COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL DIVISION

CRI/VBI/182/8/2018

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

-V-

DWAYNE BENJAMIN DECOSTA

UNLAWFUL SEXUAL INTERCOURSE WITH A PERSON UNDER FOURTEEN YEARS OF AGE

CONTRARY TO SECTION 10(1) (A) OF THE SEXUAL OFFENCES ACT, CHAPTER 99

Before:	**The Honourable Madam Justice Cheryl Grant-Thompson**
Appearance:	**Ms. Jacqueline Burrows and Mr. Perry McHardy for the Prosecution - Director of Public Prosecutions**
	Mr. Murrio Ducille for the Defence
Hearing Dates:	**11 & 17 September, 2019**

RULING ON 'NO CASE' SUBMISSION

Unlawful Sexual Intercourse-13 years old - is the lesser offence included in the greater - prejudicial vs. probative - R v Galbraith

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Headnote:

Regina v Dwayne Benjamin DeCosta
Indictment No. 182/8/2018

Supreme Court
Grant-Thompson J

Brief Facts:

The Defendant Dwayne DeCosta was charged with the Unlawful Sexual Intercourse of A.B. (a juvenile), contrary to section 10(1)(a) Sexual Offences Act, Ch. 99. The virtual complainant was declared an adverse witness in the Trial. She said he did nothing sexual to her. A.B. said she threw water in her mother's bed on the morning of the incident. Her mother dropped her off to her dad. The dad was on a cruise. A neighbour took her to the East Street South Police Station on 14 July 2018. It was a Saturday. The defendant was at work. He accepts he took her outside the station. She said they went upstairs outside the building. She claims (adversely) that nothing happened in the vacant room upstairs. There was recent complaint - a female Sergeant who saw her return looking distressed. The defendant claims he stopped to talk to someone. The bus driver of that bus line said he spoke to no one. So there appears to have been a lie told. The young thirteen year old girl was in the police officers company for some 7 minutes. The court was of the view that this was compulsory detention (prima facie - s.19 (c) - Assault-Penal Code, Ch. 84) or Abduction (s. 22 and 25(d) - Sexual Offences Act - Ch. 99). This was a big man (in size stature and rank) who in the courts view 'detained' however temporarily 'a little girl. It raises a prima facie case for the jury.

Held:

(i) The Defendant is a former Senior reservist police sergeant ;

(ii) this is a "No Case" application for the substantive charge of Unlawful Sexual Intercourse against this Defendant;

(iii) the "No Case" Submission was upheld and the jury will be directed to acquit the Defendant on that count;

(iv) however the court found that there were lesser alternative subsumed charges of Assault or Abduction for which a prima facie case was made; and

(v) Tho` se charges will be left to the jury.

Cases Referred to in the Judgment:

(R v Galbraith [1981] 1 W.L.R. 1039; Clayton Cox v Reginal, Criminal Appeal No. 70 of 1198; Taylor et al v R (1928) Crim App. R 20; Daley v R [1993] 4 All ER 86,PC; Taibo v the Queen (1996) 48 WIR 74 page 83(f-g); Crossdale v R (1995) 46 WIR 281 page 285; Director of Public Prosecutions v Selena Varlack [2008] UKPC 56 paragraph 21; Regina v Coutts [2006] 1 WLR 2154; Terrell Neilly v The Queen PC App. No 0112 of 2010 (Bahamas) paragraph 38; Hunte and Khan v The State, [2015] KPC 33 Privy Council Appeal No.0088 of 2012)

Grant Thompson J:

I reminded myself that the general approach to be followed where a submission of 'no case to answer' has been made was described by Lord Lane in **R v Galbraith [1981] 1.W.L.R. 1039** where he said:-

> *"(1). If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*
>
> *(2) The difficulty arises where there is some evidence but it is of a tenuous nature for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
>
> *(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
>
> *(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's 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 tried by the jury. There will of course, as always in this branch of the law be borderline cases. They can safely be left to the discretion to the judge".*

(1) The Court agrees with the basic submission of No Case To Answer made by Counsel for the Defendant in respect of the charge of Unlawful Sexual Intercourse with a person under 14 years of age.

