

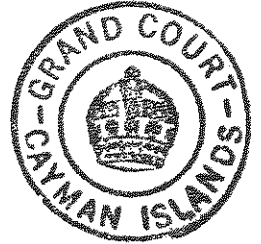
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

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5 **INDICTMENT NO: 0039/2013**

6
7 **THE QUEEN**

8
9 **V**

10
11 **MICHAEL JOSEPH FISCHETTI**



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14 **Appearances:** **Mrs. Marilyn Brandt on behalf of the DPP**
15 **for the Crown**

16
17 **Mr. Charles Clifford on behalf of the**
18 **Defendant**

19
20 **Before:** **The Hon. Mr. Justice Malcolm Swift (Actg.)**

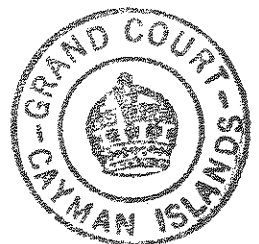
21 **Heard:** **3rd to the 5th February 2014**

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26 **JUDGMENT**

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28 ***INTRODUCTION***

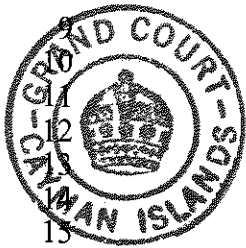
- 29 1. The Defendant stood trial on two (2) alternative Counts arising out of a single
30 incident, namely Count 1 (Wounding with intent to cause grievous bodily harm
31 contrary to s.203 of the Penal Code (2010 revision)) and Count 2 (Wounding
32 contrary to s.204 of the Penal Code (2010 Revision)).

1 2. The particulars of Count 1 are that the Defendant on the 16th day of March 2013 at
2 the Esso Service Station West Bay Road, Grand Cayman, unlawfully and
3 maliciously wounded Edenis Miguel Rives with intent to cause him grievous bodily
4 harm. The particulars of Count 2 are identical but without the requirement of intent
5 to cause grievous bodily harm.
6
7 3. I have considered the legal definitions of both Counts. It is unnecessary in this
8 judgment to set out those definitions as it is common ground that the resolution of
9 this case depends on findings of fact on the issues in dispute rather than on any
10 analysis of the law.
11
12 4. The Crown's case in short is that the Defendant punched Edenis Rives ("the
13 Complainant") on the chin so hard that he caused a wound beneath the chin and
14 broke his jaw. If it is proved that the Defendant caused that wound beneath the chin
15 by delivering a deliberate punch and that he did so unlawfully (that is - not in self
16 defence) and with the intention of causing grievous bodily harm (that is - really
17 serious harm), he must be guilty of Count 1. If all the ingredients of Count 1 are
18 proved with the exception of the intent to cause grievous bodily harm, but it is
19 nevertheless proved that the Defendant intended to cause some harm falling short of
20 really serious harm, then he must be guilty of Count 2. It goes without saying that,
21 if I am unsure that the Defendant caused the wound, or that he did so deliberately,
22 or that he may have been acting in self defence, so that the injury may have been
23 lawfully caused, he is entitled to be acquitted.
24



1 5. This is a Judge alone trial and in conducting it and in composing this Judgment, I
2 have gratefully followed the legal analysis of Quin J. in *R -v- George Dexter*
3 *Evans Indictment No 18 of 2011* paragraphs 67 to 71.

4
5 6. I fully understand that I must advise myself on the applicable principles of law, give
6 myself the appropriate warnings as necessary and state clearly my reasons for
7 acting as I do so that my reasoning is clear and I have in mind the decision of Rowe
8 J. in *K. Richards -v- R 2001 CILR 496* where he said:-



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

18 7. I also keep in mind the guidelines of the Court of Appeal stated in *R -v- Dave*
19 *Kennedy Whittaker Cr. App. R. No 14 of 2006* and in *Randy Martin -v- R Cr.*
20 *App. R. No 2 of 2010*. In the *Whittaker* case the Court adopted the words of Lord
21 Lowry LCJ in *R -v- Thompson 1977 NI 74* where he said at P83:-

