

IN THE COURT OF APPEAL OF BELIZE, A. D. 2013

Criminal Appeal No. 3 of 2010

Marlon Harris

Appellant

v

The Queen

Respondent

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BEFORE:

The Hon. Mr. Justice Dennis Morrison

Justice of Appeal

The Hon. Mr. Justice Samuel Awich

Justice of Appeal

The Hon. Madam Justice Minnet Hafiz-Bertram

Justice of Appeal

Said Musa, S. C., for the appellant

C. Vidal, Director of Public Prosecutions, for the respondent

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14 March 2013 and 28 June, 2013

**HAFIZ-BERTRAM JA**

**Introduction**

[1] This matter was heard on 14 March 2013 and on 15 March 2013 this court dismissed the appeal. The conviction and sentence were affirmed. The court also ordered that the fine of \$10,000.00 imposed by the trial judge be paid, in default of which the appellant is to serve one year's imprisonment. We now give our reasons for dismissing the appeal.

[2] On 30 November 2008, the appellant, who was a policeman at the time, was working at the checkpoint on the Western Highway, when he pulled over the virtual complainant, a motorist with respect to an apparent offence of driving with an expired insurance. The appellant was satisfied that an offence was committed and decided to institute charges against the virtual complainant. On 1 December 2008, the appellant went to the business premises of the virtual complainant, which is at the Celebrity restaurant on Marine Parade, and demanded a certain amount of money to get rid of the charge. On 8 January 2010, the appellant was charged with extortion, contrary to **section 284** read along with **section 310** of the **Criminal Code, Chapter 101**, of the Laws of Belize. The particulars of the charge were that on 1 December 2008, in Belize City, the appellant, under cover of his office as a constable of police in the Belize Police Department, obtained from Aytekin Kelat, for himself, the sum of \$100.00, which he knew he was not lawfully authorized to obtain. After a trial before a judge and a jury, he was found guilty and sentenced to pay a fine of \$10,000.00, to be paid by September 2010, in default of which he was ordered to serve a term of imprisonment for one year.

### **The evidence for the Crown**

[3] The Crown called five witnesses, namely Aytekin Kelat, ACP David Henderson, Sgt. Alfonso Aban, Insp Daniel Arzu and P.C. Lawrence Martinez to prove their case. Mr. Kelat, who is the virtual complainant, is Turkish and does not speak English fluently. He gave evidence that on 30 November 2008, the appellant checked his driver's licence and insurance at the check point at Mile 4, Western Highway and thereafter informed him that

his insurance had expired. He was taken to the Raccoon Street police station and the appellant accompanied him. At the police station, another policeman gave him a summons for driving an uninsured vehicle and he was told that he had to go to court. He said that, on the next day, he was at Celebrity restaurant at the front door and he saw the appellant at the front door. He said that he asked him why he was there and the appellant replied, *'you want to go to court or you don't want to go to court you give money I give you this paper and sticker'*. He asked the appellant how much money he wanted for the paper (Summons) and he replied that he wanted \$100.00. Mr. Kelat then told him that he will give him \$50.00 for the paper and the appellant said he wanted \$100.00. Mr. Kelat's evidence is that he told the appellant to wait, while he went inside and spoke to his partner, Mr. Koc who gave him the \$100.00 which he gave to the appellant. The serial number on the \$100 was A843131. He said that the appellant then gave him the insurance sticker and the summons. He further said, *"After he gave me paper and sticker, I went inside and a white car came and catch him and the police took me and Mr. Koc to the police station on Queen Street."* He said that he identified the appellant as the policeman he saw at the checkpoint and at Celebrity restaurant.

[4] The Assistant Commissioner of Police, Mr. David Henderson testified that he went to the Celebrity Restaurant where he saw the appellant coming out of the yard. Mr. Henderson said that the appellant had his right hand closed and he asked him to open his hand. When the appellant did so, he saw it was a \$100.00 note with serial number AD 843131 which he took from him. Mr. Henderson thereafter informed the appellant that he was under arrest for extortion.

[5] Sgt. Alfonso Aban testified that on 1 December 2008 he was on duty at the CIB office when ACP Henderson approached him and gave him certain information and handed him a \$100.00 bill with serial number DA843131. He also handed over the appellant to him. Sgt. Aban testified that the appellant was then detained pending charges and on 2 December 2008 he swore to an information and complaint and formally arrested and charged the appellant for the crime of extortion.

