



**IN THE SUPREME COURT  
THE TURKS AND CAICOS ISLANDS**

**CR 9 OF 2023**

**REX**

**v**

**CEDRIC SIMMS**

**Before: The Honourable Mr. Justice Davidson Kelvin Baptiste (Ag)**

**Appearances: Mrs. Sophia Sandy - Smith, Public Prosecutor for the Crown  
Mrs. Lara Maroof for the Defendant**

**Heard: 21<sup>st</sup> December 2023**

**Delivered: 9<sup>th</sup> January 2024**



**JUDGMENT**

1. **Baptiste J:** This is a judge alone trial in which the defendant is charged with the offence of setting fire to a dwelling house with persons therein, contrary to section 4 of the Malicious Injuries to Property Ordinance Chapter 3:11. The particulars are that on the 13<sup>th</sup> November 2022 at West Road, Grand Turk, he unlawfully and maliciously damaged by fire a dwelling house with Christine Fils-Amie and Guilene Fils-Amie Simms, the occupiers of the house being therein.

2. The case against the defendant is based essentially on circumstantial evidence; that is, pieces of evidence relating to various circumstances, none of which on their own directly proves his guilt, but which the prosecution say, when taken together, leaves no doubt that he is guilty. It is necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference: **Teper v R [1952] UKPC 15** at p 3, per Lord Normand.
3. In a criminal trial, the burden of proving the guilt of the defendant rests on the prosecution. The defendant is under no obligation to prove that he is not guilty or to explain the evidence offered by the prosecution. Our system of law requires that the defendant is presumed innocent. The prosecution can only succeed in proving his guilt by making me sure of it; nothing less than that will do. If after I have considered all the evidence, I am sure the defendant is guilty, I must find him guilty. If I am not sure, my verdict must be not guilty. In other words, I must be sure of the guilt of the defendant and must not return a verdict against him unless I am sure and the burden of making me sure rests on the prosecution and not on the defendant.
4. In this trial, I am the sole judge of the facts. Facts are the things I choose to believe from the evidence. It is for me to decide what the facts are and I must do so solely on the evidence presented in this court room. From the facts that I find, I may draw inferences with respect to other facts and I can draw upon these inferences in deciding whether the accused is guilty or not. If there are two or more inferences which can draw in relation to the facts, I must draw the inference which more favours the accused. Although I am entitled to draw inferences, that is to come to common sense conclusions based on the

evidence that I accept, I must not engage in speculation or guess work about matters that have not been covered by the evidence.

5. In considering the evidence of a witness, I am not bound to accept everything the witness says. I may accept some and reject the rest, or I may reject some or all. It is my decision to decide what evidence I believe, which witness is reliable and credible and how much weight or importance to give to the evidence of each witness. In considering the evidence of a witness, I have to consider whether the witness has any particular reason for being favourable towards one side or another. I must judge this case fairly and impartially, without sympathy for or prejudice against the defendant, the Crown, the witnesses or anyone else involved in the proceedings.
6. The defendant has chosen not to give evidence; it is a right given to him by law. I must not draw any adverse inference against him. I must not assume that he is guilty because he chooses not to give evidence. The defendant does not have anything to prove.
7. There is no direct evidence that the accused set fire to the dwelling house. The Crown's case is premised upon circumstantial evidence, and relies heavily on the evidence of Christine Fils-Aime and Guilene Fils-Aime Simms. Guilene is the estranged wife of the defendant and Christine is her sister. The Crown also relies on a recorded telephone conversation between the defendant and his wife on 29<sup>th</sup> January 2023, which was transcribed from Haitian creole into English; portions of which were admitted into evidence.

