It detailed as follows:

5  
6 i. On Saturday 03.03.18 an armed robbery took place at The Czech Inn Grill - a  
7 restaurant in Bodden Town. Two robbers came to the restaurant, threatened the  
8 staff, and got away with the takings. The Defendant is alleged to be one of the  
9 robbers.

10  
11 ii. The Czech Inn Grill is located about a mile east of the centre of Bodden Town. It  
12 is run by a man named Jiri “George” Zitterbart. Mr. Zitterbart was there on the  
13 night of the robbery along with his wife Dahema, their son, and two other members  
14 of staff.

15  
16 iii. The robbers struck shortly after 11:00 pm, as staff were cleaning up the restaurant.  
17 One came in holding a sliver/chrome gun in his hand. He demanded to know where  
18 the takings were kept, and fired a shot into the ceiling in an apparent attempt to  
19 ensure that the members of staff were compliant.

20  
21 iv. The second robber, who appears to have been the shorter of the two, was armed  
22 with a canister of “pepper spray”. He sprayed it in the direction of Mr. Zitterbart  
23 whilst the gunman was trying to get the takings. The Defendant is alleged to be  
24 the second robber.



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v. The robbers got away with the tray from the cash register. As well as cash, that register contained various documents belonging to Mr. Zitterbart and his wife, which were also stolen.

vi. The robbers got into a vehicle in the parking lot at the rear of the premises, and drove away along Bodden Town Road in a westerly direction, which would take them towards Savannah.

vii. Although the staff were unable to get the license plate number, they were able to see that the vehicle was an “old style” Honda CRV, and that it was burgundy/red in colour.

viii. Mr. Zitterbart called 911 to report the robbery. A number of police units, including the armed response unit, went to the area. That 911 call was logged at 11:16 pm.

12. The Crown called a number of witnesses who were at the Czech Inn Grill on the night of the 3<sup>rd</sup> of March 2018 at the time of the robbery. The salient aspects of the evidence of these four witnesses are set out below.

**13. WITNESS #1: JIRI GEORGE ZITTERBART – OWNER OF THE CZECH INN GRILL**

***Examination in chief***

The witness stated as follows:

i. *I was in the back area closing the credit card machine. My son was in the back by the cash register area helping me with filling up the fridge with Pepsi.*

14.



- 1           i.       *I was clearing credit cards. He came to the door and was in a distressed voice. I*  
2                   *was at the table behind this wall and I was facing into the parking lot, not into the*  
3                   *restaurant. My son stepped inside and called me by name and I went to the door*  
4                   *and I saw this guy with a gun, with his gun pointing at my wife.*
- 5           ii.       *I pushed my son behind me and hid him at the door.*
- 6           iii.       *I stepped through the door. My wife was pointing to the cash register under the*  
7                   *shelf. I stepped through the door and as I stepped that gentlemen made one shot*  
8                   *to the door. That is the sink where the shell went off. The gentleman with the gun*  
9                   *saw me and stepped in front of me with the gun to my face and wanted me to open*  
10                  *the cash register because he doesn't know how to open it.*
- 11          iv.       *He put the Berretta in front of my face. It is a Berretta, stainless steel or chrome.*  
12                  *It is one of the bigger 9 millimeter handguns pointed directly at my face*  
13                  *approximately one foot away.*
- 14          v.       *I go and open the cash register for him and a second person comes on that scene*  
15                  *at that moment.*
- 16          vi.       *The man with the gun. He had on a black hoodie with red stripes and round shaped*  
17                  *pockets zippers around the hoodie. The rest of the hoodie was black. I could not*  
18                  *see his face. It was covered. Some kind of shirt or something like that was covering*  
19                  *his face. I could just see his eyes. He was lightly brown. He had gloves on his*  
20                  *hands and blue jeans. I believe he was somewhere between 5'6" – 5'7" and*  
21                  *skinny. He was wearing sneakers.*
- 22          vii.       *The gunman was in front of the cash register there. My back was to the shelving.*  
23  
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- 1                   viii.    *When I opened the cash register, the gunman took the drawer and pulled it out of*  
2                                   *the cash register. At that moment, the next person stepped into the scene from*  
3                                   *outside and sprayed my face with pepper spray and took paperwork, money,*  
4                                   *invoices which were at the bottom of the cash register.*
- 5                   ix.       *When the pepper spray sprayed, I turned to the right side so only my left side of*  
6                                   *my face touched. I went to the sink area. With that movement, both of them started*  
7                                   *running outside and I started running after them. The person with the pepper spray*  
8                                   *was already inside the car.*
- 9                   x.        *I could see the second man's height and shoes. Hoodie again. The face was*  
10                                  *covered in the same way as the second gentleman. I see both because he sprayed*  
11                                  *me.*
- 12                   xi.       *He stepped inside; through the doorway. They crossed each other; the gunman*  
13                                  *and the second man,*
- 14                   xii.     *The second man. He had on a hoodie jacket marked "ECHO" – there was an*  
15                                  *animal in the logo in the front. The animal is the logo of this company. The hoodie*  
16                                  *was greenish, old, army colored, many times washed.*
- 17                   xiii.    *He had gloves on his hands. I can't recall anything about the gloves. I can't*  
18                                  *remember anything about the gunman's gloves. He had on camouflaged pants and*  
19                                  *white ankle sneakers, Jordan's or something like that, high tops. The pants were*  
20                                  *full length – green/brown and a lighter color; three colors together.*
- 21                   xiv.     *He was shorter than the gunman 5'1" - 5'3"- 5'4". I thought they were young*  
22                                  *kids, 17 – 25 both of them.*
- 23                   xv.     *The second man had the pepper spray in his right hand. I could see his hand. I*  
24                                  *think he was holding something else in his left hand. What it was, I cannot say.*



1                   xvi.    *The shorter of the two robbers was faster because after I was sprayed, I stepped*  
2                                   *outside under the covered patio. When I stepped out, I could see only the gunman,*  
3                                   *the second person was already in the car parked behind the outside patio, a Honda*  
4                                   *CRV, older model, burgundy colored. It had chrome steel wheels – metallic, not*  
5                                   *standard Honda wheels.*

6                   xvii. *The second robber. He was light skinned, light brown. I could only see the top of*  
7                                   *his head (witness indicates forehead). The second man, I don't remember if he*  
8                                   *said anything.*

9  
10                   **Cross-Examination**

11                                   The witness responded as follows:

12                   xviii. *It was close to 11:00 o'clock.*

13                   xix.    *The second man: I saw him when the cash register was open. He was not directly*  
14                                   *in front of me.*

15                   xx.     *He sprayed the pepper spray in my face; first time I saw him. I turned my face*  
16                                   *away from him to the right side towards where my wife was.*

17                   xxi.    *I turned and saw him grab everything with his one hand and ran away. Some*  
18                                   *money was on top of papers. He grabbed everything then. It was seconds that I*  
19                                   *saw him. He was inside about 15 seconds. He had pepper spray in his right hand*  
20                                   *and something else in his other hand.*

21                   xxii. *I can't say what he did with the pepper spray after he sprayed me. It was 15*  
22                                   *seconds and done.*

23                   xxiii. *The Honda: When I gave chase I saw the car move. I saw the gunman get in it.*  
24                                   *He got into the passenger side; not the driver's side – the gunman.*



1                   xxiv.    *The first man was 5'6" – 5'7". The second man was 5'1" – 5'4" shorter than the*  
2   *first man. It is maybe possible I may have made a mistake upside down with the*  
3   *heights.*

4  
5       15.     Mr. Zitterbart in his evidence identified a number of items which were subsequently entered  
6                   into evidence in this case. These included a contract for the sale of his Jeep, copy of a personal  
7                   loan document, a pre-contract document between himself and a supplier, various receipts and  
8                   a piece of an East German Flag as being items which were taken during the robbery. These  
9                   were entered as Exhibits 4, 5, 6, and 7.

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11       16.     **WITNESS #2: DAHEMA BAKER**

12                   *Examination in chief*



13                   The witness stated as follows:

- 14  
15                   i.        *I am the wife of Juri Zitterbart.*  
16                   ii.       *When the incident happened, I was standing right by the kitchen sinks.*  
17                   iii.      *I saw a guy walk – he had a gun in his hand. I put my hands up and I think I said*  
18    *'whoa' because I didn't know it if was real or not.*  
19                   iv.      *The guy asked "where is the money" and I turned and said "it's right there in the*  
20    *cash register. I bend around to show him because he was blocking me from seeing*  
21    *the door. I was pointing to the cash register.*

- 1 v. *He fired a shot then. I didn't know what direction he fired at. It was so close to*  
2 *me and I didn't see. I first bend down and I saw where George put my son behind*  
3 *him at the door. He take his hand to do that. He turned to go to the cash register*  
4 *and saw George and he just had the gun in his face for the rest of the time,*  
5 *George's face.*
- 6 vi. *When George opened the cash register someone from outside was spraying wildly.*  
7 *The hand was moving very fast and George held his face and he hold his face like*  
8 *the same time after it happened.*
- 9 vii. *I was looking at George. I saw things on the floor. I was more paying attention*  
10 *to George and what was happening with his face.*
- 11 viii. *The man with the gun. I could see his eyes and around his eyes, I could he was a*  
12 *light skinned person. Brown skinned.*
- 13 ix. *The gunman. He was 5'5" to 5'7". He was in front of me. I was mostly paying*  
14 *attention to my son.*
- 15 x. *The second man. I did not get a good look at him. He was shorter than the person*  
16 *that was inside. All I saw was black, a shirt. I think he was dressed in full black.*  
17 *The lights outside were turned off already. When I saw him, when I saw him first*  
18 *I didn't pay attention to see when he came inside because I was looking at George.*
- 19 xi. *I could not see his face. All I saw was full black. I could not say anything about*  
20 *his face.*



