

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Criminal Division**

**Cri/vbi/184/7/2017**

**Between:**

**THE QUEEN**

**VS**

**LEANDER BELL**

**BEFORE:           The Honourable Mr. Justice Gregory Hilton**

**APPEARANCE:   Randolph Dames for the Applicant**

**Lennox Coleby for the Respondent**

**RULING ON NO CASE SUBMISSION**

**[Criminal Law – No Case Submission – Armed Robbery /  
Receiving – Circumstantial Evidence – Whether Mobile  
Phone found on Accused proven to be the Mobile Phone  
which was taken during the Robbery –  
Conflicting Tenuous Evidence-]**

1. The Accused is charged with Armed Robbery contrary to section 339 (2) of the Penal Code, Chapter 84. The Particulars alleges:

“That Leander Bell on Thursday 29<sup>th</sup> June, 2017 at New Providence, while being concerned with another, armed with an offensive instrument to wit: a firearm, did rob Ismae Davis – Hall of cash, a handbag valued \$280.00, a Samsung cell phone valued at \$200.00, the property of Ismae Davis, a white 2005 Chevrolet Equinox Jeep valued at \$9,500.00, the property of Dr. Raquel Davis – Hall, a Huawei cell phone valued at \$300.00 and a Samsung S5 valued at \$300.00, the property of Shenique Davis – Evans.”
2. The Accused is also charged with Receiving contrary to section 358 of the Penal Code Chapter 84. The particulars allege:

“That Leander Bell, while being concerned with another, on Thursday, 29<sup>th</sup> June 2017, at New Providence, did dishonestly receive a Huawei cell phone, the property of Ismae Davis – Hall, and a Samsung S5 cell phone, the property of Shenique Davis – Evans, knowing or believing the same to be stolen.”
3. The Accused pleaded not guilty on his arraignment and the prosecution commenced the trial on 15<sup>th</sup> October 2019. At the close of the prosecution’s case counsel for the Accused made a submission of NO CASE TO ANSWER pursuant to section 170 (1) of the Criminal Procedure Code.
4. Counsel for the Accused has submitted that the evidence led of is a tenuous character having regard to the inconsistencies and/or contradictions in the prosecution evidence and it would be unsafe to leave the case to the jury and based on part A of the 2<sup>nd</sup> Limb of R.v. Galbraith (infra) on the evidence when

taken at its highest a jury when properly directed could not properly convict the Accused.

5. Counsel for the Accused has also submitted that – notwithstanding the presumption specified in section 91 of the Evidence Act that a person found in possession of recently stolen property is presumed (unless the contrary is proved) to have stolen it – there is no sufficient evidence adduced to establish that the “Grey” Samsung phone constable Rolle says he found on the Accused is the same “Black” Samsung phone the victim identified on the photo C.D. shown in court as being her phone taken during the robbery.
6. Counsel for the Prosecution has submitted that the evidence adduced by the crown is sufficient to support the charge of Armed Robbery and/or Receiving and submits that the evidence falls within part B of the second limb of R.v. Galbraith (infra). Counsel for the Prosecution submits that (notwithstanding there may be some inconsistencies) there is evidence on which the jury could properly come to the conclusion that the Accused is guilty of Armed Robbery and/or Receiving; and the case should remain before the jury for their determination.

### **THE LAW**

7. The guiding principles when the court is presented with a submission of “No Case To Answer’ at the close of the prosecution’s case are set out in R.v. Galbriath [1981] 1 W.L.R. 1039 at 1042 B-D Lord Lane C.J. stated:

“How then should a judge approach a submission of No Case?

- (1) If there is no evidence that the crime alleged has been committed by the defendants 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 character, 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's 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 Crown's evidence is such that its strengths 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 on 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 of the judge."
8. In *DPP v. Varlack* [2008] UKPC 56, a case emanating from the British Virgin Islands, the Privy Council, in the judgment delivered by Lord Carswell succinctly restated the Galbraith principles as follows at paragraph 21:

"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 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] 1WLR 1039, at 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 inferences.”

9. In Blackstone’s Criminal Practice 2010 at D15.56 the following principles were advanced as representing the position that has now been reached on determining submissions of no case to answer:
- “(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 courts 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.”