8. Christine gave evidence describing the house as half concrete and half wood, a single - story house. The part that she lives in, along with her son and sister Guilene, is plywood. Christine stated that on 12<sup>th</sup> November 2022 at about 9 a.m., the defendant came to the home and asked her for Guilene. She told him Guilene went to work. The defendant told her to tell Guilene when she comes that he will pick her up to go home with him. She told the defendant that Guilene is going to be tired because she has three jobs.
9. At about 8 p.m., she went to pick up Guilene, because the defendant always has problems with Guilene. While going to pick up Guilene, she met the defendant. They were close, nothing barred her view of him. A light pole was right in the corner. The three of them went home. That is the defendant, Christine and Guilene. Guilene went inside to put her bag. The defendant was outside the fence. She (Christine) went inside also. Guilene came outside. The defendant was sitting under a little tree. He sat outside the house for a long time. Guilene came out. The defendant told her he had something to tell her sister, go inside. Her sister came out for a while and went back in.
10. Christine also gave evidence that the defendant demanded from Guilene the \$100.00 that he had given her for the children. He was vex. On the occasion that the defendant was outside, he sat outside until 11 p.m. on November 12<sup>th</sup> 2022, after which he left. During that night, the defendant said “you took my wife and put in your house. I am going to drink. I will get gas and come burn your house down.” Christine stated that she was outside at the time as her son went to practice and had not yet arrived home. Further, she was outside as the defendant had stated that he was returning. Christine said she told the defendant don’t come and burn down the people house, is sleep they let her sleep in it. She also told him, when he is coming call her, so that she knows, so that she can put her

child out. No one else was in the yard when the defendant spoke to her. She was outside still looking out for her child.

11. Christine also stated that she was speaking to two guys and was proceeding to her house where she saw the defendant behind a house hiding not too far away. There was a light outside the house he was hiding. At the time, there were two bulbs on the outside. At the time she saw the defendant, he was in the yard and no one else was there beside him. She saw his whole body. She had already reached him. Nothing was obstructing her view of the defendant when she saw him. That was not the first time she saw him. When she saw him she called the police. The police came. The defendant left. She was on the road side, talking to two guys while awaiting her son. Her son came. She went inside and closed the door.
12. Christine stated that she was looking out through the window and saw the defendant coming and told her sister to call the police. The defendant bent down and picked up a rock and threw it on the roof of the house. It was around midnight. She was tired and lay down and started to sleep. She went to bed about after 1 a.m. She heard her sister say: "Christine, fire, fire!". She took a hammer and started hitting the door, trying to open it, and screaming out. She, her son and Guilene were inside the house at the time. She saw the fire after she opened the door. The clothes, everything was on fire. She saw the fire at the corner of the house. The neighbours assisted in putting out the fire.
13. In cross-examination, Christine said that Guilene was living with her at the time and was not living with the defendant. She never knew or found out that the defendant was having

an affair with a co-worker. There were two light bulbs when she saw the defendant crouching behind the house. She knew him since 2006. It is the defendant that she saw.

14. Guilene gave evidence that she left the defendant's home on 11<sup>th</sup> July 2022 because of physical altercation, and was living at Christine's house. On 12<sup>th</sup> November 2022 she was working at Sunny Food, West Road. The defendant came there. She and Cristine were going to Christine's house. The defendant came. It was his birthday. Guilene stated that the defendant requested to have sexual intercourse with her. She refused. He wanted her to leave her sister's house. Guilene stated that the defendant then requested her to have intercourse at her sister's house but she rejected the request. The defendant then said, he gave her 100 dollars give it back. He will burn down the house and he will kill her. He will make her lose her job. He is going to buy gas. He can stay all night he has nowhere to go. He will come back, no one will see him.
15. At 2 a.m. on 13<sup>th</sup> November 2022 she looked out and saw fire and called out to Christine, "fire, fire". It came from outside. She pushed the door opened and ran. People came and helped to put out the fire. She never knew the accused had any woman in Grand Turk.
16. PC Belzi testified that the police were called on three occasions to the property but on each occasion the accused was not found. The witness Paulis Dossous also testified. He stated that on 12<sup>th</sup> November 2022 there was a power outage in West Road. He went to bed, could not remember the specific time, it was dark. He did not hear rocks being thrown on the house. He was asleep. He was awakened by a knocking on his door and shout of "fire, fire". He lived in the same house but in a different place. Inside where he was had

no fire. His electricity came from a pole that that goes straight to his house. There was fire from a wire. He did not hear the sound of rocks; he was asleep.

17. Sergeant Adam, the investigating officer, and Chaka Skippings, the Scenes of Crime Officer, gave evidence. The evidence confirms that there was no investigation into the cause of the fire. The fire service did not attend the scene at any time. Although the fire service was called, it did not attend as another fire was being attended to at the time. The extent of the scenes of crime investigation was to take photographs, several hours after the fire.
18. Mrs. Maroof, in her closing submissions, recognized that the Crown's case was entirely circumstantial and heavily relied on the evidence of Guilene and Christine. Mrs. Maroof invited the court to assess their credibility to determine whether their evidence should be accepted. Learned counsel contended that Christine was not an independent witness and it was clear from the evidence that marital strife existed between the defendant and his wife Guilene. This led to Guilene moving out of the matrimonial home and moving in with her sister, Christine. Mrs. Maroof noted the Crown's reliance on this as part of the defendant's motive for allegedly setting fire to the dwelling house. Mrs. Maroof, however, asked the court to take into account the background of marital strife in assessing the wife's credibility. Mrs. Maroof further argued that the fact that the strained relationship between the defendant and his wife and that on her evidence, he had put her out of the matrimonial home, could likewise provide a motive for her to make up a false account against her husband.

