IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0037/2019

THE QUEEN

v

DAN DAVAR KELLY

Appearances:	**Mr. Neil Kumar for the Crown**
	Mr. Rupert Wheeler of Samson Law for the Defendant
Before:	**Dame Linda Dobbs**
Judge Alone Trial:	**11th – 12th August 2020**

HEADNOTE

Criminal Law – Robbery – Theft – Trial by Judge Alone

VERDICT JUDGMENT

1. The defendant, Dan Davar Kelly, faces an indictment containing two counts - one count of Robbery contrary to s.242 of the ***Penal Code*** (2019 Revision) and one count of Theft contrary to s.241 of the ***Penal Code***.

2. The particulars of the offence of Robbery are:

> *"DAN DAVAR KELLY, on the 25th day of April 2019, in the vicinity of the Undra's Take Out, Birch Tree Hill Road, West Bay, George Town, Grand Cayman, Cayman Islands stole a gold chain from Kerwin Boxill and immediately at the time of doing so, and in order to do so, used force on him/"*

3. The particulars of the offence of Theft are:

> *"DAN DAVAR KELLY, on the 25th day of April 2019, in the vicinity of the Undra's Take Out, Birch Tree Hill Road, West Bay, George Town, Grand Cayman, Cayman Islands stole cash to the value of KYD$9.00 belonging to Kerwin Boxill."*

4. The Defendant pleaded "Not Guilty". He has elected trial by a judge sitting alone. The case commenced on Tuesday 11th August 2020 and concluded on Wednesday 12th August. I reserved judgment.

THE LAW

TRIAL BY JUDGE ALONE

5. Sitting as a judge alone I need to direct myself both as to the law and approach. I must advise myself on the applicable principles of law, give myself the appropriate warnings

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as necessary and state clearly the reasons for my findings. I bear in mind the guidance given by Rowe, J. in ***Richards v R***[1] as follows:

> *"When a trial judge sitting alone has advised himself to the applicable principles of law and given himself any necessary warning, he must indicate clearly in his judgement his reasons for acting as he did, in order to demonstrate that he has acted with the requisite degree of caution in mind and he has therefore heeded his own warning. No specific form of words is necessary for this demonstration, what is necessary is that the judge's mind upon the matter should be clearly revealed."*

6. I note and apply the guidelines set out by the Cayman Islands Court of Appeal (CICA) in ***R v Dave Kennedy Whittaker***[2] and in ***Randy Martin v R***[3] In ***Whittaker,*** the Court adopted the words of Lord Lowry LCJ in ***R v Thompson***[4] where at page 83 he said:

> *"While on the subject I might say a word on the duty of the judge when giving judgement in a trial under the 1973 Act. He has no jury to charge and therefore will not err if he does not state every legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give a full and balanced picture of the facts for decision by others. His task is to reach conclusions and to give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts."*

7. In ***Martin***, the Court adopted the reasoning of Lowry LCJ in ***R v Thain***[5]:

> *"From these cases the following guideline may be discerned. The judge sitting in a criminal case without a jury, in rendering his decision and giving his reasons for so concluding, is not required to review every fact and to detail each argument on which the prosecution and defence rely as if he were summing up to a jury. The judge must set out the conclusion reached and make clear the reasons for arriving at that conclusion. He is required to have regard to any difficult or unusual points of law and to show how those points of law have in any way impacted the conclusion that he has reached."*

[1] 2001 CILR 496
[2] Cr App No 14 of 2006
[3] CICA Crim. Appeal No. 2/2010 (Ind. 27/2009)
[4] 1977 NI 74
[5] 1985 NI 457 at page 478

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8. By way of summary, the task is to make findings, giving reasons in support of such findings. It is not necessary to review every fact in the case or set out the detailed arguments as would be appropriate in a jury trial.