10. In *Crosdale v. R* [1995] UKPC 1, a decision of the Privy Council emanating from Jamaica, Lord Steyn, in considering the question: whether, where the defence applies to make a no case submission in the absence of the jury, it is right for a Judge to refuse the application and to hear the submission in the presence of the jury? Lord Steyn stated at paragraph 20:

“20. A judge and a jury have separate but complementary 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 jury. 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 to make the verdict.”

11. In the case of R.v. Pryer, Sparkes and Walker [2004] EWCA Crim 116, Lord Justice Hooper in elucidating on the rationale for the decision in Shippey’s case (sometimes referred to as the “plums and duff” case) had this to say at para: 26-29:

“26. Turner, J then went on, according to the report, to identify parts of the complainant’s evidence which were found to be totally at variance with other parts. He labelled those parts as “frankly incredible” as having “really significant inherent inconsistencies.” He went on to say that they were:

“.....strikingly and wholly inconsistent with the allegation of rape.”

He thus acceded to the submission and directed the jury to bring verdicts of not guilty.

27. It has been the experience of at least two members of this court that Shippey is often cited by counsel at the close of the prosecution’s case. What counsel often do, and what in our view counsel have done in this case, is to convert Shippey from what it actually is, namely a decision on the facts, into a decision on the Law. Mr. Moses and Miss Stapleton seek to find in Shippey, as many counsel have done before them, some principles of Law called “the plums and duff principle.”

28. What is a trial judge being asked to do when a submission of no case is made either at the close of the prosecution's case, or, as sometimes happens, after all the evidence in the case has been given? He has a task to perform which is stated simply and clearly in Galbraith:

“Could a reasonable jury properly directed properly be sure of the defendant's guilt on the charge he faces”

29. Although the test is a very simple one, it is often difficult to answer the questions. Help may sometimes be found in the case of Shippey in resolving that question, provided it is remembered that Shippey is no more than another case on the facts. Galbraith gives significant assistance to judges when being asked to resolve that question when the reliability of witnesses is in issue.”

12. When reviewing the above authorities it is clear that a judge should be careful not to usurp the role of the jury who are judges of the facts. However, a judge is duty bound to ensure that accused persons are safeguarded from conviction on facts which are insufficient or precarious and so that injustice would not result.

### **FACTS**

13. Before going through the evidence in the case I will rule at the outset that no evidence has been led by the Prosecution in support of the Receiving charge as laid out in the Information as Shenique Davis never testified and there is no evidence that Ismae Davis identified a Huawei cell phone.



14. On the evidence presented there is no dispute that an armed robbery was committed. The issue to be determined is whether the evidence, prima facie, establishes that the Accused (along with another) committed it.
15. The brief facts are that on Thursday 29<sup>th</sup> June 2017 at around 12 noon Mrs. Ismae Davis reported to the police that she was "held up" in her home and robbed by two gunmen, who had on masks. That after the robbery she discovered that her daughter's 2005 Chevrolet Equinox Jeep along with her hand bag, some cash and her black Samsung phone along with and her daughter Shenique Davis' Huawei cell phone and Samsung S5 cell phone were taken.

Mrs Ismae Davis was unable to identify any of the robbers. Around 7 p.m. that same day the Accused was arrested by Constable Rolle while he was in his vehicle and when he was searched three (3) cell phones were found; One in his shirt pocket and two in his vehicle. They were respectively:

- a) A grey Samsung cell phone
- b) A Gold Alcatel, cell phone
- c) A red Box sealed containing a Huawei cell phone

Another male, Andrew Pyfrom, was also arrested that day at his house #60 Seymour Street and was found in possession of a silver and Black Huawei cell phone and a Samsung cell phone.

Both men were jointly charged with the offences listed in the Information, and after arraignment in the Supreme Court Andrew Pyfrom pleaded guilty to the offence of Armed Robbery.

There was no evidence led to link the Accused with Andrew Pyfrom.