1 **Cross-Examination**

2 The witnesses responded as follows:

- 3 xii. *The first time I saw the second man he was by the door by the cash register. He*  
4 *was waving his hand about and spraying. I could not see his hands. It was*  
5 *completely black, like a Ninja. No color that I saw. I could not see the hand. I*  
6 *was looking at George. I could not tell whether he was wearing gloves or not.*  
7 xiii. *It could be that he was dressed all in black but I could not tell. I was directly by*  
8 *the kitchen sink. The lights were out, I could not tell. He was shorter than the*  
9 *other man for sure.*  
10 xiv. *Because all the lights were off. I was unable to get a good look at the second man.*  
11 *I didn't get a detailed look at him. He was short. George is 6" something. The*  
12 *other was shorter than both George and the gunman.*

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14 17. **WITNESS #3: ADRIAN GORDON**

15 ***Examination in chief***



16 The witness stated as follows:

- 17  
18 i. *On Saturday 3<sup>rd</sup> March 2018, I worked there that night. My position, I was a chef.*  
19 ii. *I was standing at a location near the warmer [in the kitchen]. I saw Mrs. Zitterbart*  
20 *talking to somebody. I couldn't see who she was talking to so I didn't pay any*  
21 *mind until I looked up to see a man holding a gun pointing at her.*  
22 iii. *I heard someone speaking. I don't recall the exact words that were said. I could*  
23 *not hear what was being said. I became convinced that it was a robbery.*



- 1           iv.     *He looked at me. I saw him looking at me and a couple seconds after that I heard*  
2                     *shots fired. After the shots were fired, I exited through the door in the side and I*  
3                     *kept running to the back of the property.*
- 4           v.     *The man, his whole body was covered, head, face and everything. I don't*  
5                     *remember the color of what was covering his face. I remember long sleeves,*  
6                     *everything covered. I did not note his skin color. He was a little bit shorter than*  
7                     *I am. I am about 5'8" I think.*
- 8           vi.    *I ran out the door and ran straight to the back of the property. I did not stop. I*  
9                     *ran very fast. As I ran out when I exit there was man behind that door. I just got*  
10                    *a glimpse of him. I did not stop to see who it was or take note. I was frightened.*  
11                    *I didn't stop.*
- 12           vii. *I glimpsed him on exiting the door. I did not exactly turn around.*
- 13           viii. *The only thing I can say about that person is that he is tall. The angle of which I*  
14                    *came to the door, I could see that. I was standing up straight as I was running*  
15                    *when I glanced at him. I assume him to be a tall person.*
- 16           ix.    *I would have to look to see his face which I couldn't see. It was dark.*

17

18           ***Cross-Examination***

19                    The witness responded as follows:

- 20           x.     *I don't remember saying he was dark skinned. I told them it was dark. I told them*  
21                     *he was in black clothing. I didn't see his complexion. I couldn't see his head or*  
22                     *face; it was dark. I could just see this figure clad in dark clothing. I couldn't see*  
23                     *his face or describe his face or head. He was tall and slim.*

1 18. WITNESS #4: CLAVEON HAYE

2  
3 *Examination in chief*

4 The witness stated as follows:

- 5 i. *Presently after closing, someone came into the restaurant with a gun. The person*  
6 *with the gun walked in and said something. I don't remember what they said. I*  
7 *know they were in dark clothing and their faces were covered. They walked when*  
8 *they came into the restaurant. I was standing to his right.*
- 9 ii. *I don't remember what they said. I saw him first. Denise didn't see him. He held*  
10 *up the gun. I was trying to get her attention so she could turn around to see the*  
11 *gunman. I got her attention. She turned around and she was like "whoa".*
- 12 iii. *He said something else I don't remember what he said, and he fired a shot toward*  
13 *the wall. He raised his hand when he was standing.*
- 14 iv. *After her fired the shot, then Dahema told him where the money was and told him*  
15 *to take it all. She told him to pull the register and he went to the other side where*  
16 *he came from, the register area, I ran through the back door.*
- 17 v. *I was at the counter sink because there was water left in it. I felt something inside*  
18 *of the sink, just behind, not like food down there or anything so I took it out. It was*  
19 *a silver metal thing. When the Police came, I gave it to them. It look like shiny,*  
20 *like a bullet.*



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**Cross-Examination**

The witness responded as follows:

- vi. *The man with the gun. I described him to the police. I could only see his eyes and this bit [witness pointing to under part of nose-bridge]. The rest of his face was covered. Right here was light brown. He was standing near Mrs. Zitterbart. He was taller than her.*

**19. WITNESS #5: PC ANDRE STRACHAN**

**Examination in Chief**

PC Andre Strachan related that he was on duty on the night of the 3<sup>rd</sup> March 2018 in the company of Officer Garwood when they received information which led them to the Gas Station at Savannah where they saw that Officer Scott had set a road block. He and Garwood positioned their vehicle at Edison Drive. He continued as below.



- i. *I observed a vehicle light coming through Edison Drive towards Hirst Road. I was on Hirst Road. I told PC Garwood of what I observed. PC Garwood pulled our patrol vehicle to the side of the road, along Hurst Road to observe this vehicle coming towards Hurst Road.*
- ii. *As the vehicle approached close, I realized the vehicle was an SUV. As it continued to approach, I realized it was a red Honda CRV. I had received a report concerning this vehicle. The vehicle began to accelerate at that point. I was outside the police unit. The headlights were illuminated.*

- 1                   iii.     *I was outside of the police unit. I pointed my G36 Carbine at the vehicle due to*  
2   *the report I had received earlier. The vehicle continued to accelerate along Hirst*  
3   *Road.*
- 4                   iv.     *I pointed my weapon and we instructed the persons inside the vehicle to stop by*  
5   *shouting at the persons to stop the vehicle. We were close enough to be heard by*  
6   *whomever was in the vehicle.*
- 7                   v.     *We went back inside the police unit and proceed to following the vehicle by turning*  
8   *back the vehicle. I could see two individuals in the vehicle. Both had something*  
9   *white wrapped around their faces. We proceed to follow the red Honda CRV.*
- 10                  vi.     *We followed and managed to pull next to the vehicle. I could see inside of it. I*  
11    *could see only two in the vehicle. We pointed our firearms at the persons and told*  
12    *them to stop by shouting “stop”.*
- 13                  vii.    *It did not stop.*
- 14                  viii.   *The vehicle turned right onto Victory Avenue. To the end of Victory Avenue it is a*  
15    *dead end. The vehicle turned into an apartment complex on the left side of the*  
16    *road at the dead end. The two occupants of the vehicle exited the vehicle and PC*  
17    *Garwood and I did the same. As we were going toward the persons, I heard PC*  
18    *Garwood yell “gun”. We continued and I heard a loud explosion. I took cover*  
19    *to my right behind a concrete column.*
- 20                  ix.     *I then heard PC Garwood begin to return fire in the direction of the two persons*  
21    *that fled from the CRV. We proceeded toward the building/apartment complex*  
22    *where the suspects ran. We decided not to continue due to the area being dark.*
- 23                  x.     *I keep sight of the two occupants in the area of Victory Avenue. They went to the*  
24    *corner of the apartment block. The explosion sounded like gunfire.*



- 1 xi. *I was watching them as an explosion rang out. I saw one of the men put their hand*  
2 *backwards in the direction we were coming from. I can't remember if it was the*  
3 *driver or the passenger.*
- 4 xii. *We waited for arrival of our colleagues from the police. Attempts were made to*  
5 *track the men with the aid of the police canine unit. One track led to the edge of a*  
6 *canal behind apartment building and another leading back to Victory Avenue. The*  
7 *search was called off in the end.*
- 8 xiii. *The men came in the direction of where the canister was found when they got out*  
9 *of the Honda.*
- 10 xiv. *I was back on duty the following Monday, 9<sup>th</sup> March.*
- 11 xv. *I was at Marina Drive with other police units present. I noticed Odain Ebanks.*  
12 *He began to look at me and he made some comments referring to the night of*  
13 *March 3.*
- 14 xvi. *I can't say what he said word for word. He was making mention to firearms that*  
15 *we were carrying, that they were big guns. I ignored him and then he began to*  
16 *make mention to say to the effect that my face could not be missed. He also*  
17 *mentioned to the effect, that we needed target practice and if we were the ones that*  
18 *were involved in the incident on March 3. Again, I ignored him. He started to*  
19 *look at me once more and I saw his lips move but I could not make out what he*  
20 *was saying.*
- 21 xvii. *He appeared aggravated when he was saying these things. Aggravated some of*  
22 *the time. When he wasn't, he was smirking at me. I was a bit uneasy. I asked him*  
23 *what was wrong because of what he was saying, his demeanor. I was outside the*  
24 *police unit during that exchange.*



1 xviii. *He was in front of the residence on Marina Drive and he continued to stare at us*  
2 *with an aggravated look on his face. We eventually left the location.*

3  
4 ***Cross-Examination***

5  
6 The witness responded as follows:

7 xix. *On the 3<sup>rd</sup> of March, I was on Hirst Road at Countryside. As the SUV passed, I*  
8 *saw two occupants in the SUV with their faces covered. I could not see what color,*  
9 *height, etc., but the faces were covered, covered with something white, both of*  
10 *them.*

11 xx. *[At Victory Avenue when the Driver's door opened] I saw him when he got out.*

12 xxi. *It would take seconds to get from there to the corner of the building. He did not*  
13 *stop. He was in my vision for a matter of seconds. I couldn't see his face, seen him*  
14 *mainly from behind. I know the importance of putting a description in my*  
15 *statement and if anything had stood out I would have put it into my statement. I*  
16 *didn't put down a description because I did not notice them. I was watching their*  
17 *hands. My view was at night from a distance from the back and just for a few*  
18 *seconds.*

19 xxii. *[On the 9<sup>th</sup> March] He [the defendant] said, "All you, your faces can't be missed."*  
20 *He did say those words. I was in the presence of PC Lewis and PC Robinson.*

21 xxiii. *I did not feel like it was to PC Lewis and PC Robinson. It was to me because he*  
22 *was looking at me when he said it. He looked at me not in our direction. He said:*  
23 *"you all carrying big guns".*

24 xxiv. *He began to lift his chin at me. He lifted his arm and put his head back, sideways.*

25 xxv. *"Lifting chin at me". To me, it was as though he knew something about what took*  
26 *place. He gave me that impression. Referring to the 3<sup>rd</sup> of March.*





1           **20.     WITNESS #6: PC JEROME GARWOOD**

2           *Evidence in Chief*

3  
4           PC Garwood and Officer Strachan followed the Honda CRV to Victory Avenue.

