

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. ANUCHCR 2018/0079

BETWEEN:

THE QUEEN

and

MIKHAIL GOMES

Defendant

Appearances:

Ms. Rilys Adams, Counsel for the Crown

Mr. Lawrence Daniels, Counsel for the Defendant

2021: July 22nd, 27th

DECISION

- [1] **WILLIAMS, J.:** Is there a case for the Defendant, Mikhail Gomes, to answer? That is the question to be answered at this stage in relation to the three counts of Demanding With Menaces which have been laid against the Defendant.
- [2] The Defendant was indicted on 12th October, 2020. The Counts of Demanding With Menaces, contrary to section 35 of the **Larceny Act** Cap 241 of the Laws of Antigua and Barbuda, Revised Edition 1992 are the ones which remained from the original six-count indictment, as the prosecution prior to the commencement of trial withdrew the three counts of Money Laundering, contrary to section 61 (3) (b) of the **Proceeds of Crime Act** No. 13 of 1993.
- [3] This matter came on for trial by a single judge, sitting without a separate jury. This is pursuant to the **Criminal Proceeding (Trial by Judge Alone) Act** No. 8 of 2021 that entered into force on 7th June, 2021.

- [4] It must be noted from the outset, that even though the matter is being heard by a judge alone, the same considerations that operate upon an application of ‘no case to answer’ when there is a separate jury, apply with equal force. A trial judge, even though sitting as both the forum of law and forum of fact in a matter, may only exercise the duties as the forum of law at the stage of a ‘no case’ submission.

The Particulars

- [5] The Particulars of Offence read:

First Count:

“Mikhail Gomes, between the 1st and 31st days of July 2016, at Swetes Village, in the Parish of Saint Paul, with intent to steal, demanded (1) Giorgio Armani blue and gold watch valued at \$300.00 USD from Charlika Joseph with menaces.”

Second Count:

“Mikhail Gomes on the 8th day of January 2017, at St John’s Fire Station, in the Parish of Saint John, in the State of Antigua and Barbuda, with intent to steal, demanded \$200.00 ECC from Charlika Joseph with menaces.”

Third Count:

“Mikhail Gomes between the 1st and 31st days of February 2017, at Liberta Village in the Parish of Saint John, in the State of Antigua and Barbuda, with intent to steal, demanded \$500 ECC from Charlika Joseph with menaces.”

- [6] No issue was made at the time of the submissions about the absence in the Particulars of Offence of the First Count that there is no reference to “in the State of Antigua and Barbuda”. Also, no issue was made that the Third Count states “and 31st days of February 2017”.

- [7] Section 35 of the **Larceny Act** addresses the offence of demanding with menaces. It states:

“Every person who, with menaces or by force, demands of any person anything capable of being stolen, with intent to steal such thing, shall be guilty of [a] felony....”

- [8] The Crown’s allegation is that Mikhail Gomes:

- 1) With menaces;
- 2) Demanded of Charlika Joseph something of value;
- 3) With intent to gain for himself (or another) or with intent to cause loss to Charlika Joseph.

- [9] Although the Crown was not required to prove the handing over of the thing of value (property) to the Defendant, the Crown in the course of its case adduced evidence that a watch and money were given to the Defendant, Mikhail Gomes on two separate occasions, which the Crown is saying is as a consequence of the threats made to the Virtual Complainant. Charlika Joseph was therefore induced to part with her property.

Demand With Menaces

- [10] Archbold Criminal Pleading, Evidence & Practice, Thirty-Sixth Edition, at paragraph 1875, had this to say of 'demanding' in the context of the offence of demanding with menaces:

"A mere request, such as asking for charity or the like without imposing any conditions, would not come within the meaning of the word 'demand'."