[6] Inspector Daniel Arzu testified that on 30<sup>th</sup> November, 2008 he was assigned as executive duty officer at the patrol branch and the appellant was assigned by him to the western vehicular checkpoint as a patrolling officer at patrol branch. In cross-examination, he said that he was not at the check point and as such, he cannot tell whether the appellant went out there but added that the appellant was a good worker.

[7] P.C. Lawrence Martinez testified that on 30 November 2008 he was attached to the patrol branch on the western vehicular checkpoint along with the appellant when the appellant pulled over the complainant and told him that he will be charged for driving without insurance. He testified that while waiting for a mobile police vehicle to take the complainant down to the police station, Mr. Jenkins from the traffic department came and asked the appellant to give the complainant a “break”. The appellant then told Mr. Jenkins that he had already called for a mobile to take the complainant to the station.

### **Appellant’s unsworn statement from the dock**

[8] The appellant gave an unsworn statement from the dock and he did not call any witnesses. The appellant’s statement was as follows:

*I am Marlon Harris. I am a police constable with regulation number 314. I was attached to patrol branch, eastern division police station to team four. On 30 November 2008, I went on my duty at the check point at Mile 4 and 5, western highway. There on duty with P.C. Lawrence Martinez along with two BDF soldiers. Whilst on duty, Mr. Kelat drove up to the check point from the direction to Belize City to Belmopan. He as driving a grey Nissan Altima with a lady inside the car. I checked the said vehicle and discovered that it was uninsured. I placed the driver under arrest and detained him. Meanwhile, I called for the Delta 1 mobile to assist me. I still continued my duties. Whilst waiting for the mobile, Mr. Kevan Jenkins reached at the checkpoint in a white Cherokee vehicle with another clear skin man. He is the traffic manager for Belize City. He asked me what happened. I told him that Mr. Kelat was driving a motor vehicle without insurance. He then asked me to give Mr. Kelat a break. He told me that if I should give him a break he will ensure that the driver will report to the station the following day with a new sticker. I refused. Corporal Cawich arrived at the checkpoint and came out of the Delta mobile and walked over to where Mr. Kelat's vehicle was pulled over. Corporal Cawich then asked me what was the situation. I told him that I had placed Mr. Kelat under arrest for driving his motor vehicle without insurance. Corporal Cawich then asked me to give the driver a break. I told him "no". He told me not to charge Mr. Kelat but only to impound the vehicle. I told him "no" that it is an offence and if he will get into any accident or hurt anybody else, the insurance company will not cover for that. I then took Mr. Kelat to the Racoon Street police station where I processed and issued him with a summons to appear in court on 4 December 2008. Mr. Kelat then asked me for a break. I told him "no". At this*

*time he was accompanied by another female who introduced herself to me as one Pauline. We were talking. She told me that she had just separated from her husband for two years and that she is looking for somebody. I then responded and I told her that I myself had just separated from my common-law relationship for five years. I then handed Mr. Kelat the summons and made a report in the police traffic diary in regards to Mr. Kelat. The following day I reported for duty at eastern division at 3:00 p.m. where I was to hand in the summons in regard to Mr. Kelat and the sticker to Sgt. Lino who was the NCO in charge of duties and he would have kept it in team four locker after he had taken it over from me. Whilst reporting for duty Raul Garcia told me that I had a phone call. When I picked up the phone I recognized the voice to be one Pauline, the same girl with whom I had spoken with at the Racoon Street, police station. She told me to come and see her and to meet her at Celebrity restaurant. Upon reaching at Celebrity restaurant, in the yard to my surprise, instead of Pauline coming out to meet me, it was Mr. Kelat. I did not went there to see Mr. Kelat. Neither did I call him outside. He asked me what I want. I told him that a female friend just called for me to come and see her. He was then inviting me inside and I refused. He then started talking about the incident. He told me if I should not charge him that I could eat or drink anything from Celebrity restaurant. He also told me that he could have arranged for me to go to the San Ignacio Casino to eat, drink, gamble, because his cousins own it. I told him that I am not interested. Mr. Kelat then went inside. I was disappointed because I did not see Pauline so I was leaving when Mr. Kelat came out again and he wanted to see my summons. I told him that I cannot do that. I then asked him, 'Where is the copy of your summons and that will show you the date and time when to appear in court'. Mr. Kelat insisted so I*