(2) It is the view of this court that pursuant to Section 170(1) of the Criminal Procedure Code Act, Chapter 91, and having heard the submission of Counsel for the Defence and Counsel for the Prosecution in Reply, that there is not sufficient evidence that a jury properly directed may consider relative

to the charge of Unlawful Sexual Intercourse pursuant to Section 10(1)(a) Sexual Offences Act, Ch. 99.

I will not leave that charge as a matter for this jury to decide if they accept the evidence of the virtual complainant in this matter. In that respect A.B. the Virtual Complainant did not say that this accused man did anything sexual to her. It would normally be a matter for the jury having been warned of the **Special Need for Caution** in dealing with evidence of this nature if they accept the evidence of this witness having heard her and having had the opportunity to assess her demeanor. Her evidence had no corroboration.

(3) However the Crown is seeking to build a circumstantial evidence case combined with an alternative lesser charge. In **Clayton Cox v Reginal, Criminal Appeal No. 70 of 1198,** Justice Sabola cited the case of **Taylor et al v R (1928) Crim App. R 20** Hewart J in the course of his judgment said as follows:

> ***"it has been said that the evidence against the applicants is circumstantial; so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."***

Inconsistencies

(4) With respect to the inconsistencies, it was the Crown's submission that they were not grave or fatal to the prosecution's case. They were of the view that the inconsistencies did not render the prosecution witnesses completely unreliable. And, that the jury could be properly directed as to how to deal with the inconsistencies/discrepancies.

Submission of No Case to answer

(5) Mr. Ducille submitted that his client had no case to answer. It was common ground that the governing principles on a submission of 'no case' to answer are set out in **Galbraith.**

Galbraith in perspective

(6) The learned Authors of Blackstone's Criminal Practice 2010 at D15.56 determined that the guiding principles on determining submissions of No Case to Answer are:

> **(a) If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.**
>
> **(b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.**
>
> **(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the court has shown to be of doubtful value.**
>
> **(d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey [1988] Crim LR 767) where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone."**

(7)(i) These principles are well-established and have been accepted by the Judicial Committee of the Privy Council as authoritative. The principles have been applied in many cases throughout the English-speaking Commonwealth. In **Daley v R [1993] 4 All ER 86, PC,** an appeal from Jamaica, the Privy Council acknowledged (at p 90) that for many years, it has been recognized that "**the trial judge has power to withdraw the issue of guilt from the jury if he considers that the evidence is insufficient to sustain a conviction."** The Board recognized that while the judge had the

power to intervene on his own motion, more commonly a formal submission on this basis is made by counsel for the defence at the close of the prosecution case; as occurred in the case at bar. In **Larry Raymond Jones - The Privy Council**, affirmed the applicability of Galbraith in The Bahamas.

(ii) In **Taibo v the Queen (1996) 48 WIR 74**, a case from Belize, the Privy Council found that there were serious weaknesses in the case for the prosecution, but they were not necessarily fatal: page 83 (f-g). They also found that although the case against the appellant "was thin and perhaps very thin", if the jury found the evidence of [JC, CG and FV] to be truthful and reliable there was material on which a jury could, without irrationality, be satisfied of guilt." This being so, the judge was not only entitled but required to let the trial proceed.

(iii) In **Crossdale v R (1995) 46 WIR 281**, a decision of the Privy Council from Jamaica, Lord Justice Steyn at page 285 stated that:

> *"**A judge and a jury have separate but complimentary functions in a jury trial. The judge has a supervisory role. Thus the judge carries out a filtering process to decide what evidence is to be placed before the jury. Pertinent to the present appeal is another aspect of the judge's supervisory role: the judge may be required to consider whether the prosecution has produced sufficient evidence to justify putting the issue to the jury.***

(iv) **Lord Devlin in Trial by Jury, The Hamlyn Lectures, (1956, republished in 1988) aptly illustrated the separate roles of the judge and jury. He said (at page 64):-**

> *"…**there is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by***

using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is…The trained mind is the better instrument for detecting flaws in reasoning; but if it can be made sure that the jury handles only solid argument and not sham, the pooled experience of twelve men is the better instrument for arriving at a just verdict. Thus logic and common sense are put together."