- [11] The authors of Archbold then go on at paragraph 1877 to note that in order to constitute the offence as charged, the demand must be with menaces:

"The word 'menaces' includes 'not merely threats of injury to person or property, but menaces which would involve injury to a third person intended to be injured, and would induce the person to whom the menaces are address to part with money or valuable property', such as threats to accuse of misconduct not amounting to a crime: **R v Tomlinson** [1895] 1 Q.B. 706; **R v Boyle** [1914] 3 K.B. 339, 10 Cr. App.R 180."

No-Case Submission

- [12] At the close of the Crown's case, the Defendant's Counsel, Mr. Lawrence Daniels, submitted that his client had no case to answer. Counsel Daniels said that the Defence was relying on "the second limb of **Galbraith**." He contended that the evidence adduced by the Crown has been so discredited and given the tenuous nature of the evidence, the case ought to be withdrawn from the jury.
- [13] Counsel for the Crown, Ms. Rilys Adams, in response submitted that the issue was one solely of credibility and that credibility is always an issue for the fact finding forum, in the province of the jury – not for Judge of law. Counsel Adams submitted that the question to be asked is: whether a jury could properly convict if the virtual complainant is believed.
- [14] Ms. Adams was asked by the Court whether the Crown satisfied the first limb of **Galbraith**, and more specifically whether any importance ought to be attached to the dates stated on the indictment and whether the value stated in the particulars needed to be proven by the Crown. She indicated that in cases such as this, dates are not material; and that in cases of dishonesty under the **Larceny Act** it was not necessary to prove the value of the item.
- [15] The test to be applied is found in the judgment of Lord Lane CJ in **R v Galbraith** [1981] 1 WLR 1039, 73 Cr App R 124 (CA) at 127:

“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty – the judge will 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 concludes that the prosecution’s evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

(b) Where however the prosecution’s 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 on which the 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, always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

The Witnesses

[16] The four witnesses listed on the back of the Indictment all gave testimony on oath: the Virtual Complainant, Charlika Joseph; her sister, Nyla Scott; Police Sergeant #194 Raymond Findlay; and Officer #640 Amethyst George (nee Adams). It is useful to review the testimony of each witness in seeking to determine whether the Defendant has a case to answer: whether “a jury properly directed [could or] could not properly convict”.

Charlika Joseph

[17] Charlika Joseph of Potters said that she knows Mikhail Gomes. (However at no time did she indicate that the person to whom she referred to as Mikhail Gomes is one and the same person as the Defendant in the box). She knew Mikhail Gomes from since she was a little girl going to school; they “connected” for a few years then they “reconnected in June 2016.” He was working for the Transport Board, she saw him and said “Hi.” They started talking again. They talked for a few weeks and then he wanted to see her. Mr. Gomes picked her up one day when she was going to the hairdresser and took her to his house. They went into his bedroom and started to “catch up talking”; he came on to her sexually, but nothing happened, because she said “no”. He then took her to the hairdresser. That was not the only time that she saw him in June.

[18] On another occasion, Mikhail Gomes picked her up again and took her to his house. Again they went into his bedroom. He took the sim card out of his phone and put it into the smart television set. He told her that is how he watches movies. They had sex on that occasion. She would see him “time after time” and he came by her home once.

“Then he started asking me for money. I was unable to give him money, because I was not working at the time. I communicated that to him – my inability to give him money. He message me and said he have something for me. So he started to send naked pictures of myself. I felt angry and afraid. Angry because I never thought he would have done something like that. Afraid, because he said if I do not get the money, things will happen to me. He will come and look for me and my family. He did not explain why he sent naked photos of myself to me. He said if I did not get the money to give to him, things will start to get crazy. He start to call me from an unknown number and I refuse to answer. I did not have the money to give to him. So he wanted something of value. Jewelry or anything that he could sell to get money.”