*showed him my summons held in my hand. He then grabbed the summons and handed me a hundred dollars. I then informed Mr. Kelat that I will charge him for bribing an officer. He then went inside with the summons. I immediately took my cell phone and called for assistance from 911 and was walking towards the police station when a green police mobile approached me and Mr. Henderson came out. He then grabbed me and told me 'weh di money deh weh you just collect from them people?' He never cautioned me, he never asked me what happened and did not even tell me why he was arresting me. Neither did he read my constitutional rights to me. Mr. Henderson then took me to CIB Office and brought Sergeant Aban, placed me on a bench and instructed Sergeant Aban to process me to charge me for extortion and ensure that I take off my police uniform. I was then placed under arrest, locked up in detention at cell block. On the following day, I was subsequently charged for extortion.*

*That is all, your honor. I could ask Mr. Pitts something? Your honor I just want to say something short that I forgot. I would like to say that whilst at the checkpoint, Mr. Jenkins took out his cell phone and gave it to me and told me that Mr. Henderson wanted to talk to me. I informed Mr. Jenkins that I was busy. Mr. Jenkins got annoyed and he called Mr. Henderson a second time and again he was handing over the phone to me and told me that Mr. Henderson wants to talk to me. I again told Mr. Jenkins that I was busy. And whilst Corporal Cawich asked me to give Mr. Kelat a break, in the presence of Mr. Kelat and Mr. Jenkins and myself, I responded, 'no man'. I still wah arrest this man. I would like to say that I had kept the copy of the summons and insurance sticker in my knapsack so as to hand it in to Sgt. Lino who was the duty NCO at the time, senior duty NCO.*

## Grounds of Appeal

[9] On 12<sup>th</sup> April, 2010, the appellant appealed his conviction. There are six grounds of appeal. These are:

1. The verdict was unreasonable having regard to the evidence.
2. The learned trial judge misdirected the jury when at paragraph 15 page 401 of the summing up, he implied that it was a proven fact the appellant had made a demand for money from the witness Mr. Kelat.
3. The learned trial judge misdirected the jury when at page 398 line 8 he incorrectly states that the appellant denied that he got money from Kelat. What in fact the appellant stated in his unsworn statement at page 248 line 10 were that, "*He then grabbed the summons and handed me a hundred dollars.*"
4. The learned trial judge misdirected the jury in referring to the Belize Constitution in explaining who is a public officer and in concluding that a police constable is a public officer (see pages 390-392 of the summing up).
5. The offence of extortion as defined in sections 284 and 310 of the Criminal Code applies to public officers as defined in section 299 of the Criminal Code. This definition of "public officer" unlike that in the Constitution of Belize does not extend to police officers. The appellant could not therefore be properly convicted in law for the offence of extortion under the said sections of the Criminal Code.
6. The learned trial judge failed to give a full "good character" direction to the jury of the appellant.



## **Ground 1**

*The verdict was unreasonable having regard to the evidence.*

[10] Learned senior counsel, Mr. Musa after giving a summary of the evidence for the prosecution, contended that there was only one witness who was of significance, that is, Mr. Kelat. The reason being, that the crucial issue was whether or not the appellant made a demand on Mr. Kelat in exchange for the dropping of the charge for extortion. He submitted that the appellant was doing his duty whilst others were trying to get him to drop the charge but, he refused to do so and then there was a turn of events where the prosecution says that he obtained \$100.00 from Mr. Kelat. He submitted that Mr. Henderson's evidence is not vital evidence although he found the \$100.00 in the appellant's hand. He also pointed out that the \$100.00 was not admitted into evidence. Learned senior counsel submitted that the evidence for the prosecution is, therefore, fraught with doubts rendering the verdict of the jury unsafe.

[11] The learned Director, in response submitted that it was a question of fact for the jury to decide whether they found the evidence of Mr. Kelat credible or the unsworn statement of the appellant. Further, the oral evidence established what had happened with the \$100.00 note.