5           His evidence continued:

6           i.     *I saw the driver exit from the right door. And then from the passenger door another*  
7                     *suspect exited that door. He was the taller suspect in relation to the driver. They*  
8                     *both exited the vehicle and I was look at them at the same time.*

9           ii.    *As they ran to the right front corner of the building. The taller suspect opened fire*  
10                    *at us. He pointed his firearm in our direction and he discharged a round from his*  
11                    *firearm. I could see a muzzle flash as I have experience in firearms.*

12           iii.   *When I saw the discharge we were about 20 – 30 feet away. I was already in the*  
13                    *yard as I was advancing toward the men as they ran away from the vehicle.*

14           iv.    *He was running away and he turned and fired in our direction from the corner of*  
15                    *the building. I fired my handgun. I couldn't say if I hit the threat. They started*  
16                    *stumbling to the right side of the building. I am not sure if they got hit.*

17           v.     *I observed the corner of the building where the men ran. I observed a pepper spray*  
18                    *container in the grass at the side of the building. It was lying there and easy to see*  
19                    *as the area was illuminated by lights. I saw both come out of the car and one was*  
20                    *taller than the other. I observed them both and how they moved. The passenger*  
21                    *was tall and slim. The driver was short, medium build.*

22           vi.    *The two men had something covering their faces. As they exited the vehicle, I don't*  
23                    *recall if they were still covered. I did not see their faces.*

- 1                   vii.    *On Friday 9<sup>th</sup> March, I was on duty with PC Strachan and a number of our*  
2                                   *colleagues. I was asked to assist in an area of Marina Drive, the residence of*  
3                                   *Odain Ebanks. I saw Odain Ebanks at the property.*
- 4                   viii.   *After the search was completed, we were outside in the yard and I observed Odain*  
5                                   *Ebanks staring at myself and PC Strachan. He was moving about in the yard. I*  
6                                   *looked at his height and build and the way he moved. I considered that these were*  
7                                   *very similar and I pointed that out to PC Strachan.*
- 8                   ix.     *He was staring at us and he was staring us down and this prolonged for a while.*  
9                                   *Not quite a normal stare; seemed odd to me.*
- 10                  x.     *We left the premises and we came off the property and went and sat in our vehicle*  
11                                  *at the front of the apartment.*
- 12                  xi.    *Odain Ebanks left the apartment, to the rear of the premises and came to the front*  
13                                  *of the apartment staring at PC Strachan and I as we were in the vehicle.*

14

15                   ***Cross-Examination***

- 16                  xii.   *The Driver's side of my vehicle was closest to the SUV.*
- 17                  xiii.   *I saw the driver and the passenger get out of the car. I don't know who got out*  
18                                  *first. I don't remember. The passenger was the taller of the two and slim. The*  
19                                  *driver was shorter and of medium build.*
- 20                  xiv.    *I agree I did not say medium build in my [police] statement. No description of that*  
21                                  *kind. It was probably an oversight. I know the importance of a statement and*  
22                                  *giving descriptions in a statement.*



- 1                   xv.        They ran when they got out of the vehicle to the corner of the building. Upon being  
2                   shown Picture 39 - the driver was between the car door and the car to the corner  
3                   of the building. The extent of my sight of the driver was a matter of seconds. He  
4                   was running. Upon being shown Picture 26 – It is not a long distance from the  
5                   driver’s door to the corner of the building. My view of him [the driver] was  
6                   possibly obscured for some of it by the car door. It was a short distance at night.
- 7                   xvi.        I took note of the passenger who opened fire at me and Officer Strachan. The  
8                   person turned partially and fired the weapon. I did not see skin color or anything.  
9                   I did not see their faces. I could not say if they were wearing masks or not. They  
10                  were running, it happened fast. I could see heads. I did not see faces to positively  
11                  identify them. I could see hands, feet and head. I knew it was a human being but  
12                  otherwise there were no discernible features that I could see.
- 13                xvii.       I did say he was staring us down as I was in the yard with PC Strachan. I don’t  
14                recall him saying anything to me.
- 15                xviii.      He came up to the vehicle, close, about 5”. He was staring down PC Strachan  
16                and I. The vehicle was parked on the outside of the premises’ wall, not in the yard.

17

18                **Re-Examination**

- 19                xix.        Re the description of the driver of the vehicle:

20                                I said he was of medium build. I am saying Odain Ebanks was of similar  
21                                height and build as the driver of the vehicle. I explained that opinion in  
22                                my witness statement of the 10<sup>th</sup> of March.





1           21.    **WITNESS #7: DC KENVAL BRYAN**

2  
3           *Evidence in chief*

4  
5                   On the night of the 3<sup>rd</sup> March 2018, he received report of robbery at the Czech Inn  
6                   just after 11:00 pm when he was detailed to investigate. He took the role of the  
7                   investigating officer in the case, after he arrived at the George Town Police station  
8                   at about 11:30 pm. He gave evidence of the steps he took that evening in  
9                   furtherance of the investigation into the robbery including the taking of witness  
10                  statements and recovering exhibits. He stated that on the 9<sup>th</sup> of March he went to  
11                  the Marina Drive residence of the defendant with other police officers. His further  
12                  evidence was as follows.

- 13                  i.    *Later that morning I received an interim report of the finding of DNA on the pepper*  
14                  *spray can (Exhibit 15). Following this I arrested Odain Ebanks around 10:45 on*  
15                  *9<sup>th</sup> of March, 15 minutes after receiving the interim report.*
- 16                  ii.   *I cautioned him before I arrested him on suspicion of robbery. [Words of caution*  
17                  *stated.] Mr. Ebanks made no reply to the caution.*
- 18                  iii.   *I interviewed Odain Ebanks in the presence of Ms. Prathna Bodden at 8:57 – 9:23*  
19                  *pm. I caused transcript to be prepared. I cautioned him at the beginning of the*  
20                  *interview. He declined to answer any of my questions except his name and that*  
21                  *he understood what I was saying to him.*
- 22                  iv.   *It was made it clear to him that I was investigating the robbery at the Czech Inn*  
23                  *Grill on 3<sup>rd</sup> September 2018 at about 11:15 pm. I asked him to give an account of*  
24                  *where he was between 11:00 pm – 12:00pm. In response to that and all other*  
25                  *questions, and knowledge of events and movements he answered no comment.<sup>5</sup>*

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<sup>5</sup>Transcript Interview 9<sup>th</sup> March 2018 was tendered into evidence at trial as Exhibit 16.

- 1 v. *On Saturday 10<sup>th</sup> March 2018, I returned to the address at Marina Drive. I had a*  
2 *warrant to search that address and in the course of the search I seized camouflage*  
3 *pants from a drawer inside Mr. Ebanks' apartment.*
- 4 vi. *That same day, I conducted a further interview with Odain Ebanks. He was*  
5 *represented by an attorney of his choice and he was cautioned at the beginning of*  
6 *the interviewed. I caused a transcript of the second interview to be prepared.<sup>6</sup> I*  
7 *asked him about the pepper spray and the burgundy Honda CRV. I asked him if*  
8 *he was a passenger or a driver in that vehicle. I also indicated the vehicle had*  
9 *been reported stolen on 2<sup>nd</sup> March. I asked him if he had permission for access to*  
10 *the vehicle and he made no comment when asked that question.*
- 11 vii. *On 11<sup>th</sup> March 2018 I reported for duty and in the course of that afternoon I*  
12 *commenced viewing National CCTV footage as part of the investigation into the*  
13 *robbery at the Czech Inn Grill.*
- 14 viii. *During the course of my viewing I viewed footage at relevant times. I saw the*  
15 *vehicle which in my opinion matched the vehicle followed at 299 Victory Avenue.*  
16 *I made notes of my sightings as it was travelling along route with reference to the*  
17 *CCTV to cameras.*
- 18 ix. *On 12<sup>th</sup> March 2108 I formally charged Odain Ebanks for robbery and possession*  
19 *of unlicensed firearm and possession of a prohibited weapon and discharge of a*  
20 *firearm. I cautioned him after I charged him. He made to reply to the caution.*
- 21  
22  
23



---

<sup>6</sup> Transcript of Interview 10<sup>th</sup> March 2018 was tendered into evidence at trial as Exhibit 18

1 **Cross-Examination**

- 2 x. *The pepper spray and the swabs were taken from it [pepper spray can] for DNA*  
3 *comparison. I believe it was checked for fingerprints but nothing was found that*  
4 *matched Mr. Ebanks in the way of fingerprints.*
- 5 xi. *I found some camouflage pants. These were never shown to the witnesses at the*  
6 *Czech Inn. They were not tested for residue for GSR or pepper spray. That was*  
7 *the only item of clothing seized from Mr. Ebanks' home address.*
- 8 xii. *I did not seize any items of clothing similar to those described in the statement. I*  
9 *did not seize any white Jordan's. The pants were the only item similar to that*  
10 *described in Mr. Zitterbart's statement.*
- 11 xiii. *I do have some idea that there may be a twin, a twin sister. It is not something I*  
12 *have definite information about. I heard something to that effect. I am not aware*  
13 *that he has a brother.*

14  
15 **AGREED FACTS**

- 16  
17 22. The evidence of these witnesses who appeared in court was in addition to other witnesses whose  
18 evidence was agreed between the prosecution and the defence pursuant to s.34 of the **Evidence**  
19 **Law** (2011 Revision). The agreed facts in respect of the evidence of PS Scott; Officer Woodall;  
20 Det. Sergeant Morrison; DC Santo; PC Garth Braham and PC Andre Stewart are set out below.