The Prosecution presented their case on the basis that the Grey Samsung cell phone found by Constable Rolle in the pocket of the Accused was the cell phone of Ismae Davis taken during the robbery; and as such he was presumed by law

(section 91 of Evidence Act) to be one of the robbers; or alternatively that he dishonestly received the cell phone.

Section 91 of the Evidence Act provides:

“91. Where a person is found in possession of property proved to have been recently stolen he shall be presumed to have stolen it, or to have received it knowing it to have been stolen according to the circumstances of the case, unless he shall give some satisfactory explanation of the manner in which it came into his possession.”

### **THE EVIDENCE**

16. The Prosecution called seven witnesses in support of the charges. The pertinent testimony is set out below.
17. D/Sgt. Paul Adderley testified that on 30<sup>th</sup> June 2017 he was attached to Crime Scene investigations C.S.I. and he viewed a White Chevrolet Equinox at I.S.D. registered in the name of Raquel Davis – Hall. He took photographs of the vehicle which were produced at the trial. He also processed the vehicle and found 3 latent finger prints. He never got any notification that the prints found were connected to the Accused.
18. Inspector Gardell Rolle testified that he worked at C.S.I. and was supervisor of Sgt. Colebrook and constable Armbrister who were out of the jurisdiction. He without objection from the Defence, was permitted to read their reports to the jury; and produced photographs which Sgt. Colebrook took of the house of Ismae Davis. He also produced a C.D. containing photographs which constable Armbrister took of two cell phones: a Black Samsung cell phone and a Grey Huawei cell phone. He testified that latent prints were found on the screen of the Samsung cell phone and were submitted to the AFIS. The C.D. was shown to the Court. He said he had no information that any of the prints found on the phone were connected to the Accused.

19. The complainant Ismae Davis testified that on 29<sup>th</sup> June 2017 She lived on Oakhill Road off Skyline Drive and that Raquel Davis – Hall and Shenique Davis are her daughters. That on that date as she was leaving her home two masked gunmen held her up and forced their way into her home. That when the gunmen went upstairs she ran out of the house and after they left she returned and discovered they had taken the white 2005 Chevrolet Equinox Jeep which had her bag in it along with \$100.00 cash and two cell phones were taken from her one being a Black Samsung. She reported the matter to the police and later at the police station she identified her Black Samsung which had been taken and the jeep which had been taken. She was unable to identify any of the two men. She said her phone was a Samsung S5 and she could identify it by the photo screen shot on the phone. She viewed the C.D. photo produced by Inspector Gardell Rolle and identified the Black Samsung cell phone.
20. Dr. Raquel Davis – Hall testified that on 29<sup>th</sup> June 2017 she received information of what had happened to her mother and went to her mother's house and waited with her for the police. She gave a statement to the police and later identified her white Chevy Equinox at the police station. She also identified a receipt where her mother's phone was purchased by her from Brandsmart which was exhibited in the trial. She said her mother's Samsung phone was a black phone Samsung Galaxy 5.
21. Inspector Darren Turnquest testified that on 29<sup>th</sup> June 2017 while he was on mobile patrol in the night he discovered a white Chevrolet Jeep on an unnamed road off of Fox hill road and contacted Police control who gave him information and he later towed the jeep to I.S.D. of Police Force. He identified the jeep in the photograph shown to him in court.

22. D.C. 3847 Samuel Rolle testified that on 29<sup>th</sup> June 2017 he was attached to the Flying Squad and he along with other officers were on Seymour Street and he stopped a vehicle in which the Accused was in and on searching the Accused he found a Grey Samsung phone in his pocket; a gold Alcatel and red Box sealed with a New Huawei phone in the accused vehicle. He said he arrested the Accused with reference to Armed robbery and he identified the Accused in Court. He said after he arrested the Accused he booked him into the Grove Police Station and handed the phones over to Cpl. Rolle at the grove Police Station.

He said he had placed the 3 phones he took from the Accused in a Brown evidence bag and placed his initials on a paper which he placed inside the bag. In court he opened the brown bag and took out a Samsung phone and a Red Box containing a Huawei phone which he identified as having retrieved from the Accused.