INGREDIENTS OF THE OFFENCE

9. Theft is the dishonest appropriation of property belonging to another with the intention of permanently depriving that other of it. The prosecution must prove four things. They are that:

i. The defendant appropriated, in other words, took property;

ii. The property belonged to another, in this case Kerwin Boxhill;

iii. At the time when the defendant appropriated the property he intended permanently to deprive Mr. Boxhill of it; and

iv. He was acting dishonestly when he did so.

10. Robbery involves a theft with the use of force at the time and in order to steal.

OTHER DIRECTIONS

11. The issue in this case is intent. Voluntary Intoxication is raised. Counsel, at the Court's request, provided an agreed note on Voluntary Intoxication. The court then went through the steps to decision on the issue with counsel which was also agreed. There is no dispute that both offences are ones of specific intent.

12. Section 11 of the ***Penal Code*** (2019 Revision) deals with the issue of drunkenness as a defence. It reads:

*"**Intoxication***

11. (1) Save as provided in this section, intoxication shall not constitute a defence to a criminal charge.

(2) Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof, the accused shall be discharged, and in a case falling under paragraph (b), section 10 shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

*(5) In this section "**intoxication**" shall be deemed to include a state produced by narcotics or drugs."*

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13. As to the appropriate direction in a case of Voluntary Intoxication in relation an alleged offence of specific intent Hughes LJ in ***Sheehan and Moore***[6]. At 744B said:

> *"[i]n cases where drunkenness and its possible effect on the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.*
>
> *Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."*

14. It should be noted that it is not the *capacity* of the defendant to form the particular intent, but whether he *did* form it.[7]

[6] [1975] 1 W.L.R. 739

15. There must be a factual basis to justify the giving of the direction[8]; i.e. sufficient evidence of intoxication.

16. Chapter 9 of the ***UK Crown Court Bench Book Part 1*** (July 2020) gives the following suggested framework for a direction:

> *"11. In relation to an offence of specific intent where D was voluntarily intoxicated by alcohol and/or drugs, the jury should normally be directed as follows:*
>
> *(1) It is possible for a person to be so intoxicated by alcohol/drugs that he/she does not form the requisite intent.*
>
> *(2) However, in many cases a person intoxicated by alcohol/drugs may still be perfectly capable of forming an intention and does in fact do so.*
>
> *(3) The crucial question for the jury is whether, notwithstanding the level of intoxication, D did in fact have and/or act with the relevant intent.*
>
> *(4) If D does so, then it is no defence for D to say that they would not have had a particular intention or acted in a particular way had they not been affected by alcohol/drugs.*
>
> *(5) The jury should therefore consider whether, despite being intoxicated, D had the required intention at the time of the alleged offence.*
>
> *(6) If they were sure that D did have the relevant intent, D's intoxication would not provide him/her with any defence.*
>
> *(7) If they were not sure, D would be not guilty.*
>
> *(8) See also paragraphs 15 and 17 below."*

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[7] (See *Garlick* (1982) 72 Cr. App. R. 291, 293; ***Sheehan and Moore***).
[8] (*McKnight, The Times,* 5th May 2000, CA)

17. It was agreed with counsel that having found that the offences were ones of specific intent, the court would then consider the ***Penal Code*** as set out above. The court would go on to consider if there was a factual basis for justifying directing itself on Voluntary Intoxication, reminding itself that a drunken intent is still an intent. It would ask itself whether, notwithstanding the level of intoxication, the defendant did in fact have and/or act with the relevant intent.

18. There is one additional feature. The defendant in evidence claimed that he had no memory of the incident due to his severe intoxication. In Chapter 9-5 Paragraph 15, page 161 of the ***Crown Court Compendium***, this issue is considered. The guidance given is that the court should first consider whether or not the defendant's claim is true. If the court is sure the claim is untrue, then it should disregard it. If the court thinks that the claim is or might be true, then it should be taken into account when deciding whether the prosecution has proved that the defendant had the requisite state of mind. The court should bear in mind that the defendant may have had the requisite state of mind at the time of the alleged offence even if the defendant did lose or may have lost his memory at some later stage.

