COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp. No. 56 of 2021

B E T W E E N

VINCENT E. NAIRN

Intended Appellant

V

DIRECTOR OF PUBLIC PROSECUTIONS

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Intended Appellant appearing Pro se**
Ms. Darnell Dorsette, Counsel for the Intended Respondent

DATES: **13 September, 2021; 30 September, 2021; 29 November, 2021; 27 January, 2022; 3 March, 2022; 1 September 2022**

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Criminal appeal – Armed Robbery – Application for an extension of time for leave to appeal convictions and sentences – Prospects of success – Fingerprint evidence - Circumstantial evidence

On the 8th of March 2014, "A Sure Win" web shop on Fire Trail Road was held up by a masked gunman. The gunman assaulted the cashier hitting her in the head with a gun and took $200 from the cash register, $216 from the cashier's purse, her cell phone, her watch and three bracelets. The masked gunman also took the security's guard cell phone and the sum of $40 and then left the scene. Following police investigation of the scene, three latent fingerprints were lifted from the underside of the cash register's tray and sent for processing. One of the fingerprints was identified to be that of the intended appellant, Vincent Nairn, and he was arrested and arraigned in the Supreme Court on three counts of armed robbery. On the 30th of May 2019 the intended appellant was convicted on the three counts and he was sentenced on the 20th of February 2020 to thirteen years imprisonment on each of the counts of armed robbery with consideration given to the two years he spent on remand. The intended appellant seeks to appeal his conviction. and sentences. On the 22nd of November 2021 an application for an extension of time for leave to appeal was filed. On 3rd March 2022 after hearing the arguments, the Court reserved its decision.

Held: The application for an extension of time is refused. The convictions are affirmed. The sentences of thirteen years on each of the counts are affirmed. The Registrar is directed to inform the Registrar of the Supreme Court to have a Certificate of Conviction drawn up to reflect the correct date of conviction and the sentence of thirteen years imprisonment on all three counts of armed robbery to take effect and run concurrently from the 30th of May 2019.

The intended appellant's print was found on the underside of cash register's tray which had been removed by the armed robber from the cashier's booth and taken to the front of the web shop where money was extracted therefrom. Evidence was led that the intended appellant had never been employed by the web shop. And more importantly was not one of the very limited and select few that had access to the cashier's booth. His fingerprint on the underside of the cashier register's tray remained unexplained. This was cogent evidence of probative value which was outweighed by any prejudicial effect that could be linked to the other two prints not being eliminated. There was no challenge that the intended appellant's print was found in an area where the general public had access nor was there any challenge that that was his print. There was no explanation proffered as to how his print was located under the very same register that was taken by the robber from a secure location in the web shop to the foyer of the shop and his print lifted a short while later.The judge quite rightly allowed the print to be entered into evidence for consideration by the jury. These factors were left to the jury. The learned judge correctly addressed his mind to the principles as to what evidence could be left to the jury.

It is settled law that discrepancies are a matter for the Jury. The judge gave a proper direction as to discrepancy and inconsistency. It is for the jury to resolve the discrepancies and inconsistencies. I do not consider that there was any material inconsistency that needed to have been drawn specifically to the jury's attention. I find that there was no breach of a principle of law nor was there any miscarriage of justice which resulted in rendering the verdict as unfair.

There is no reason for interfering with the sentences of 13 years imprisonment on each count. The sentences of 13 years imprisonment are to run concurrently and take effect from the 30th of May 2019. I find that the proposed appeal has no prospect of success.

Attorney-General v Omar Chisholm MCCrApp. No. 303 of 2014 mentioned
Alexander Williams V Regina SCCrApp No. 156 of 2016 considered
Gayle v The Queen [1996} UKPC 3 considered
Kesnor Lexidor v Regina SCCrApp. 76 of 2017 considered
Ormond Leon v Regina SCCrApp. No. 51 of 2016 considered
Rashid Farrington v Regina SCCrApp. No 3 of 2016 considered
Teeluck v. The State [2005] 1 WLR 2421 mentioned
Stoddart 1909 2 Cr App R 217 considered

JUDGMENT

Judgment delivered by The Honourable Madam Justice Bethell, JA

1. This is an application by the intended appellant for an extension of time (EOT application) within which to file an appeal. He seeks to appeal his convictions and sentences.

2. On the 30th of May 2019 the intended appellant was convicted following a trial before then Acting Justice Forbes on three counts of armed robbery. He was sentenced on the 20th of February 2020 to thirteen years imprisonment on each of the counts of armed robbery, the judge having taken into consideration the time he spent on remand.

Background

3. The intended appellant was arraigned in the Supreme Court on 8th May 2019 on three counts of armed robbery. He pleaded not guilty to all three counts and a trial ensued.

4. At the close of the case for the prosecution, Counsel for the intended appellant made no case submissions on the basis that the crown had not established a prima facie case against the intended appellant on all three counts of armed robbery.

5. The learned judge ruled that the prosecution had made out a case against the intended appellant based on strong circumstantial evidence. He rejected the submissions, holding that a jury, properly directed, can consider the evidence.

6. The intended appellant elected to remain silent. The defence called no witnesses.

7. On the 30th of May 2019, the jury returned a unanimous verdict of guilt on all three counts. Counsel for the intended appellant requested a probation report prior to sentencing. The matter was adjourned on a number of occasions pending the production of the report.