19. Mrs. Maroof noted that there were no other witnesses supporting the accounts of Christine and Guilene. The witness Dossou, who gave evidence for the Crown, lived within the same property and did not hear rocks falling on the roof of the house. Further, although officer Belzi's evidence confirmed that the police were called on three occasions to the property, the last being in response to the fire, on each occasion, the police did not see the defendant at the property or in its vicinity.
20. In addressing the significance of the evidence of Christine and Guilene, Mrs. Maroof argued that if the court deemed their evidence credible and reliable, it is of limited evidential value in relation to the charge. In advancing that position, learned counsel stated that the evidence suggested that the defendant was angry with his wife on the 12<sup>th</sup> of November and made threats to go and buy gas and burn down the house. While accepting that if true, this establishes grounds for suspicion, Mrs. Maroof submitted that it does not, without more, establish that it was the defendant who set the property on fire on the 13<sup>th</sup> November 2022. In determining whether this would be a fair and reasonable conclusion to arrive at, Mrs. Maroof invited the court to consider whether there is another reasonable conclusion consistent with innocence. Here, that would include: whether the fire could have been caused accidentally; whether the fire could have been caused by an electric fault; if the fire were caused intentionally, could another person have caused it?
21. Mrs. Maroof submitted that the failure to conduct any investigation into the fire is significant and fundamentally affects the fairness of the trial and what inferences can be drawn from the evidence of Christine and Guilene. Mrs. Maroof advanced the position that the failure to investigate the cause of the fire meant that (i) there is no evidence as to whether it was caused accidentally or intentionally; and (ii) there is no evidence that the



fire was started by the use of gas (which could have been specifically addressed by the fire investigation). Flowing from that, Mrs. Maroof argued that the Crown cannot properly ask the Court to find that it is sure that the defendant set fire to the property maliciously, when there is no evidence that the fire was started intentionally, let alone, maliciously.

22. With respect to assessing what weight the court should give to the telephone transcript exhibited through Dalene Eugene, Mrs. Maroof contended that the court should take into account there was no evidence from PC Doughty as to where the phone call came from. Further, Ms. Eugene's evidence is that the only reason that she marked the document as being a conversation between "Cedric Simms" and "Guilene Simms" is because that is what she was told by the Investigating Officer. This would be hearsay evidence. The only evidence that the person being recorded on the phone was Cedric Simms is the evidence of Mrs. Guilene Simms.

23. Further and in any event, Mrs. Maroof argued that even if the court accepted the transcript as a reliable account of a conversation between the defendant and his wife, the court at this stage has to determine whether it can be sure that the comments by the defendant amounts to an admission or confession to setting fire to the property on 13<sup>th</sup> November 2022. Mrs. Maroof urged upon the court to be cognizant that this conversation is alleged to have taken place on the 29<sup>th</sup> January 2023 – about 10 weeks later. There is nothing in the comments in the person alleged to be Cedric Simms which established with the certainty required, that he did set fire to the property in question on 13<sup>th</sup> November 2022. For these reasons Mrs. Maroof posited that the court should not to place any significant weight on this evidence. In conclusion, Mrs. Maroof submitted that when the evidence is

properly assessed, it cannot safely establish the guilt of the defendant and the verdict should be not guilty.

24. Mrs. Sandy-Smith in her closing address reasoned that the Crown's case is premised on circumstantial evidence from which the court is invited to draw an adverse inference in support of the defendant's guilt. Mrs. Smith stated that the issues to be determined are:

- (i) whether the defendant unlawfully set fire to the dwelling house;
- (ii) whether the accused intended to or recklessly set fire to the dwelling house and
- (iii) whether, when the house was set on fire, there were persons therein.

