

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CLAIM NO. BVIHCR 2019/0025

BETWEEN:

THE QUEEN

Applicant

and

KHORI PRINCE

Defendant

Appearances: Ms. Stacey Abel, Counsel for the Defendant
Ms. Patrice Hickson, Crown Counsel

2021: October 13th

JUDGMENT

Overview

- [1] **FLOYD J:** This is a no case submission and I must therefore decide if a jury properly instructed could convict. The test is set out in **R. v Galbraith**¹, wherein two limbs of reasoning are described. The first being where there is no evidence that the alleged crime has been committed by the defendant, the judge must stop the case. The second limb, it is agreed, is the one to be considered in this case. That is, where there is some evidence, but the evidence is of such a tenuous nature, that the judge must stop the case. This is based on inherent weakness or inconsistency in evidence. This involves an assessment of the quality of the evidence.

¹ 73 CR. APP. R. 124

- [2] Is the prosecution evidence, taken at its highest, such that a reasonable jury properly directed could not convict? If so, the court has a duty to stop the case. However, if the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are, generally speaking, within the province of the jury, and where, on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be decided by the jury.
- [3] The court must not usurp the function of the jury. The reliability or the credibility of each witness is a matter for the jury to decide.
- [4] The principle underlying No Case submissions is set out in **Archbold Criminal Pleading, Evidence and Practice 2015 at 4 – 364:**
- A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict. In such a case, a directed verdict must be taken from the jury.

Positions of the Parties

- [5] Learned Defense Counsel in her submissions emphasizes that while there is some evidence, it is so tenuous and contains so many inherent weaknesses that it would be unsafe to leave it with the jury and the case must therefore be withdrawn. The essential elements of the offence of burglary have not been established by the prosecution.
- [6] Reference was made to **s. 211 (1) & (2) of the Criminal Code of the Virgin Islands 1997** and the charge of burglary. A person commits the offence if he enters a building as a trespasser with intent to commit any offence mentioned in **ss. (2)** which would include stealing anything in the building.
- [7] The defendant had not been shown to be a trespasser in the Mi Amor Jewellery Store, contends Defence Counsel.

- [8] Defence Counsel also took issue with the fingerprint evidence. If the fingerprint of the defendant was found on the premises, its mere presence does not link the defendant to the crime. It cannot be established when the fingerprint was left there or under what circumstances.
- [9] Defence Counsel also took issue with the evidence of the Crown's expert in fingerprint analysis, D/C Washington. In particular, she pointed out that he testified that a modern electronic analysis of the fingerprints as opposed to a manual or visual only process could lower the margin of error. More importantly, D/C Washington agreed that ACE-V method (analysis, comparison, evaluation and verification) was used in his examination of the evidence. However, the final step, verification, was questionable. The witness provided no documentary proof of verification or peer review having taken place in this case. That damages his evidence beyond repair and it is his evidence that is essential to the Crown's case. It would therefore be unsafe to leave the case with the jury.
- [10] Defence Counsel was, however, unable to provide the Court with any authority confirming a requirement for documentary evidence of verification or peer review of the results of fingerprint comparisons, such that the ACE-V method should not be accepted or could not be established without it. Reference was made to the case of **William Penn v The Queen**². Although two fingerprint experts testified in that case, and one agreed with the other, nothing was stated as to a requirement for such confirming evidence. Instead, that case focussed on the numerical and non-numerical standards and guidelines for fingerprint evidence.
- [11] Defence Counsel also referred to a lack of evidence relating any of the seized jewellery to the defendant. None of it was found on his person. None of it was found at his residence (or his mother's residence if that is where he was residing). There was little or no evidence that he used the motor vehicle where jewellery was recovered and little or no evidence that he resided at the premises where jewellery was recovered from in Greenland, East End.
- [12] Although the defendant gave a statement to police which was at times unclear as to whether he had been at the Mi Amor Jewellery Store at all and if so, whether he had been inside, he consistently maintained his innocence, denying responsibility for the burglary.

² HCRAP 2006/001

- [13] For these reasons, the case must therefore be removed from the jury.
- [14] Learned Counsel for the Crown referred to the second limb in the **Galbraith** test and submitted it was not satisfied, such that the case should be removed from the jury. It is a circumstantial case. Crown Counsel pointed to the need to examine all of the evidence and the case as a whole. If that was done, the Court would be satisfied that the evidence was not tenuous.
- [15] Consider the location of the fingerprint on the inside of the window of the jewellery store. No employees or the store owner recognized the defendant as being a customer. Although D/C Washington was not able to say how long the fingerprint had been present on the store window, D/C Morris testified that the print appeared to be recent and relatively fresh. This, coupled with the statements of the defendant to the police about whether he had ever been at the Mi Amor Jewellery Store, was strong evidence. The statements of the defendant were equivocal. He may have been there. It may have been a long time ago. It may have been when they first opened. He may have gone inside. He may have remained outside. It was a long time ago. He could not be sure. He was never there.
- [16] Crown Counsel also pointed to the evidence of the recovered stolen jewellery from a residence where the defendant was found in (his brother's residence), and from a vehicle close by which also contained his identification.
- [17] With regard to the verification process of D/C Washington's positive match of the fingerprints of the defendant with the fingerprint found at the scene, Crown Counsel submitted that had taken place. D/C Washington testified to peer review having been done by USVI Police personnel. That verification had confirmed his findings. Although the report had not been disclosed, D/C Washington testified about that process. There was no requirement for documentary evidence to confirm such a verification process. No authorities were submitted to show a requirement for such evidence.
- [18] For all of these reasons, Crown Counsel contended, there was sufficient evidence to leave the case with the jury. It would require thorough directions from the trial judge but it could result in a verdict of guilt.