- [19] Ms. Joseph said that she told Mikhail Gomes that she would find something to give to him. She decided to give Mikhail a watch in the hope that he would stop bothering her. She gave a friend a Giorgio Amani watch to give to Mikhail; but he said it had no value. She cannot remember the month when she gave the friend the watch to give to Mikhail. The watch was a gift to her and she did not know the cost of it.
- [20] The Virtual Complainant testified that Mikhail Gomes never told her which members of her family he was referring to when he told her he would come and look for her family.
- [21] Ms. Joseph, a mother, was in a relationship at the time. She however was experiencing trouble in that relationship and told Mikhail Gomes so.
- [22] Ms. Joseph did not know where the photos Mikhail Gomes sent to her came from. He never told her how he came by the photos. However later she realised they were from a video and she asked him to delete the video. She does not know what would have become of the photographs if she did not give Mikhail the money.
- [23] The Virtual Complainant said that Mikhail kept insisting that she gives him something of value; he needed hard money. He said to her if she did not give him some kind of money, things would get worse. He also said that he would come looking for her boyfriend. Then he said he will send the pictures to her boyfriend.
- [24] Ms. Joseph said that that one day, on a date she cannot remember, she met Mikhail on the road above the fire station. They arranged to meet there as he was on the road working. She gave him \$300.00. He said to her: “You think you pay, you don’t pay yet. You think \$300.00 can do anything?”
- [25] The Virtual Complainant also testified to encounters where there were exchanges and even physical altercations involving her boyfriend and Mikhail Gomes: once at the drive through at KFC; then in the area of the Home Depot; another time at gas station; and in the area of Little Canton.
- [26] Under cross-examination by Counsel Mr. Lawrence Daniels, Ms. Joseph acknowledged that even before she made any report to the police, a friend of hers who is a police officer obtained and returned the watch to her. She disagreed that she was in a relationship with Mikhail Gomes, but agreed that she and Mikhail Gomes were involved in a sexual relationship. She would visit him at Golden Grove. Ms. Joseph denied that Mikhail Gomes loaned her \$700.00; or that she promised to repay him any

funds when her boyfriend gives her money. Ms. Joseph said that she did not produce for the police any text or WhatsApp messages or photographs that she received from Mikhail Gomes.

- [27] Ms. Joseph confirmed that it was \$300.00 that she had given to Mikhail Gomes and knew this even when she gave her statement to the police. She knew the statement that she gave to the police said it was \$200.00. She read over the statement before signing it and she noticed the error but did not correct it. What she was saying now in Court is the correct figure: it was three \$100.00 notes.
- [28] She was asked if Mikhail Gomes was a happy-go-lucky person and later if he was a fun person to be around, she responded on both occasions: "I guess". She agreed he made a lot of jokes. She denied that she had any attraction for Mikhail Gomes or even liked him.
- [29] Ms. Joseph said that before 2017, Mikhail Gomes never demanded money from her but he demanded money about twenty times before she gave in. She did not report to the police at that time that Mikhail Gomes was making any demands. After she gave in on the first occasion, Mikhail Gomes demanded money a further five times before she gave him the money.
- [30] Ms. Joseph said that it was before she and Mikhail Gomes "reconnected" that he used to visit her home and that he knew her mother and sister. Since they reconnected, Mikhail would pick her up to go to his home and they would have sex "one time a week... but not every week."

Nyla Scott

- [31] Nyla Scott is Charlika Joseph's sister. She knows Mikhail Gomes for a few years. She did not identify the Defendant as Mikhail Gomes. She described answering her sister's cell phone. The caller's number came up as unknown. She asked who it was. The person said:

"You know who it is. Wha' yo' mean who dis? You can keep the \$500.00, but tell yo' man me ah look fu he."
- [32] Ms. Scott said that she recognized Mikhail Gomes's voice from hearing conversations with him and her sister on the phone.
- [33] No evidence was lead as to whether Ms. Scott ever spoke with Mikhail on the phone before, how often or when was the last occasion that she heard his voice prior to that call.
- [34] There was no indication that Ms. Scott said anything to her sister about the conversation with the caller.
- [35] Under cross examination, Ms. Scott said that she did not know what currency the caller was referring to. The question relating to currency no doubt concerned the fact that the indictment specifically mentions "\$500.00 ECC". She explained that she did not get to ask any questions; the person hung up right after making his statement. Ms. Scott said the call did not last long. She said that she did not have a clue what the caller meant.