25. In support of the case against the accused in respect of the first issue of whether the accused unlawfully set fire to the dwelling house, Mrs. Sandy-Smith contended that the defendant became infuriated at his wife's rejection of his invitation for sexual intercourse on his birthday. His motive was to frustrate anyone or anything that kept him away from his wife. In support thereof, Mrs. Sandy-Smith pointed to Christine's testimony as well as the defendant's dialogue with Guilene, on 29<sup>th</sup> January 2023 (at page 55) as follows:

"you making me mad, I will let some time pass, because I know they call police later you won't like. See even your job you're going to lose. If I see someone give you a ride I'll burn that fucking car. I can't take this even at your house. I will sleep in the bushes to see what happening. To see who take you who helping you."

26. Mrs. Sandy-Smith argued that on the material date, it was Christine who kept the defendant's wife from him. The fact that Christine accommodated her, infuriated the

defendant. The defendant was seen several times during the 12<sup>th</sup> November 2022 – 13<sup>th</sup> November 2022 at the home. The defendant was engaged in an argument with Guilene on the night of 12<sup>th</sup> November 2022; that same night he threatened to burn down the house. The defendant was seen throwing rocks on the house the night of 12<sup>th</sup> November 2022. The threat to burn the house was made at the house and in its vicinity on 12<sup>th</sup> November 2022. Mrs. Simms indicated that she placed her items outside as there was no space on the inside to store them. Notably, the third image in the bundle of petrographs, CS1, depicting the clothing, shows scorched marks on some of the clothing just at the back of the burnt fence. In that regard, Mrs. Sandy-Smith asked the court to draw the inference that the fire could not have been started inside the house. There are no electric wires seen in the area of the clothing. There are no scorch marks on any other areas of the house.

27. The Crown also relied on page 60 of the edited transcript as follows:

Cedric Simms: Bonnes aint going lie on me man. I know Bones my good friend. I know my good friends. I know who love me. You I thought you did love me I can't say anymore the way you try to put me in prison. Guilene you never supposed to do that, you suppose to sit together talk. I see you can talk good with you can talk good with other people.

Guilene Fils - Amie Simms: Listen look at all you do to me. You put me out, you want me go back you come burn the house so just like that you want me to move. Come do bad things to me make me move. Go back to you, just like that.

Cedric Simms: Guilene that to show you how much I need you."

Mrs. Sandy - Smith invited the court to draw the inference that the above response of the defendant in the context in which it was stated, was in fact an admission to having set the house on fire.

28. Mrs. Sandy-Smith further posited that the conditions were ripe for the defendant to have spoken to his wife concerning the fire, as some time had passed between the commission of the offence and the dialogue with his wife on 29<sup>th</sup> January 2023. It was for this reason the accused spoke freely to his wife concerning the fire which occurred.

29. Mrs. Sandy-Smith submitted that the evidence, when woven together, leads to an inference of guilt beyond reasonable doubt. The court should find that the accused unlawfully set fire to the dwelling house on the 13<sup>th</sup> November 2022.

30. Concerning the absence of a fire report, Mrs. Sandy-Smith advanced the position that a determination as to the cause of a fire was not detrimental to a finding of guilt, and cited in support thereof, **Grace v the State, Cr. App No. 10 of 2002 (Trinidad and Tobago)**.

31. Further, the Crown invited the court to infer from an examination of the photographs that the fire occurred on the outside of the house. Mrs. Sandy-Smith referred to the first photograph in the bundle collectively tendered as CS1, and stated that it depicted a charred area leading a little above the lower zinc roof, the fire extended partially to the fence of the house. Notably, there were no other areas of the house with black scorch marks. At the front of the house, the charred remains of a mattress is seen. Mrs. Smith pointed out that in addition, the photographs depicted poles but no cords or wires in the area where they are positioned; neither are there black scorch marks in the upper area of the house,

only to the face of the house and the fence. The witnesses had to exit the house to extinguish the fire. The evidence of Guilene is that there were no candles in the area inside the house where the scorch marks are located.

32. Regarding the accused's intention, Mrs. Sandy- Smith submitted that the accused's threats during the late hours of the 12<sup>th</sup> November 2022 to buy gas and burn down the house indicated an intention to set fire to the dwelling house. Further, the words the accused uttered sometime before the house was on fire, showed his state of his mind. In light of the above, Mrs. Sandy-Smith submitted that the defendant intended to set fire to the dwelling house.

33. With respect to the issue of whether there were persons in the house when it was on fire, Mrs. Sandy-Smith relied on the evidence of Christine and Guilene that they were inside the house when the fire was set.