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19. The defendant gave a "No Comment" interview. For reasons which need not be set out, the Crown do not seek adverse inferences to be drawn from that fact. Accordingly, none will be drawn.

THE CROWN'S CASE IN SUMMARY

20. The Crown's case in a nutshell, is that this defendant approached Kerwin Boxhill, who had gone to *Undra's* restaurant to get a take-away meal. He remonstrated with Mr. Boxhill. He then took $9 which Mr. Boxhill had placed on the ledge of the service window of the restaurant in readiness to pay for his meal. He also snatched a gold

chain and pendant from around Mr. Boxhill's neck, breaking the clasp in the process. The whole incident was captured on CCTV.

THE DEFENCE

21. The Defendant's case is that he did not have the requisite intent due to his severe inebriation at the time. Moreover, due to his inebriation, he has no memory of the incident.

EVIDENCE AT TRIAL

THE PROSECUTION CASE

22. The first witness to give evidence was Kerwin Boxhill. He is the manager at *Cashwiz*. On 25th April 2019, sometime after 11pm, he went to get a takeaway from *Undra's* restaurant. He ordered his food and was told that it would take 15 minutes. He went across the road to Kelly's Bar and had one bottle of Dragon stout and bought a second bottle, most of which he consumed on his return, whilst waiting for the takeaway. On his return to the restaurant, he was told that his meal was not yet ready. He therefore waited. There were a few people around he said, but he noticed two men in particular. One was a man with tattoos (there is no dispute that this is the defendant). The other man, who was sitting on the bench, was someone he recognised as often being at the restaurant.

23. The defendant asked Mr. Boxhill him to buy the other man, his cousin, a drink. Mr Boxhill replied that he didn't have any money to do so. The defendant got aggressive and said "you are dissing my family" or words to that effect. Mr. Boxhill replied, that whenever he was at the restaurant, he bought the other man something, but he could not do so that day.

24. Mr Boxhill put $9 on the counter to pay for his meal. He is not quite sure of the next order of events. He described how the defendant had collected his own food and threw the box at Mr. Boxhill. The defendant said he was going to take Mr. Boxhill's money and took the $9 from the counter. Mr. Boxhill turned to go but decided to tell the restaurant to cancel his order. The defendant approached him and said he was going to take Mr. Boxhill's chain. The chain is worth $4,000.00. Mr Boxhill told the defendant to leave him alone. The defendant put his hand on Mr. Boxhill's neck and yanked the chain. He said "*I can take your chain, I can take whatever*". Mr. Boxhill was scared as the defendant had his hand behind his back and he thought the man might be carrying a weapon.

25. Mr. Boxhill went to his car and drove to West Bay police station where he reported the incident. Two officers were dispatched to the restaurant. On their return, Mr. Boxhill was handed his chain which had a broken clasp. He remembered seeing the defendant at the police station.

26. Cross-examined, Mr. Boxhill denied that the approximately two bottles of stout had affected his memory or his sobriety. He accepted, that in his initial report to the police, he did not mention that the defendant said he was going to take his money. He explained that he was tired and shaken at the time and was giving the police the bare bones and not the detail of the incident as he wanted the police to go back to the restaurant to catch the defendant. He denied exaggerating the value of the chain and pendant. He explained that where he worked at *Cashwiz* he was able to get things cheaper. He had paid $2,000 but the chain and pendant was worth $4,000. He did not see the defendant with a weapon, but he remembered him having his hands in his pocket.

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27. The next witness for the prosecution was Mr Alexander Malachi who is a security officer. He has worked at Kelly's Bar since 2007. He has known the defendant for a long time.