1 i. PS Scott

2  
3 *“At 11:20 pm on 03.03.2018 PS Scott was in the area of the Savannah Gas*  
4 *Station when he heard a report of a robbery of the Czech Inn Grill. He set*  
5 *up a police roadblock at that location. He later attended 299 Victory*  
6 *Avenue where reports had been made of shots fired. When he arrived*  
7 *there he sought to secure the scene pending the arrival of a Scenes of*  
8 *Crime Officer. He noted spent shell casings and a can of “pepper spray”*  
9 *on the ground. He placed sterile latex gloves next to them to mark their*  
10 *locations.”*

11  
12 ii. Scenes of Crime Officer Jayne Woodall:

13  
14 *“At 12:17am on 04.03.2018 Scenes of Crime Officer Jayne Woodall*  
15 *attended 299 Victory Avenue. Whilst there she took the photographs*  
16 *contained in Exhibit 10. Amongst the exhibits she retrieved from in and*  
17 *around the vehicle were the following:*

- 18 a. *JAW 6 (Exhibit 15 – see photograph 34 in Exhibit 10);*  
19 b. *JAW/5 (Exhibit 4 – see photograph 24 in Exhibit 10);*  
20 c. *JAW/18 (Exhibit 5 – from driver’s footwell of vehicle);*  
21 d. *JAW/19 (Exhibit 6 – from driver’s footwell of vehicle);*  
22 e. *JAW/21 (Exhibit 7 – from driver’s footwell of vehicle);*  
23 f. *JAW/20 (Exhibit 9 – from driver’s footwell of vehicle);*  
24 g. *JAW/14: a wet swab taken from the steering wheel of the Honda*  
25 *CRV #101669;*  
26 h. *JAW/25: a wet swab taken from the top of the spray can JAW/6.”*



1                   iii.     Detective Sergeant Morrison:

2  
3                                   *“Detective Sergeant Dave Morrison also attended 299 Victory Avenue on*  
4                                   *the night of the robbery. After Ms. Woodall concluded her examination of*  
5                                   *Honda CRV vehicle 101669, he noted that the engine was still running and*  
6                                   *that a key was in the ignition. He powered down the vehicle and made*  
7                                   *arrangements for it to be towed away. Once the vehicle had been loaded*  
8                                   *onto a truck he noted that the key would no longer start the vehicle.”*

9  
10                   iv.     Detective Constable Owen Santo:

11  
12                                   *“On 23.03.2018 Detective Constable Owen Santo visited the following*  
13                                   *residents from the apartment complex at 299 Victory Avenue: Meagan*  
14                                   *Colburn, Alexander Henry, Rosaly Bass and Dave Nagy. He showed them*  
15                                   *the image exhibited as OLS/1, which he had downloaded from the internet.*  
16                                   *The image was not an image of the pepper spray seized at the scene*  
17                                   *(JAW/6).”*



18  
19                   v.     PC Garth Braham and PC Andre Stewart<sup>7</sup>:

20  
21                                   *“PC Garth Braham and PC Andre Stewart were dispatched to the Czech*  
22                                   *Inn Grill at 11:16pm on 03.03.2018. Whilst there they spoke with Mr. Jiri*  
23                                   *Zitterbart, who described the robber with the gun as being ‘about 5’8” in*  
24                                   *height’ and the robber with the spray as being ‘about 5’6” in height’. PC*  
25                                   *Braham was handed a spent casing (ex.GB/CHI) by Claveon Haye.*

---

<sup>7</sup> See Paragraph 10 of the “Further Agreed Facts”

1 *Mr. Zitterbart was of the opinion that at least CI\$700 was in the cash*  
2 *register at the time of the robbery.”*

3  
4 23. Other agreed facts came from the evidence of civilian witnesses Yvonne D’Aguilar and  
5 Gerome Bodden.

6  
7 i. Yvonne D’Aguilar, the owner of the Honda CRV vehicle registration number  
8 101669 confirmed that it was taken from outside her home address on Marina  
9 Drive (depicted on the map in Exhibit 11) at some time after 9:30am on the  
10 morning of Saturday 03.03.2018. The keys to the vehicle were not taken. She  
11 confirmed that nobody had permission to take it, that the only people who drive  
12 her vehicle are herself, her husband and her work colleagues, and that she has never  
13 given Odain Ebanks access to her vehicle. She and her husband confirm that they  
14 do not pick up passengers when driving.

15  
16 ii. Gerome Bodden, an officer with the Customs Department, resides in the Lower  
17 Valley area of Bodden Town. Whilst he was overseas between 28.01.2018 and  
18 09.02.2018 he left his vehicle parked at home. On 31.01.2018 he was told that his  
19 vehicle had been broken into. Upon his return he discovered that taken from the  
20 vehicle were a number of items including one ‘FREEZE + P CS/OC’ with “J.  
21 Bodden’ written on it.



1 24. Further agreed facts related to exhibits used during the course of the evidence presented  
2 in Court by the prosecution and related to photographs sketches and a map which all  
3 formed part of the evidence considered by this court.<sup>8</sup>  
4

5 25. The evidence of Alexander Henry, Rosaly Bass, Dave Nagy and Meagan Colburn were  
6 read into the record as part of the evidence for the Crown pursuant to s.33 of the  
7 *Evidence Law* (2011 Revision). These were persons who resided in the immediate  
8 vicinity of the apartment block at 299 Victory Avenue, the carpark in which the car in  
9 which the robbers were driving stopped on the night of the 3<sup>rd</sup> March 2018.

10  
11 i. Alexander Henry:

12  
13 *“I have been residing at my current address for over four years now  
14 as a renter. I live alone, I have never seen any pepper spray  
15 canister or anything resembling it anywhere in the yard. I certainly  
16 do not own the / a pepper spray. I am the type of person who go to  
17 work in the mornings and then home in the evening.*

18 *I use mainly the front yard for parking my vehicle and as a public  
19 thoroughfare/footpath. I do recall that one Saturday night in early  
20 March police were outside the apartment. I do recall hearing two  
21 loud gun shots before police checked on me that night. I was home  
22 alone when I looked outside I saw police officers, police vehicles  
23 and a red CRV in the yard. I had never seen that can in the yard  
24 before.”*



---

<sup>8</sup> See Paragraphs 5, 6 and 7 of the “Agreed Facts” dated 24<sup>th</sup> September 2018

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25

ii. Rosalyn Bass:

*“This year specifically I arrived on island February 17<sup>th</sup> 2018. I have been at this address to date. I can say for sure that I have never seen the pepper spray around and that if it was in the yard for any period of time I would have not only seen it but picked it up and thrown it in the trash. This is because, I am the only owner besides the owners of #1 who really are owners, I believe the others rent. I am a farmer at home in the US and I know all the other owners so we usually hire someone to do the cutting of the yard but I am very active in and around the yard planting plants and removing debris. That for me means, with all the activity I do outside if it was there ‘it’ being the pepper spray I would have seen it. I pretty much do things everyday outside when I am here, it ranges from cleaning up the yard and caring for the plants to cleaning up the garbage area. I am outside doing something in the yard while I’m here. I do recall being outside in the day on Saturday March 03<sup>rd</sup> 2018, it was the day immediately before my family members came here to visit.”*



iii. Dave Nagy

*“The police is here at my home making checks about an image he showed me on a piece of paper with OLS/I written on it. I recognize the item to be pepper spray. I have been living in this unit for 31 years with my wife Ursula Nagy and I can say I do not own that*

1                                    *item and I have never seen anyone with it and I have never seen it*  
2                                    *in the yard. .... One night early in March a few weeks ago late night*  
3                                    *I was in my unit when I hear a loud knocking on the door. I looked*  
4                                    *outside and saw a lot of policemen with guns.”*

5  
6                                    iv.     Meagan Danielle Colburn:

7  
8                                    *“I reside in an apartment complex containing 5 units my unit is #5*  
9                                    *located furthest to the right when facing the complex from the road.*  
10                                   *Today Officer Bradshaw showed me an image on a piece of paper*  
11                                   *labeled OLS/1, the image is that of a pepper spray canister., I was*  
12                                   *asked if I had ever seen this anywhere in my yard. I recognize the*  
13                                   *canister to be pepper spray. I have been living here since January,*  
14                                   *myself and my eight year old.*



15                                   *That is since January 2018. I am in and out of the unit everyday*  
16                                   *but this is my substantive address where I sleep. As it relates to the*  
17                                   *pepper spray, I can state conclusively that I have never seen this*  
18                                   *item or any other item resembling it anywhere on this property.*  
19                                   *Every now and then I use the backyard as a playground for children*  
20                                   *but most of my outside activity is from parking my vehicle to the far*  
21                                   *right side of the yard and walking in and out through the front door.*  
22                                   *I am usually quite vigilant with checking my surroundings because*  
23                                   *I leave with my eight year old and sometimes my 14 year old come*  
24                                   *over to visit me so I am always on the lookout for anything strange*

1                                   that would or could post (sic) any risk for my children especially.  
2                                   If a pepper spray was outside I would have definitely noticed that.”

3                                   ...