34. In conclusion, Mrs. Sandy-Smith submitted that the defendant had a motive to burn the house; he threatened to burn it; he was in the vicinity of the house on more than one occasion on the 12<sup>th</sup> November to the 13<sup>th</sup> November 2022. These facts taken together and married to an admission by the defendant, when considered as a whole, lead to the conclusion that the defendant committed the offence. These facts are inconsistent with the hypothesis of innocence.

35. Having considered the evidence and the submissions of both counsel, I now consider the offence for which the defendant stands charged. Section 4 of the Malicious Injuries to

Property Ordinance states that: Whoever shall unlawfully and maliciously set fire to any dwelling house, any person being therein, commits an offence.

36. The Prosecution must make me feel sure that the accused intentionally set fire to the dwelling house; he did so unlawfully and maliciously; that is without lawful justification or excuse; and that persons were in the dwelling house at the time the house was set afire.
37. I have no difficulty on the evidence in finding that the house that was set afire on 13<sup>th</sup> November 2022 was a dwelling house and that Guilene and her son as well as Christine resided therein and were in the house at the time of the fire. This is clear from the evidence of Christine and Guilene, which I accept.
38. The critical issue in this case is whether the defendant set fire to the dwelling house. There is no direct evidence that he did so. The prosecution's case is based essentially on circumstantial evidence. The prosecution must make me feel sure that the fire was set by the defendant; and that it was set unlawfully and maliciously. Unlawfully means without lawful justification or excuse. Maliciously requires either an actual intention to do the particular kind of harm that was in fact done or recklessness as to whether such harm should occur or not. The prosecution must prove that the accused had the necessary intention at the time of the alleged offence. In considering whether the prosecution has done so, I should draw such conclusions as I think right from his conduct and or words before and/or at the time of and or after the alleged offence. A person intends a certain result if he acts to bring it about.

39. I now examine the law pertaining to circumstantial evidence. A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence. Circumstantial evidence “works by cumulatively, in geometrical progression, eliminating other possibilities”. (**DPP v Kilbourne [1973] 1 All ER 440, per Lord Simon at p 462**). The prosecution seeks to prove certain events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances include opportunity, motive, proximity to the critical events, words uttered by the defendant that he will burn the house, and communications between the defendant and his wife. The subsequent conduct of the defendant may also furnish evidence of guilt. The prosecution is relying on strands of evidence relating to different circumstances no one of which on their own directly proves that the defendant is guilty, but which, the prosecution says, when taken together and with other evidence prove no doubt that he is guilty.

40. Where, as here, the case rests substantially on circumstantial evidence, the authorities are clear that a verdict of guilt cannot be returned unless the prosecution has excluded all reasonable hypotheses consistent with innocence. It is not incumbent on the defence either to establish that some inference other than guilt should be drawn from the evidence or to prove particular facts tending to support such an inference. It is sufficient that an accused’s hypothesis consistent with innocence can be derived reasonably from the evidence in the Crown’s case. In considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence. The evidence must be considered as a whole and not by a piecemeal approach to each particular circumstance.

41. I have to examine all the strands of circumstantial evidence the prosecution relies on and decide which reasonable conclusions can fairly and reasonably draw from the evidence taking the pieces of evidence together. I must weigh all the evidence and decide whether the prosecution has made me sure of the guilt of the defendant. The inference that guilt has been proved beyond reasonable doubt will not be open if the prosecution has failed to exclude an inference consistent with innocence that was reasonably open. In order to draw the inference of guilt, I must be able to exclude all realistic possibilities consistent with the defendant's innocence: **R v Massih [2015] EWCA Crim 477** at paragraph 3.

42. In **De Gruchy v R [2002] HCA 33**, the court stated at paragraph 46:

“It is of the nature of many crimes that their perpetrators perform their deeds in secret. They do so in the hope of avoiding observation, detection and subsequent prosecution and conviction. In such cases, a prosecutor must necessarily rely upon circumstantial evidence to prove the case against the accused. Circumstantial evidence “can, and often does, clearly prove the commission of a criminal offence”.

At paragraph 48 of **De Gruchy** the court stated that “There is nothing in the law that renders proof by circumstantial evidence unacceptable or suspect of itself – “[i]t is no derogation of evidence to say that it is circumstantial”.

43. In support of its circumstantial evidence case, the prosecution relies on several factors, firstly, motive. A motive can be proved as part of the circumstantial case which the prosecution seeks to build against the defendant.