8.. On the 20th of February 2020, the intended appellant was sentenced to a term of fifteen (15) years imprisonment. Two years was taken off that sentence, taking into

consideration the time the intended appellant spent on remand prior to being granted bail. The sentence of thirteen (13) years was to take effect and run from the 30th of May 2019, the date of conviction.

9.. The intended appellant appealed his convictions and sentences using Criminal Form No. 1. It was dated 20th April 2021. It was filed the following day in the Registry of the Court of Appeal.

10. On the 22nd of November 2021 an application for an extension of time for leave to appeal was filed. It was supported by an affidavit of the intended appellant.

11. On the 27th of January 2022, the intended appellant submitted that he was unable to get an appeal form as he was still considered a remand inmate, the reason being that no conviction warrant had been sent to the department of corrections. Ms. Dorsette, Counsel for the Crown, confirmed that the department of corrections was yet to receive a certificate of conviction. The intended appellant also complained about the conduct of his trial attorney. The matter was once again adjourned in order for the Supreme Court to forward a certificate of Conviction to the Department of Corrections.

12. Having been informed of the allegations made by the intended appellant, namely that his counsel at trial inadequately and improperly conducted the case, Mr. Damien White, his attorney at the trial in the Supreme Court, filed an affidavit in response on the 2nd of February 2022, followed by a supplemental affidavit filed on the 28th of February 2022, refuting his claims.

13. The Court was forwarded a certificate of conviction signed by the Registrar Edmund Turner, dated the 18th of February 2022. On the face of it there are a number of errors. Firstly, it certifies that the intended appellant was found guilty by a Jury and convicted on the 25th of July 2018, rather than on the 30th of May 2019. Secondly, it certifies that the intended appellant was sentenced to a term of fifteen (15) years on each count of armed robbery rather than to a term of imprisonment of thirteen (13) years. The following has been extracted from Acting Justice Forbes' sentencing decision of the 20th of February 2020, which shows, perhaps not as clearly as it should have been, that the learned judge intended to sentence him to 13 years on each count rather than 15 years having deducted a term of imprisonment of two years for the time he spent on remand in pretrial detention. [Emphasis added]

> **"It is the view of this Court that a strong message must be sent to the Convict that his conduct is unacceptable in our society. Given what can only be described as an escalation of conduct and the use of firearms, given what transpires almost weekly in the Bahamas involving young and old alike and the violence being perpetrated with firearms it is an imperative that society must be protected from this Convict. The Court however recognizes that Mr. Nairn is still a young man and can potentially make a contribution to this society and must offer some potential guidance to his minor children. In these**

circumstances the Court will impose a Custodial Sentence of Fifteen (15) years acknowledging that he has been on remand awaiting sentencing since May 2019. Therefore his sentence will commence from 30th May 2019. The Court is unclear as to when Mr. Nairn was granted bail Pre-trial and that he was arraigned in July 2015 and inevitably the Convict would have incurred some pretrial detention although it is unclear from the record what that would amount too, but given precedent the Court factored at minimum at least Two (2) years. These years would also be applied to the years ascribed for sentence of the Convict. The Court would further recommend that he is be enrolled in some trade while serving his sentence so as to improve his Job prospects.

The Mr. Nairn may appeal his conviction and sentence to the Court of Appeal within statutory time"

The Extension of time Application

14. The Extension of time application was filed on the 22nd of November 2021.

15. It is settled principle that in exercising its discretion whether to grant or refuse an extension of time the court considers four factors: the length of delay, the reason for the delay, the prospect of success and the prejudice, if any, to the respondent. **Attorney-General v Omar Chisholm** MCCrApp. No. 303 of 2014

Length of delay

16. Pursuant to *s*.17(1) of the Court of Appeal Act, the intended appellant had 21 days from the date of sentence to appeal his conviction and or sentence, that is by the 12th of March 2020. On his own calculation he is one year and seventeen days out of time. The length of delay in this case is the time calculated from the 12th of March 2020 to the date of the filing of the EOT application on the 22nd of November 2021. The delay in this case is in actual fact over one year and eight months. It is woefully out of time.

Reasons for the delay

17. The intended appellant gave no reasons in his affidavit for the late filing of his appeal. During his hearing before the Court, he indicated that he was unable to get an appeal form as he was still considered a remand prisoner. This was acknowledged by the Crown as noted above. However, there have been so many instances where appellants do not wait to be handed a form and take an active part in the appeal process by being proactive and approach the court by way of letter. This was not done in this case.

Prospects of Success

18. The Court must also consider the intended appellant's prospects of success. As noted by Allen, P at paragraph 15 in the matter of **Alexander Williams V Regina** SCCrApp No. 156 of 2016:

"15. Inexorably, notwithstanding the length of the Delay, and the absence of good or sufficient reasons for the delay, if the

prospects of success of the intended appeal are good, then this Court would nevertheless grant an extension of time and hear the appeal, provided there is no prejudice to the other side."

19. The intended appellant's proposed grounds of appeal are:

Ground 1:

That Council (sic) inadequately and improperly conducted the intended application (sic) case.

Ground 2:

Trial Judge erred in his discretion under 178 of the Evidence Act when he allowed evidence of fingerprint to be entered.

Ground 3:

That the judge erred when he ruled that the intended appellant had a case to answer.

Ground 4:

That a material irregularity occurred when the judge prevented a material defence question from being asked.

Ground 5:

That the trial judge failed to highlight any of the material inconsistencies and discrepancies and contradictions in the case.

Ground 6:

That the judge did not adequately direct the jury as to the significance of the presence of the unidentified prints.

Ground 7:

That the conviction is unsafe and unsatisfactory.