[12] This court was in agreement with the learned Director that it was a question of fact for the jury to decide which evidence they found credible. Further, the evidence that there was some interference by other officers to get the appellant to drop the charge did not render the verdict unreasonable. The appellant gave no explanation as to how Mr. Kelat got the Insurance

sticker from him. Also, the jury heard the evidence in relation to the reasons why the \$100.00 note was not admitted into evidence. However, this was not an impediment in believing the oral evidence of Mr. Kelat. As such, the court was of the opinion that there was no merit in this ground.

## **Ground 2**

*The learned trial judge misdirected the jury when at paragraph 15 page 401 of the summing up, he implied that it was a proven fact the appellant had made a demand for money from the witness Mr. Kelat.*

[13] The learned trial judge in his directions to the jury in relation to the final element of the charge, that is, whether or not the accused knew that he was not lawfully authorized to demand the hundred dollars from Mr. Kelat, said to the jury at paragraph 15 page 401:

*Here, members of the jury, you will determine whether or not the accused knew he was not lawfully authorized to demand the money by drawing reasonable inferences from the proven facts in this case. And that will be relating to the surrounding facts in this case.*

[14] Learned senior counsel submitted that it seems that the judge was telling the jury that it can be assumed that there was a demand and the only issue is whether he was lawfully authorized to make this demand.

[15] The learned Director accepted that if this direction is read in isolation, it could convey the impression that the learned trial judge was telling the jury that this was a proven fact that the appellant had made a demand for

money. However, she referred the court to page 400 of the record at line 12 where the learned trial Judge gave directions to the jury to consider the first three elements and then tell the jury that if those elements are proven, thereafter they must go on to consider the final element and that is whether or not the accused knew he was not lawfully authorized to demand the \$100.00 from Mr. Kelat.

[16] The court was of the opinion that the directions of the learned judge at paragraph 15 page 401, if read in isolation, do convey the impression that it is a proven fact but, the jury having heard the entire summation was clearly directed that, what they had to decide was whether the three elements were proven. At page 400 line 12, the learned trial Judge gave the following directions:

*It is for you , members of the jury to decide whether or not the accused obtained money in the sum of a hundred dollars from Kelat and he did that by using the cover of his office or taking advantage of his position as a police constable when he went to the Celebrity Restaurant to ask and obtain the \$100.00 from Mr. Kelat in exchange for Mr. Kelat not going to court. **It is for you to decide, members of the jury, whether this evidence is of a kind, and quality from which you can conclude that these three elements that I have outlined to you have been proved by the Prosecution.** And again, if you are not sure that these three elements have been proved, or if you have a reasonable doubt about it then the Prosecution would not have discharged their burden of proof with respect to them. *But if you are not sure on the evidence that the prosecution have discharged their burden of proof with respect to these three**

*elements, then, members of the jury, you are entitled to find those elements proven. And of course provided the other elements have been proved, you are entitled to return a verdict of guilty. **But, you must be sure of the guilt of the accused person with respect to these elements. Having dealt with these three elements or having considered these three elements, you will go on to consider the final element of this charge** and that is whether or not the accused knew he was not lawfully authorized to demand the hundred dollars from Kelat. (emphasis added).*

[17] It was after this direction that the learned trial judge gave the direction which is the subject of this ground of appeal. The said direction is not properly worded but, when it is read along with the previous directions as a whole, it is clear that the learned judge was not implying that it was a proven fact that the appellant made a demand for the \$100.00. The court was of the opinion that this ground was without substance.

### **Ground 3**

*The learned trial judge misdirected the jury when at page 398 line 8 he incorrectly states that the appellant denied that he got money from Mr. Kelat. What in fact the appellant stated in his unsworn statement at page 248 line 10 were that, "He then grabbed the summons and handed me a hundred dollars."*

[18] Learned senior counsel, Mr. Musa submitted that this was a misdirection, which came after a serious misstatement of the facts in evidence at page 398 line 8 of the summing up, where the judge told the jury the following:

*....Then he (the appellant) disputes the version of events as narrated to you by Kelat. Kelat is saying that the accused went there to ask for money, he is saying, 'no man'. I didn't go there to ask for no money. I got no money form Kelat.*

[19] Learned senior counsel contended that the accused did not say that, as the record shows at page 248, that the appellant in giving his unsworn statement said that: *"Mr. Kelat insisted that I showed him my summons held in my hand. He then grabbed the summons and handed me a hundred dollars."*

[20] The learned Director, in response submitted that the misquotation of the words of the appellant by the judge at page 398 line 8 could not have resulted in any miscarriage of justice, particularly given the fact that the judge dealt with the unsworn statement of the appellant in its entirety from page 409 line 9 to page 412 line 3, and correctly recounted the words of the appellant at page 411 at line 6.