(v) In **Director of Public Prosecutions v Selena Varlack [2008] UKPC 56**, a case emanating from the British Virgin Islands, the Privy Council succinctly restated the **Galbraith** principles. At paragraph 21, Lord Carswell, in reading the judgment of the Court said:

"The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in R v Galbraith [1981] 2 All ER 1060, [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such

as the present, concerned with the drawing of inference." *[Emphasis added]*

The Crown's Case

(8) The Crown submitted that it had established a prima facie case against the defendant, that there was sufficient evidence for a jury to convict on.

The Defendant was charged with the offence of Unlawful Sexual Intercourse contrary to section **10(1)(a) of the Sexual Offences Act Ch. 99.**

The Crown has accepted the position of this Court and Mr. Ducille's submission and in the result, the Prosecution conceded that, it has not proved that sexual intercourse occurred between the Defendant and 13 year old A.B., on the 14th of July, 2018.

ALTERNATIVE/LESSOR OFFENCE

(9) The Prosecution submitted, however, that this is a case of "the Greater including the Lesser". That legal principle was enunciated in **Regina v Coutts [2006] 1 WLR 2154**, 'Murder' was the offence charged in that case. The defence case was that of 'Accident'. Based on the facts of the case, 'Manslaughter' should have been left for the jury to consider, in the interest of justice.

(10) Section 6(3) of the Criminal Law Amendment Act reads as follows:

> ***"Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."***

In the Privy Council decision of **Terrell Neilly v The Queen** PC App. No 0112 of 2010 (Bahamas). At paragraph 38, their Lordships applied the **Coutts** principle in relation to the offences of Robbery and Receiving

(11). In section **129(3) of the Penal Code** Ch. 84 provides as follows:

> "***129. With respect to cases where one act constitutes several offences or where several acts are done in execution of one criminal purpose, the following provisions shall have effect, that is to say -***
>
> > ***(3) If, when a person is charged with an offence part only of such charge is proved, which part amounts to an offence other than that charged and being, in the opinion of the court, an offence committed in execution of the same design as is specified in the charge, he shall be punishable in respect of the offence which he is proved to have committed, although he was not charged with it, or he may be punishable for an attempt to commit the offence charged, although not charged with the attempt.***

Under Section **114(2) of the Criminal Procedure Code:**

> "***When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence, and such combination is proved but the remaining particulars are to be proved, he may be convicted of the lesser offence although he was not charged with it."***

In the **Coutts** decision **Lord Bingham** said at paragraph 12 and 23:

> ***"The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than the crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves." (paragraph 12)***
>
> ***"The public interest is in the administration of justice is, in my opinion best served if in any trial on indictment the trial judge leaves to the jury subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious***

alternative offence which there is evidence to support." (Paragraph 23)

(12). I noted that in the **Coutts** decision, **Lord Bingham** confirmed in paragraph 15 that a lesser offence to Unlawful Sexual Intercourse is that of Indecent Assault. The Prosecution submitted to me that the offence of Indecent Assault should be left to the jury for their consideration.

(13). **Indecent Assault in accordance with - Section 17 of the Sexual Offences Act** provides that:

17(1) Any person who -

(a) indecently assaults any other person;

(b) does anything to any other person with the consent of that other person which, but for such consent, would be an indecent assault, such consent being obtained by false and fraudulent representation as to the nature and quality of the act, is guilty of an offence and liable to imprisonment for eight years.

(2) It is no defence to a charge of an indecent assault committed on a person under fourteen years of age, to prove that that person consented to the act of indecency.