Ground 8:

That due to the circumstances of the case the sentenced (sic) is harsh and unduly severe.

20. The Crown objects to the intended appellant's EOT application on the ground that there are no prospects of success.

Brief Facts

21. On the 8th of March 2014, shortly before 10pm, as the cashier and security guard were about to exit through the front door of a recently opened "A Sure Win" web shop on Fire Trail Road, in New Providence, a masked man holding a handgun pushed his way into the shop.

It was dark as the lights from the interior of the web shop had already been turned off. The only light came from the porch light on the outside of the web shop. The masked man demanded that the security guard lie face down on the ground. He placed the gun to the cashier's head and demanded that she open the cashier's booth to get the money.

She was unable to gain entry once it had been closed. The cashier then told the security guard to break the cashier window with a fire extinguisher. The guard complied and then jumped through the window to open the door to the booth from the inside. He was once again made to lie down on the floor, this time holding the door to the cashier's booth open with his foot.

The gunman then grabbed the cashier with the gun to her head and took her inside the booth demanding the money. The cashier was unable to retrieve any money from the safe as it was bolted to the ground. He then hit the cashier's head with the gun. After being threatened that she had better get the same she told him that there was $200 in the cash register. The masked gunman then took the tray of the cash register out to the front of the store where he took the money out of the slot. He searched the cashier's purse and school bag and relieved her of $216, her cell phone, her watch and three bracelets.

The masked gunman also took the security's guard cell phone and the sum of $40 and made good his escape.

Neither the security guard nor the cashier were able to identify the gunman as he was masked, and it was dark.

The police were alerted. Sergeant Darrell, a Crime Scene Investigator, photographed the interior portion of the web shop. On completion he processed the entire interior portion of the web shop for latent prints. He discovered three (3) latent prints. He photographed those as well. All three of these prints were found on the underside of the cash register tray found near the keyboard in the foyer area. He then lifted those prints and returned to the office where he packaged them, labelling them "A", "B" and "C". He later handed over the lifted prints to Inspector Gilbert, a fingerprint examiner, for further processing.

On the 24th of February 2015, Inspector Gilbert received a RBPF Official Fingerprint Form bearing the name Vincent Errol Nairn, date of birth 12th December, 1981 of Fire Trail Road. He conducted a comparison examination between the fingerprint impression lifts that were handed to him by Officer Darrell and the controlled prints on the RBPF fingerprint form. He found that the fingerprint impression labelled "A" shared the same unit relationship in sequence as that of the middle finger on the left hand on the RBPF form. He concluded that the individual that made the fingerprint impression lift labelled "A" is one and the same person that made the left middle finger on the Official RBPF form bearing the name Vincent Errol Nairn.

The intended appellant was charged with three counts of armed robbery.

Evidence was lead in support of the following factors; (i) one of the intended appellant's fingerprints was found on the underside of the cash register's tray; (ii) he had never been employed by A Sure Win web shop; (iii) members of the public had no access to the cashier's booth; (iv) the place where his print was discovered and (v) the limited number of persons who had access to the cash register.

As noted above, the intended appellant elected to remain silent. His defence as put to the prosecution witnesses was that he did not commit the crimes he was accused of and that his print had been transferred to the place where it was found.

He was unanimously found guilty on all three counts.

Ground 1: That Counsel inadequately and improperly conducted the intended applicant's case.

22. The intended appellant alleges that he gave his counsel notes to use in support of the no case submissions which he did not use. He admitted during the hearing before this Court that he did not ask to be relieved of counsel and that his counsel did make no case submissions on his behalf. He also alleges that he wanted to take the stand and counsel told him not to take the stand. He further alleges that his counsel failed to bring his good character to the attention of the court.

23. The Crown relied on two affidavits of Mr. Damien White, who represented the intended appellant at his trial. He denied any allegations of improper or incompetent representation of the intended appellant. He deposed that at no time did the intended appellant complain to him about his representation.

24. I do note also that none of these allegations were ever made on oath and placed before the Court by the intended appellant by way of affidavit.

25. In **Ormond Leon v Regina** SCCrApp. No. 51 of 2016 similar allegations by the appellant against his trial lawyer, namely inadequate representation, failure to put his good character in issue and dissuading him from giving evidence, were made before the Court, differently constituted. Isaacs JA, writing for the Court, had this to say at paragraph 49:

> **"For the sake of completeness, it must be noted that the decision whether or not to go into the witness box is made by the accused. The question when posed by a judge to the accused at the end of the Crown's case must be answered by the accused. Even if his lawyer answers for him, it is incumbent on the judge to require the accused to signify his election."**

26. After the learned judge gave him his elections the intended appellant replied, "My choice is to remain silent, my Lordship".

27. I have perused the transcripts of the trial in the Supreme Court. I find that Counsel for the intended appellant adequately defended him. He took objection when it was necessary and made no case submissions based on what was before the court. I note the affidavit in response by the impugned attorney filed on the 2nd of February, 2022, in particular paragraphs 15 through 20 as well as paragraph 23.

> **"15. That I advised the Intended Appellant of the "pros and cons" of the case if the jury rejected his defence that he never robbed anyone at a "Sure Win" Web Shop; And that the Police framed him.**

16. That I also duly informed the Intended Appellant that the possibility of a "Plea Agreement Deal" offered by the Prosecution in this matter was still on the table; and he will only receive a "five-year sentence' if he took the "Plea Agreement Deal" the Prosecution was offering him.