[21] This court has read the summation of the learned trial judge and it is clear that he reviewed the relevant portion of the appellant's unsworn statement from page 409 of the record. At page 411 line 5 he repeated the exact words of the appellant: *" Mr. Kelat insisted so I showed him my*

*summons. I held it in my hand. He then grabbed the summons and handed me a hundred dollars.”*

[22] There was indeed a misstatement of the facts by the learned trial judge, however, the court was in agreement with the learned Director that there was no miscarriage of justice since the learned trial judge quoted thereafter the exact words spoken by the appellant in his unsworn statement where he said that he was handed a hundred dollars. Accordingly, the court was of the opinion, that there was no merit in this ground.

#### **Grounds 4 & 5**

*The Learned trial judge misdirected the jury in referring to the Belize Constitution in explaining who is a public officer and in concluding that a police constable is a public officer (see pages 390-392 of the summing up).*

*The offence of extortion as defined in sections 284 and 310 of the Criminal Code applies to public officers as defined in section 299 of the Criminal Code.*

[23] The learned trial judge at pages 390 to 392 of his summing up said that the appellant was a public officer and for the meaning of public officer he referred the jury to the Belize Constitution, Part X, section 131 where it says that “*Public Office*” means any office of emolument in the public service and ‘*public office*’ means a person holding or acting in any public office and “*the public service*” means subject to the provisions of this section, the service of the Crown in a civil capacity in respect of the Government. He further said, that the jury may wish to consider the appellant was employed

as a police constable and holding a public office. The learned trial judge did not refer to any of the substantive sections of the Constitution in his directions to the jury.

[24] Learned senior counsel, Mr. Musa submitted that it is doubtful whether a police officer is to be included in the definition of 'public officer' as defined in section 299 of the **Criminal Code**. He further submitted that the offence of extortion as defined in sections 284 and 310 of the **Criminal Code** applies to public officers as defined in section 299 of the **Criminal Code**. This definition of 'public officer' unlike that in the Constitution of Belize does not extend to police officers. As such, the appellant could not therefore, be properly convicted in law for the offence of extortion under the said sections of the Criminal Code.

[25] The learned Director, submitted that by virtue of section **299(1) (a)** and **(c)**, read along with **section 299(3)** and **sections 107** and **110** of the **Belize Constitution**, a constable of police falls within the definition of a public officer.

#### The Law under which the appellant was charged

[26] The offence is set out in section 284 and explained in section 310 of the Criminal Code. **Section 284** provides:

*Every public officer or juror who is guilty of corruption or of wilful oppression or of extortion in respect of the duties of his office, shall be liable to imprisonment for two years.*

**Section 310 provides:**

*A public officer is guilty of extortion who under cover of his office demands or **obtains** from any person whether for public purposes or for himself or any other person, any money or valuable consideration which he knows that he is not lawfully authorized to demand or obtain.*

Definition of public officer

[27] Public officer is defined in **section 299** of the **Criminal Code** as follows:

299(1) "Public Officer" means any person holding any of the following offices or performing the duties thereof as a deputy or otherwise namely :-

(a) Any civil office, including the office of Governor-General of Belize, the power of appointing a person to which or of removing a person from which is vested in Her Majesty or in the Governor General of Belize, or in any public commission or board.

.....

(c ) any civil office, including any commissionerships, the power of appointing to which or of removing from which is vested in any person or persons holding public office of any kind included in either paragraph (a) and (b);



299 (3) "Civil Office" means any public office other than an office in the Naval, Military or Air Force Service of Her Majesty.

The Constitutional provisions

[28] Sections 107 and 110 of the Constitution provides:

107. (1) *This section applies to the offices of Financial Secretary ...head of a department of Government, **Commissioner of Police**, ..any other office designated by the Governor General, acting in accordance with the advice of the Prime Minister given after consultation with the Public Services Commission.*

(2) ***The power to appoint persons** to hold or to act in offices to which this section applies (including the power to transfer or to confirm appointments) and, subject to the provisions of section 111 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office **shall vest in the Governor General, acting in accordance with the advice of the Prime Minister.***

.....

