COMMONWEALTH OF THE BAHAMAS **CRIM/VBI/2385/08/2022**

In The Supreme Court

Criminal Division

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

v

HORATIO RUSSELL

Before:	The Honourable Madam Justice Mrs. Jeanine Weech – Gomez
Appearances:	Janet Munnings and Davina Pinder for the Office of the Director of Public Prosecutions
	Stanley Rolle and Danielle Kemp for the Defendant
Hearing Date:	February 13, 2023

RULING – NO CASE SUBMISSION

Weech – Gomez, J

1. The Defendant, Horatio Russell has been charged with Attempted Armed Robbery contrary to sections 283 (1) and 339(2) of the Penal Code, Chapter 84 concerning the alleged events against the Virtual Complainant Roderick Minnis (hereinafter "VC") on the 9th July, 2022 at the G & J Water Depot, Prince Charles Drive, New Providence.

2. At the close of the Prosecution's case, Defense counsel made a no case submission pursuant to section 170 of the Criminal Procedure Code.

The Law

3. **Sections 83 (1) and (2) of the Penal Code, Chapter 84: Attempts to Commit Offences.**

   83. (1) A person who attempts to commit an offence by any means shall not be acquitted on the ground that, by reason of the imperfection or other condition of the means, or by reason of the circumstances under which they are used, or by reason of any circumstances affecting the person against whom, or the thing in respect of which, the offence is intended to be committed, or by reason of the absence of such person or thing, the offence could not be committed according to his intent.

   83. (2) Whoever attempts to commit an offence shall, if the attempt is frustrated by reason only of accident or of circumstances or events independent of his will, be deemed guilty of an attempt in the first degree, and shall, except as in this Code otherwise expressly provided, be punishable in the same manner as if the offence had been completed.

4. **Section 339(2) of the Penal Code, Chapter 84: Robbery and Robbery with Violence.**

   339. (2) Whoever commits robbery, being armed with any offensive instrument, or having made any preparation for using force or causing harm, shall be liable to imprisonment for twenty years: Provided that whoever commits robbery, being armed with any offensive instrument shall, where the offensive instrument is a firearm, be liable to imprisonment for life.

5. **R v Galbraith**

   The guidelines with which the Court assess an application of no case submission in respect to indictable offences as argued by Counsel on both sides is that of **R v Galbraith [1981] 1 WLR 1039**. The test provides that the Court should approach the application by determining:

"(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 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 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."

Submissions

Defense

6. At the outset Counsel for the Defendant submitted that the case for the prosecution taken at its highest does not demonstrate that the Defendant committed the alleged offence, and in the alternative that the evidence taken at its highest is such that a jury properly directed could not convict on it.

7. Defense Counsel further stated that the offence of Armed Robbery encompasses a number of elements that must be proved by the Prosecution against the Defendant, namely:

    i. The Defendant attempted to take something from the VC.
    ii. The Defendant has no right to the thing he sought to take.
    iii. The Defendant intended to permanently deprive the VC of the said thing.
    iv. The Defendant used a firearm in the course of the attempt.

8. Defense Counsel submits that the Crown has not proven each element of the offence and the evidence that was adduced in support of the allegations are insufficient. The case before the jury is not one that a jury properly directed could convict

9. In support of its submission they relied on the following cases:

i. **R v Colin Shippey et al,** where it was stated that "***if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense, then such evidence was tenuous and suffered from inherent weaknesses".***

ii. ***Everton Wright v DPP*** (SCCrApp No. 233 of 2017), Issacs JA, ***"the court was keenly aware that the judge had to strike a balance, between on the one hand a usurpation by the judge of the jury's function and on the other the danger of an unjust conviction"***. The Defense further stated that the Judge is the assessor of the facts and the authority of the law and submit that the evidence of the VC clearly extinguishes every likelihood that the mens rea of the offence has been met.