4                                   “*When I had looked outside that night I had noticed a red type SUV*  
5                                   *close to my vehicle behind it. If the pepper spray was found in that*  
6                                   *area I can only say that if it was there before that night I would have*  
7                                   *seen it because out there is well lit and on that Saturday I came*  
8                                   *home about 3:00 pm after work, parked my vehicle in the same area*  
9                                   *and did not leave home again until after the incident. Therefore if*  
10                                  *pepper spray was in the front yard, I would have seen it.”*

11  
12           26.       In addition, on the Crown’s case was the evidence of the DNA expert Angella Tanzillo-  
13                   Swarts. The Report of Tanzillo-Swarts was exhibited as part of the Crown’s case. The  
14                   Crown and the Defence agreed facts which were a series of comments from the Crown’s  
15                   expert and the defence expert James Clery on the other’s opinions on the DNA  
16                   Evidence<sup>9</sup>. I have considered the Reports and the Further Agreed Facts as part of my  
17                   consideration of all of the evidence in this case. I will refer in detail to these when I  
18                   consider the DNA evidence below.



<sup>9</sup> See “Further Agreed Facts” at paragraph 11.

1 **CROWN'S SUMMARY SUBMISSIONS FOR 5 FEATURES WHICH PROVE THE**  
2 **OFFENCES**

3  
4 27. At the close of the prosecution evidence, the prosecution invited the court to view the  
5 evidence presented as having five distinctive features which together proved the offences  
6 against the defendant to the requisite standard. Having reviewed all of the evidence I  
7 will deal with each of these in turn.

8  
9 i. **THE GENERAL DESCRIPTION OF THE ROBBERS:**

10  
11 a) I accept the evidence of the Crown's witnesses that there was a  
12 robbery on the relevant date and that one of the robbers was taller  
13 than the other. I believe the evidence of Mr. Zitterbart. He had the  
14 best opportunity to see the robbers and I note the time that he had  
15 them under observation as well as the distance that he stood from  
16 the robbers in finding that he was able to give the best evidence of  
17 description. He appeared to me to be a witness who remained calm  
18 and level headed during the course of the robbery, bearing in mind  
19 that his wife and child were there on the premises.

20 b) I discount the evidence of Adrian Gordon and Claveon Haye, the  
21 two workers at the premises that evening as neither of them was  
22 able to give a description of the robber.

23 c) I accept his (Mr. Zitterbart's) evidence and that of his wife on this  
24 issue. Mr Zitterbart said:





1 see his hand. I think he was holding something else in his  
2 left hand. What it was, I cannot say.

3  
4 The first man was 5'6" – 5' 7". The second man was 5'1"  
5 – 5'4" shorter than the first man."  
6

7 ii. **THE OBSERVATIONS OF OFFICER GARWOOD:**

- 8  
9 a) The Crown also relied on the statement by Officer Garwood on the 9<sup>th</sup> of  
10 March 2018 wherein he stated that he made observations of the defendant  
11 how he related that to the robbers on the night in question. Officer  
12 Garwood stated:

13 *"I saw the driver exit from the right door. And then from*  
14 *the passenger door another suspect exited that door. He*  
15 *was the taller suspect in relation to the driver. They both*  
16 *exited the vehicle and I was look at them at the same time.*



17 *As they ran to the right front corner of the building. The*  
18 *taller suspect opened fire at us. He pointed his firearm in*  
19 *our direction and he discharged a round from his firearm.*  
20 *I could see a muzzle flash as I have experience in*  
21 *firearms.*







1 d) In any event his evidence as stated above was that as the robbers were  
2 running quickly away from the vehicle he could see heads, he could not  
3 see faces and he could see so little of the head or face that he could not  
4 even say when asked whether at that point the robbers were still masked  
5 as described in the evidence of Officer Strachan.

6  
7 e) While I do not say that he could not have made an observation, the weight  
8 that I can attach to such an observation in those circumstances when  
9 coupled with a general observation that the defendant was of a similar  
10 build and height to the robber, the driver of the getaway vehicle on the  
11 night of the 3<sup>rd</sup> of March 2018, is minimal at best. There is nothing in  
12 particular about the driver that the Officer observed on the night that he  
13 now says that he observed when compared with this defendant to support  
14 what has been offered as evidence to bolster identification.

15  
16 f) I agree with Counsel for the defendant the description given by Officer  
17 Garwood is not capable of being an identification in all the circumstances.  
18 It does not identify the Defendant with any degree of particularity  
19 sufficient to bolster the prosecution case against the defendant nor indeed  
20 to bolster the other aspects of the prosecution case.



1                   iii.     THE EVIDENCE OF THE DEFENDANT’S BEHAVIOUR ON THE 9<sup>TH</sup> MARCH

2                   2018:

- 3
- 4                   a) The Crown’s argument was that the evidence of the Officers Stracham and
- 5                   Garwood as to the defendant’s behavior when they saw him on the 9<sup>th</sup>
- 6                   March 2018 strengthened Officer Garwood’s statement of his having
- 7                   observed that the defendant was of “*similar height and build and the way*
- 8                   *he moved*” to the shorter of the robbers on the night of the 3<sup>rd</sup> March 2018.
- 9
- 10                  b) The Crown also points out that Officer Garwood noted that the defendant
- 11                  did say something to himself and Officer Stracham on the 9<sup>th</sup> of March
- 12                  when they, together with other officers, carried out a search at the
- 13                  defendant’s premises. He said: “*He was staring at us and he was staring*
- 14                  *us down and this prolonged for a while. Not quite a normal stare; seemed*
- 15                  *odd to me.*”
- 16
- 17                  c) The Crown continues by pointing out that on the 9<sup>th</sup> March 2018, Officer
- 18                  Stracham noted the defendant’s behaviour in greater detail:

19

20   *“I noticed Odain Ebanks. He began to look at me and he made*

21   *some comments referring to the night of March 3. I said can’t say*

22   *word for word. He was making mention to firearms that we were*

23   *carrying -- they were big guns. I ignored it and then he began to*

24   *make mention to say to the effect that my face could not be missed.*

25   *Also mentioned to effect, that we needed target practice and if we*

26   *were the ones that were in the incident on March 3. Again, I*

27   *ignored him. He started to look at me once more and I saw his*





1 of March, was consistent with that of someone who had been shot at to  
2 someone whom he felt was responsible.

3  
4 g) I note that when the defendant gave evidence at trial he was questioned  
5 about what he said and did on the 9<sup>th</sup> of March 2018. He stated that he  
6 was upset and unhappy that the officers had a gun pointed at him during  
7 the search. He said that he stared at all the officers and not Strachan in  
8 particular, because he wanted to make note of their badge numbers. He  
9 stated that he did notice an officer Lewis searching premises at the rear of  
10 him home on the night of the 8<sup>th</sup> of March and that when he said that  
11 “unnuh face can’t hide” that he was referring to the officers he had seen  
12 that night. He went on:

13  
14  
15 *“I did ask PC Strachan if they were the ones chasing down people.  
16 I did say that they needed target practice. It was because they  
17 shouldn’t ever let the bad guys get away from the start. That is  
18 what I meant.”*

19  
20 h) I noted that in cross examination when asked about the 8<sup>th</sup> of March, he  
21 admitted that he did not in fact know if any ‘bad guys’ got away that night.  
22 He stated that he was not staring at Strachan alone and that Strachan did  
23 not do anything in particular for him to stare at him.

24  
25 i) The Crown described the defendant’s explanation as nonsensical.  
26



1 j) Counsel for the defendant argued that this evidence of the officers'  
2 impressions was not such as could support the Identification of this  
3 defendant as one of the robbers on the night of the 3<sup>rd</sup> March. Counsel for  
4 the Defendant states that the answers advanced by the defendant for staring  
5 at the officers on the 9<sup>th</sup> of March were not unreasonable and asked the  
6 court to consider whether the proposition put forward by the Crown was  
7 the only reasonable inference in all the circumstances.

8  
9 k) I do not find that this is evidence lends any credible support to the  
10 prosecution's case against the defendant.

11  
12  
13 iv. **THE CAMOUFLAGE PANTS:**

14 a) Similarly, the evidence of the camouflage pants found at the  
15 defendant's premises does not assist the prosecution in any material  
16 particular.

17  
18 b) It is a peripheral point and I must be mindful that, without some  
19 connection to the robbers, I cannot attach much weight to this bit of  
20 evidence.

21  
22 c) No forensic testing was carried out on these pants, they were never  
23 shown to Mr. Zitterbart, the witness who stated that he saw  
24 camouflage pants on the night of the robbery.  
25



1 d) While such evidence would not have been conclusive, it may have  
2 assisted the prosecution case more – had it been presented in a  
3 manner other than which it was presented at trial.

4  
5 e) At the very least the witness may have stated whether or not the  
6 pattern that seen on these pants are of the same type that he saw on  
7 the evening of the robbery.

8  
9 v. **THE DNA EVIDENCE:**

10 a) I remind myself as I consider the evidence of the DNA experts that  
11 while the experts are entitled to offer opinions on their findings  
12 contained in the respective reports that I will have regard to that  
13 evidence and the opinions offered and give them careful  
14 consideration but that I am not bound by such opinions on the  
15 evidence.



16  
17 b) This aspect of the Crown's case relates to DNA found:  
18 a. on the steering wheel of the getaway car; and  
19 b. on a can of pepper spray found at the scene of the robbers  
20 escape at Victory Avenue in Prospect.

21  
22 c) The Crown contends this is the Defendant's DNA.  
23

1 d) Crown Counsel submits that this Court should view each of pieces  
2 of DNA individually as they are independent planks of evidence  
3 against the Defendant.

4  
5 e) The Crown's evidence from Yvonne D'Agular was that her car was  
6 stolen on the 3<sup>rd</sup> of March 2018.