110. (1) ***Power to appoint persons or to hold or act in any office in the Police Department** ... below the rank of Inspector and to exercise disciplinary control over persons holding or*

*acting in such offices and to remove such persons from office shall vest in the Commissioner of Police.*

(emphasis added).

[29] The trial Judge in giving his directions to the jury did not refer to sections 107 and 110 of the Constitution in stating that police officers are public officers. However, this court was of the opinion that the learned trial judge was not wrong to say that police officers are public officers. Sections 284 and 310 of the **Criminal Code** under which the appellant was indicted speaks of public officer. The offence of extortion is stated in section 284 and section 310 explains extortion.

[30] Public officer is defined in section 299 of the **Criminal Code**. Section 299 (1) (a) includes civil offices such as the Governor General and those persons appointed by him. Section 299(1) (c) includes persons who are appointed by persons mentioned in 299(1) (a). For example, the Governor General is vested with the power to appoint the Commissioner of Police. The Commissioner of Police is vested with the power to appoint police officers. Where does that power come from? The power vested in the Governor General and the other persons appointed by him to make these appointments are stated in the Constitution. The relevant sections of the Belize Constitution are sections 107 and 110.

[31] The definition of civil office as shown by section 299(3) means any public office other than the Naval, Military or Air Force Service. As can be seen by this definition, the Belize Police Department was not excluded. However, the Constitutional provisions are of some importance as will be shown below in making a determination as to whether police officers are included in the definition of public officers.

[32] Section 107 (1) applies to several offices, including that of the Commissioner of Police and section 107(2) speaks of the power of the Governor General to appoint those persons holding such offices mentioned in subsection (1).

[33] As for the appointment of the other officers of the Police Department, the Commissioner of Police is vested with the power to appoint such persons pursuant to section 110 (1).

[34] The definition of a public officer under **section 299(1) (a)** includes any person who is appointed by the Governor General under 107 of the Belize Constitution and this includes the Commissioner of Police.

[35] **Section 299 (1) (c)** includes all those persons appointed by persons who were appointed under (1) (a). The Commissioner of Police is included under (1) (a) and he appoints police officers pursuant to the powers vested in him under 110.

[36] Accordingly, the Learned Director is correct in her submissions that a constable of police falls within the definition of public officer as defined in section 299 of the Criminal Code. The court was therefore, of the opinion that these grounds are without any merit.

**Should there be an element of oppression in the taking for the offence of extortion?**

[37] Learned Senior Counsel, Mr. Musa further submitted under this ground that for the offence of extortion to be committed pursuant to **section 310**, there must be an element of oppression in the taking. He relied on **Earl Jowitt's Dictionary of English Law** where extortion is defined as "*any oppression under colour of right, as the demanding of more than a legal fee by colour of office. The misdemeanor committed by a public officer who under colour of his office wrongfully takes from any person any money or valuable thing.*" Learned senior counsel referred to **section 284** and **section 310** of the **Criminal Code** and submitted that the element of demand or some form of force or oppression must be present if the "obtaining" is to constitute extortion. Further, that in this case the evidence does not disclose any such element and the jury if properly directed, would have been constrained to find the appellant not guilty.

[38] The learned Director submitted that it is clear from sections 284 and 310 of the **Criminal Code** that the offence can be committed if the public officer demands or obtains, under the circumstances defined. Further, that the appellant was indicted for the obtaining of the sum of \$100.00 in the circumstances as presented and the act of obtaining does not import any form of oppression and none was therefore required to be proved by the prosecution.

[39] The particulars of the indictment state that the appellant, under cover of his office as constable of police in the Belize Police Department, **obtained** from Aytekin Kelat, for himself, the sum of \$100.00, which he knew was not lawfully authorized to obtain. The evidence as presented to the court by the prosecution is that the appellant obtained the \$100.00 from Mr. Kelat. This court is in agreement with the learned Director that the act of obtaining does not import any form of oppression. As shown by section 310

which explains the crime of extortion and section 309 which explains the crime of oppression, these are two distinct crimes. The court was of the opinion that it is clear from the definition of extortion under section 310 that the prosecution did not have to prove some form of force or oppression for the “obtaining” to constitute extortion.