44. In **De Gruchy**, Kirby J explained at paragraphs 51 and 53, that motive is not an element of the offence charged and does not have to be proved by the prosecution. Motive must not be confused with intention. It is not necessary as a matter of law for the prosecution to prove that an accused had a particular motive, still less one to commit the offence charged. The rule is based upon sound legal analysis of the actual ingredients of the offence and is also grounded in high practical considerations. As the United States Supreme Court explained in **Pointer v United States 151 US 396 (1894)** at p 413:

“The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it.”

45. The prosecution says that the defendant had a motive for committing the offence charged. Evidence that tends to establish motive may rationally affect the assessment of the probability of the existence of one or more of the elements of the offence. If established, motive may support the prosecution’s case. As Gleeson CJ explained in **HML v The Queen [2008] HCA 16** at paragraph 5:

“The prosecution may set out to establish that an accused had a motive to commit an offence charged. Motive may rationally affect the assessment of the probability of the existence of one or more of the elements of an offence. Evidence that tends to establish motive, therefore, may rationally affect such assessment. If so, it is relevant. When the prosecution sets out to establish motive, that is often a step in the prosecution case that is not indispensable. If it

is established, motive may support (sometimes powerfully) the prosecution case, but juries are often told that the failure to establish motive does not mean that the case must fail. The legal necessity is to establish beyond reasonable doubt, the elements of the offence. What that entails as a matter of fact may depend upon the circumstances of the particular case.”

46. The prosecution’s circumstantial case depends heavily on the evidence of Guilene and Christine as to what the defendant did and said, from which a motive can be established. Mrs. Maroof, however, asked the court to critically assess their testimony to see whether it should be accepted on the bases that Christine was not an independent witness; and the strained marital relations between the defendant and Guilene provided a motive for her to make false accusations against him.

47. This brings me to factors which are material in assessing the testimony of a witness. In making the assessment, matters to be taken into account include: Did the witness have a good opportunity to observe the event or events described? How long was the witness watching or listening? Did anything interfere with the witness ability to observe? Was there anything else happening at the same time which would have distracted the witness? Did the witness have a good memory? Was there something specific that helped the witness to remember the details of the event that he or she described, or was the event relatively unimportant at the time, so that the witness might easily have forgotten or been mistaken about some of the details? Did the witness give evidence fairly or was it tainted by self-interest or bias? Does the evidence disclose any reason why the witness might tend to favor the Crown? I will take these matters into account in assessing the evidence of Guilene and Chistine.

48. With respect to motive as a strand of the prosecution's circumstantial case, Guilene's evidence is that she rejected the defendant's request for sexual intercourse on the night of the 12<sup>th</sup> November 2022, his birthday. Page 49 of the transcript of the recorded telephone conversation of 29<sup>th</sup> January 2023, between the defendant and his wife is also instructive. The defendant said:

To understand what happen to me, you understand look like you leave me, almost seven months you leave me, you at other people house. I don't know what is happening with you. I am calling you don't answer. Guilene you hurt me, you put me in jail. I never cry like this in my life. I pay all your papers man. I ain't asking for all the monies back but I want half back. You can't say I do you wrong.

49. The defendant was clearly infuriated at his wife's rejection of his request for sexual intercourse. Further, he regarded Christine's accommodation of his wife at her home as an impediment which kept his wife away from him and he was prepared to take action by burning the house to bring an end to that situation. Thus, during the night of 12<sup>th</sup> November 2022, the defendant passed by the house and told Christine: "you took my wife and put in your house. I am going to drink. I will get gas and come burn your house down." The defendant wanted Guilene to leave Christine's house and was not happy that she was being accommodated by Christine. On the material date Christine kept him away from Guilene. In my judgment, the prosecution has clearly established motive. I note however, that that a motive will not, of itself, be sufficient to establish guilt.

50. In coming to my conclusion on motive, I am cognizant of Mrs. Maroof's invitation to be cautious with the evidence of Christine and Guilene. I do not find that Guilene had an ulterior motive in giving the evidence she gave. I found that both Guilene and Christine gave their evidence honestly. Their evidence was truthful, credible and reliable. It was not tainted by self-interest. The matters to which they testified were matters which were certainly significant, they were not everyday events, and it is improbable that they would be mistaken about them.

