



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No. 030

BETWEEN:

**FIONA MILLER
(POLICE SERGEANT)**

Appellant

-and-

**(1) ZURITA TUCKER
(2) O'KEISHA CLARKE
(3) YUKIE PEARMAN**

Respondents

Before: Hon. Assistant Justice Diel

Appearances: Ms Kenlyn Swan, Department of Public Prosecutions,
for the Appellant
Ms Zurita Tucker, 1st Respondent in Person
Ms O'Keisha Clarke, 2nd Respondent in Person
Mr Yukie Pearman, 3rd Respondent in Person

Date/s of Hearing: 6 February 2019

Date of Judgment: 25 March 2019

JUDGMENT

Introduction

1. This is an appeal from a decision of the Worshipful T Chin dated 8th March.2018 by the Crown pursuant to Section 4 of the Criminal Appeal Act 1952.

2. I would wish to state that I am very grateful for the industry of Counsel for the Director of Public Prosecution, Ms K Swan, which saved a considerable amount of Court time and preparation as a result of her clear and comprehensive submissions.
3. Having praised Ms Swan for her work, I feel I can now justifiably rely upon her submissions which accurately set out the trial background and the Crown's case at trial.

“3. The defendants were charged and appeared at the Magistrates' Court Plea Court session on 21st March 2016. At this time, all defendants elected a summary trial. All were unrepresented and entered a plea of Not Guilty.

4. A trial date was eventually set for 13th June 2016 at 9.30 a.m. in HMC2. On this day, defence counsel Mr V Caines appeared holding for Mr C Richardson who now represented the defendant Z Tucker. Mr Caines indicated to the court the Mr Richardson was sick and requested an adjournment. The complainant, who had now returned to the UK, was present on this trial date. Despite the expenses which had been incurred in bringing the complainant back to the Island on this occasion, the Crown did not oppose the adjournment. The matter was adjourned until the 20th September 2016 for trial.

5. On 20th September 2016 the matter was called. At this time, all defendants were present. Mr Richardson appeared on behalf of Tucker, Mr K Worrell appeared on behalf of Clarke and Pearman was unrepresented. Mr Worrell made an application to the court for an adjournment, as his client had applied for legal aid which had been refused and there was an intention to/had been an appeal filed against this

decision. The Crown opposed the request for an adjournment due to the fact that this would have been the second occasion that expenses had been incurred to secure the attendance of the complainant; simply for the matter to not go ahead. The application was refused by the court and the trial commence.

6. *There were approximately sixteen (16) adjournments in this matter from the time that evidence was first given. This was mostly in relation to the withdrawal, possible changes of counsel due to conflicts and attempts to secure additional counsel by defendants Tucker and Clarke.*

7. *The Crown closed its case on 29th August 2017. Ultimately, the court ruled on 8th March 2018, that there was no case for the defendants to answer.”*

4. The Crown thereafter set out their case against the Respondents as follows:-

“10. *The complainant is Mark Lewis a customer due diligence deployment manager based at HSBC. On 19th March 2016, his contract would expire, he was due to leave Bermuda and get married in two weeks. Therefore, his colleague took him out for a celebratory drink. They went to various establishments on Front and Reid Streets where the complainant consumed a number of alcoholic drinks.*

11. *Feeling both happy and hungry, the complainant decided to walk for food. First, along Front Street then up the hill to King Street, he turned left and continued walking down Spurling Hill. He was drunk and staggering whilst walking in the road. Cars were passing him and making remarks.*

12. *One car, he recalls it being next to him and drove towards him at a slow pace, it was moved him slowly forward, forcing him to one side. The complainant recalls having a friendly conversation with the female but whilst she was inside and then as she got outside of the car. While the complainant and the female were talking, a second individual, who was male, got out of the car and approached him. The complainant then felt pressure in his pockets by the male, he placed his hands on his pocket but he was stronger than him and items were removed, whilst the complainant was saying 'stop please don't'. This was also done to his other pockets removing his wallet, phone, identification. This made the complainant, feel scared, worried and that he was being robbed.*

13. *The two of them then got in the car and it drove off. The complainant knew that it was important to remember the license plate number of the car, therefore, he focused on it as it drove away. He then ran to the police station where he met a female constable, explained what had just happened and gave her the license plate number as 40934. This took less than fifteen (15) minutes. The complainant then commenced making a formal report of the incident.*

14. *Officers were immediately dispatched from the Hamilton Police Station in search of the motor car being registration number 40934. Officers made their way to the listed address for the motor car. However, whilst on their way to this address, they turned onto Elliott Street from Princess Street and their attention was drawn to a motor car with*

registration number 40934 which was parked on the side of the road with persons standing near it.

15. *As officers approached the motor car, a female known as Zurita Tucker (1st Respondent) got into the driver's seat of the said vehicle. She was questioned if she had been driving the car a short while ago in the area of Crow Lane. She replied 'Yes, I was but they spoke with him not me' and pointed out two other persons standing on the other side of the car.*
16. *Officers commenced a search of O'Keisha Clarke (2nd Respondent), whilst doing so, she appeared nervous placing her hand in her left side jacket pocket. During this search, officers recovered the complainant's Iphone 4s cellphone and identification card with the complainant's picture affixed as well as his security card from the same jacket pocket of Clarke.*
17. *At the same time, an officer searched Yukie Pearman (3rd Respondent), and discovered in his right side pants pocket was the black leather wallet belonging to the complainant.*
18. *A search of the motor car 40934 revealed in a white plastic bag, on the floor of the passenger side, contained various bank cards in the name of the complainant.*
19. *Upon arrest of all three both Tucker and Pearman gave no explanation. Clark indicated that she first saw the complainant on Spurling Hill, that she saw his items on the ground, and that she put them in her pocket."*

5. The Crown's complaint against the Learned Magistrate's decision is a simple and forceful one, namely that the Crown's case had little if anything to do with the question of identification. The prime basis for the Crown's case was that of recent possession. I say "prime" as I note in the evidence at first instance the statement of Robert Butterfield, a police officer, who was part of the team who arrested the Respondents shortly after the offence was committed and found the stolen items in the possession of the various Respondents. He was present when the Respondent, Mr Pearman, admitted to PC Hill that he was present in the car at the time the Complainant was accosted. Further in submissions to me Ms Tucker (perhaps unwisely) stated "I never put my hands on him". This also implicitly accepts that she too was present at the scene at the time of the offence.
6. The test for a no case ruling is well known and is as follows:-

"Whether or not, on the basis of a prima facie assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable trial chamber could convict the Accused. The emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial."

7. As stated on the day, I am firmly of the view that the evidence led by the Crown in this matter met and passed this test. As stated, I set aside the decision of the Learned Magistrate and remitted the case back to Magistrates Court for retrial pursuant to the provisions of S.19(4) of the Criminal Appeal Act 1952.

Dated the 25th day of March 2019

MARK DIEL
Assistant Justice