Raymond Findlay, Senior Sergeant #194

- [36] No testimony was lead from Senior Sergeant #194 Raymond Findlay. He was tendered by the Crown for cross examination.
- [37] When cross examined by Counsel for the Defendant, Sergeant Findlay stated that he cannot remember when a report was made in this matter and further stated that he was not the investigator in the matter. He however recalled that the allegations made against Mikhail Gomes stretch from 1st August, 2016 to 28th March, 2017.

Amethyst George, Constable #640

- [38] Officer #640 Amethyst George testified that she was on duty at the Criminal Investigations Department on the 26th March, 2017 when the Virtual Complainant, Charlika Joseph made a report against Mikhail Gomes. On the 11th April, 2017 she saw Mikhail Gomes in police custody; he was with Senior Sergeant Raymond Findlay. Sergeant Findlay identified both himself and Constable George to Mikhail Gomes and informed Mikhail Gomes of an intention to conduct an interview. Mikhail Gomes was cautioned and informed that there was a report of demanding with menaces made against him, alleging that on the 1st August, 2016 and the 28th March, 2016 he demanded \$500.00 from Charlika Joseph. Officer George made a written record of the interview. Mikhail Gomes did not answer any of the questions.
- [39] The interview was conducted in the presence of counsel, Mr. Chaku Symister. For 60 of the 61 questions the response was the same: "Base[d] on what I was told, I don't have to answer, so I am not answering." The other response, to the final question: "Do you wish to sign this interview?" the response was: "No."
- [40] In cross examination, Officer George said that she could not remember if at the time Mikhail Gomes was detained at the station in excess of 48 hours in relation to another matter. She was however aware that Mikhail Gomes was under investigation for another matter. She was unaware as to whether police had taken Mikhail Gomes's telephone from him when he was taken into custody.
- [41] Officer George never saw any electronic messages – text or WhatsApp messages – in relation to this matter. Although the report that was made to her spoke of naked photos, she never saw any. Constable George also testified that no device was taken to the Cyber Lab for analysis – whether belonging to Mikhail Gomes or to Charlika Joseph.
- [42] Ms. George confirmed that the report made by the Virtual Complainant spanned the period 1st August, 2016 to the 28th March, 2017. However, she also said that the report was made at the CID on 26th March, 2017.

[43] The police officer could not recall whether the Virtual Complainant had the watch in her possession at the time. Ms. George said that she was made aware that the Virtual Complaint may have previously spoken to an Officer Martin. Constable George however never spoke with Officer Martin.

Discrepancies

[44] A number of discrepancies arose on the Crown's case.

[45] It is accepted that discrepancies and credibility assessment are matters in the exclusive province of a jury. They do not arise for consideration of their effect on the facts or for resolution upon a no case submission. However, they are matters which the Judge must reflect on at that stage in terms of being able to give intelligent, worthwhile, sensible and useful directions to the jury, if a jury is to be properly directed and in turn properly convict.

[46] Some of the discrepancies the Judge would have to draw to a jury's attention are:

- Charlika Joseph in her statement to the police, said that she gave Mikhail Gomes \$200.00. That figure forms the basis of the Second Count. She signed a statement saying the content was true and correct. At trial, she testified to giving Mikhail Gomes \$300.00. She admitted that she saw the incorrect figure in the statement, but did not correct it. Ms. Joseph did not provide any explanation as to why at that time she said it was \$200.00 or why, having observed the error, she did not correct it.
- Officer Amethyst George testified that the Virtual Complainant made a report to the CID on the 26th March, 2017 but that date is two-days before the end date (of the 28th March, 2017) that both she (Officer George) and Senior Sergeant Raymond Findlay testified as to when the demand with menaces ended (since they said the report concerned the period the 1st August, 2016 to the 28th March, 2017).

[47] The fact-finding function however and determination as to where the truth rests, or who or what to believe are not to be performed at this stage.