28. On the day in question Mr Malachi was on duty. He could see an altercation in front of the restaurant between the defendant and another customer. Mr Malachi told the defendant to leave the customer alone. This was because the defendant was speaking in an aggressive voice. There was some food on the counter which the defendant took and threw at the other man. The man did not retaliate because Mr Malachi was standing in between the two of them. Mr Malachi told the defendant to leave the man alone and the defendant walked off. The other man then got into his car and drove off. Once the man had gone the defendant said he would give Mr Malachi the chain and he would keep the pendant. Mr Malachi said he didn't want it. The defendant walked off. Mr Malachi then saw the police arrive.

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29. Cross-examined he said that he could not remember every detail of the incident. The Defendant was drinking but he didn't notice him stumbling and could not say if he was drunk. He agreed that the conversation about the chain took place in Kelly's Nar and was emphatic that he had not mistaken what had been said. The bar was not busy that night.

30. That was all the live evidence called by the Prosecution.

31. There are admissions which have been put into writing - the most relevant of which are extracts from the statement of Kimaree Bent who is a server/cashier at *Undra's* restaurant. She was on duty at the restaurant that night. Sometime after 11pm she heard a commotion outside. She saw the defendant standing at the service window next to a man who was ordering food. The man had a gold chain and pendant around his neck.

When she initially saw the defendant he looked drunk to her. Whilst he was walking the defendant was stumbling, and when he ordered food, he was talking with a slur.

32. After Mr Boxhill had made his report to the police, PCs Ramzan and Bodden attended the restaurant. The defendant walked over to the officers and PC Bodden spoke with him. The defendant walked away and shortly afterwards returned and gave the police a chain. PC Bodden observed that the defendant appeared to be intoxicated. PC Ramzan spoke to the defendant's girlfriend. Subsequently the defendant and his girlfriend attended the police station and the complainant was provided with a receipt for the collection of a food order which he took and left the police station.

33. The defendant was arrested on 30th April 2019 at Kelly's Bar. On the same day he was interviewed and gave a "No Comment" interview. He was shown a photograph of the chain and pendant and said "*that nah had nutten to do with me, man, weh you saying now, man*" When asked to repeat what he said, he did so. He was legally represented at interview.

34. The main exhibit in the case was the CCTV evidence of the whole incident, recorded by an officer from the original recording as it was not possible to extract the footage. No point is taken about this procedure.

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THE DEFENCE CASE

35. The defendant gave evidence. He said that on the day in question he had been drinking since about 4.30pm. His girlfriend arrived home about an hour later and they both went out about two hours later. He later said that they arrived at Kelly's Bar at 6pm. He was drinking over proof white rum, which is very strong, sometimes neat, sometimes with

orange juice. When his girlfriend got home he was about 5 on a drunkenness scale of 10. When he left to go to Kelly's Bar it had risen to about 6.

36. He could not remember if Kelly's Bar was very full. It usually had about 30 – 35 people from Thursdays to Saturdays. There would have been music playing. He drank continuously through the evening. Mr Boxhill made advances to his girlfriend when he was in Kelly's Bar. The Defendant had drifted off from his girlfriend. He turned round and saw Mr Boxhill trying to speak to his girlfriend and trying to touch and dance with her. That made him angry. He felt violated and disrespected so he walked outside. He thought that he went to his girlfriend first before going out, although he did not remember speaking to her. He was in the frame of mind that he knew what he had seen so anything his girlfriend said after that would not have registered with him. He smoked a cigarette and went across the road to get some food as he had had enough.

37. From there onwards he could not remember anything other than he saw the police later on. After that he just remembered the next morning. He had looked at the CCTV but it had not brought his memory back. He was asked, given that it was incontrovertible that he had taken the $9 on the counter, why he thought he did so. He replied that it was a mixture of alcohol and disrespect. He didn't need the money. The taking of the chain was the same – he meant nothing by it and did not intend to steal it. He could not remember anything the next morning due to his inebriation. He knew there were cameras in the area. He gave a "no comment" interview as that was what his lawyer told him to do. When he told the officers in interview that the chain was nothing to do with him, he meant that he was not guilty of robbery. He had no intention to keep anything as he had no need for money. His family could provide for him.