7  
8 f) The evidence of items stolen from the Czech Grill subsequently  
9 recovered in the vehicle as well as the evidence of police officer  
10 Kenval Bryan detailing the course of the vehicle at the relevant  
11 times by CCTV from Bodden Town to Prospect marries with the  
12 evidence of the officers Garwood and Strachan that this was the  
13 vehicle that was followed and which eventually stopped at Victory  
14 Avenue in Prospect.

15  
16 g) The Crown invites this court to find that there was no doubt that this  
17 vehicle was in fact the getaway car used by the Robbers on the  
18 evening of 3<sup>rd</sup> March.

19  
20 h) I accept on the evidence that the Honda CRV was in fact the  
21 getaway vehicle.



1 i) With regard to the DNA evidence: The report of the Crown’s expert  
2 witness Angela Tanzillo-Swarts was that she received item  
3 JAW/14<sup>10</sup> from Jane Woodall. Upon examination her conclusions  
4 were as follows:

5  
6 “4. ***JAW/14, Wet Swab Steering Wheel***

7 *The multiple-source DNA profile obtained from the*  
8 *swab of the steering wheel JAW/14 consists of an*  
9 *inseparable mixture from at least three individuals,*  
10 *at least one of which is male.*

11 *4.1.1 Odain Lloyd Ebanks and Yvonne*  
12 *Aguilar cannot be excluded as possible*  
13 *contributors to this multiple-source DNA*  
14 *profile. Assuming three contributors and*  
15 *based on the population of the Cayman*  
16 *Islands, it is estimated to be 1.4 million*  
17 *times more likely to observe this multiple-*  
18 *source DNA profile if Odain Lloyd Ebanks,*  
19 *Yvonee (sic) D’Aguilar, and an unknown,*  
20 *unrelated individual are the contributors*  
21 *than if Yvonne D’Aguilar and two*  
22 *unknown unrelated individuals are the*  
23 *contributors.*



---

<sup>10</sup> JAW/14: a wet swab taken from the steering wheel of the Honda CRV #101669



1 4.1.2 It is not possible to make a meaningful  
2 comparison between this multiple-source DNA  
3 profile from the swab of the steering wheel  
4 JAW/14 and the DNA profile of Glenmore  
5 D’Aguilar.

6 4.1.3 Elmer Wright is excluded as a possible  
7 contributor to this multiple-source DNA profile  
8 from the swab of the steering wheel, JAW/14.”

9  
10 j) The Crown’s submission was that given the area from which this swab  
11 was taken, there should be no doubt that this DNA recovered from the  
12 steering wheel was left there by the robber. The crown contends that the  
13 report’s findings that “it is estimated to be 1.4 times more likely to observe  
14 this multiple-source DNA profile if Odain Lloyd Ebanks, Yvonne  
15 D’Aguilar and an unknown unrelated individual are the contributors than  
16 if Yvonne D’Aguilar and two unknown unrelated individuals are the  
17 contributors” was definite support for the proposition that it was Odain  
18 Ebanks’ DNA on the steering wheel.

19  
20 k) The Crown’s expert also detailed that she received item JAW/25<sup>11</sup> from  
21 Jane Woodall. Upon examination her conclusions were as follows:

22 “2. JAW/25 Wet Swab Top of CS Spray Can  
23

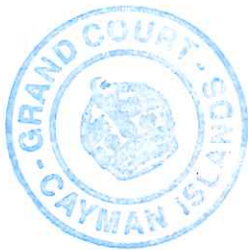
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<sup>11</sup> JAW/25: a wet swab taken from the top of the spray can JAW/6.”



1 m) Having considered this evidence from the crown, I am satisfied that the  
2 pepper spray can was dropped by one of the robbers as they alighted the  
3 vehicle at Victory Avenue on the night of the 3<sup>rd</sup> March 2018.  
4

5 n) The Crown submits that the Court should find that their expert's  
6 conclusion that "*it is estimated to be 130 thousand times more likely to*  
7 *observe this partial, multiple-source DNA profile if Odain Lloyd Ebanks*  
8 *and an unknown, unrelated individual are the contributors than if two*  
9 *unknown, unrelated individuals are the contributors*" was compelling  
10 evidence against this defendant that he was in possession of the pepper  
11 spray canister that evening and, therefore, if the court finds that it must  
12 have been dropped where it was recovered by one of the robbers, then it  
13 must follow that the defendant was one of those robbers.  
14



15 o) The defence urge that the DNA evidence is not capable of proving how,  
16 when or where contact is made between an object and someone's genes.  
17 Counsel for the defence asked this court to consider that the evidence does  
18 not necessarily show direct physical contact between the defendant and  
19 the pepper spray canister or the steering wheel. She argues that it may have  
20 been indirect contact, meaning someone that the defendant had contact  
21 with then had contact with both items or that it may have even been  
22 someone related to the defendant. Defence counsel argues that the  
23 presence of DNA was not conclusive without other evidence on the  
24 prosecution case.  
25

1 p) Counsel for the defendant went on to argue that the foundation for the  
2 hypothesis that the DNA was that of the Defendant deposited there as he  
3 took part in the robbery, was not supported by the eye witness accounts of  
4 the witnesses at the Czech Inn Grill during the robbery, as their evidence  
5 could not provide a clear description of the robbers. Defence counsel drew  
6 the court's attention to the discrepancies in the height of each and stated  
7 that there was no positive indication of height – except that one robber was  
8 shorter than the other. Defence counsel also pointed to the difference  
9 between Zitterbart's description of the robbers as being light-skinned or  
10 light brown and the actual complexion of the defendant who is dark.  
11 Defence counsel also drew the court's attention to the evidence of Officer  
12 Garwood to which this court has referred at paragraphs 26 (ii) above.

13 q) The Defendant gave an account of how he came to touch *a pepper spray*  
14 *can* when he gave evidence at trial. He could not account for how his  
15 DNA could have been found on the steering wheel of the car. He said: "*I*  
16 *have seen a CS canister before. My step father is a police officer and I*  
17 *have seen his and sometime in February I saw one. A friend of mine*  
18 *showed me one and I held it and give it back. No other time."* The  
19 defendant also said: "*I heard of my DNA found on the canister and steering*  
20 *wheel of the car. I can't say how my DNA would have got there. To my*  
21 *knowledge, I have never touched that car. I have never seen anyone*  
22 *driving a car like that."*  
23  
24



1 r) The Crown reminded the court that, with regard to the Defendant's  
2 touching of a pepper spray canister, the Defendant was not forthcoming  
3 with any detail about that incident nor could he provide an identification  
4 of the person who handed it to him. The Crown submitted that he was  
5 deliberately vague with his answers.

6  
7 s) The Crown further argued that the defendant did not give an explanation  
8 for his DNA being found in the vehicle because he had none to give or  
9 none which could have stood up to scrutiny.

10  
11 t) **Court's analysis of the DNA evidence:**

12 a. The mixed profile from the steering wheel was a strong profile  
13 with the defendant's DNA being in the main the stronger  
14 components in that mixture. There is no issue between the experts  
15 on this point. No body fluid testing was done due to the fact that  
16 doing those tests risks consuming the DNA sample and thereby  
17 making some or all of it unavailable for analysis. The experts are  
18 agreed that this was sensible when dealing with low amounts of  
19 DNA as was present with this sample.

20  
21  
22 b. The experts also agreed on the assumption of the presence of DNA  
23 from Yvonne D'Aguilar, given that all of her DNA was consistent  
24 at every location with the DNA found in the mixed sample and  
25 also because it was her car and she drove it. I consider the defence  
26 position that to not include her as a known contributor will



1 increase the potential match/inclusion with the defendant and  
2 therefore that the true stats value of a potential inclusion is  
3 somewhere between the 2 values. It is clear that even if the Court  
4 considers the value that the defence expert has offered, that  
5 somewhere between the 2 values is still a highly significant match  
6 given the population of the Cayman Islands.

7  
8 c. I also note the Crown expert's further position that the presence  
9 of additional unidentified persons does not change the comparison  
10 results to Mrs. D'Aguilar any more than an inconclusive result  
11 when comparing to her spouse, that the absence of testing of  
12 additional persons does not change the existing results.

13  
14 d. I agree with the Crown's submission that each location on which  
15 the defendant's DNA was found should be considered separately  
16 against him. The DNA match on the steering wheel of the  
17 getaway vehicle was found in that car which had only been stolen  
18 earlier in the day on the 3<sup>rd</sup> March 2018 and for which the  
19 defendant gave no explanation.

20  
21 e. The DNA match with the defendant found on the pepper spray can  
22 was found on a can which was used at the robbery and which I  
23 accept must have been deposited by one of the robbers as they fled  
24 the scene at Victory Avenue. Although the other strands of  
25 evidence which were put forward by the Crown as being able to



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provide independent identification of the defendant to support the Crown's DNA evidence has not been able, in this court's view, to bolster the Crown's DNA evidence, the two separate stands of DNA evidence do bolster each other.



1 THE DEFENCE CASE



2  
3 The Defendant

4  
5 28. At the close of the Prosecution case the defendant elected to give evidence on oath.