10. Ultimately the Defense has submitted:

i. There was no requisite mens rea or an intention to rob by the Defendant.

ii. There was no evidence led by the Prosecution of the Defendant seeking to take anything from the VC and highlighted the exchange of questions from the Jury :

- ***Jury: Did he ask you for any money?***
- ***VC : Yes***
- ***Jury: Why did you not state this to the police?***
- ***VC: "No, ine think I never tell them that. I think I did. I mean he only ask for a dollar so he could buy a cigarette"*** **(page 47-48 of the transcripts dated the 8th February, 2023).**

iii. Defense Counsel further argued that based on the above exchange there was no intention by the Defendant to rob the VC nor was there no intention to deprive him of anything based on the evidence of the VC, he was asked by the Defendant for a dollar to purchase a cigarette.

iv. They argued that it stands to reason that if there was no intention by the Defendant to take anything from him, there clearly be could no intention to permanently deprive the VC of anything.

v. In relation to the use of a firearm in the commission of the alleged offence, the Defense Counsel submitted that this has not been proven by the Prosecution. The VC on being questioned stated that a firearm was never used or produced by the Defendant against the VC.

vi. Defense Counsel concluded his submissions by asserting that the Court should accede to their application as the Prosecution has failed to prove the elements of the offence of attempted armed robbery. Further, the

evidence does not meet the requisite standard for which a jury properly directed could come to a just verdict.

Prosecution

11. Counsel for the Prosecution submits that there is a prima facie case against the Defendant who while armed with an offensive instrument, namely a firearm, attempted to rob Roderick Minnis. That the evidence submitted is sufficient and taken at its highest, is a matter for the jury.

12. The Prosecution further submits that this case "falls under the ambit of 2(b) in the case of Galbraith and that this case should be put to the jury".

13. The Crown submits that all the elements of the offence have been met, they contend that there is evidence by the VC that the Defendant entered the water depot and said "Give me everything" to the VC, and that he was wearing a ski mask and with a firearm which he exposed to the VC.

14. They assert that the mens rea of the charge has been met and relies on the case of **R v Qadir & Khan [1998] Crim L.R. 828**, where a person is said to have attempted to commit the offence ***"at the moment when he embarks upon the crime".*** The Crown further stated that the primary evidence capable of constituting an attempt is the evidence of Roderick Minnis, where he described when the accused entered the Water Depot, being clothed in a black shirt, dark blue pants and a green ski mask and told him to give him everything and, "you don't hear me hey, I does kill".

15. Secondly, they maintained that he was in possession of an offensive instrument namely a firearm. Therefore, Horatio Russell was taking active steps to commit armed robbery. They further submitted that the mere sight of the firearm is sufficient to support the charge of attempted Armed Robbery.

16. The Crown thereafter drew the Court's attention to Section 4 of the Penal Code, that Robbery is stealing something "with actual violence or even threats of violence to any person with the intent to extort the property stolen". They maintained their position given the meaning of the robbery under the act that the evidence of the VC supports that the accused attempted to commit robbery and that he took more than mere preparatory steps.

Intention

17. Counsel for the Prosecution further submitted that the Defendant had the requisite intention to commit the offence when he went into the water depot, disguised and declared "give me everything". However his actions were

frustrated by the VC who stated that he rushed up to the Defendant and prevented him from taking a firearm out of his pouch.

Identification

18. The Crown submits that this is a case of recognition, that the VC knew the Defendant and identifies him as a friend of some 10 years having attended the same educational institutions and having positively identify him via the 12 man photo lineup and dock identification.

19. The Crown continued that the VC described the person who attempted to rob him at the time as wearing a black shirt and dark blue pants, green ski mask and wearing a pink pouch containing the firearm. Also mentioned was that a security officer from nearby pulled down the accused mask revealing the accused face, nothing obstructed his view, the incident also occurred sometime around 5:30pm and that he and the accused were at a close distance as demonstrated in Court and that the ordeal took about half an hour. The Crown submits that the identification was sound.

Inconsistencies

20. In relation to inconsistences, the Crown submits that the evidence are matters for the jury properly instructed and for the jury to decide whether or not they believe the VC or not (see: ***Black (Albert) v R (1989) 42 WIR 1 at pg.5***).

21. The Crown thereafter concluded that it is the role of the jury to assess the facts, credibility and reliability of the witness after being directed by the Trial Judge in respect of the Law and in this instance there is sufficient evidence that the Defendant be called upon to answer and that a Jury properly directed can convict the Defendant and to stop the case at this stage is to usurp the functions of the jury.