(14). **Lord Griffiths** in **R v Court [1988] 2 W.L.R. 1071** defined indecency as conduct that right-thinking people will consider an affront to the sexual modesty of a woman. Lord Lane CJ in Faulkner v Talbot [1981] 1 W.L.R. 1528 at page 1081 stated in his summing up that:

"***The judge in assisting the jury in his summing up as to the meaning of an indecent assault adopted, inter alia, a definition used by Professor Glanville Williams, Textbook of Criminal Law, 2nd ed. (1983), p.231: "Indecent" may be defined as 'overtly sexual.' "This is a convenient shorthand expression, since most, but not necessarily all, indecent assaults will be clearly of a sexual nature although they, as in this case, may have only sexual undertones. A simpler way of putting the matter to the***

jury is to ask them to decide whether "right-minded persons would consider the conduct indecent or not." It is for the jury to decide whether what occurred was as offensive to contemporary standards of modesty and privacy as to be indecent."

(15). **Lord Goddard CJ** in **Beal v Kelley[1951] 2 All E.R. 763** defined indecent assault as follows:

"*An assault accompanied with circumstances of indecency."*

At page 1082 **Lord Griffiths** said:

"*To decide whether or not right-minded persons might think that assault was indecent, the following factors were clearly relevant - the relationship of the defendant to his victims - were they relatives, friends or virtually complete strangers? How had the defendant come to embark on this conduct and why was he behaving in this way? Aided by such material, a jury would be helped to determine the quality of the act, the true nature of the assault and to answer the vital question - were they sure that the defendant not only intended to commit an assault upon the girl, but an assault which was indecent - was such an inference irresistible?*

In addition to establishing the assault, the prosecution had to establish that the defendant was aware of the indecent circumstances of what he did, or that he was reckless to their existence. On a charge of indecent assault the prosecution must prove:

(1) that the accused intentionally assaulted the victim;

(2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent;

(3) that the accused intended to commit such an assault as is referred to in (2) above."

(16). In **Blackstone's Criminal Practice 2019/Part B Offences/Section B3 Sexual Offences,** at B3.388 **(Tab 4), Lord Griffiths'** position in **R v Court** is affirmed as follows:

> "'*Indecent' The precise manner in which the issue of indecency should be left to a jury was considered by the House of Lords in Court [1989] ac 28. A jury must decide whether 'right-minded persons' would consider the conduct indecent or not. If the assault is either inherently indecent or rendered indecent by its accompanying circumstances, the element of indecency can be established simply by proving the facts constituting the assault, and the defendant's motive will be irrelevant. If the assault is incapable of being considered indecent, the prosecution cannot secure a conviction by adducing that a defendant had a secret indecent motive. However, if the assault is at most capable of being considered indecent, a defendant's sexual motive is admissible both to show the assault was, in fact, indecent and he had intended it to be so.*

(17). In this case no such act of Indecency is detailed. The most that could be conjectured here is that this defendant allegedly has an indecent mind or a secret indecent motive. There is simply no evidence of indecency. This proposed lesser count must fail, under the circumstances, the Crown has simply not established it on the evidence before me.

Assault

(18) The Crown then asked me to consider Assault.

Section 19 of the Penal Code defines assault as:

> 19. (1) "Assault" includes —
>
> (a) assault and battery;
>
> (b) assault without actual battery;
>
> (c) imprisonment, or detention and compulsion.

(2) Every assault is unlawful unless it is justified on one of the grounds mentioned in Title vii. of this Code.

Section 22 of the Penal Code Ch 84 defines assault by imprisonment as:

22(1) A person imprisons another person if, intentionally and without the other person's consent, **he detains the other person in a particular place**, of whatever extent or character and whether enclosed or not, **or compels him to move or be carried in any particular direction.**

(2) This definition is subject to the following provisions, namely, that detention or compulsion may be constituted, within the meaning of this section, either by force **or by any physical obstruction to a person's escape** or by causing him to believe that he cannot depart from a place, or refuse to move or be carried in a particular direction, without overcoming force or incurring danger of harm, pain, and annoyance, or by causing him to believe that he is under legal arrest or by causing him to believe that he will immediately be imprisoned if he does not consent to do, or to abstain from doing, any act.