Credibility

[48] The learned authors of **Blackstone's Criminal Practice 2017** addressed the 'Credibility of Prosecution Witnesses' at the time of considering a submission of no case to answer. At paragraph D22.53, they point to the test in **Galbraith**. For convenience, what is stated is broken up into three sub-paragraphs:-

- i. "The requirement that the Crown Court judge should 'take the prosecution evidence at its highest' is intended to leave questions of credibility to the jury. In *Barking and Dagenham Justice, ex parte DPP* (1995) 159 JP 373, the Divisional Court said that

questions of credibility should, except in the clearest of cases, not normally be taken into account by justices considering a submission of no case.

- ii. “Nonetheless it is submitted that some justices may well take the pragmatic view that it would be inappropriate for them to go through the motions of hearing defence evidence if they already formed the view that the prosecution evidence is so unconvincing that they will not be able to convict on it in any event.
- iii. “However the general principle remains that, so long as the necessary minimum amount of prosecution evidence has been adduced so as to raise a case on which a reasonable tribunal could convict, the justices should allow the trial to run its course rather than acquitting on a submission.”

[49] This suggests that where the credibility of the witness is clearly damaged, that a judge may consider that fact upon a ‘no case’ submission. Although a judge may consider that the evidence is weak, if the evidence reaches the threshold that a jury could convict, then the case ought to be left to the jury.

[50] The Virtual Complainant readily admitted that at the time of giving her statement to the police, that she stated a false figure but does this rise to the level of requiring a fulsome consideration of her credibility at this stage? On one view of what transpired: it was a relatively minor transgression and further, she readily admitted the error. A full consideration of her credibility appears in the circumstances to be better left for a jury.

No Corroboration

[51] Ms. Adams in her response to the ‘no-case’ submission pointed out that no corroboration was needed. The allegation from the Virtual Complainant is that she received pictures and messages from Mikhail Gomes. However, no one else can testify to the existence of the pictures or messages. There is no documentation of the demand or menaces.

[52] The **Larceny Act 1916** of the United Kingdom preceded the Antigua legislation which was enacted in 1944. The earlier legislation specifically spelled out the role of documentation in the commission of the offence of demanding money with menaces. It stated:

“Every person who – (i) utters, knowing the content thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing: (ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead, of any crime... with intent to extort or gain any property or valuable thing from any person....”

[53] There is no requirement in the Antigua legislation for the demand or menaces to be in “any letter or writing”.

[54] One can well understand however Counsel Daniels's concern with the total absence of any semblance of corroborative evidence, given the fact that certain allegations can be easily made and be extremely difficult to disprove.

[55] The more contemporary terminology for this offence would be extortion or 'blackmail'.

Concerns

[56] What are the concerns with the evidence?

First Count

[57] The date of the First Count was described as "between the 1st and 31st days of July 2016." According to the police, the reports that were made to them complained of things commencing the 1st of August 2016. The Virtual Complainant could not give any dates, not even the month. As far as any timeline was concerned, the Virtual Complainant only testified that she "re-connected" with Mikhail Gomes sometime in July and they spoke "for a few weeks" before Mikhail Gomes even said he wanted to see her. And even after she visited Mikhail Gomes home on the first occasion, nothing notable occurred. It was sometime after at the very least her second visit to the house that according to her testimony she received any demands for money.

[58] While there was no evidence of the particular demand for the Giorgio Armani watch, it would be covered in the demand for "jewelry, anything that he could sell to get money." There are some concerns with this: Ms. Joseph admitted that she is in possession of the same watch that she sent for Mikhail Gomes. The friend whom Ms. Joseph said she gave the watch to deliver to Mikhail Gomes did not testify to support what is a bare allegation. Further, the other friend of the Virtual Complainant who it was said retrieved the watch from Mikhail Gomes did not testify to this fact – indeed, he was not even interviewed by the investigating officer, even though that person, one Martin, was said to be a police officer.

[59] The evidence regarding the demand and the menaces needs to be scrutinized as well.