[19] Yesterday, I received oral submissions from both counsel and authorities from learned counsel for the Crown. This morning, I received a case from Defence Counsel. I have carefully listened to those submissions and reviewed all of the material.

[20] The consideration for this court is that a no case submission should succeed if there is no evidence to prove an essential element of the offense, or if the evidence is so weak that no reasonable jury properly directed could convict. If there is some evidence which, at face value, establishes each essential element of the offense, then the case should continue before the jury.

The Law

[21] There is no doubt that this case rests essentially upon circumstantial evidence. For that reason, the case of **DPP v Selena Varlack**³ is important. Could a reasonable jury properly instructed conclude that the defendant was guilty? Could a reasonable jury, on one view, properly draw inferences as contended by the prosecution? It is not the judge's concern that the guilty verdict may be set aside upon appeal as being unsafe. A judge must decide upon a basis that the jury will draw inferences reasonably open to them and favourable to the prosecution. The fact that one reasonable inference is consistent with innocence does not mean the case must be stopped. It is not the function of the judge to choose between inferences which are reasonably open to the jury.

[22] Furthermore, as to cases involving circumstantial evidence, I am guided by the case of **Malcolm Maduro v The Queen**⁴. Where the case involves circumstantial evidence, the only concern of the judge is whether a reasonable jury could reach a conclusion of guilt on the evidence, by drawing reasonable inferences from the evidence that is given at the trial. The question then is, whether a reasonable jury may, on one view of the evidence, convict the accused. If so, even if another view of the circumstances thrown up by the evidence may be consistent with innocence, the judge should not withdraw the case from the jury.

³ (BVI) (2008) UKPC56

⁴ ECSC CA HCRAP 2007/004

Analysis

- [23] The defence is quite correct when it points out that there is no direct evidence linking the Defendant to the crime. No evidence in and of itself proves the Defendant committed the burglary. The closest the evidence comes to that is the fingerprint analysis of D/C Washington, which shows that the Defendant was at the scene, touching a window, at a time relatively close to the burglary. D/C Washington admitted in cross examination that he could not say that the fingerprint was left as a result of the burglary.
- [24] The Crown's case relies on a combination of that fingerprint and other evidence.
- [25] The witnesses, Keisha Almorales and Eileen Bourke testified that they locked up the Mi Amor Jewellery store at the end of the business day on 28 December 2018, after placing most of the jewellery and valuables into containers in the storage bathroom. Upon their return next morning, store staff discovered the break in and the loss of jewellery, gold, diamonds and cash. A window was determined to be the likely point of entry and that was later pointed out to police. Due to a detailed accounting and inventory system, along with unique lines of product, many of the items stolen were identifiable.
- [26] The witness, D/C Morris, attended the location the day after the incident. He was designated an expert in the processing of crime scenes, including photography and fingerprints. He carried out those duties at Mi Amor Jewellery Store. He processed the ransacked storage room and the front window, which was slightly ajar. He concluded that was the point of entry. He developed two palm prints on the inside of the window frame ledge. Other prints were also processed elsewhere in the store. The fingerprint lifts were placed on cards and conveyed to D/C Washington. Although the prints were recent and relatively fresh, he could not say how long they had been there. The process employed, which involved the use of magnetic powder to develop the latent prints, is an old-style process. There are indeed newer techniques involving electronic methods, but his process is effective and not antiquated. It continues to be used extensively by police services.