17. That I also duly informed the Intended Appellant of the likelihood of success or otherwise for him if the case goes before the jury to consider.

18. That the Intended Appellant also had a gentleman (Layperson) contact me and told me that I could "appeal the No Case submission Ruling" of Acting Justice Andrew Forbes, which I told him was not possible at the stage of the trial that we were in.

19. That the Intended Appellant rejected the Prosecution's offer of a Plea Agreement Deal" in this matter herein; and he wished to allow the jury to consider the case on his behalf instead.

20. That, hence, I proceeded on those same said "instructions" of the Intended Appellant.

……

23. That I also did a "Plea-in-Mitigation" on behalf of the Intended Appellant at the Sentencing stage of the Intended Appellant's matter where I submitted, inter alia, that given the fact that the Intended Appellant was not a violent person, and he did not have any similar antecedent(s) for Armed Robbery, he should be given an "alternative sentence" instead of imprisonment, including "restitution" to the victims of his crime."

28. I note that counsel attached to his affidavit a copy of the Plea in mitigation which bears the stamp of the Attorney General's dated 26th November 2019.

29. The law is that a defendant's good character must be distinctly raised during the trial: (i) by direct evidence from him; or alternatively, (ii) through witnesses called on his behalf or (iii) elicited through cross-examination of the Crown's witnesses **Teeluck v. The State** [2005] 1 WLR 2421.

30. The intended appellant had previous convictions for possession of Dangerous Drugs, possession of firearms and possession of ammunition. Even if the defence counsel had requested that the trial Judge give a modified good character direction, I am satisfied, that given the cogency of the circumstantial evidence adduced by the Prosecution, a good character direction by the Judge to the jury would not have affected the outcome of the trial.

31. The intended appellant further contends that the officers' credibility were weakened because of the following six factors and his counsel did not discharge his duties resulting in him being deprived of a probable acquittal.

(i) Firstly, that the CSI (Crime Scene Investigator) Darrell was never deemed an expert in the area of finger printing or forensic evidence, nor did he give his expertise in this field.

32. I note, as did the intended applicant, that Officer Darrell was not challenged on his expertise and or training to lift prints.

(ii) Secondly, that the print was signed by one "Edwin Ferguson" casting great doubt on the admissibility of the evidence.

33. Edwin Ferguson was one of the complainants in the matter. He was the security guard that was robbed at gunpoint. I am not sure why his signature was on the card with the lifted print. But I fail to see how an unexplained signature casted great doubt on the admissibility of the evidence. Officer Darrel explained the manner in which he processed the scene and sealed the lifted print on his return to the Crime Scene Investigation Unit.

(iii) That there was a "huge unexplained gap in the chain of control". Officer Darrel stated he took the prints that he had lifted from the crime scenes to Inspector Gilbert at Criminal Records office on the same day or the following morning. Inspector Gilbert testified that he received the prints on the 11th of April 2014. As such, because no explanation was given as to who was in possession of the print, there is no certainty that what was examined by Inspector Gilbert was the print that was lifted from the scene.

34. There is a discrepancy in the dates. However, I do note that Officer Darrel was not challenged by the defence. He stated that the prints that he lifted from the crime scene was sealed on his return to the office. Those prints were handed over to Inspector Gilbert. He identified the prints in court from his signature and date. There is a presumption of regularity unless proven otherwise.

(iv) The intended applicant also took issue with the manner in which Inspector Gilbert examined the print.

35. It was done the old school way, by eyesight instead of being computer assisted. Inspector Gilbert explained that this is the way he was trained and over the years had compared thousands of prints using this method albeit with the use of a magnifying glass. Inspector Gilbert was deemed to be an expert for the purpose of giving opinion evidence in the area of fingerprint comparison and identification. This was done without objection from counsel of the intended appellant. Nor did counsel ask for the court's assistance in obtaining an independent expert to consider the fingerprint evidence.

(v) The intended appellant contends that the jury was concerned about the absence of any reason as to how he became a suspect in the first place. He bases this on the question the jury asked to Inspector Gilbert namely:

> "**MADAM FORELADY: If a fingerprint identification is based on eye examination what other evidence is used to determine the defendant was the potential suspect and his fingerprints should be checked. I think previous note that they compared side by side and not necessary had it run through a system. What other evidence was used to determine the defendant was a potential suspect and that his fingerprint should have been checked?"**

36. In my opinion it was a question as to what led the police to consider the intended appellant a suspect in the first place. Inspector Gilbert quite rightly answered that the did not know what led the police to consider the intended appellant as a suspect. It was a question that should be posed to the arresting officer.

I see nothing in that question to suggest that the jury was concerned about the manner in which the print was examined.

(vi) The intended appellant contended that the police had his prints in their database before he was arrested.

37. This is purely speculative as there has been not evidence led to support the same.

38. In my judgment, this proposed ground has no merit.

Ground 2: The trial judge erred in his discretion under section 178 of the Evidence Act when he allowed evidence of fingerprint to be entered.

39. The intended appellant concedes that the trial judge had the power to admit fingerprint evidence into evidence but contends that notwithstanding that he should have used his inherent jurisdiction to exclude the evidence due to a number of factors. Section 178(1) of the Evidence Act states:

> **'In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that having regard to all the circumstances in which the evidence was obtained, the emission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not admit it."**

40. I note that it was not suggested nor was it submitted to the trial judge that the fingerprint evidence should have been excluded and not admitted into evidence having regard to all or any of the circumstances in which it was obtained.

