

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

S.C.A. Nos. 7 of 2009 & 44 of 2008

THOMAS ELDON WEBSTER

V.

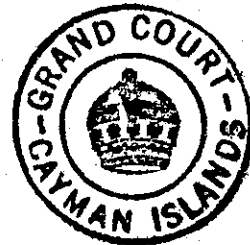
REGINA

**Appearances: Mr. Phil McGhee of Walkers for the
Appellant/Defendant**

**Mr. John Masters of the Govt. Legal Dept.
for the Crown, the Respondent**

Before: Hon. Justice Henderson

Heard: August 14, 2009



JUDGMENT

1. This appeal raises a point of procedure regarding the right to address the Court at the conclusion of the case and questions involving the sufficiency of identification evidence and of evidence of an intent to steal.

2. Thomas Eldon Webster was convicted in the Summary Court on charges of attempted burglary and criminal trespass (relating to the same event). The complainant was in bed and asleep at her home on October 3rd, 2005 when she was awakened in the early morning hours by a bright flashlight shining into her bedroom. She awakened her daughter and both women looked out their windows to see a man removing a window screen on the residence. He turned and fled.
3. Later on the same day the complainant recognized Mr. Webster as the man who had removed the window screen when she saw him standing on a porch with three other people. When Mr. Webster was arrested, he was placed in a police identification parade with eight other men; the complainant viewed the parade and identified him. The complainant's daughter testified that she recognized him as the man who had been at the window because he is a person whom she sees passing her house on a daily basis.
4. Mr. Webster argues that the Crown should not have been permitted to make a closing speech to the Court and that this constituted a "material irregularity" in the course of the trial. Opening and

closing speeches in Summary Court trials are governed by section 73 of the *Criminal Procedure Code* (2006 Revision):

“(1) Subject to subsection (2), the prosecutor shall be entitled to address the court at the commencement of his case, and the accused person or his counsel shall be entitled to address the court at the commencement and in conclusion of his case.”

(2) If the accused person, or any one of several accused persons adduces any evidence, the prosecutor shall be entitled to address the court again, prior to the closing address, if any, of the accused person or persons or his or their counsel.”

This section establishes the entitlement of both parties to make opening and closing speeches. If the accused person does not adduce any evidence, as happened here, the Crown has no entitlement to make a closing speech. The Learned Magistrate was well aware of that but acceded to a request by the Crown for permission to make a closing address: she considered that she had a discretion to do so. I consider that she was correct. Given the failure of the accused to adduce any evidence (I do not accept the Crown’s submission that asking a question in cross-examination of a Crown witness is “adducing evidence” within the meaning of the section), Crown counsel was not entitled to make a closing speech and could not insist upon doing so. However, in any case where the Magistrate considers that such a speech would be of assistance,

she has a discretion to call upon the Crown for that purpose. The language of section 73 deals only with entitlement to make a speech and says nothing about the discretion undoubtedly possessed by a Magistrate to alter conventional practices where it is fair and reasonable to do so.

5. Mr. Webster argues that, at the conclusion of the evidence, the Magistrate applied section 70 of the *Criminal Procedure Code* (2006 Revision) and felt compelled to convict because there was a *prima facie* case and the accused had presented no evidence.

Section 70 reads:

“If at the close of the case for the prosecution the court considers that, subject to any fresh matter which might be revealed in the conduct of the defence, the prosecution has established a *prima facie* case, the court shall, if no defence is offered, convict the accused, but, if the court considers that a *prima facie* case on the evidence presented has not been established and the accused offers no defence, or submits that there is no case to answer, the court shall acquit the accused.”

6. What the Learned Magistrate actually said on this subject is:

“The Court was not addressed by either counsel on the effect of [section 70] of the *Criminal Procedure Code* which requires the Court to enter a conviction if a *prima facie* case has been made out by the prosecution and no defence is offered. The Court finds from the evidence adduced that the prosecution has discharged the burden of proof to the requisite standard of proof,

which is beyond reasonable doubt. The Court accordingly finds the Defendant guilty of both charges and convicts [the] Defendant of both charges of attempted burglary and criminal trespass.”

7. Despite the mandatory nature of its wording, I think it highly questionable whether section 70 “requires” the Court to enter a conviction where the Crown has established a *prima facie* case. Establishing a *prima facie* case means adducing sufficient evidence to justify a conviction if the evidence is unanswered. No doubt that will be the usual result. However, no conviction may be recorded unless the trier of fact is sure that the evidence demonstrates the guilt of the defendant. It seems to me possible, albeit unlikely, for the Crown to adduce a *prima facie* case to which a defendant offers no evidence in response and for the trier of fact to remain, at the end of the day, unsure of the defendant’s guilt. A *prima facie* case is one which, if unanswered, may result in conviction but there is no automatic rule that a conviction must be the result.
8. In any event, the Learned Magistrate merely observed that neither counsel had alluded to section 70 in their respective closing addresses. She does not say that she applied section 70 for any

purpose and she did not misdirect herself regarding the burden and standard of proof.

9. Mr. Webster argues that the evidence of identification summarized above was inadequate to justify a conviction. In her reasons for judgment, the Learned Magistrate referred twice to the *Turnbull* Guidelines and reminded herself of the need for caution and the reason for that. Her conclusion that the identification evidence was sufficient is one with which I agree.
10. Finally, Mr. Webster argued that there was inadequate evidence of an intent to steal. The charge of attempted burglary particularized his intent in this way and, as a consequence, the Learned Magistrate could not convict unless she was sure that he had such an intent. Mr. McGhee says that he may well have been intending to enter the residence for some other reason, which might be anything from a simple desire to look around the premises to an intent to commit rape. How, asks Mr. McGhee, can it be inferred to the required standard that his intent was an intent to steal?
11. The incidence of burglary in the Cayman Islands is relatively high and most burglaries involve a theft or, at least, an intention to

commit theft. That is by far the most common reason for which young men enter residences unlawfully in the dead of night. In the absence of any evidence suggesting some other intent was present, the Learned Magistrate could safely find that she was sure that Mr. Webster had an intent to steal. I agree with her conclusion.

12. For these reasons, the appeal from conviction is dismissed.

Dated this 25th day of August, 2009

Henderson, J.

Henderson, J.
Judge of the Grand Court