- [27] Police Technician Smith obtained fingerprints and palm prints from the Defendant. He cooperated fully and voluntarily with that process. She passed on those prints to D/C Washington.
- [28] D/C Washington was designated an expert in fingerprint analysis. He has over 20 years' experience in the field and has made over 20,000 fingerprint comparisons. He compared the latent prints found at the crime scene with the prints provided by the Defendant, and had no doubt that the latent prints from Mi Amor Jewellery Store were made by the Defendant. The prints were identical. He found the latent prints to be of good quality. D/C Washington confirmed that no two people have the same fingerprints. Each is unique. He readily admitted that there are newer, more modern methods of fingerprint analysis, including the use of electrical technology. However, the manual comparison is still used and is required by international standards. Newer, electronic versions are useful. They can decrease the risk of contamination. However, the method he used is a standard process. Although one of the oldest methods, it is a normal and widely accepted process. He is confident in its application and its results.
- [29] D/C Washington is familiar with and used the ACE-V method – analysis, comparison, evaluation and verification. There was verification in this case. He referred to a memorandum of understanding with other jurisdictions such as the USVI & Cayman Islands, using a blind verification process of his findings. It was done in this case and his conclusions were confirmed. Such verification results are, for some reason, not routinely disclosed by the RVIPF, but they can be and he is aware of the results in this case. It was the belief of D/C Washington, therefore, that the ACE-V process had been followed.
- [30] Other witnesses such as D/S Etienne, D/S Avril and Inspector Williams all testified as to the execution of search warrants at a residence in Greenland, East End, a residence in Cane Garden Bay and a motor vehicle close to the apartment building in Greenland. The defendant was found at the Greenland apartment. It was his brother's apartment. Jewellery from the Mi Amore burglary was found there. Jewellery from the Mi Amor burglary was also found in the vehicle. Nothing relating to the burglary was found at the residence belonging to his mother, which may also have been the residence of the defendant. Nothing from the burglary was found on the person of the defendant.

- [31] The Investigating Officer, D/C Remy, testified that he interviewed the defendant under caution twice. Those interviews were recorded and transcripts were provided. Over the course of those interviews, the defendant maintained his innocence. However, he also gave conflicting answers as to whether he had ever been at or inside Mi Amor Jewellery Store and if so, when that was. The defendant also averred that it was a long time ago and he had difficulty remembering.
- [32] All of this evidence is circumstantial. It must be for the jury to decide what inferences may properly be drawn therefrom. Those inferences must be assessed “together with the surrounding circumstances in general...weighed, assessed and determined by the jury, in light of proper directions from the judge, applying the appropriate standard of proof.” See **Melody Baugh-Pellinen v R.**⁵
- [33] A number of inferences are possible based on the evidence in this case. An inference could be drawn that the Defendant was present at the Mi Amor Jewellery Store at the time of the burglary, owing to the presence of his palm print on the window, which was found to be the point of entry. However, that inference may only go so far as to confirm the presence of the defendant at some time in the recent past but not necessarily at the time of the burglary. It is for the jury to decide.
- [34] An inference could be drawn that the defendant was involved in the burglary of the Mi Amor Jewellery Store owing to the recovery of stolen items from a residence where he was found and a vehicle where his identification was found. His identification cards in the vehicle may indicate his presence within, and therefore a connection to the stolen jewellery found there. It may be, however, that the jury would decline to make such inferences due to a lack of ownership in either the vehicle or the apartment or both, but it is for the jury to make that determination.
- [35] Discrepancies and credibility assessments are matters within the exclusive purview of the jury.
- [36] Issues relating to the reliability and credibility of D/C Washington, as it pertains to the verification process used in his case study and the techniques he used in analysis and comparison of the evidence, are matters to be assessed by the jury.

⁵ [2011] JMCA Crim 26 at para 38

- [37] Similarly, issues relating to the reliability and credibility of the defendant, as found in his police statements, are also matters to be considered and assessed by the jury.
- [38] The key evidence in the case for the Crown is the fingerprint evidence. There may be issues relating to the obtaining and analyzing of that fingerprint evidence but it is not totally unsupported by any other evidence. If that were so, then I would have to stop the case. I also remind myself that supporting evidence need not be corroboration in the strict sense. It is for the jury to decide.
- [39] All of this means that there may be an interpretation that a jury might accept that allows the defendant to have been in the store at the time of the burglary and later found to be in possession of jewellery stolen during that burglary. It is an inference that might be drawn from the totality of the evidence. The jury might reach such conclusions and make such inferences, depending on which evidence and which witness they believe, if any, in that regard. As such, I must leave it with the jury.
- [40] Defence counsel submits these are not inescapable inferences to be drawn from the evidence. Indeed, she submits that the evidence is so tenuous that it is unsafe to leave such evidence with the jury. With respect, I must disagree. The evidence will require careful directions to the jury as to how they may receive and consider it. But it must be left with them nonetheless.
- [41] The comments made by the defendant during the course of his interviews may place him at the scene of the burglary or they may not, depending upon which portions of those interviews are accepted, if any. To be sure, the Defendant consistently maintains his innocence during his interviews. However, as the Crown points out, his denial of being there or his assertion that he was not inside the store, coupled with the location of the fingerprint, could be an inference of guilt. The Defendant also says in his statement "I can't recall". "It was a long time ago." "I am not too sure." Those are equally acceptable answers. Honest words perhaps from someone who was confused. But it is for the jury to decide.

[42] For all of these reasons, I am not persuaded that the evidence is so poor that it would be unsafe to leave it with the jury. As noted in **Riley v Barron**⁶ (Phillips JA applying Parker CJ in practice note⁷), the decision does not depend so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

[43] The no case submission is therefore dismissed, for the reasons advanced.

Richard G. Floyd
High Court Judge

By the Court

Registrar

⁶ 1965 8 WIR 164

⁷ (1962) 1 ALL ER 448