38. Cross- examined, he denied that he had a drinking problem although he had been drunk before many times. When he drinks he tends to go "the full 100". When he passes a certain point, his memory goes. He said that Mr. Boxhill had disrespected him and he got angry but denied that the robbery was intentional. He accepted that the CCTV showed that he took the money and had his hand on Mr. Boxhill's neck/shoulder area and grabbed the chain from his neck. He accepted that it also showed him throwing food at Mr. Boxhill. He said he was more than drunk. It was not in his character to do what he saw on the CCTV. He made a mistake that night due to lack of judgment due to the disrespect. He did not intend to keep the cash and chain. He agreed that he was not in position to dispute or contradict what Mr. Boxhill said he was saying. He didn't remember most of what happened that night. He also did not remember speaking to the security officer about the chain. He said he had done a number of things wrong that night, but he wasn't taking responsibility for robbery. The series of events was pure disrespect.

CLOSING SUBMISSIONS

39. Identifying the issue in the case as being whether the defendant had the necessary intention at the time of the incident, Mr. Kumar for the prosecution, submits that, notwithstanding his apparent intoxication, the evidence of the CCTV plus the evidence of Messrs. Boxhill and Malachi prove to the requisite standard that the defendant had the necessary intent.

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40. Mr. Kumar rehearsed what could be seen on the CCTV. In short, it showed the defendant, although unsteady on his feet, carrying out actions which required thought and focus, such as ordering his food, putting condiments on the food, pulling up his shorts on a number of occasions, talking to a man sitting on the bench, offering another

man his food, the actual acts of taking the money and the chain and putting the latter in his right pocket. Add to that the evidence of the two Prosecution witnesses and even the defendant's evidence about being disrespected, the court could be sure, Mr. Kumar submitted, that the defendant had the necessary, albeit drunken intent. As agreed by both counsel, if the court was so sure, dishonesty would also be proved.

41. Mr. Wheeler on behalf of the defendant submitted that, applying the appropriate burden of proof and standard of proof, the court could not be sure that the defendant had the requisite intention. In the alternative, even if the court did find that the defendant's intoxication did not render him unable to form the intent, it could not be sure that, at the moment the defendant pulled off the chain, his intention was to *steal* rather than to simply reprimand Mr. Boxhill for a perceived slight. In the defendant's words, he felt that he had been disrespected and so he was disrespecting back.

42. Dealing with the issue of intoxication, Mr. Wheeler points not only to the evidence of the defendant as to his alcohol consumption, but also relies on the CCTV and the observations of Kimaree Bent and PC Bodden. The evidence suggests, submits Mr. Wheeler, that the defendant was too drunk to be able to form the necessary intention for the offences.

43. Mr. Wheeler submits that even if he were able to form the necessary intent to permanently deprive Mr. Boxhill of his chain and money, the evidence should lead the court to have doubts as to whether he intended to steal as opposed to reprimand Mr. Boxhill for disrespecting him. The evidence on the CCTV shows the defendant remonstrating with Mr. Boxhill and is consistent with him intending to reprimand him.

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44. The evidence of the prosecution witnesses is to be doubted, contends Mr. Wheeler. Mr. Boxhill had been drinking. He could not even remember where the defendant's prominent tattoos were located. He was also was prone to exaggeration as exemplified by, *inter alia*, his exaggeration of the value of his chain. Mr. Malachi was unlikely to remember the specific night given the length of time which has elapsed and his daily duties at the club.

45. Further, submits Mr. Wheeler, even if the words were spoken as the witnesses say, they could have been the words of a very drunken person and not a window to his intent. The Defendant had no need to steal. He remained at the premises after Mr. Boxhill left and he returned the chain to the police.

DECISION

46. I am satisfied so that I am sure that both offences are made out based on a) the incontrovertible CCTV evidence, b) the evidence of the two main prosecution witnesses and c) the evidence of the defendant himself - all of which has been rehearsed above.

