

SAINT LUCIA

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CASE NO. SLUCRD2018/0033A, 0033B

BETWEEN

THE CROWN

vs

- 1. KEYWIN FLORENT**
- 2. KERVON JOSEPH**
- 3. KELVIN HENRY**

Defendants

Appearances:

Bernick Faisal together with Stacey-Ann St. Ville Counsels for the Crown
Horace Fraser for the Defendants

2019: September 30th.

DECISION

- [1] **TAYLOR-ALEXANDER, J.:** The Defendants are on trial for the Abduction of two Virtual Complainants. Kervon Joseph is on trial for unlawful sexual intercourse of one on the Virtual Complainants while Keywin Florent is indicted for aiding and abetting Kervon Joseph in the unlawful sexual intercourse.
- [2] At the close of the case for the Crown the Defendants advanced the following submissions on Counts 1 through 3 of the indictment and partially on count 4.
- (i) That the Crown has failed on its third and fourth count to establish collective intent of the Defendants and has failed to establish the individual intent necessary to constitute the offence of Abduction

against Keywin Florent and the jury should be directed to return a verdict of not guilty.

- (ii) That the Crown has failed on its third and fourth count to establish collective intent and have failed to establish the individual intent necessary to constitute the offence of Abduction against Kelvin Henry and the jury should be directed to return a verdict of not guilty.
- (iii) The evidence adduced by the Crown has not established a case against the Defendant Keywin Florent, for aiding and abetting and the jury should be directed to return a verdict of not guilty.
- (iv) The Crown has failed to establish a case against the Defendant Kevon Joseph for unlawful sexual intercourse, and in the interest of Justice, the jury should be directed to return a verdict of not guilty.

The Law

- [3] The common law case of **R v Galbraith** continues to be the seminal authority on a submission that the Crown has not established a case to answer. The guiding principles distilled from Galbraith is set out in Halsbury's Laws of England /Criminal Procedure Vol 27 (2015) paragraph 400. It provides that a submission of no case to answer may be properly made and upheld:—

- “(1) If there is no evidence to prove that the crime alleged has been committed by the Defendant, or*
- (2) Where there is some evidence but it is of a tenuous character, and taken at its highest, is such that a jury properly directed could not properly convict upon it.”*

- [4] The first limb of the Galbraith test is not in issue. In **R v Pryer, Sparkes and Walker** unreported , 7th April 2004 CA [2004] EWCA Crim 1163 Turner J held that

the requirement to take the evidence at its highest did not mean “picking out all the plums and leaving the duff behind” A judge should assess the evidence and if the evidence of a witness upon whom the prosecution’s case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. It was necessary to make an assessment of the evidence as a whole and it was not simply a matter of credibility of individual witnesses or of evidential inconsistencies between witnesses although those matters may play a subordinate role.

- [5] Blackstones Criminal Practice 2019/Part D16.57 provides the court’s approach on the second limb of the test. The court is required to consider the quality and the reliability of the evidence rather than its legal sufficiency and therefore the court is required to conduct an assessment of the evidence and witnesses that would otherwise be excluded from the prerogative of the jury. The second limb, Blackstones’ surmises, leaves a residual role for the court as assessor of the reliability of the evidence. The court is empowered to consider whether the prosecution’s evidence is too inherently weak or vague for any sensible person that rely on it. It is on the guidance of these common law authorities that I now proceed to assess the challenges of the no case submission.

The Charges of Abduction in Count 3 and 4 of the indictment

- [6] Section 160 (1) of the Criminal Code provides that a person commits the offence of abduction who with the intent to deprive the male or female of the custody, care or control of the person, (a) unlawfully takes him or her from the lawful custody care or control of any person; (b) detains him or her from returning to the lawful custody care and control or charge of any person.
- [7] Section 160 (2) provides that the custody, control, charge or care of the minor by a parent, guardian or other person shall be held to continue although such minor is absent from his or her or the actual custody, control care or charge of the minor, parent or guardian or other person, if such absence is for a special purpose only

and is not intended by the parent guardian or other person to exclude or determine such custody, control care or charge for the time being.

- [8] Section 161(2) provides that it is not necessary that the taking or detaining should be without the consent of the person taken or detained, and it suffices if the person is persuaded, aided or encouraged to depart or not return.
- [9] The indictment charged that all three defendants abducted Lily Marshal and that Kera Daniel. The indictment did not identify the role each defendant played and in this instance, the posture of the Crown is that all three were parties to a joint enterprise.
- [10] The Defendant Keywin Percy Florent submits that he was merely a passenger in the car who sat there and did and said nothing. Similarly the evidence does not establish that he was engaged in abduction nor did he instigate, command counsel procure or solicit, or aid, facilitate, encourage or promote an abduction.
- [11] Kelvin Henry submits, that neither in the collective sense or the individual sense, does the evidence display an intent by him, to abduct or to instigate, command, counsel, procure, solicit, or aid, facilitate, encourage or promote an abduction. He submits that he was merely the driver of a car without there being evidence that he knew of an abduction. He submits that the evidence presented by the crown that he locked up the bar locking the Virtual Complainants inside is capable of two inferences one positive namely to facilitate privacy and two, negative, to facilitate the commission of the crime. He submits that where two such possible inferences are present, the Defendant must be given the benefit on the one that favours him.
- [12] The Crown on the other hand submits, that when assessing the evidence on a no case submission, I am obliged to consider the evidence as a whole including both its weaknesses and its strengths.