[60] The Virtual Complainant's evidence is that after she had sex with Mikhail Gomes she "would see him time after time". Then "he started asking me for money" which she was unable to give to him, as she was not working. "He didn't care. He said that I'd have to find money somewhere to give him because he had gotten into some problems." Mikhail Gomes then messaged Ms. Joseph telling her that he had something for her and started to send her nude photographs of herself.

[61] Ms. Joseph was asked why did Mikhail Gomes send the nude photographs of herself to her. Ms. Joseph replied: "He didn't explain that."

[62] The Virtual Complainant said she felt afraid: "Because he said if I do not get the money, things will happen to me. He will come and look for me and my family." When Ms. Joseph was asked later if she knew which members of her family Mikhail Gomes was referring to, she said; "No."

- [63] Ms. Joseph also testified that: “He said if I did not get the money to give him, things will start to get crazy.”
- [64] On the issue that the watch was valued \$300.00 USD, the Crown’s evidence did not come up to proof. In fact, the only reference to the value of the watch is when Ms. Joseph quoted Mikhail Gomes as saying that “the watch had no value.”
- [65] There was therefore no indication as to any specific act Mikhail Gomes said he would do or any specific person he would contact if he did not get money or something of value.

Second Count

- [66] When the Counsel for the Crown said to Ms. Joseph: “Let me take you to the 8th of January 2017,” which is the date recited for the Second Count, the Virtual Complainant clearly stated: “I cannot remember the date.”
- [67] In relation to this Count, Ms. Joseph expressly stated of Mikhail Gomes: “He said if I didn’t give him the money, he will send the pictures to my boyfriend.” And that after receiving the money: “He said you think you pay? You don’t pay yet. You think \$300.00 can do anything?”
- [68] Interestingly, even though the testimony from the Virtual Complainant at trial differed from the particulars stated in the indictment, no application was made by the Crown to have the Indictment amended to bring it in line with what Ms. Joseph said. At the close of the Crown’s case, therefore, the witness gave one figure and the Indictment stated another.
- [69] This issue as to whether it was \$200.00 as stated in the particulars of the charge or \$300.00 as the witness testified was discussed earlier on when looking at the individual witnesses and more specifically, what emerged during cross examination of Ms. Joseph. A challenge which arises has to do with the possibility of concoction. Ms. Joseph admits that her statement had \$200.00 and she was aware of the wrong figure stated in it but signed it as being true and correct. The absence of any explanation as to why she did so raises the issue of her reliability and a jury would not have the benefit of any evidence to fully explore this fundamental issue.

Third Count

- [70] The evidence relied on by the Crown to support the Third Count comes from Nyla Scott. Her testimony was very brief. She answered her sister’s cell phone sometime in February 2017 and the voice on the other end said: “You can keep the \$500, but tell yo’ man me ah look for he.” Ms. Scott said she recognized the voice to be that of Mikhail Gomes.
- [71] The Crown’s view is that because (i) it was Charlika Joseph’s phone, (ii) the caller was said to be Mikhail Gomes, and (iii) since the caller said: “You can keep the \$500.00 but tell yo’ man me ah look for he” the inference to be drawn is that it constituted a demand with menaces for \$500.00.

- [72] The direction to a jury on inferences would state that where there is more than one inference to be drawn and they are of equal probability, that the inference most favourable to the accused must be drawn. It is only where a jury is absolutely certain that the only common sense inference was adverse, that it can be adopted.
- [73] The plain English of the brief telephone conversation however the caller is saying (i) that the person is entitled to retain the money, and (ii) the caller would like a message relayed that he (the caller) is looking for the third person.