## **Ground 6**

*The learned trial judge failed to give a full “good character” direction to the jury of the appellant.*

[40] Learned senior counsel, Mr. Musa submitted that under the circumstances of this case which hinged on whether the appellant or Mr. Kelat was telling the truth, it was incumbent on the learned trial judge to give the appellant the benefit of a full “good character” direction to the jury. Learned senior counsel submitted that the appellant had no criminal convictions and was entitled to such directions which should have related to both his credibility and lack of any propensity to commit crimes of the kind charged against him. He relied on the case of **Jagdeo Singh v The State [2005] 68 WIR 424.**

[41] Learned senior counsel submitted that the appellant’s entitlement to a good character direction was important since the crucial issue for the jury’s decision concerned the conversation and what actually transpired between the appellant and Mr. Kelat in front of the restaurant when in fact, he went there to meet a young lady. Learned senior counsel also contended that the undisputed evidence is that Mr. Kelat was using his connections with persons higher up in authority to persuade the appellant to give him a “break”.

[42] The learned Director submitted that the appellant did not give sworn evidence and so was not entitled to the credibility limb of the good character direction. Further, that the issue of good character has to be raised by the defence. She submitted that the appellant has not demonstrated in what way his good character was raised or, in what way the absence of a propensity direction would have affected the outcome of the case. She relied on the case of **Nigel Brown v The State [2012] UKPC 2**.

Whether the judge was under a duty to give a 'good character' direction

[43] There are two limbs to a good character direction as can be seen in the case of **Gilbert (Edmund) v R [2006] 68 WIR 323** which was cited by Learned Director, Mrs Vidal. Lord Woolf had this to say about good character direction at paragraphs 14 and 15 :

*..... We suggest that the starting point must be that it is the task of the judge to give, at least, such directions as are necessary to ensure that the defendant has a fair trial and the jury received the directions necessary to enable them to reach a just result.*

*Normally this will mean a direction should be given by the judge setting out the relevant principles. Lord Taylor of Gosforth CJ in R v Vye [1993] 1 WLR 471 at 479 stated:*

*(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements.*

*(2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given whether or not he has testified, or made pre-trial answers or statements.'*

[44] Learned senior counsel, Mr. Musa submitted that the appellant had no criminal convictions and was entitled to both limbs of the good character direction. However, the appellant's counsel at the trial did not ensure that the judge was aware that the appellant was relying on his good character. Lord Woolf, in **Gilbert** at paragraph 21, pointed out the following on the duty of counsel for the defence and the defendant himself . He said :

*It is still the general rule that it is up to defending counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character. If this rule is not adhered to, there is a danger that an unscrupulous defendant will be able to manufacture a ground of appeal based upon the failure of the judge to give the proper character direction. The fact that a defendant has no previous convictions recorded against him, does not mean that he inevitably is of good character. This is why it is good practice for the judge, where*

*there is any doubt as to the position, to raise the matter with counsel.*

[45] In this case, the appellant had not testified, but it can be inferred from his unsworn statement from the dock, that he had put his character in issue as he stated that others were telling him to give Mr. Kelat 'a break' and he did not do so. He decided to arrest Mr. Kelat. He said: ..... *I would like to say that whilst at the checkpoint, Mr. Jenkins took out his cell phone and gave it to me and told me that Mr. Henderson wanted to talk to me. I informed Mr. Jenkins that I was busy. Mr. Jenkins got annoyed and he called Mr. Henderson a second time and again he was handing over the phone to me and told me that Mr. Henderson wants to talk to me. I again told Mr. Jenkins that I was busy. And whilst Corporal Cawich asked me to give Mr. Kelat a break, in the presence of Mr. Kelat and Mr. Jenkins and myself, I responded, 'no man'. I still wah arrest this man.*

[46] Also, in cross-examination of Inspector Arzu for the Crown, though not elicited by counsel for the appellant, he stated that the appellant "was a good worker". As such, it was the opinion of this court, that the learned trial judge could have raised the issue of the appellant's good character with defence counsel.