41. The intended appellant submitted that there were several reasons why the trial judge should have excluded the fingerprint evidence using his inherent jurisdiction. Four of which have been repeated and already discussed in paragraphs 31 through 35 above.

42. The intended appellant further contends that there were 3 prints found, 2 of which were not identified and it was crucial to the admission of the fingerprint which was identified as his print. He submits that there should have been an elimination process

of authorised personnel failing which the print identified as his had no probative value as those other two prints could be those of unauthorized persons.

43. I do agree that the investigation would have been tidier if the two other prints found could have been eliminated as those of authorised personnel. But it does not deviate from the fact that the intended appellant's print was found on the underside of cash register's tray which had been removed by the armed robber from the cashier's booth and taken to the front of the web shop where money was extracted therefrom. Evidence was led that the intended appellant had never been employed by the web shop. And more importantly was not one of the very limited and select few that had access to the cashier's booth. His fingerprint on the underside of the cashier register's tray remained unexplained. This was cogent evidence of probative value which was outweighed by any prejudicial effect that could be linked to the other two prints not being eliminated. As such, in my opinion the judge quite rightly allowed the print to be entered into evidence for consideration by the jury.

44. In my judgement this proposed ground had no merit.

Ground 3: That the judge erred when he ruled that the intended appellant had a case to answer.

45. The intended appellant submitted that the Crown failed to make out a *prima facie* case against him under the second limb of **R v. Galbraith** [1981] 1 WLR 1039. Namely,

> **"The difficulty arises where there is some evidence, but it is of a tenuous character, because of inherent weakness or vagueness or it is inconsistent with other evidence.**
>
> **(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.**
>
> **(b) Where however the prosecution 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 within the province of the jury and where on one possible view of the facts there is evidence upon which a 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."**

46. The intended appellant submits that had the judge trained his thoughts on the tenuous nature of the evidence, its collection handling and testing, as well as the witnesses' testimony he would have been bound to find that he did not have a case to answer.

47. The intended appellant submits that on the testimony of Kerea Turnquest, the armed gunman took the money from the register at the back of the store and therefore there was no need to remove the tray and take it to the front of the store. The pertinent part

of the evidence of Turnquest is found at page 37 lines 17 to 32 and continuing on page 38 lines 1 to 10:

> "**A. The robber. He grab me up with the handgun to my head and took me to the back.**
>
> **Q. When you reach in the back what happened.**
>
> **A. He told me to get the money. I told that the money was in the safe, and he said to get the fucking money. And I said to him that I cannot get the money because the money was in the safe. It is bolted in the ground. He said, "You better get it." I said to him, there is $200 in the cash register. So, he took that money out of the cash register.**
>
> **Q. What did he do with the cash register?**
>
> **A. He took me and the cash register out to the front of the store. When he took the money out he searched my purse where he took my personnel belongings of $216.**
>
> **Q. Who carry the cash register from the cage to the outside?**
>
> **A. The robber. He took me -- the cash register was in the other hand and he took the other hand and grab me up.**
>
> **Q. Now, where was his gun at the time?**
>
> **A. It was in his hand.**
>
> **Q. And tell us where exactly in the cash register, where was the money?**
>
> **A. It was inside the little slot. It was small change $200.00."**

48. What is clear from the evidence is that money was taken from the drawer of the cash register which was taken to the front of the web shop. The following is extracted from the cross examination of the witness by the defence:

> "**Q. So, you stated that the robber came into the back area with you?**
>
> **A. Yes, he took me.**
>
> **Q. Did you give him the money or he took it?**
>
> **A. He took it, I didn't give it to him.**
>
> **Q. Where did he take the money, while in the back?**

A. While in the back.

Q. Not in the front?

A. I <u>think</u> he took the whole cash register with him."[Emphasis added]

Q. He didn't remove the money at the back portion?
A. He took it at the front.

49. Under cross examination, defence counsel put to the witness what I can only assume came from instructions, the following extracted from page 43 lines 10 to 20:

> "**Q. Ms. Turnquest, I am going to suggest to you that the robber never touched that cash register. What do you have to say to that? Do you agree?**
>
> **A. Oh yes, he did.**
>
> **Q. I am going to suggest to you that you gave him the money out of the cash register?**
>
> **A. No, I did not."**

50. Under reexamination the witness, Turnquest was shown the crime scene photographs taken by office Darrel. She pointed out what she termed the cash register, namely the tray from the register at the front of the store near the computer.

51. The intended appellant also submitted that the evidence of the security officer Edwin Ferguson was that the money was given to the robber by Turnquest therefore it was impossible for the officers to find his print under the tray of the cash register.

52. The evidence of Ferguson disclosed that he was lying on the ground of a dark web shop holding the door open with his foot looking towards the exit. He admitted he did not see the cashier give the robber anything, he just heard.

53. The Crown closed it case without calling the arresting officer with no objection of the defence.

54. During his submissions to the Court at the no case stage, defence counsel contended that no time line had been established as to when those prints were place on the tray and this failure was fatal to the case for the Crown.

55. Counsel for the defence drew the Court's attention to the case of **Kesnor Lexidor v Regina** SCCrApp. 76 of 2017, a decision of this Court differently constituted. In that case the only evidence in relation to the appellant was the discovery of a single fingerprint on the passenger side of the vehicle in which the deceased was shot and killed. There was no evidence led as to the time frame when that print could have been place there. There were four other unidentified fingerprints found on the vehicle.