- [13] The evidence of the Lily Marshal is that she saw a white four door car number plate PA 655 tinted dark. She had seen the car before. The car belonged to Fillings Henry. He is the owner of the bar. There was light to enable her to see because the lamp post was on. She saw the vehicle had three persons inside. Kelvin was driving. Percy was in the passenger and Kervon was in the back seat. She was able to see inside the car because the media player was on with a blue light, which enabled her to see.
- [14] The car stopped a little past the shed. She and Kera went to stand next to the car because they knew the car from the area. Kervon opened the left door at the back of the car and Kervon and Percy asked them to come in the car. She said "no". Kervon got out and pushed Kera and her into the car. She did not want to go into the vehicle.
- [15] Her mother knew they were at the shed, but she had told them not to go there. Although forced, she and Kera did not hesitate to go with the boys because they knew them from the area. When they got to the bar, Percy was holding her and Kervon was holding Kera and they went inside. She sat on a stool at the bar. Kelvin locked the door at the back of the bar. Kervon grabbed her and took her to the game room in the back. She tried to make him drop her, but he was stronger than her. Kera also tried to make him drop her. She blacked out and came to her senses a few times. At one of the times she was without clothing. The last thing she remembered, was standing at the door of the game room, at which time she had all her clothes on her. She does not know how or who put them on. She did not see Kera or Kervon. Percy was at the bar, and Kelvin was by the door at the back of the bar.
- [16] She did not know what time it was. She walked towards the door at the back of the bar to go home, Kelvin was standing by the door, he pulled her back and said "where you going, we not yet finish yet!" When he pulled her back she got a scratch on her left leg. She pushed him and went outside. When she got outside

he called her, she turned back looked at him, and he was walking towards her, he gave her Kera's pants and slippers.

[17] **Kera Daniel's Evidence**

A white car came, slowing down and stopped just past the shed tinted number plate PA 655. She was able to see the car because there was light. Somebody called Lily and her from the back seat, somebody opened the left side of the back seat and she saw Kelvin and Kervon and Percy.

[18] Kervon asked them to come into the car and they said "no". Kelvin was in the driver's seat, Percy was in the front passenger's seat, and Kervon was to the back. Kervon came outside and pushed Lily and her into the car and Kelvin drove off. Kervon was in the back seat. The car went to Fillings bar and shop.

[19] At the shop Kelvin went to close the front door and he put a lady called Tai outside, after he did so, he continued to lock the shop. He went behind the bar and gave Lily and her Campari and Mount Gay to drink.

[20] Kervon said they were not going anywhere until they drank the rum so they drank it. She was afraid and wondered what was to happen. She drank the alcohol because she wanted to go. Percy and Kervon were sitting with them. Kervon was sitting next to her.

[21] After they had the drink Kelvin went to close the door on the left side. The door is close to his house. There are two doors to the outside of the shop. This door is the second door. Kervon grabbed Lily and pulled her in the games shop. Kelvin went back to the bar and Percy was sitting by her.

[22] Kervon pulled Lily. She went to pull Lily back and Kervon told her to leave Lily alone. Percy pulled her away and Kervon locked the door. The games room has a pool table and machines on the side. She did not see inside the games room. She knew the door was locked because she heard when it locked. Then Kelvin

came out of the bar and threw her down on a beach chair. He was trying to take off her pants.

[23] He took off her pants and panty while she was wrestling with him. During the wrestle, he had a small gold chain and it burst. He got up and went behind the bar with her pants in his hand. When he went behind the bar, she put her panty on. She started walking to the door on the side and told him to let her go. He told Percy to deal with her and he started cursing her. He started choking her, and told her to stay there for him to fuck her. Then he opened the door and he pushed her outside in her panty.

[24] **Assessment of the Evidence of Abduction.**

The abduction according to the evidence of the Crown would have commenced when the Virtual Complainants were put in the car. Both Virtual Complainants state that they initially refused the request of Kervon and Percy to go into the car and then Kervon came out of the car and pushed them into the car. The abduction would have continued until they were released or pushed out of the bar. The evidence reveals that all three Defendants were present in the car. Kevon played an active role in that he came out of the car, and forced the girls into the car. He held on to Kera and escorted her into the bar, where the Virtual Complainants alleged they were kept.

[25] Kelvin drove the car without opposition and drove to the bar where it is alleged that he excluded a person from the bar, proceeded to lock up the premises in which they were kept and at some point in the night refused Kera's exit from the premises telling her to stay there so he could have sex with her. He thereafter pushed her out of the premises. I find that in relation to Lily Marshal the evidence reveals that Kelvin was the driver in which the Virtual Complainants were transported under fear, that he secured the premises and by doing so made the Virtual Complainant exit of the premises difficult.