All Counts

- [74] The Three Counts have some common issues:
- i. The Virtual Complainant has not provided any explanation as to why she did not make any report at the time they occurred;
 - ii. The Virtual Complainant has not provided any explanation as to what prompted her after several months, to finally make a report to the police towards the end of March 2017;
 - iii. No witness identified the Defendant in the box as being one and the same person as the Mikhail Gomes they are referring to. (It is acknowledged that Constable George in giving her formal testimony of what transpired at the CID on the 11th of April, 2017 used terms like “Senior Sergeant Adams identified himself and I to the Accused...” but the next step of linking the person in the dock as being the accused to whom she referred did not happen).

Directed Verdict

- [75] The principle underlying ‘no case’ submissions is stated in Archbold Criminal Evidence and Pleadings 2015, at 4-363 this way:
- “A submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could not convict. In such a case, a directed verdict must be taken from the jury.”
- [76] Counsel for the Defendant focused his ‘no case’ on what can be conveniently termed part (a) of the second limb of **Galbraith**. Counsel for the Crown focused on part (b) of the second limb. There is a sentence that was not highlighted by either counsel:
- “There will of course, always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”
- [77] This case may not be described as a classical ‘identification case’. In those matters there is a live dispute regarding whether or not the Defendant is the person identified as committing the alleged offence – for example, where there is only fleeting glance or an observation made in difficult

circumstances. However, at trial in this matter, there was no identification of the Defendant in the dock by any witness at all.

- [78] The “sufficiency and the quality of the identification evidence” was considered by the Court of Appeal of Belize in **Leroy Gomez v The Queen** Criminal Appeal No. 17 of 2012. Justice of Appeal Samuel Awich in delivering the Appellate Court’s judgment noted at paragraph [24]:

“The duty to withdraw a case when there has been no evidence of identification, or when the quality of the evidence of identification is poor is wider than the usual duty to dismiss a case at the close of the prosecution’s case.”

Conclusion

- [79] This matter can at best be described as a borderline case.

- 1) The evidence of the Virtual Complainant is unsupported by any other evidence;
- 2) The Virtual Complainant alleges a course of conduct over several months but she:
 - (i) does not provide any explanation for remaining silent over that period of time; or
 - (ii) provide any explanation as to what motivated her to come forward when she did;
- 3) No documentary evidence was provided in support of the allegation and more specifically, no digital forensics attempted to garner possible evidence in support of the Virtual Complainant’s report;
- 4) Two friends of the Virtual Complainant whom she said did certain things in relation to the watch were not interviewed nor called as witnesses;
- 5) There are notable differences between the information contained in the various Counts of the Indictment and the evidence of the witnesses. These concerned in particular the dates and the sum allegedly demanded;
- 6) The Virtual Complainant admitted to certifying false information in her statement to the police without providing any explanation for doing so;
- 7) As far as the First Count is concerned, the distinction between a request for charity and a demand has to be borne in mind, although clearly a request can crystallise into a demand. However to be a demand in the context of the charge there must be the accompanying menaces, which in this case were unspecified and non-specific. What was the threat? Was Mikhail Gomes going to inform the family of his sexual

relationship with Ms. Joseph, or show them the nude photographs of her, or do the unspecified family members some physical harm?

- 8) The Second Count was alleged to have occurred on the 8th day of January, 2017. But the Virtual Complainant testified that she could not remember that date. Further, the issue of the Virtual Complainant's credibility and reliability arose from her admission regarding the sum of money.
- 9) In relation to the Third Count, the words spoken to Nyla Scott cannot reasonably be construed as a demand with menaces for \$500.00 ECC. The person who received the call said she did not know what the caller meant; she did not testify of conveying the information to anybody; and she did not know whether the \$500.00 the caller referred to was United States Dollars or Eastern Caribbean Currency.
- 10) There is no identification of the Defendant as being the person whom the Virtual Complainant is referring to as Mikhail Gomes.

[80] A jury properly directed cannot properly convict on any of the Counts in the Indictment. To answer the question posed at the very beginning: Is there a case for the Defendant Mikhail Gomes to answer? The short answer is: "No."

[81] Accordingly, upon the Indictment for three counts of demanding with menaces, the 'no case' submission is upheld.

Colin Williams
High Court Judge

By the Court

Registrar