22
23 “While on the subject I might say a word on the duty of the judge when giving
24 judgment in a trial under the 1973 Act. He has no jury to charge and therefore
25 will not err if he does not state every legal proposition and review every fact
26 and argument on either side. His duty is not as in a jury trial to instruct laymen
27 as to every relevant aspect of the law or to give a full and balanced picture of
28 the facts for decision by others. His task is to reach conclusions and to give
29 reasons to support his view and, preferably, to notice any difficult or unusual
30 points of law in order that if there is an Appeal, it may be seen how his view of
31 the law informed his approach to the facts.”

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1 In the *Martin* case the Court adopted the reasoning of Lowry LCJ in *R –v- Thain*
2 *1985 NI 457* at P478 where he said:-



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“From these cases the following guidance may be discerned. A judge sitting in a criminal case without a jury, in rendering his decision and giving his reasons for so concluding, is not required to review every fact and to detail each argument on which the prosecution and defence rely as if he were summing up to a jury. The judge must set out the conclusion reached and make clear the reasons for arriving at that conclusion. He is required to have regard to any difficult or unusual points of law and to show how those points of law have in anyway impacted the conclusion that he has reached.”

12 8. In essence my task is to reach conclusions and to give reasons in support of those
13 findings. I am not required to review every fact in the case or to detail every
14 argument as if I was summing up to a jury. I am required only to state my
15 conclusions and to give clear reasons for those conclusions.

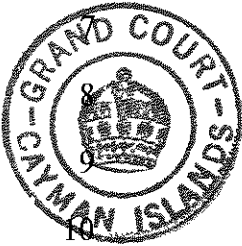
17 9. I must begin by reminding myself of the steps in the process of proof in this case.
18 The questions for me to answer are:-

- 19 a. Was the Complainant wounded?
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- 21 b. If so, did an act of the Defendant cause the wound?
- 22
- 23 c. If so, was that act deliberate? For these purposes that means - was the wound
24 caused by a deliberate punch?
- 25
- 26 d. If so, was the Defendant’s act unlawful? For these purposes that means – was
27 the wound caused otherwise than in lawful self-defence?
- 28
- 29 e. If so, was the deliberate and unlawful act accompanied by an intention to cause
30 grievous bodily harm?
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- 32 f. If not, was the act accompanied by an intention to cause some injury however
33 minor?

THE EVIDENCE

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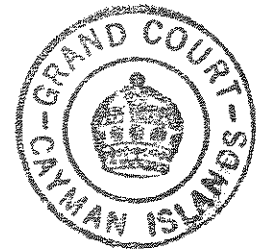
10. **Edenis Rives** (who I shall call the Complainant – in order to avoid confusion with Mr. Rivers the taxi driver) said that he was struck in the face at least 3 times at different points in the incident by someone or possibly by more than one person. He suffered a broken jaw (a fracture of the coracoid of the left mandible), a 5cm wound below the chin, a 2cm cut below the lower lip and, as revealed in the photographs, an injury below the left eye. The broken jaw is certainly a serious bodily injury but is not in itself a wound. On the other hand, the cuts below the lower lip and below the chin are certainly properly described as wounds. There is clear evidence that the wound below the lower lip was caused inside the gas station and there is no evidence that the Defendant caused it. I therefore concentrate on the question of how, where and by whom the wound beneath the chin and the fractured jaw were caused. I shall ask myself whether I can be sure that the wound below the chin and the fractured jaw were caused by the same single impact. Therefore one question is whether, on this evidence, I am able to find so that I am sure that the Defendant delivered a punch which caused either the wound beneath the chin or the fractured jaw or both.