Under Cross examination he accepted that 2 other phones were found in House #60 on Seymour Street by Officer Hunt and another man was arrested. He said that the only Samsung phone he can speak to is the one he took from the Accused. He said he went to C.D.U. before court and retrieved the brown Paper evidence Bag which had contained the phones he got from the accused from the Evidence lock up.

He said when he opened the evidence bag only 2 phones were in it not the 3 he had placed in it. He could not say what happened to the Gold Alcatel phone. He could not say who all had access to or custody of the phones from June 2017 up to now.

He stated that when he took the phones from the Accused he never documented the serial number or model of the Samsung phone or the Huawei phone.

When questioned about police procedure and Detention Records of persons arrested he said that when an arrested person is booked into a station a Detention record for that person should detail the items taken from that person and in

this instance he did not document the phones he took from the Accused on his Detention record; nor did he write in his Police note book about the 3 phones he took from the Accused.

He admitted that it would surprise him that the complainant said her missing phone was "Black".

He said he never dealt with the other two phones that constable Hunt found in House #60 Seymour Street and he admitted that he was surprised that the Gold Alcatel was not in the Evidence Bag.

When questioned as to whether this meant that someone else must have tampered with the Brown Evidence Bag he said he cannot speak to that.

23. The final witness was D/Cpl. 3478 Rolle the investigator attached to C.D.U. he testified that on 29<sup>th</sup> June 2019 he received information about an Armed Robbery on Oakhill Road. He went to that address and spoke to Ismae Davis and he checked the house which was ransacked. He gave Sgt. Colebrook instructions to take photographs of the house interior and exterior.

That on 30<sup>th</sup> June 2017 he conducted a Record of Interview with the Accused in the presence of his attorney at 2:22 p.m. where the Accused denied committing the offences.

At 3:10 p.m. he said he spoke to P.C. 3847 Rolle who handed to him 2 cell phones, a Huawei phone and a Samsung phone. He said that on the same day he saw the complainants Ismae Davis Shenique Davis and Raquel Davis and they identified the White Chevrolet Equinox and Ismae Davis identified the Black Samsung and Shenique Davis identified the Huawei phone. He said he instructed P.C. Armbrister to photograph the two cell phones.

Later that day he reinterviewed the Accused outside of the presence of his Attorney and showed him the Samsung phone which the Accused denied knowledge of.

He testified that sometime later Dr. Raquel Davis – Hall gave him a receipt for the Samsung phone and he compared the serial number on the receipt with the serial number on the phone and they were the same.

He said he charged the Accused and he identified the Accused in Court.

Under cross-examination he stated that as the investigator he read the report of officer Hunt which stated that Hunt found a Samsung phone and a Huawei phone in the house #60 on Seymour Street and arrested Mr. Andrew Pyfrom. He said he never received any phone from officer Hunt but he did receive, the Huawei phone (found by Hunt in the house) and a Samsung phone which P.C. Rolle said took from the Accused, from P.C. Rolle on 30<sup>th</sup> June 2017 while at C.D.U. He said he was never given the Gold Alcatel phone found by P.C. Rolle nor the Samsung phone found by Hunt. He said P.C. Rolle handed the two phones to him in a clear exhibit bag. He said he was never at the Grove Police Station on 29<sup>th</sup> June 2017 and that it would surprise him if P.C. Rolle said that he handed the phones to him at the Grove Police Station.

He said when he initially saw P.C. Rolle, Rolle gave him the Huawei cell phone and the Samsung phone and that later on Rolle gave him the Red Box containing another Huawei cell phone.

He admitted that from his investigation he only received one Samsung phone although two Samsung phones were recovered in the case.

He said he never questioned P.C. Rolle about the serial number of the Samsung phone Rolle said he got from the Accused.

He admitted that the Detention Record of the Accused did not show the phones taken from the Accused and that if it had been documented with make, model and serial number there would be no doubt.

He testified that he cannot speak to how P.C. Rolle got the Huawei phone found at house #60 which Rolle gave to him. And that Rolle never gave him the Samsung found at the house.

He testified that the Accused gave him an Alibi that he was at home at Colony Club with his mother at the date and

time of the Armed Robbery. That he went to Colony Club to check their video surveillance but was told it only covered the office area and not the rooms. He said he did not check the Accused room at Colony Club and did not take the Accused out on enquiries to locate his mother at Colony Club not let the Accused call another family member to let them check for his mother to confirm his alibi.