6  
7 29. His evidence was to deny that he was at the Czech Inn Grill on the night in question or that he  
8 was part of any robbery of those premises. He also denied being in possession of a firearm on  
9 that night or being with anyone who was in possession of a firearm or who may have discharged  
10 a firearm that night. The Defendant stated that on the night of the robbery, the 3<sup>rd</sup> March 2018:

11 *“I know where I was on the night of the third going into the 4<sup>th</sup>. I was home with*  
12 *my newborn and baby mother.”*

13  
14 30. He denied that he was wearing the camouflage pants taken from his home by the police on the  
15 night of the 3<sup>rd</sup> March and he also denied that he had seen the canister of pepper spray a photo  
16 of which was tendered into evidence in this case. He stated:

17 *“I have seen a CS canister before. My stepfather is a police officer and I have seen*  
18 *his and sometime in February I saw one. A friend of mine showed me one and I*  
19 *held it and give it back. No other time.”*

20 *“I heard of my DNA found on the canister and steering wheel of the car. I can’t*  
21 *say how my DNA would have got there. To my knowledge, I have never touched*  
22 *that car. I have never seen anyone driving a car like that.”*



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*“On the 3<sup>rd</sup> of March, I was home cleaning my girlfriend’s car and watching my newborn. I remember because it was one of my friends’ birthday and he messaged me wanting me to come over but I told him I had a newborn and [I] was staying home that day.”*

*“I don’t know anyone who lives in Victory Avenue. I have seen the video of a car being driven. I was neither the driver nor the passenger in that car that night. I heard that the driver was wearing an ECHO hoodie. I don’t own one and have never owned one. I have never worn one. I would say I am dark skinned, dark brown.”*

31. In Cross Examination the defendant stated with regard to the pepper spray:

*“The friend who gave me the pepper spray I can’t recall his name. I know him by an alias name, ‘Brown Man’.”*

32. The Defendant related that the friend asked him if he wanted the pepper spray and passed it to him and he held it. He stated that this happened sometime in February, after the baby was born.

The Defendant said:

*“I held around it and I gave it back. I know which bit the gas comes out of. I touched that bit”*

*“On the day of the robbery I was at home cleaning. This is what I would normally do on a Saturday. I was indoors watching a movie that evening. I was at home for the evening and the night and all day. I didn’t leave the house at all.”*

1                    Santos Mayorquin

2

3            33.    The defence also called the witness Santos Mayorquin, who is the mother of the defendant’s

4                    girlfriend. She gave evidence that she knew that her granddaughter, the defendant’s infant

5                    daughter, was born on the 2<sup>nd</sup> February 2018. She stated that on the 3<sup>rd</sup> of March her daughter

6                    came to her home and that she remembered that day in particular. She said that she called her

7                    daughter around 3:00pm in the afternoon to invite her to go to church and that her daughter

8                    went to church with her at about 6:00pm. She stated that church finished at about 9:00pm and

9                    that she, her daughter and the baby returned to her home. Her evidence was that:

10                                    *“She was at my home until around 10:30. I live in George Town. She lives at*

11                                    *Marina Drive. I spoke to her after she left. I called her. I called her on WhatsApp*

12                                    *Video Call. I could see where she was when I called her. She was in the bedroom.*

13                                    *In the bedroom, apart from my daughter I could see the baby’s father. He was*

14                                    *laying down covered from the waist down and the baby was sitting next to him.*

15                                    *When I say I could see the baby’s father,- that was Odain. I did not speak to him.*

16                                    *I stayed talking to my daughter for about two minutes. When I saw Mr. Ebanks he*

17                                    *was awake. I saw when he went to the bathroom to vomit because he was sick.*

18                                    *“I said I made a video call to my daughter. I remember the time of that call. It*

19                                    *was around 11:00 pm.”*

20

21

22

23

24



1 34. In cross examination she maintained that her daughter and granddaughter were with her during  
2 the evening into the night of the 3<sup>rd</sup> of March 2018. She stated:

3

4 *“When she arrived at 6 we were there for fifteen minutes and then we went to*  
5 *church in my car. We left her car at Rock Hole at about 6:16pm. When I got back*  
6 *from church it was still where my daughter left it.*

7 *It was something like 9:10 when we returned home. We stayed there until about*  
8 *10:30 when my grandchild and daughter left. I know they left at 10:30 because I*  
9 *watched the time.”*

10

11 35. She was adamant when questioned by Crown Counsel that:

12 *“It is not possible that on that night she [her daughter] left a couple of hours*  
13 *earlier. I know she left at 10:30. I can say that because I checked the time, because*  
14 *it was late already. It is not possible that I made a mistake about the time.”*

15

16 36. When Crown Counsel stated to her that the Defendant had earlier in his evidence stated that  
17 her daughter was home with him all night, her answer was:

18 *“That is not true. She was at church with me on that date.”*

19

20 37. She went on to say that after her daughter left her to return home:

21 *“I remember that time because I was waiting for her to call when she arrived and*  
22 *because she didn’t call me, I called her before going to bed. I looked at my clock*  
23 *because I was getting ready for bed.”*

24

25 38. This is material evidence for the defence.

1 39. If this court believes this evidence, then the defendant could not have been at the Czech Inn  
2 Grill at the time that it was robbed at approximately 11:00 pm on the night of the 3<sup>rd</sup> March  
3 2018.

4  
5 40. I remind myself that I must assess the evidence of the defendant and of any witness called for  
6 the defence in the same objective and dispassionate manner as I would any witness for the  
7 prosecution. I remind myself that if I don't accept the evidence of the defendant and his  
8 witness, I must still return to the Crown's case to look for evidence that the crown has proved  
9 its case to the requisite standard before I can find the defendant guilty. If the Crown's evidence  
10 does not reach that standard so that I am sure of the defendant's guilt, then my verdict must be  
11 not guilty.

12  
13 *Crown's Rebuttal Evidence*

14  
15 *Benieca Thompson*

16 *In chief*



17  
18 41. The Crown called evidence to rebut the evidence of Ms. Mayorquin. The Crown's rebuttal  
19 witness was Benieca Thompson. Ms. Thompson works as the Electronic Monitoring Officer  
20 with the Cayman Islands Government. She related that she worked with the Automated  
21 Number Plate Recognition system as part of her duties. The system is a national system of  
22 specific devices set up at various locations throughout the Islands that captures number plates  
23 of vehicles as they are driving past any such device. Ms. Thompson related that she had  
24 produced a record for the investigating officer with regard to the defendant's girlfriend's  
25 vehicle 182 625 after reviewing the data for operational functionality to ensure that it was in  
26 working order.

1 42. Ms. Thompson produced a log to show the movement of the defendant's girlfriend's vehicle  
2 on the night of the 3<sup>rd</sup> March 2018 as visible on the ANPR system.<sup>12</sup> According to Ms.  
3 Thompson that log showed at 6:27 pm the licence plate was first captured at 6:27 pm at  
4 Shamrock and Bimini Drive from a camera near to Hurley's Roundabout. She went on to state:

5  
6 *"At 6:27 pm, it was travelling west along Shamrock Road in an area somewhere*  
7 *near Hurley's. The next entry at 9:35 pm, same licence plate at WB 19-A-W-WBR-*  
8 *WIL. That location is at West Bay Road and Willie Farrington Drive. That is in*  
9 *West Bay, not near to Foster's Airport nor near to Rock Hole in George Town.*  
10 *The vehicle was travelling west.*

11 *At 10:58 pm it was captured travelling at West Bay Road and Willie Farrington,*  
12 *travelling South. It's the same junction but a different camera.*

13 *At 11:18 pm the vehicle was at Shamrock Road and Bimini Drive, near the*  
14 *Hurley's Roundabout. The vehicle was travelling east at that time."*

15  
16 **Cross-Examination**

17  
18 43. Ms. Thompson said:

19 *"I reviewed the data for operational functionality. The clock on the system cannot*  
20 *be altered. There is no way of altering the time on the clock. When it says 11:18*  
21 *it is 11:18. That camera picks up the image. I am aware of the location of Marina*  
22 *Drive. From the location of that camera [at Shamrock Road and Bimini Drive] to*  
23 *Marina Drive is about 2 to 3 minutes. About that, it is not very far from the*  
24 *vicinity."*

---

<sup>12</sup> The ANPR log was admitted into evidence as Exhibit 22.

1 COURT'S ANALYSIS

2  
3 The ANPR Evidence and the evidence of Santos Mayorquin

4  
5 44. There is a great discrepancy between the evidence of the defence witness Mayorquin and the  
6 ANPR evidence. I have no reason to doubt the evidence of Ms. Thompson that the ANPR  
7 system was properly functional on the night of the 3<sup>rd</sup> of March 2018 when the information that  
8 she presented in court was recorded. This evidence points to the defendant's girlfriend's  
9 vehicle not being in the location that Ms. Mayorquin states that it was on the night in question.  
10 In her evidence she stated that her daughter's vehicle remained at her residence at Rock Hole  
11 while she, her daughter and granddaughter went to church with her [Ms. Mayorquin] in her  
12 vehicle.

13  
14 45. Her evidence was that they left for church at 6:15 pm and returned to her house at 9:10 pm. and  
15 that her daughter and granddaughter *remained with her* until 10:30 pm when the daughter left  
16 in the vehicle to return home. However, the vehicle was seen at 6:27 at Hurleys' roundabout,  
17 a location that is quite a few miles out of town and away from Rock Hole in George Town.  
18 The vehicle is also seen at 9:35 pm in West Bay, again miles away from where it is on Ms.  
19 Mayorquin's evidence parked at her home.

20  
21 46. The next point at which this evidence contradicts Ms. Mayorquin's evidence is at 10:58 pm  
22 when the vehicle is seen again in West Bay.



1 47. Ms Mayorquin was firm that she spoke to her daughter at 11:00pm. West Bay is at the other  
2 end of Grand Cayman from Marina Drive, Prospect. It would not be possible to cover the miles  
3 from West Bay to Marina Drive, Prospect in two minutes by motor vehicle. The vehicle is  
4 seen in the vicinity of Hurleys at 11:18 pm well outside the time that Ms. Mayorquin says that  
5 she saw and spoke to her daughter while the daughter was in her bedroom with the defendant.

6  
7 48. This evidence therefore calls into question Ms. Mayorquin's evidence as to whether her  
8 daughter was with her at the times that she states and whether the daughter was at home when  
9 she says she spoke to her at 11:00pm on the night of the 3<sup>rd</sup> of March 2018. The vehemence  
10 with which the witness insisted that she called her daughter at 11:00pm that evening is set  
11 against the recording of the daughter being on her way home at 11:18pm.