11. The Complainant was a customer at the Esso Service Station on West Bay Road in the early hours of the morning of the 16th March 2013. He and his cousin, who was in his company, had been drinking and they were affected by drink. There he met, purely by accident, a girl named Melissa who was also shopping there. They were friends. She was however the girlfriend of the Defendant who was sitting outside in a taxi awaiting her return. The Defendant saw Melissa and the Complainant greet each other and I have seen on CCTV footage that they hugged and embraced each other. The Complainant also appears to introduce Melissa to his cousin who also

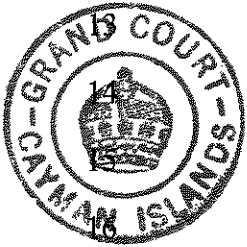
1 greets her in a similar manner. It was all quite harmless and normal. But not to the
2 Defendant. The Defendant himself describes in his Police interview what he saw as
3 “grabbing on my girlfriend”, “grabbing her and pulling her close”. He was, in my
4 judgment, completely misreading the situation and was provoked into a jealous
5 reaction by what he saw. He made his way quickly inside the Esso station where,
6 as I saw on the CCTV recording, he confronted the Complainant. I am completely
7 satisfied that Mr. Fischetti brought this whole unhappy situation about and was
8 entirely responsible for causing the brawl (as Mr. Clifford, his counsel, describes it)
9 which ensued.

10
11 12. According to the Complainant, the Defendant was threatening to kill him because
12 he had hugged his girlfriend. “I’ll fucking kill you. Why you fucking holding my
13 girl?” were the words used. He also threatened to kill the Complainant’s cousin –
14 by which description I assume he means Umberto Campo – which triggered a
15 fracas in which Umberto hit the Defendant and they fought with each other. It is
16 clear from the CCTV that Melissa was trying to act as peacemaker and to calm the
17 Defendant down. The Complainant’s account was challenged but he refuted the
18 suggestion that he was not telling the truth about the Defendant’s words and
19 actions. I have no hesitation in accepting the account given by the Complainant
20 concerning the events inside the Esso station which mirror what I saw on the CCTV
21 footage.



1 13. The action then moved outside. The Complainant says that his cousin – this time I
2 think he meant Eduardo Swaby - told him that he, the Complainant, had sustained a
3 wound under his lower lip at some stage whilst inside the station. The Complainant
4 did not know how he had sustained that injury and what had caused it. Mr. Swaby
5 also cannot account for how it was caused. Therefore, despite being satisfied that
6 the Defendant was entirely responsible for bringing about the violent exchanges
7 inside the station, I cannot conclude that the Defendant was in any way responsible
8 for the injury sustained by the Complainant below his lower lip.

9
10 14. Outside on the forecourt, the action continued. The CCTV recordings show the
11 Complainant (obviously by this time very upset) clearly wanting to move towards
12 the Defendant but being prevented from doing so at first by a girl whose identity is
not entirely clear to me – and at that time the Defendant is standing facing the
Complainant but not moving towards him. The Complainant moves around the girl
and makes towards the Defendant and the action then moves off camera to the right
where Mr. Jonathan Rivers, the taxi driver, says he saw Umberto Campo hitting the
Defendant numerous times from behind to the back of the head.

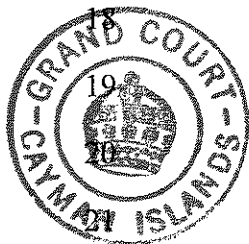


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19 15. Within a few seconds, the Defendant is seen running across the forecourt (from
20 right to left on the CCTV footage) in pursuit of the Complainant who is backing
21 away quickly from him. The Defendant appears to throw a punch at the
22 Complainant as they cross the screen but that punch does not appear to make
23 contact and they disappear off screen to the left. Others follow - males and females.
24 We see no more of the action but it is clear that the Complainant, the Defendant and
25 others of both sexes had moved away in the direction of Burger King to the left of
26 camera. An argument has been advanced that the broken jaw and chin injury may

1 have been sustained inside the Esso station so that the Complainant was already
2 suffering that serious injury when he was being prevented by the girl from moving
3 towards the Defendant, and later as he ran backwards across the forecourt. I have
4 seen the CCTV images and I am completely satisfied that the behaviour of the
5 Complainant outside on the forecourt is not that of a man with a broken jaw. He is
6 fully conscious, clearly very talkative and very mobile. Although the Complainant
7 has no memory of how he sustained the jaw injury which knocked him out, he
8 remembers events leading up to that point, and the evidence of Mr. Swaby strongly
9 suggests that the jaw injury could only have occurred after the Complainant is seen
10 retreating off screen – pursued quickly by the Defendant. I therefore find that the
11 Complainant sustained the jaw injury after being chased by the Defendant and that
12 the jaw injury caused him to stay on the ground until the emergency services
13 arrived. How then was that jaw injury caused?