51. The second factor I consider in the circumstantial case, is the threats issued by the defendant. I accept the evidence and find as a fact that the defendant made threats to buy gas and burn the house the night of 12<sup>th</sup> November 2022. I agree with Mrs. Maroof that this does not without more establish that he was the one who set fire to the house. I am however of the view that it establishes more than grounds of suspicion. It is part of the circumstantial evidence relied on by the prosecution and has to be looked at cumulatively with the other evidence.

52. The defendant and Guilene were engaged in an argument the night of the 12<sup>th</sup> November outside the house. She had refused the defendant's request for them to have sexual intercourse. The defendant demanded that Guilene return the \$100.00 he had given her. He said to her that he will burn the house. He will kill her. He will make her lose her job. He can stay all night; he has nowhere to go. He will come back; no one will see him. During that same night, the defendant said: "you took my wife and put in your house. I am going to drink. I will get gas and come back and come burn your house down."

53. Did the defendant have the opportunity to burn the house? The defendant was seen several times during the night of the 12<sup>th</sup> November 2022 to 13<sup>th</sup> November 2022, at the house and in the vicinity of the house. The threat to burn the house was made at the house the night of the 12<sup>th</sup> November and in the vicinity of the house. The defendant sat outside the house for a long time. He was sitting under a little tree. He left and returned. Later that night, Christine saw him hiding behind a house not too far away. He was crouching. There was a light outside. When she saw the defendant, no one else was besides him. She saw his whole body. She had already reached him. Nothing was blocking her view of the defendant. There were two light bulbs on the outside, when she saw him crouching.

54. I remind myself of the need for caution in dealing with the evidence of identification. Even where a witness purports to recognize a known person, mistakes can be made and a convincing witness can be a mistaken witness. I have carefully considered the surrounding circumstances relating to Christine's sighting of the defendant. The defendant was a person she knew before, they were not far apart, the lighting conditions were adequate, there was no interference with her observation, nothing obstructed her view. I am of the view that Christine's identification of the defendant was reliable. She had a sufficient opportunity to make a reliable identification of the defendant, as the person she saw hiding behind a house not too far away.

55. Around midnight the night of the 12<sup>th</sup> November 2022, the defendant was seen throwing rocks on the roof. About 1 a.m. Christine lay down and started to sleep; she was awakened by Guilene shouting "fire, fire". In my judgment, the defendant undoubtedly had the opportunity to set fire to the house.

56. On 29<sup>th</sup> January, 2023, the defendant made a telephone conversation to Guilene which she recorded. It was later transcribed from Haitian creole into English by Ms. Eugene. The prosecution relies on various extracts of the transcripts in support of its case. With respect to admission, the prosecution relies on the following extract:

“Guilene Fils - Amie Simms: Listen look at all you do to me. You put me out, you want me go back you come burn the house so just like that you want me to move. Come do bad things to me make me move. Go back to you, just like that.

Cedric Simms: Guilene that to show you how much I need you.”

57. Was the response of the defendant to Guilene’s comment an admission of setting fire to the house, given the context in which it was made? I recognize Mrs. Maroof’s contention that it does not constitute an admission or confession and nothing in the defendant’s response establishes with certainty that he set fire to the house.

58. I accept the evidence of Guilene that she recorded the conversation between the defendant and herself and I regard the transcript as a reliable and accurate account of that conversation. I have no reason to conclude that its integrity was impaired in any way. Edited portions of the transcript were admitted into evidence. The critical question is whether the defendant’s response to what his wife said, constitutes an admission. This is a context sensitive determination. If I am not sure whether the defendant’s response amounted to an admission, I must ignore it.

59. Contextually, Guilene was essentially directly confronting the defendant with doing bad things to her and burning the house. This prompted his response: “this is to show how much I need you”. Guilene’s comment had nothing to do with “need”. The reasonable inference is that the defendant is saying that he did these things because he needed her. This is set against the background that the he was not happy that Guilene was at Christine’s home, was being accommodated there by Christine and he wanted Guilene back at his home.

60. I regard the defendant’s response as an admission against interest. It is evidence which supports the prosecution’s case. It is part of the prosecution’s circumstantial case against the defendant. The fact that the telephone conversation was made and recorded about 2 and ½ months after the fire does not detract from its probative value. An admission or confession can be made at any time. I do not accept Mrs. Maroof’s contention that it has minimum relevance as to what happened in November 2022, and that what the prosecution relies on as amounting to an admission, has nothing to do with the offence before the court.