12  
13 49. I do not believe her evidence. I do not believe her daughter was with her at the hours that she  
14 stated on the 3<sup>rd</sup> of March or that when she spoke to her daughter that evening, she saw the  
15 defendant at 11:00 pm.

16  
17 *ANPR evidence and the Defendant's evidence*

18  
19 50. The ANPR evidence also goes to contradict the evidence of the defendant who stated that he  
20 was with his girlfriend for the entire day on the 3<sup>rd</sup> of March 2018. She was clearly elsewhere  
21 during the day and was not at home until sometime after 11:18 that evening. The robbery was  
22 alleged to have taken place at just after 11:00pm. The evidence of Mr. Zitterbart was that the  
23 robbery was close to 11:00 pm and investigating officer Kenval Bryan stated that he received  
24 a report of the robbery just after 11:00 pm that evening.



1 51. The Defendant stated that he was at home with his girlfriend on the night in question.  
2  
3 52. The mother of his girlfriend stated that her daughter was with her for most of the evening.  
4  
5  
6 53. In seeking to resolve this inconsistency between the defendant and his witness, I have to  
7 consider whether it is major or minor inconsistency. Going as it does to one of the most  
8 important aspects of the defendant's case, I consider it a major inconsistency. I cannot resolve  
9 it based on the evidence presented by the defence. I consider that it does cause me to doubt the  
10 credibility and reliability of the evidence of both of the defendant and the witness, Mayorquin,  
11 on this point.  
12  
13 54. I have carefully considered the evidence of the defendant. I reject the defendant's account that  
14 he, at all times during the 3<sup>rd</sup> March 2018 was at home with his girlfriend and that he was at  
15 home with her at the material time on that date.  
16  
17 55. I reject the defendant's explanation of his having coincidentally touched a CNS canister some  
18 weeks prior to the robbery as being conveniently made up and untrue.  
19  
20 56. I remind myself that I cannot convict the defendant because I reject his account. I must go  
21 back to consider the Crown's case in order to make a finding of the defendant's guilt or  
22 innocence on the evidence presented by the Crown and that it is only if I am satisfied so that I  
23 am sure of the defendant's guilt on that evidence that I can find him Guilty of the offence. If I  
24 am not so satisfied on the Crown's case then my verdict must be Not Guilty.

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1                    *Defendant's failure to give an account at interview*

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3        57.        The Crown has submitted that this court should draw an adverse inference from the defendant  
4                    not having given the account of the incident until he gave evidence at trial. The defendant in  
5                    his evidence stated:

6                    *“I know where I was on the night of the third going into the 4<sup>th</sup>. I was home with*  
7                    *my newborn and baby mother.”*

8                    *“On the 3<sup>rd</sup> of March, I was home cleaning my girlfriend’s car and watching my*  
9                    *newborn ...”*

10  
11        58.        Section 148 of the **Police Law** (2017 Revision) states:

12                    *“148. (1)        Where, in any proceedings against a person for an offence, evidence*  
13                    *is given that the accused –*

14                    *(a) at any time before he was charged with the offence, on being*  
15                    *questioned by a police officer trying to discover whether or by*  
16                    *whom the offence had been committed, failed to mention any*  
17                    *fact relied on in his defence in those proceedings; or*

18                    *(b) on being charged with the offence or officially informed that he*  
19                    *might be prosecuted for it, failed to mention any such fact; or*

20                    *(c) at any time after being charged with the offence, on being*  
21                    *questioned under the Terrorism Law (2017Revision), failed to*  
22                    *mention any such fact ,being a fact which in the circumstances*  
23                    *existing at the time the accused could reasonably have been*  
24                    *expected to mention when so questioned, charged or informed,*  
25                    *as the case may be, subsection (2) shall apply.*



26                    (2)        A -  
27                    (a)        Court in determining whether there is a case to answer; or  
28                    (b)        court or jury, in determining whether the accused is guilty  
29                    of the offence charged,  
30                    may draw such inferences from the failure as appears proper.”

31  
32        59.        I am satisfied that before each of his interviews the defendant was cautioned. He was first told  
33                    that he need not say anything. It was therefore his right to remain silent. However, he was also  
34                    told that it might harm his defence if he did not mention when questioned something which he  
35                    later relied on in court; and that anything he did say might be given in evidence.

1 60. The defendant related in Court that he was aware, upon being told of the robbery, that he could  
2 have given the police an explanation. He stated that he understood that he had a choice about  
3 whether to accept his lawyer's advice. However, he went on to say that his lawyer said to give  
4 a no comment statement and that is what he did during the course of the two interviews  
5 conducted by Officer Bryan.

6  
7 61. Counsel for the defendant has urged this court to find that no inference should be drawn if the  
8 defendant was acting on the advice of his attorney.

9  
10 62. I find that when interviewed, the defendant could reasonably have been expected to mention  
11 the facts on which he now relies at trial. Even if the defendant genuinely relied on the advice  
12 of his attorney, I find that it was unreasonable for him to rely on that advice in circumstances  
13 where he admitted in evidence that:

14  
15 *"I knew I was at home with [his girlfriend] and the newborn baby and I hadn't gone out*  
16 *on any Saturday or any other night since the child was born. I knew [his girlfriend] could*  
17 *tell the Police it was true. I had an explanation for where I was when the robbery happened*  
18 *and my baby mother could exonerate me."*

19  
20 63. I find that that the only sensible explanation for his failure to give responses at the time of his  
21 interview with the police is that he had did not have an answer at the time or none that would  
22 stand up to scrutiny.

23  
24 64. I find that apart from his failure to mention those facts, the prosecution's case against him is  
25 sufficiently strong that it clearly calls for an answer by him. This failure on the part of the  
26 defendant should count against him.

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65. I remind myself that I cannot convict him wholly or mainly on the strength of my conclusion that his silence should count against him but I take it into account as some additional support for the prosecution's case and when making a determination regarding whether the defendant's account at trial is true.

*The failure to call a witness*

66. The Crown has also submitted that the failure of the defendant to call his girlfriend as a defence witness is a relevant feature of this case that the Court should not ignore. If the girlfriend were available the Crown argues, then she could have supported the defendant as to his whereabouts on the night of the 3<sup>rd</sup> March 2018. The Crown's submission is that the failure of the defendant to call his girlfriend at trial should take away from the defendant's version of the case especially because the defendant did not give the account of being home with the girlfriend on the relevant date before trial whereby the prosecution would have had notice that there was a witness with potential information relevant to the case.



67. I find that I can consider this failure to call the defendant's girlfriend as a factor when considering the version of events given by the defendant.

68. I remind myself however that I must be cautious in making any inference from this failure because there may be many reasons why a witness is not called by a defendant to give evidence. I remind myself also that just as there is no onus on the defendant to give evidence himself there is no onus on him to call witness in his defence. I consider that I should only take this factor as going against the defendant's credibility if I find the prosecution case strong.

69. On the facts as found in this case, I do find that the prosecution case is strong.

1 **COURT’S FINDINGS AND CONCLUSIONS**

2  
3 70. The Indictment charges 4 Offences. I must consider the offences on the indictment and the  
4 evidence offered by the prosecution in support of each count separately. In this case if I accept,  
5 that the defendant is guilty of the robbery at Count 1 – on the basis of his involvement put  
6 forward by the Crown, then he is equally guilty of counts two and three on the indictment. The  
7 prosecution must satisfy the Court for robbery that the defendant and another person stole cash  
8 from Jiri Zitterbart and at the time of so doing and in order to do so put Jiri Zitterbart in fear of  
9 then and there being subjected to force.

10  
11 71. I am satisfied on the evidence of the witnesses who were at the Czech Inn Grill on the night of  
12 the 3<sup>rd</sup> March 2018 that there was a robbery at the premises and that cash was taken during the  
13 course of the robbery. I am also satisfied that the two robbers were acting in concert and that  
14 possession and the discharging of the firearm which grounds the second count of the indictment  
15 was a probable consequence of the enterprise upon which they were engaged. The only issue  
16 is whether the defendant was one of the robbers.

17  
18 72. The presence of the defendant’s DNA on the steering wheel of the getaway vehicle which was  
19 stolen on the morning of the robbery is highly indicative of him being one of the robbers at the  
20 Czech Inn Grill on the 3<sup>rd</sup> of March 2018. When this is coupled with the presence of his DNA  
21 on the pepper spray can which was used in the robbery, there being no doubt that the pepper  
22 spray can was dropped at Victory Avenue by one of the robbers, this is evidence that I consider  
23 and accept to be evidence that the defendant was one of the robbers of the Czech Inn Grill.



1       73.     I couple these with the inferences adverse to the defendant that I am entitled to draw from the  
2             defendant's failure to give an account when interviewed and also by his failure to call his  
3             girlfriend as a witness. I also bear in mind that this court did not believe the defendant's  
4             account of his whereabouts on the evening of the 3<sup>rd</sup> of March 2018 nor indeed his witness's  
5             account. It is clear to this court that these accounts were offered in an effort to mislead this  
6             court. While I do not find that he is guilty because I have rejected those accounts, I do find  
7             that the Crown's case is strengthened because of such findings.

8

9       74.     I am satisfied so that I am sure of his guilt of the offences of robbery, discharging of the firearm  
10            and possession of an unlicensed firearm as well as the further charge of possession of a  
11            prohibited weapon in respect of the can of pepper spray.

12

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**Dated this the 28<sup>th</sup> day of November 2018.**



16

17

A handwritten signature in black ink, appearing to read "Carter J.", with a horizontal line underneath.

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**Madam Justice Marlene I. Carter**  
**Judge of the Grand Court (Acting)**