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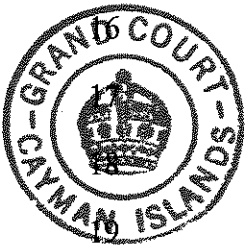
15 16. The Complainant does not know. He woke up later in hospital. Eduardo Swaby
16 says that, outside the Esso station, he saw the Complainant and the Defendant
17 fighting face to face and saw the Defendant being held back by two girls who were
saying to him “stop - let’s go”. Mr. Swaby says that the Defendant pulled away
from the girls and walked towards the Complainant. He then hit the Complainant –
a blow or lick straight in the face – which knocked him to the ground. Until that
point he says the two men were squaring up to each other like boxers but he says
22 that no blows had been exchanged. However Mr. Swaby says that he then saw the
23 Defendant follow up his punch by going to the Complainant who was lying on the
24 ground and making as if to punch him again while he was down. That is when Mr
25 Swaby says he intervened to stop what would have been a piece of sheer
26 unwarranted retaliation. Mr. Swaby was cross examined and it was suggested that



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1 he had not seen everything he related – he denied that assertion but accepted that
2 there may have been some short gaps in what he saw. He remained unshaken in his
3 account. Accordingly I have concluded that Mr. Swaby may not have seen
4 everything that led to the final punch – which he says was delivered by the
5 Defendant and which knocked out the Complainant. In particular he seems to have
6 missed the Complainant punching the Defendant and the actions of Umberto
7 Campo.

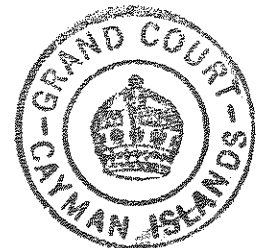
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9 17. However we heard from Jonathan Rivers, the taxi driver who had brought the
10 Defendant to the Esso station, who was effectively tendered to the defence as Mrs.
11 Brandt asked no questions in chief. In cross-examination he said that he saw
12 Umberto Campo hitting the Defendant some 6-8 times from behind at a time when
13 the action was off camera to the right. He also said that he then saw the
14 Complainant hit the Defendant. I accept his evidence about that. I have concluded
15 that Mr. Swaby missed that blow and I am quite certain that it was this blow from
the Complainant which led to the pursuit across the forecourt seen on the CCTV
footage. Why, however, did Mr. Rivers fail to see any subsequent blow by the
Defendant to the Complainant and why did he fail to see anything that could have
accounted for any injury to the chin or jaw suffered by him? I am quite certain that
20 Mr. Rivers is correct in describing what he saw Umberto Campo doing. In fact I
21 can say now that I found Mr. Rivers to be an entirely convincing witness whose
22 evidence I accept in its entirety. Every time his evidence was tested against the
23 CCTV footage, his account was confirmed. However when the Complainant was
24 pursued off screen by the Defendant, it is clear that Mr. Rivers did not follow the
25 action as did others. He remained where he was and it is likely that he simply did
26 not see what happened near Burger King (off to the left of camera) where Mr.



1 Swaby says the final blow was struck, or that his attention was diverted by the
2 threatened imminent attack on his taxi by Umberto Campo who, by this time, had a
3 rock in his hand. Mr. Rivers' account is also consistent with the injuries the
4 Defendant sustained during the incident.

5
6 18. The Defendant has not given evidence. I asked the usual questions of his counsel
7 and was assured that the Defendant was fully aware that I would be entitled, if I
8 thought it proper to do so, to draw an inference adverse to his defence from his
9 failure to go into the witness box and to have his account given in interview tested
10 in cross-examination. The Defendant has in effect relied upon his account in
11 interview.