Evidence was also led that fingerprints could be lifted from a surface up to three years after they had been placed there. Issacs JA, writing for the Court found that that evidence, taken at its highest, could only show, if accepted by the jury that the appellant had at some indeterminate point in time come into contact with the truck.

56. The evidence led in the present case through the fingerprint expert, Inspector Gilbert, was that there was no timeline to fingerprints. Each case would depend on the weather for instance, the person who made the print whether for instance he is a heavy sweater.

57. The following is extracted from the learned trial judge's ruling on the no case submissions:

> "**What is relevant is that Mr. Turnquest and Mr. Ferguson, and the establishment of Sure Win are alleging that their property was taken and they had not given any permission for their property to be taken and that the property was in fact accompanied by force or threat or harm at the time in which case a gun was being brandished. The evidence of both Mr. Turnquest and Mr. Ferguson was unchallenged that they were robbed and that the personal property along with funds which allegedly belonged to A Sure Win was taken in the robbery.**
> **So, as to the charges themselves, the Court considers that in the element of the offence present when one considers the evidence. The question then becomes to the second limb of Galbraith, whether the evidence is tenuous. The Court notes that this is not direct evidence case but rather that of circumstantial evidence case. And is singular evidence in that of a fingerprint. If the Court was accepting of the arguments as presented by defence counsel then yes, the evidence as to the timeline is questionable and the case is tenuous and ought not to be put before the jury.**
> **However, closer examination of the evidence reveals differences between this case and Lexidor. Int (sic) his case the cash register is in a restricted area and only essential employees would have had access to that area whereas the case of Lexidor, the vehicle was in a public area and multiple people had access. Secondly, according to the evidence of Ms. Bodie, the former human resource's manager she would have overseen the hiring and firing of staff of A Sure Win. It is her uncontroverted evidence that the defendant Vincent Nairn was never an employee of A Sure Win.**
> **The evidence of Mr. Alexander Bodie, IT person who set up the cash register at this establishment. His evidence was that the cashier's shipped through the company's shipping company in boxes and received at its warehouse. And that he along with another employee at the time Mr. Justin Ferguson would have installed the items and that the store was only recently opened in 2014 and that would he opened the boxes and removed them from their plastic wrapping before installing them. It was suggested by defence counsel that the packages could have been interfered with. Mr. Bodie rejected that idea, suggesting that he would have noticed the irregularity, the packaging.**

Finally, not withstanding that the fingerprints could have existed for a long time, that seems unlikely given that this establishment had only opened according to the evidence of Mr. Bodie and Mr. Ferguson when it was robbed unless we have a started timer and that the evidence of when it was robbed thus the fingerprints could not have existed for any long period of time. Furthermore, what would the defendant's print be doing on the cash drawer, not a computer, not a front door or customers area but in a restricted area reserved solely for the employees. Defence counsel sought to suggesteds (sic) the defendant may have been a delivery person and thus gain access to the employee area for example and that could be so. But how does his prints end up on the bottom of the cash drawer and giving the evidence of Ms. Turnquest which was not challenged as to the assailant picking up the cash drawer and moving the cash therefrom. These factors when considered draw a sharp distinction from the factors in the Lexidor case. The Court notes the decision of the Court of Appeal in Daniel Coakley versus Regina, Supreme Court No. 50 19 2017, and I would rely on the comments of his Lordship Mr. John Isaacs Senior Justice of Appeal. Justice Isaacs said the following: "The Crown's case is based on circumstantial evidence. Circumstantial evidence is more likely the case of several cords. One strain of the cord may be insufficient to sustainweight but three strained together maybe quite of sufficient strength. In term circumstantial evidence there maybe a combination of circumstances no one of which raise a reasonable conviction or more it would may have suspicion but the whole taken together may create a strong conclusion of guilt. That is with as much certainty as who what appears to or. The prosecution presented a strong circumstantial evidence case against the appellant through the witnesses."

58. In my opinion, the learned judge thereafter quite correctly addressed his mind to the principles as to what evidence could be left to the jury.

> **"I will state principles in summary forms as follows: If there's direct evidence which is capable of providing the charge there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends on circumstantial evidence and that evidence if accepted is capable of producing a reasonable mind and a conclusion of guilt beyond a reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypothesis as unreasonable there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. A circumstantial case that implies that even if all the evidence from the prosecution were accepted, and all inferences most favourable for the prosecution which are reasonably open or drawn, a reasonable mind could not reach**

a conclusion of guilt beyond a reasonable doubt or to put it another way, could not exclude all hypothesis consisting innocent as not reasonably open of the evidence."

A similar statement appeared in a recent judgement of the English Court of Appeal, criminal division R v Javer 2006 where Moses Lord Justice said at paragraph 21 in particular (Direct approach is to ask whether a reasonable jury properly directed would be entitle to draw an adverse inference, to draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all listed realistic possible circumstances with consistent. That is not the same as saying that anyone considering those circumstances will be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on a submission of a case. The correct test is the conventional test of what a reasonable jury would be entitled to. This court, having accept the appearances, the decisions of the Court of Appeal in Daniel Coakley versus the Queen, the DPP of Val (ph), which was cited in Daniel Coakley, as well as the case of R v Javer accepts that that is the appropriate test and standard which this Court must apply. The Court is of the view that not withstanding defence counsel's contention, the evidence submitted does not support the case being submitted to the jury. The Court rejects that contention and submit that there is evidence, even if, rather as tenuous in character, it is the view of the Court that a jury properly directed can consider the evidence such as it is and its function ought not to be. In the circumstances the Court will reject the submissions of the no case and invite the defendant to his election."