Evidence of Assault

(19). The Crown submitted that the Assault they claimed they established by the evidence falls under **section 19(1)(c) of the Penal Code.** The evidence they relied upon was assault by **imprisonment, or detention and compulsion** as follows:

- The evidence of A.B. is that an officer called her outside.
- The Defendant, during his record of interview, allegedly identified himself as the officer who called A.B. outside.
- A.B. said that the officer who called her outside asked her to go to the back, and that she did go to the back.
- That the officer followed her to the back and then told her to go up the stairs.
- Further that the officer was behind her the entire time.
- She was then told to open a door and go into one of the rooms.

- A.B. identified herself in the first video of the foyer area that was shown in evidence.
- The evidence of Inspector Bowles is that she met A.B. and her mother at the station on the 15th of July 2018, when A.B. showed her the garage area of the station.
- Insp. Bowles, then said that officer Capron photographed the location, the photos were produced in evidence.
- The Defendant's explanation for calling her outside is that he wanted to assist her in getting something to eat from Esso gas station. During the record of interview, they allege that he said that they never left the compound, because he stopped to talk to someone who was standing to a Nassau Flight Services bus that was parked in the yard.
- That A.B. was 13 years old at the time and was brought to the police station for safe keeping, she was not under arrest.
- She was asked to sit in the foyer of the police station.
- At about 11:53am the surveillance camera of the station show an officer in all dark clothing on the outside of the station.
- Then the same male opens the front door of the station and beckons the complainant to come outside to him, which she did.
- A.B. is seen returning into the station at 12 noon, in time for the end of defendant's shift.

It was submitted that the detention of the complainant by the defendant, is a form of assault. And the circumstances under which A.B. was in the defendant's company for almost 7 minutes.

The complainant was 13, she was not accompanied by a female adult, she was at the station for safe keeping and not under arrest, the defendant being a male officer acted outside of protocol and procedure when calling her outside, and the location where she was directed to go at the back of the station into the garage, up the stairs and into a room. A.B. is alleged to have been in the defendant's company for almost 7 minutes.

OTHER ALTERNATIVE CHARGES

(20). **Assault** contrary to section 265(4) of the Penal Code, and

Abduction contrary to sections 22 and 25(d) of the Sexual Offences Act

Abduction is defined as:

> "22. Any person who is guilty of an abduction of any unmarried person under sixteen years of age is guilty of an offence and liable to imprisonment for two years.
>
> 25. For the purposes of the sections of this Part relating to abduction —
>
> (d) a person having the temporary custody, care or charge of another person for a special purpose, as his attendant, employer or schoolmaster or in any other capacity, can be guilty of abduction of that person by acts which he is not authorised to do for such special purpose, and he cannot give consent to any act by another person which would be inconsistent with such special purpose."

(21). I find that the Virtual Complainant was a young child 13 years old, that there was an imbalance in power she was dealing with an adult 56 years old. Secondly this was a young female with an adult male who was not her relative or friend which was the second imbalance in power. Thirdly the Virtual Complainant is a civilian who was in the company of a trained senior police officer - all of these factors created an imbalance in the power before these individuals and was such in my view that the Virtual Complainant was open to be compromised under all the circumstances. Fourthly they were in a police station an intimidating environment for adults much less a vulnerable female child. Fifthly, In my view this leaves a decision for the jury to decide, whether on one possible view of the facts they would find that she was open compulsorily detained which is one of the definitions of assault. In my view it was under limb 261 of the Galbraith test, and essentially a question for the Jury.