12
13 19. I shall not relate the contents of the Interview in this Judgment. It is enough to refer
14 to the following matters. The essence of the Interview was that the Defendant was
15 maintaining throughout that he acted in self defence. His description includes
16 apparent acceptance that he swung a punch at the Complainant after he had himself
17 been struck blows outside the gas station. *"I just swung at the first person I saw"* –
18 P3. *"he was the first person I saw after I'd been hit a couple of times"* - P3. He
19 later said he swung at the Complainant but did not remember his punch making
20 contact – P9.

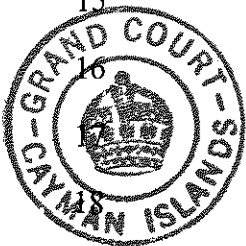


1 20. I do however bear in mind that the Defendant has not given evidence and allowed
2 his story to be tested in cross-examination. In particular the pursuit of the
3 Complainant across the screen, and what happened afterwards, when set against his
4 account in interview, has not been capable of being investigated. I draw the
5 conclusion that the Defendant is aware that this is a weakness in his defence and
6 has deliberately avoided having his story put to the test lest further exploration
7 revealed that he was not telling the whole truth in his interview. I draw that
8 conclusion as an inference adverse to the case for the defence. However it is only
9 one small element of the case and is not in itself determinative of guilt.

10
11 21. The medical evidence was read. The attending physician recorded the injuries to
12 the Complainant but did not specifically say that the wound under the chin and the
13 fractured jaw were, or may have been, caused by a single impact. The evidence
14 from Mr. Swaby is of a single blow. The Defendant himself speaks in his interview
15 of a single swing although he says it didn't land. The only evidence of an injury to
16 the Complainant sustained before that point is the injury below the lower lip which
17 occurred inside the station. My conclusion is that the wound under the chin and the
18 fractured jaw were inevitably caused by a single heavy blow delivered off screen to
19 the left after the pursuit of the Complainant by the Defendant.

20
21 22. In addition to assisting in putting the interview into evidence, Detective Sergeant
22 Anderson Taylor told me about his attempts to obtain witness statements which
23 were, in the main, unsuccessful. I do not, of course, rely in any way upon the
24 absence of evidence in this case and remind myself where the burden of proof lies.

25
26 23. Having reminded myself of the burden of proof, I keep well in mind that the Crown
27 must make me sure of guilt before I can return a guilty verdict.

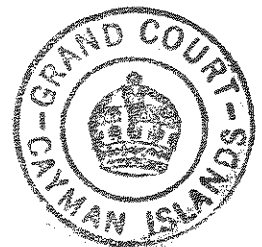


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24. I answer the questions I posed earlier in this judgment as follows and first draw the following conclusions from the evidence I have heard:-

I am satisfied so as to be sure that:-

- a. The Defendant started the incident by his jealous reaction to the perfectly harmless friendly encounter between his girlfriend and the Complainant;
- b. Umberto Campo started the brawl by punching the Defendant inside the station. He also provoked the Defendant by hitting him from behind when the incident had moved outside. Somehow (but I do not know how), the Complainant sustained a cut below his lower lip whilst inside the station;
- c. The Complainant had become riled by these events and at some stage, around the time when Umberto Campo was provoking the Defendant, the Complainant hit the Defendant. I accept that the Defendant may have been hit whilst two girls were attempting to persuade him to leave;
- d. I am satisfied (mainly from watching the CCTV) that the Defendant then pursued the Complainant across the forecourt, and I am satisfied on the evidence of Mr. Swaby that the Complainant was then punched and knocked down. Although I think that Mr. Swaby did not see everything and missed the punch the Complainant admits he threw earlier at the Defendant, I accept Mr. Swaby's evidence about the punch which floored the Complainant and found his account reliable. It is really uncontradicted by any other evidence. Although I found Mr. Rivers to be a reliable and truthful witness, I conclude that he simply did not see the final act in this sorry business;