### **ANALYSIS**

24. Counsel for the Accused has submitted that based on the factual inconsistencies conflicts and discrepancies between the evidence of P.C. Rolle and Cpl. Rolle the evidence is inherently weak and that a jury when properly directed could not properly convict on it. That the case should be withdrawn from the jury.
25. Counsel for the crown, while accepting that there are some discrepancies, has submitted that on one possible view of the facts there is evidence (notwithstanding there may be some inconsistencies) on which the jury could properly come to the conclusion that the Accused is guilty of Armed Robbery and the case should remain with the jury.
26. In this case the only evidence connecting the Accused to the offence is the Samsung cell phone which P.C. Rolle states he retrieved from the pocket of the Accused and handed over to Cpl. Rolle; which Samsung phone was identified by the complainant as being taken from her during the Armed Robbery. The doctrine of recent Possession as specified in Section 91 of the Evidence Act (supra) would then presume that the Accused committed the offence of Armed Robbery.
27. There are, however, significant conflicts between the evidence given by P.C. Rolle, the complainant and Cpl. Rolle as it specifically relates to the Samsung phone and other phones the subject of the investigation in the case; some of which are listed below:

- a) P.C. Rolle said the Samsung phone he took from the Accused was Grey Ismae Davis said her Samsung phone taken during the robbery was Black.
- b) P.C. Rolle said the 3 phones he took from the Accused were placed in a Brown Paper Evidence Bag and turned over to Cpl. Rolle on 29<sup>th</sup> July 2017 at the grove Police Station.  
Cpl. Rolle said he received two phones from P.C. Rolle in a clear evidence bag on 30<sup>th</sup> July 2017 at C.D.U. The Huawei found in the house and the Samsung taken allegedly from the Accused.
- c) P.C. Rolle said he never gave Cpl. Rolle any of the phones collected by Officer Hunt from the House #60 Seymour Street.  
Cpl. Rolle said P.C. Rolle gave him the Huawei phone collected by Hunt from the house #60.
- d) No Account has been given by either P.C. Rolle or Cpl. Rolle in regarding the Samsung phone found by Officer Hunt in the house #60. Or how the Gold Alcatel vanished from the evidence bag.
- e) P.C. Rolle and Cpl. Rolle both verify that it is proper procedure and mandated that, where a person is arrested, that the items/property taken from the arrested person be documented on the Detention Record; so that there is certainty of what was taken and received. But in this case no documentation of what was taken from the Accused (i.e. the



various phones) were placed on the Detention Record nor was any documentation made of any serial number or model of the phones.

28. There are other inconsistencies in the evidence of the officers but I do not need to refer to them. However, It was also a concern that the Investigator did not properly check out the Alibi given by the Accused. That is, that he was at his home at Colony Club with his mother.

While Cpl. Rolle said he went to Colony Club he only checked for surveillance camera at the office.

He admitted that he never checked the room the accused lived in with his mother not sought out any other means to try to contact her.

It is the Law that in a criminal case, where an Alibi is given, that the prosecution, as a part of its case, must disprove the Alibi and a jury must be directed as such in a judge's summation.

### **CONCLUSION**

29. What is clear on a submission of NO CASE TO ANSWER is that the question to be answered by the judge is whether a jury, when properly directed, could properly convict on the evidence adduced by the Prosecution at the close of their case.

30. In my view having regard to the evidence, as outlined above, and the Law and Legal guidelines set out earlier I find that the evidence connecting the Accused to the offences is inherently weak. That the conflicts and inconsistencies are primarily related to the only evidence (the Samsung cell phone) the prosecution has sought to lead against the Accused.

I find that the evidence, when taken at its highest, is such that a jury when properly directed could not properly convict on it .

31. The result is that case against the Accused will be withdrawn from the jury and the jury will be directed to return a verdict of Not Guilty on the charges of Armed Robbery and Receiving in the Information.

Dated this 29<sup>th</sup> day of October 2019

The Hon. Mr. Justice Gregory Hilton