59. I am satisfied that the judge was correct in rejecting the no-case submission. The evidence was such that it was open to a reasonable jury to draw inferences from which they could properly conclude that the appellant was guilty.

60. In my opinion this proposed ground has no merit.

Ground 4: That a material irregularity occurred when the judge prevented a material defence question from being asked.

61. The intended appellant contends that the judge stopped defence counsel from asking a question that was materially relevant to the defence's case. The following is extracted from the transcripts of evidence in the court below:

> "**Q. Can you -- I know you said all you can remember is a mask and a gun, but can you recall if the gunman had on gloves?**
>
> **MR. BONABY: My Lord, objection --**

THE COURT: Question asked and answered."

62. I find no irregularity, material or otherwise in the learned judge not allowing the question to be answered. The witness had stated earlier that all he could have remembered was that the robber was masked and had a gun.

63. I find no merit in this proposed ground.

Ground 5: That the trial judge failed to highlight any of the material inconsistencies and discrepancies and contradictions in the case.

64. The intended appellant submitted that the trial judge ought to have pointed out to the jury how to approach and treat inconsistencies and discrepancies.

65. I note that the trial judge at pages 155 to 156 of the transcripts of the hearing gave a full general direction to the jury:

> "...**you would recognize as you deal with the evidence of a particular witness or all of the witnesses together, you'll find that there are differences between what the witnesses have said or what one witness said on one occasion or at one point and what was said at a different point. Those discrepancies are matters which you, as the jury, have to deal with and approach it in this manner. If the discrepancy is something that is very serious, then you would have to take the next step and decide how this affects the assessment of that witness' testimony. If a witness, for instance, says that it was raining that day the incident happened and there are doubts as to whether it was raining, then you have to begin to question what that witness is telling you. So where you find major discrepancies, it affects either the truthfulness or the credibility of a witness. The witness may not be deliberately intending to mislead you, but may be unreliable, or the witness may be untruthful. Even where you find discrepancies as serious as to cause you to question the reliability or truthfulness of a witness, it does not necessarily follow that because you have doubts about a witness' reliability or truthfulness in one area, that you must have doubts about the witness' truthfulness or reliability throughout their evidence. Conversely, the fact that you find a witness being wholly truthful in one area doesn't mean that everything they say is reliably true. The other thing about discrepancies is this; there will always be discrepancies, not only in court, but everywhere else. Indeed, you nine women and men will be on guard, if nine people came in and told you all the same story matching in every detail, and then you would rightly caution yourselves as to whether you are being misled. So, if the discrepancies are minor, you do not have to worry about resolving them. You may ignore them, pass over and move on. It's only major discrepancies that you have to analyze in the way I indicated previously."**

66. However, the intended appellant further contends that where there are major discrepancies or inconsistencies, these ought to be brought to the attention of the jury in order to consider whether it affects the reliability and credibility of the witness or the case as a whole.

67. The intended appellant submitted that there were material inconsistencies between the evidence of the cashier and the security guard, discussed above in paragraphs 47 through 52, and that these were not brought to the attention of the jury.

68. The intended appellant further submitted that there was a discrepancy in dates as to when Officer Darrell delivered the lifted prints to Inspector Gilbert and when Inspector Gilbert stated that he had received them which led to the credibility and integrity of the evidence. This aspect was already addressed in paragraphs 33 and 34 above.

67. I do note that the trial judge did not point out any specific discrepancy in the evidence nor did he highlight any inconsistency. However, in my opinion, the inconsistency in the evidence between whether the money was taken in the booth as given by the security guard is negated by his own testimony that he could not have seen what occurred. Further, as noted above, there is a difference in dates on the unchallenged evidence of officer Darrel and when Inspector Gilbert stated that he received the prints. However, there is a presumption of regularity unless it can otherwise be shown that the evidence was tampered with. There was no evidence led by the defence to suggest otherwise.

68. Although the Crown's sole evidence was the unsupported evidence of a single fingerprint there is nothing in the evidence of the witnesses for the Crown which affected the veracity, reliability, integrity, and credibility of the evidence of the witnesses upon whom the Crown relied.

69. This Court is concerned with examining the safety of the conviction. As noted by Lord Alverstone CL in **Stoddart** (1909 2 Cr App R 217 at 246:

> **"Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction that has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which might have led to a miscarriage of justice."**

70. It is settled law that discrepancies are a matter for the Jury. The judge gave a proper direction as to discrepancy and inconsistency. It is for the jury to resolve the discrepancies and inconsistencies.

71. I do not consider that there was any material inconsistency that needed to have been drawn specifically to the jury's attention. I find that there was no breach of a principle of law nor was there any miscarriage of justice which resulted in rendering the verdict as unfair.

72. I find no merit in this proposed ground.

Ground 6: That the judge did not adequately direct the jury as to the significance of the presence of the unidentified prints.

73. During the trial, Officer Darrell, Inspector Gilbert and the charging officer were cross examined on the two unidentified prints. The jury, the triers of the facts, were made fully aware that three prints were found under the tray of the cash register and only one was identified to be that of the intended appellant. They were also made aware that there was no investigation carried out to eliminate the unidentified prints to be those of the authorised workers in the web shop who had access to the cash register.

74. In his summing up the learned judge drew the jury's attention to the fact that there was no timeline to indicate when any of those prints were deposited on underside of the tray of the cash register as well as the fact that the other prints were not ruled out. He also pointed out to the jury the Crown's contention that notwithstanding that, the intended appellant's fingerprint ought not to have been in that location as he was not an employee, nor did he have access to that specific location where the prints were retrieved. The intended appellant's print was found in a very secure place where the general public had no access. These were matters that he left for the consideration of the jury.