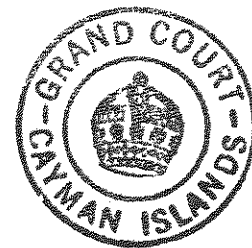


1 e. I am therefore satisfied that the Defendant punched the Complainant after
2 chasing him across the forecourt, after the Complainant had first hit the
3 Defendant. Such behaviour cannot amount to self-defence as the danger is
4 over, the threat no longer exists if the person who attacks you is running away
5 and there can be no question of self-defence arising in such circumstances. In
6 short the Defendant, no doubt under a degree of provocation, retaliated by
7 chasing the Complainant and punching him;

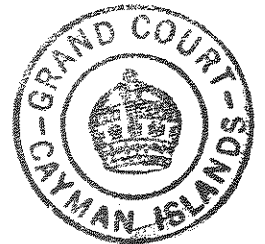
8 f. I am also satisfied that the Defendant punched the Complainant once;

9 g. I am satisfied on the evidence of Mr. Swaby that the blow knocked the
10 Complainant out. There is no evidence that the Complainant was struck again
11 by anyone after he was knocked out. There is no evidence that, before he was
12 punched by the Defendant, the Complainant had any serious injury other than
13 the wound below his lower lip. I am satisfied that the wound below the chin
14 and the fractured jaw were both caused as a result of a punch by the Defendant
15 which was of sufficient force to render the Complainant immediately
16 unconscious. I am therefore satisfied that the punch caused the injuries to the
17 jaw, and to the chin, and that they were individually and collectively serious
18 injuries;

19 h. I saw the Defendant on the CCTV recording chasing a retreating Complainant.
20 He was in hot pursuit. I am satisfied that, by this time, the Defendant had lost
21 his self-control and was intending to hit the Complainant.

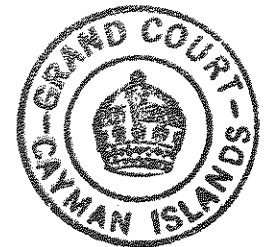


- 1 25. I answer the essential questions relating to the Indictment therefore as follows:-
- 2 i. Was the Complainant wounded? Yes, he sustained a wound under his
- 3 chin;
- 4 ii. Did an act of the Defendant cause the wound? Yes, he punched him
- 5 under the chin;
- 6 iii. Was that punch deliberate? Yes, the Defendant swung a punch at the
- 7 Complainant;
- 8 iv. Was the Defendant's act unlawful? Yes, the punch was delivered in
- 9 retaliation for being punched by the Complainant. It was not self-
- 10 defence because the Defendant chased his victim who was fleeing;
- 11 v. Was the deliberate and unlawful punch accompanied by an intention to
- 12 cause grievous bodily harm? No, I am completely satisfied that,
- 13 although the Defendant chased the Complainant because he was
- 14 provoked, the punch was a wild swing unaccompanied by any specific
- 15 intent to cause really serious harm. I draw no adverse conclusion from
- 16 Mr. Swaby's suggestion that the Defendant was about to strike his
- 17 victim when he was down. The fact is that, for whatever reason, he
- 18 didn't do so;
- 19 vi. Was the act accompanied by an intention to cause some injury however
- 20 minor? Yes, that is the likely result of taking a swing at someone if the
- 21 swing lands and that possibility was in the Defendant's mind.



1 26. I have also had the benefit of submissions from both counsel and of written
2 submissions on behalf of the Defendant from Mr. Clifford. Of course I have given
3 due weight to those submissions. I am unable to conclude however that the
4 Defendant was not responsible for causing the injury to the Complainant's jaw and
5 chin.

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7 27. Accordingly I conclude that the Defendant is not guilty on Count 1 but is guilty on
8 Count 2 and that is my finding.



14 **Dated this the 5th day of February 2014**

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18 A handwritten signature in black ink, appearing to read "M. Swift J.", is written over the lines 18, 19, and 20.

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21 **Honourable Mr. Justice Malcolm Swift (Actg.)**
22 **Judge of the Grand Court**
23