Defense's Reply

22. In reply, the Defense maintained its submissions and reiterated that the Court must look to what the Defendant has been charged with and the elements of the offence. They maintained that the Crown has not proven or provided any evidence of any attempt to appropriate or permanently deprive the VC of anything. The alleged exchange is said to have taken some 30 minutes in length but there was no evidence adduced to support it.

23. The evidence of the lead detective Huyler reflects a poor investigation with the sole evidence being that of the VC. There were no further attempts of video

surveillance or canvassing the area and asking other nearby establishments, no confirmation of the Defendant's alibi, asking people in the area where he states he was, to confirm or deny same, or the parties he was said to be with, he simply relied on the evidence of the VC which was marred with inconsistences and discrepancies which should not be left to the jury .Ultimately the test was not met to the requisite standard of the elements of the offence and for these reasons this application should stand.

Analysis & Conclusion

24. What is clear by the Law and from submissions tendered to this Court, it is not the role of the trial Judge to be the trier of the facts in such matters but such a role promulgated to the function of the Jury. However, where there is no evidence that connects the Defendant to the matter in question or the evidence is tenuous in character, inherently weak, vague or inconsistent with other evidence adduced and a jury properly directed could not properly convict upon it, then it is my role as the Judge to accede to such an application and this seems to be the case in this instant matter.

25. The Defendant has been charged with attempted armed robbery, the elements of which include that :
    a) The Defendant attempted to take something from the VC.
    b) The Defendant has no right to the thing he sought to take.
    c) The Defendant intended to permanently deprive the VC of the said thing.
    d) The Defendant used a firearm in the course of the attempt.

26. Throughout the evidence particularly from the VC himself, these elements have not been met, the VC, by his own admission discredited elements 1-3 above in that the only thing asked for and seemingly freely given was a dollar for a cigarette. The evidence tendered was weak and marred with inconsistencies.

27. The test of Galbraith has been addressed and this Court would have to agree that this case falls under limb 2(a):

> *"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".*

28. These principles were further confirmed in the case of ***The DPP v. Varlack*** and also Blackstone's Criminal Practice 2010 at D15.56 where the following principles are quoted concerning the treatment of submissions of a 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 doubtful in 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".

Inconsistencies

29. In addition to the elements of the offence on their own not being met, the Court turns its attention to the inconsistencies in the evidence that lend to limb 2(a) of the Galbraith principles succeeding.

30. We are told that the water depot faced the plaza for Marco's Pizza, Bamboo Shack and other businesses, yet no surveillance footage is said to have been procured from these businesses or persons in the surrounding area, additionally there was no interview with potential witnesses in the area given the incident is said to have occurred during what could be described as a busy period.

31. There is absolutely no evidence from the security guard whose evidence would have been critical to this case given that the VC on the stand stated that the security guard took the mask off the Defendant, although it must be noted that the VC's statement to the police was that he "yucked" the alleged mask from the Defendant himself. There was also no explanation as to his lack of evidence albeit in the form of a witness statement or attendance at Court. The alleged firearm is said to have been in a pink pouch; no firearm, no ski mask, or pouch was ever retrieved. The Defendant provided an alibi to the police but the police

by his own evidence, admitted that it was not followed up on nor followed through.

32. The only evidence relied on by the Prosecution was that of the VC which showed internal inconsistencies in the evidence by far.

CONCLUSION

33. Having regard to Section 83 (6) of the Penal Code, Chapter 84, ***"[t]he question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit, is a question of law"*** and matters of law are for the trial judge to adjudicate.

34. Having regard to the evidence tendered and the elements of the offence of armed robbery, I am of the view that the Prosecution has not met the requisite standard and the evidence so produced of such tenuous character, I find that "a jury properly directed could not properly convict upon it. It is therefore my duty upon such a submission to stop the case and so hereby do.

35. In the circumstances I will direct that the jury return and be directed to enter a not guilty verdict on the Defendant on the single count of attempted armed robbery.

Dated this 13th day of February, 2023.

_____

The Hon. Madam Justice Jeanine Weech – Gomez