75. There was no challenge that the intended appellant's print was found in an area where the general public had access nor was there any challenge that that was his print. There was no explanation proffered as to how his print was located under the very same register that was taken by the robber from a secure location in the web shop to the foyer of the shop and his print lifted a short while later. These factors were left to the jury. In **Gayle v The Queen** [1996} UKPC 3 the police found two fingerprints on two glass louvres of a bathroom window. The appellant's fingerprint was identified on one of the glass louvres. The appellant was convicted for the murder of the deceased based on one of his fingerprints being found on the louvre glass.

76. The jury, from their finding of unanimous verdicts of guilt on all three counts of armed robbery, must have been satisfied by the forensic evidence that the intended appellant's fingerprint was correctly identified on the underside of the tray of the cash register.

77. I find no merit in this proposed ground.

Ground 7: That the conviction is unsafe and unsatisfactory.

78. This ground encompasses the specific grounds set out above.

79. A conviction based only on the presence of a fingerprint does not make it unsafe. As noted in **Gayle** above, the fingerprint of the appellant in that case was identified on one of the glass louvres, the point of entry into the deceased home. There was no other sign of forced entry.

80. At paragraph 5 of the judgment Lord Griffiths noted:

> **"From this evidence the prosecution invited the jury to conclude that whoever murdered the deceased had broken into her apartment through the bathroom window at the rear of the house and left their fingerprints on the glass louvres in so doing. And, as the evidence showed it was the appellant's thumbprint on the bathroom window, they could safely conclude that he was the murderer."**

81. Lord Justice Griffiths concluded that the jury, from their finding of a verdict of guilty, must have been satisfied by the forensic evidence that the appellant's thumbprint was correctly identified on the window.

82. There was no evidence led nor elicited that the intended appellant had any legitimate access to the cashier's booth, an area only accessible by very few persons. Further evidence was led that this Web shop had only just recently been opened and only the cashier, the installer of the cash register and his assistant had access to the cash register. That his fingerprint was found on the bottom of the cash register's tray which had been removed by the armed robber gives rise to the inference that the fingerprint found thereon was placed there by him. As found by the Court of Appeal in **Gayle's** case, That together with the fingerprint identified as the intended appellant's was presumptive evidence of the intended appellant' involvement in the crime and one upon which the jury could act in coming to a verdict adverse to the applicant.

83. The trial judge directed the jury that this case was not one of identification. It was one solely based on circumstantial evidence. In his summing up he stated that the Crown's case was that the fingerprint of the intended appellant ought not to have been in that location as he was not an employee, nor did he have access to that specific location where the prints were retrieved. He also pointed out the defence's contention that the other prints were not ruled out. He then directed them that these were all matters for their consideration.

84. In **Rashid Farrington v Regina** SCCrApp. No 3 of 2016 a man took the virtual complaint's handbag from her car which had been washed the day before the incident. That fingerprint was identified to the that of the appellant. Longley P writing for the Court had this to say at paragraph 59 of the Judgement:

> **"..the reasonable inference that may be drawn was that the person who stole the hand bag left his finger print on the vehicle belonging to the virtual complainant when he opened the car door to take the bag. It would therefore have been open to the**

jury to find as a fact that the fingerprint identified as that of the appellant could not have gotten on the car unless he was the person who took the handbag from her car on the night in question, thus eliminating any possibility of an innocent explanation for the discovery of his fingerprints."

85. As noted from the above a conviction based only on the presence of a fingerprint does not make a conviction unsafe and a jury id entitled to be satisfied as to an accused guilt based upon an unexplained presence of his fingerprint at the crime scene.

86. For the reasons already expressed this ground has no merit.

Ground 8: That due to the circumstances of the case the sentenced (sic) is harsh and unduly severe.

87. The intended appellant submits that the 15 years that he was sentenced to is within the range of sentences handed down for this type of offence.

88. He contends however that the Court ought to consider a reduction in sentence as he has not had the benefit of a sentenced inmate for three years. Judicial knowledge is taken however of the benefits he has continued to enjoy as a remand inmate as opposed to a convicted one.

89. I find no merit in this proposed ground.

90. There is no reason for interfering with the sentences of 13 years imprisonment on each count. I refer to paragraph 15 above. The sentences of 13 years imprisonment are to run concurrently and take effect from the 30th of May 2019. I encourage the intended appellant to take full advantage of the vocational and academic classes offered as he seems prepared to do so from his submissions.

Prejudice

91. The fourth aspect that the Court has to consider in an EOT application is whether there is any prejudice to the intended respondent.

92. The intended Respondent only contested the EOT application on the ground that there were not prospects of success. Therefore, there was no need to consider this factor.

Disposition

93. For all of the above reasons, I find that the proposed appeal has no prospect of success. In the circumstances, the application for an extension of time is refused. The convictions are affirmed. The sentences of thirteen years on each of the counts are affirmed. The Registrar is directed to inform the Registrar of the Supreme Court to have a Certificate of Conviction drawn up to reflect the correct date of conviction and the sentence of thirteen years imprisonment on all three counts of armed robbery to take effect and run concurrently from the 30th of May 2019.

The Honourable Madam Justice Bethell, JA

94. I agree.

The Honourable Sir Michael Barnett, P

95. I also agree.

The Honourable Mr. Justice Evans, JA