47. There is no doubt that the defendant was under the influence of alcohol but his actions and words taken together show that he knew what he was doing. I find that he had an intent to permanently deprive Mr. Boxhill of the cash and chain and by doing so, he was acting dishonestly.

48. I have considered the defendant's claim to have lost his memory of the incident. I reject this. He was perfectly able to remember what he did at Kelly's Bar, when on his evidence, he was extremely drunk and, importantly, in the same state of inebriation on leaving the bar. He clearly remembers what he alleges to be Mr. Boxhill's advances to

his girlfriend (although none of this was put to Mr. Boxhill in cross examination). He remembers deciding to leave the bar, have a cigarette and order food. He clearly remembers his state of mind of feeling disrespected, violated and angry. He then claims no memory of the incident whatsoever even though he has watched the CCTV evidence which shows the whole incident. His memory returns when he recalls the police attending the premises. This was when he returned the chain.

49. Even if I were wrong to disbelieve the Defendant on this point, and I were to accept that he did or may have forgotten the events, taking this into account, I am still satisfied that he had the necessary intent on the evidence before the court. That is because there is no doubt as to what the CCTV evidence shows. The camera was at very close range although there is no audio content. So far as the Prosecution witnesses are concerned, their evidence was consistent with the CCTV evidence, although the witnesses could not remember every twist and turn which is shown on the CCTV.

50. I reject the suggestion that Mr. Boxhill must have been under the influence of drink. The timings on the CCTV relating to how long he was away in Kelly's Bar are quite consistent with his evidence as to consumption. Moreover, observation of him on the CCTV shows someone who was acting quite normally and not someone under the influence.

51. As to Mr. Boxhill's credibility, it is suggested that giving two figures for the value of the chain show that he tends to exaggerate. I accept Mr. Boxhill's explanation for the two figures because he explained that one figure was what he paid for it and that being a manager of a pawn shop he was able to buy items more cheaply and the other figure represented the value of the chain which is considerably higher. The fact that Mr.

Boxhill could not remember where the defendant's tattoos were, even though they are on the defendant's face, does not significantly undermine his evidence in my judgment.

52. The CCTV evidence shows that it was the defendant who approached Mr. Boxhill and was consistently aggressive towards him. Whether it was as a result of perceived "disrespect" or not, there is no doubt that the defendant assaulted Mr. Boxhill, took his money and snatched his chain, using force enough to break the clasp.

53. As for Mr. Malachi the security officer. He knew the defendant. Given that, there is every reason for him to remember the evening, and, in particular, the conversation. It is submitted that he could have been mistaken as to the conversation. That is not accepted. It was a very short conversation. Mr. Malachi does not give evidence as to seeing the "snatch". It is difficult to imagine what other conversation there might be about the chain other than perhaps the defendant showing Mr. Malachi what he had taken from Mr. Boxhill because he was disrespected. The evidence, however, which I accept, is that the defendant offered him part of his dishonest gains, which Mr. Malachi rightly refused.

54. I have considered whether the evidence is consistent with the defendant simply wanting to "reprimand" Mr. Boxhill. If the defendant had wanted to do that – he could have done so verbally. Indeed it is clear that he did do so, verbally, as he can be seen in an aggressive stance towards Mr. Boxhill - sometimes slapping his hand on the counter for emphasis. Even if the taking of the cash and chain was to represent some kind of reprimand or sanction, given his actions I am in no doubt that the defendant intended to permanently deprive Mr. Boxhill of those items, and was acting dishonestly.

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55. Might the words spoken be the bravado of a very drunk person and not the window to his intent? The actions show differently - even though the defendant eventually returned the chain following the police attending Kelly's Bar after Mr. Boxhill's reporting of the incident.

56. It follows from what has gone before, that this court finds the defendant guilty on both counts on the indictment.

Dated this the 18th August 2020

Dame Linda Dobbs
Acting Judge of the Grand Court