(22). Mr. Ducille relied on the case of **Hunte and Khan v The State, [2015] KPC 33 Privy Council Appeal No. 0088 of 2012** delivered on 16 July, 2015 at paragraphs 36 and 38 provide as follows:

"On that basis, the judge had no cause to give the jury and further directions of the kind suggested. They would have been unnecessary and confusing. Such directions would been relevant only if the case against the defendant involved the difficult topic of "parasitic secondary liability" (to use the expression coined by Professor Sir John Smith), i.e. possible liability for murder even though the defendant lacked the mens rea for murder if he was a party to an agreement to commit some other crime in the course of which the victim was murdered. (Paragraph 36)

The leading authorities on the question of when a judge is obliged as a matter of law to leave a lesser alternative verdict to the jury are the decisions of the House of Lords in **R v Coutts [2006] 1 WLR 2154** and the Court of Appeal in Foster [2008] 1 WLR 1615 (in which a five- judge court considered the Coutts principle and its application). The reason for requiring a trial judge in some circumstances to leave an alternative verdict to the jury, even where neither the prosecution nor the defence has asked the jury to consider it, is that the courts have recognized that there may be a risk, identified in Foster at para 60, that faced with a stark choice between convicting a defendant who was plainly guilty of serious wrongdoing and acquitting him altogether, the jury may be influenced to convict of the crime charged, although a proper verdict on the evidence would have been a finding of guilty of some lesser offence. But the question only arises in cases where the evidence before the jury provides an obvious basis for conviction of an alternative offence. In Coutts Lord Bingham referred to an "obvious alternative offence which there is evidence to support" at para 23. Other judges used other formulations to the same general effect (summarized in Foster at para 54). It is not the law that a bare possibility that a defendant may have been guilty of a lesser offence makes it incumbent on the trial judge in all circumstances to leave an alternative verdict to the jury. In Foster the court approved the decision of the Court of Appeal in **R v Banton [2007] EXCA Crim 1847**, that the judge would be justified in not leaving an alternative verdict to the jury if he reasonably considered it to be remote from

the real point of the case (see Foster paras 57-58)." (Paragraph 38)

GENERAL COMMENTARY

(23). The common thread running through these cases is that the task of a judge in considering a submission of 'no case' is the balancing one. On the one hand, a judge should be careful not to usurp the purview of the jury who are the judges of the facts. On the other hand, the judge is duty bound to safeguard accused persons from conviction, on facts which are so precarious, unsafe or insufficient that injustice would result.

The Standard of Proof

(24). On a submission of 'no case' to answer, the question to be decided by the trial judge is whether a properly directed jury could convict on the evidence adduced by the prosecution at the close of their case. The judge does not have to find at this stage that the prosecution have established the ingredients of the offence beyond a reasonable doubt. This is never a determination for a judge to make on an indictable trial. To do so will amount to a usurpation of the jury's function. As stated in Taibo [supra], the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt, if there is, the judge is required to allow the trial to proceed. In other words, the judge is merely to consider whether a prima facie case has been established by the evidence adduced by the prosecution.

THE STANDARD OF PROOF

ANALYSIS OF PROSECUTION EVIDENCE

(25). What is clear from the authorities is that the judge at this stage must only be satisfied that there is a prima facie case for Mr. Dwayne

Decosta to answer. Applying the principles enunciated in Galbraith and having considered the prosecution evidence in its totality, it is correct to say that there is no evidence to ground that count changed. However I find that the direct evidence coupled with the circumstantial evidence as outlined above in my view grounds the conclusion of this Honourable Court that this defendant has a case to answer to the lesser charges of Assault with imprisonment and detention and also of Abduction.

(26). As to Guidance 2 (a), I am of the view that the evidence adduced by the Prosecution is not so inherently weak as to justify the case to be taken away from the jury. Instead, the Prosecution has established a prima facie case on the two lesser alternative counts Assault or Abduction. They will both be left for the juries consideration. Discrepancies (if any) in the prosecution evidence are matters for the jury as judges of the facts.

(27). In my opinion, a properly directed jury might on one view of the facts, come to the conclusion that the defendant may be guilty on these alternative counts. In the result, the submission of “no case to answer” in respect of the defendant must fail and I will overrule it.

(28). I promised to put my reasons in writing and this I now do.

Dated the 3 April 2020

The Honourable Justice Cheryl Grant-Thompson
Justice of the Supreme Court