[26] Keywin Percy was seated in the car and would have been an observer to what transpired with Kevon when he allegedly pushed the girls in the car. When they got to the shop his actions appear consistent with the design in that he held onto and escorted Lily into the bar and escorted her inside. Admittedly he played a less active role in terms of words and conduct, but of the evidence adduced, I am prepared to conclude, looking at the Defendant's actions and the relevant surrounding circumstances that his actions revealed a criminal intent to participate in the alleged abduction.

[27] In assessing the evidence, I am also obligated to consider what the Virtual Complainants genuinely felt. Both the evidence of Lily Marshal and Kera Daniel evidence reveal that they genuinely felt that they were being coerced and forced to act contrary to their stated intentions. It is therefore for a jury to decide on the assessment of the evidence whether such belief was genuine, was natural in the circumstances and whether the legal definition of Abduction in the Code is founded on the facts.

[28] **Aiding and Abetting Sexual Intercourse with the Virtual Complainant**

The Defendant Keywin Percy Florent suggests that his actions of aiding and abetting must be proximate to the offence and that the only evidence adduced by the Crown in that regard is that he held onto Kera Danial as she tried to stop Lily Marshal from being taken away by Kervon Joseph.

[29] Counsel for the Defendant referred me to a number of authorities including **the Queen v Ann Marie Benoit SLUHRD2013/1094** and **CPL 443 Montoute v Delvin George SLUHCR2007/0014**, and **National Coal Board v Gamble [1959] 1 QB 11** to establish what the Crown's burden is in relation to an aidor or abettor. He submits that the Crown must present prima facie evidence that the Defendant has done some act which amounts to aiding and abetting the offence and has done these acts with the required mens rea. They must prove an intention to aid

coupled with knowledge of the circumstances. The evidence must show that the Defendant knew the essential elements of the offence.

[30] In **R v Jogee [2016] UKSC 8** considered together with **Ruddock v The Queen [2016] UKPC7** the Privy Council reversed previous case law on joint enterprise. The Privy Council reiterated that accessory liability requires proof of a conduct element accompanied by the requisite intent. This, the court found is a question of fact and degree.

[31] I have assessed the evidence lead by the Crown and I am reminded that I must assess the totality of the evidence including the circumstantial evidence leading to the events and not just the single act of Keywin Percy holding Kera back when she tried to reach out to stop Lily from being taken. The evidence reveals that Keywin Percy Florent did hold Kera back to allow his friends to proceed unhindered to the game room where he would be alone with Lily. That coupled with his deliberate inaction throughout the whole night, although present and an observer to what he saw happening indicates that the Defendant had the accompanied mental element with the co accused to perpetrate the offence of sexual intercourse with a minor.

[33] **Sexual intercourse with a person between twelve and sixteen.**

The Defendant Kervon Joseph, ask that the court view the evidence of the virtual complainant as unreliable given her severe intoxication that evening, which he says challenged her ability to recall what actually transpired. That she did not engage her friend Kera Daniel when she tried to speak with her at the bar, and she black out twice while allegedly on the pool table, such that she is unable to say for certain what happened to her. When she eventually came to, she found herself by the door.

This evidence he says coupled with the medical report which suggests that there was no evidence of a sexual assault is sufficient for the court to conclude that the evidence is tenuous and speculative at best. The charge should be remove the

matter from the Jury's determination and direct them to return a verdict of not guilty.

[34] I accept that there were lethal cocktails consumed that evening, and the evidence of the virtual complainants and of Alice Marshal was that they were in fact drunk, whether induced or otherwise. Despite this, I have assessed the evidence of the Virtual Complainants advanced by the Crown. I have found that evidence given by the two Virtual Complainants to be consistent with each other with minor inconsistencies on non-material issues. I have found that Lily Marshal's evidence of the events that evening unrelated to the sexual assault to be consistent with both Kera Daniel and Alice Marshal, such that I am prepared to conclude that her intoxication did not impair her awareness of what transpired on that evening. There is only one version of events for what transpired with Kera Marshall in the game room on the pool table, and I find no basis to conclude that it is not credible.

[35] As regards the medical report. The report was adduced through the evidence of the Investigating Officer. The author was not called to clarify his/her findings. It is unsafe to draw from the medical report, the conclusions that the Defendant asks that I find without the benefit of medical guidance. The only conclusion revealed by the examination of Lily Marshal was that the examination was unremarkable. It is appropriate in the circumstances to allow the Jury to draw what conclusions they may from the medical report, assessed together with all of the other evidence.

[36] I am fortified in this finding by the case of **Brooks v D.P.P** [1994] 1AC 568at 581 referenced in Archbold 2015 at 4-365, where it was said that "the question of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case.

[37] I therefore dismiss the no case submission and order that the evidence is reliable and can safely be put to a Jury for determination.

V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT JUDGE

BY THE COURT

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