*Was the appellant entitled to the "first limb" direction ?*

[47] It has clearly been shown that the appellant in this case did not give evidence, but made an unsworn statement. It may be doubted whether in these circumstances he was entitled to a credibility direction. In **Nigel Brown** the Board appears to have accepted the circumstances of the conclusions of



the Court of Appeal of Trinidad and Tobago that, because the appellant in that case had given an unsworn statement, he was not entitled to such a direction. But, because this aspect of the matter was not fully argued before us, we prefer to say no more than was said by the Board in **Nyron Smith v R [2008] UKPC 34**, para 30, which is that, in these circumstances, “*the credibility limb of the direction would have been of lesser consequence.*” See also the following cases on this point:

In the case of **Gerald Muirhead v R [2008] UKPC 40**, Lord Hoffmann in the majority, at para 26 said:

*..... counsel did not call evidence of the appellant's good character. At the first trial, Mr Frater called evidence that the appellant had no convictions. There was other evidence of good character. But none was called at the second trial and the judge therefore did not give the standard directions on the relevance of good character to credibility and propensity. As the appellant did not give evidence on oath, the value of the former direction may be doubtful but he would have been entitled to the latter.*

In the case of **Peter Stewart v R [2011] UKPC 11**, in which Lord Brown at para 15 said:

*The one further general point that is perhaps worth making on this appeal is that the credibility limb of the direction is likely to be altogether less helpful to the*

*defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed chosen simply to rely on pre-trial statements) than when he has given sworn evidence.”*

*Was the appellant entitled to the ‘second limb’ direction?*

[48] As shown above, it can be inferred that the appellant had put his character in issue in his unsworn statement. In the case of **R v Vye; R v Wise; R v Stephenson** [1993] 3 All ER 241 at page 247, Lord Taylor of Gosforth CJ said that “*We see no logical ground for distinguishing in regard to a ‘second limb’ direction between cases where the defendant has given evidence and cases where he has not.*” As such, it is the opinion of this court, that the propensity limb direction would have been applicable in this case.

Whether the lack of propensity direction has affected the fairness of the trial?

[49] There is no explanation as to why defence counsel at the trial did not raise the issue of the appellant’s good character. In **Nigel Brown**, the Board at paragraph 32 of its judgment said that in such circumstances, it is necessary to examine whether the lack of propensity direction has affected the fairness of the trial and the safety of the conviction of the appellant on the basis that such direction should have been given. The Board further stated:

*It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction – Jagdeo Singh’s case (2006) 1 WLR 146 para 25 and Bhola v The State (2006) UKPC 9,*

*paras 14-17. As Lord Bingham of Cornhill said in Jagdeo Singh's case, "Much may turn on the nature of and issues in a case, and on the other available evidence"*

[50] In the case at hand, the appellant's entitlement to a good character direction was important since the crucial issue for the jury's decision concerned the conversation between the appellant and Mr. Kelat in front of the Celebrity restaurant. It will be necessary therefore, on the authority of **Nigel Brown**, for this court to examine the strength of the evidence against the appellant and the nature of the issues in the trial, as well as, an assessment of the significance of a good character direction.

[51] Mr. Kelat testified that the appellant went to the Celebrity Restaurant and he received the summons and the insurance sticker from the appellant and he gave him \$100.00. Mr. Kelat's evidence was not shaken under cross-examination. Further, the Assistant Commissioner of Police, Mr. David Henderson testified that he went to the Celebrity Restaurant where he saw the appellant coming out of the yard. The appellant had his right hand closed and he asked him to open his hand. Upon doing so, he saw it was a \$100.00 note with serial number AD 843131 which he took from him.

[52] Further, the appellant in his unsworn statement gave no explanation as to how Mr. Kelat got the insurance sticker from him. In his dock statement he said that, *I would like to say that I had kept the copy of the summons and insurance sticker in my knapsack so as to hand it in to Sgt. Lino who was the duty NCO at the time, senior duty NCO.* In his unsworn statement, the appellant gave an explanation as to how Mr. Kelat got the summons from him but, he gave no explanation as to how Mr. Kelat got the insurance sticker

from him. The jury clearly accepted the evidence of Mr. Kelat and rejected the unsworn statement given by the appellant. As such, the court was of the opinion, that if the jury had received a 'propensity limb' good character direction, they would have nevertheless, come to the same conclusion. The lack of the propensity direction did not affect the fairness of the trial as it was wholly outweighed by the evidence of the witnesses for the prosecution. Accordingly, the court was of the opinion that there was no merit in this ground.

[53] It is for these reasons that this appeal was disposed of in the manner set out at paragraph 1 of this judgment.

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MORRISON JA

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AWICH JA

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HAFIZ-BERTRAM JA