61. The opinion of Gleeson CJ in **Tofilau v The Queen [2007] HCA 39**, is quite reflective of the present situation. Gleeson CJ explained at paragraph 5, that an admission may have been made to any manner of person, and in any kind of circumstance. It may have been made to the pressure of events or circumstance. It may have been made in circumstances where the issues of legal rights or consequences, or considerations of choice either to speak or remain silent, never entered the mind of the maker. “Admissions which may turn out to be very damaging, are often made in circumstances where the maker of the admission is unconcerned with legalities, and may not even realise the significance that

later will be attached to what is said.” “Interception and recording of telephone conversations often produces evidence of admissions tendered at a criminal trial, as well as circumstantial or direct evidence of criminal activity.”

62. Given the context in which the defendant responded to what Guilene said and the nature of the response, I regard his response as a general acknowledgement of his involvement in the offence; an admission against interest. It constitutes reliable proof, because of the probative value inherent in an admission against interest. As Dixon CJ said in **Sinclair v The King [1946] HCA 55; (1946) 73 CLR 316** at 334:

Confessions, like other admissions out of court, are received in evidence as narratives statements made trustworthy by the improbability of a party’s falsely stating what tends to expose him to penal or civil liability.

Any tribunal of fact is entitled to regard an acknowledgement of involvement in serious wrongdoing as powerful evidence against the person making the admission. See **ZT v R [2023] NSWCCA 241** (September 2023) paragraphs 259 and 260.

63. In my judgment, the prosecution has presented a powerful circumstantial case against the defendant. On the night of the 12<sup>th</sup> November 2022, he clearly stated that he would burn the house. The house was burnt in the early hours of the 13<sup>th</sup> November, 2022. He had a clear motive for so doing as well as the opportunity for so doing, coupled with an admission against interest. There is no doubt that he intended to set fire to the dwelling house at the time that it was set afire. That intention is drawn from his words and conduct before the fire was set. The defendant stated that he was going to buy gas and come back



and burn the house. He did return later that night (12<sup>th</sup> November 2022). He was seen throwing rocks on the house about midnight. The fire occurred around 1 a.m. the following morning.

64. Essentially, Mrs. Maroof posited that the circumstantial evidence relied on cannot satisfy the court to the extent that it can be sure of the defendant's guilt. The evidence does not exclude the hypotheses that the defendant did not have any involvement in the fire; the fire may have been caused by an electric fault; or by some other person. There was no evidence to refute these two other possibilities. These are two reasonable conclusions consistent with innocence. Dossous' evidence was that the power went out at his home. The wire was on fire. Further, Mrs. Maroof highlighted the fact that there was no investigation into the cause of the fire, thus, no evidence that the fire was started by gas. No evidence that it was started intentionally, let alone maliciously. Polius had not heard disturbance or rocks on the roof. Further the property was searched and there was no indication that the accused was on or near the property. Accordingly, it is not a fair and reasonable conclusion that the defendant set fire to the house.

65. I am satisfied that the evidence adduced by the prosecution excludes the hypotheses advanced by the defendant that the fire may have been started by some other person or caused by an electric fault. There is no evidence that the fire was set by any other person. I accept the evidence of Dossous that there was a power outage on West Road and he was unsure whether Fortis had taken the power. He said there was no fire where he was. He lived in the same house but in a different place. His electricity came from a pole that went straight to his house. I draw the inference that the fire started from outside the house. From the photographs tendered collectively as CS1, although there are poles, there are no

rods or wires where they are positioned. There are no black scorch marks to the upper area of the house, only to the face of the house and the fence. The evidence excludes the hypothesis that the fire was the result of an electric fault.

66. In my judgment, the defendant intentionally set fire to the dwelling house with persons therein and he had no legal justification or excuse for so doing. It was therefore set unlawfully. I do not find that there is another reasonable explanation or conclusion available on the facts which is inconsistent with the defendant's guilt. I draw the inference of the defendant's guilt from the combination of the circumstantial evidence. I find no co-existing circumstances which weaken or destroy the sure inference of guilt. The combination of circumstances satisfy me to the extent that I am sure of the defendant's guilt and it is the only reasonable conclusion on the facts that I have found. Having regard to the powerful circumstantial case against the defendant, the absence of scientific evidence as to the cause of fire, neither weakens nor is fatal to the prosecution's case.

67. I accordingly find the defendant guilty as charged: setting fire to a dwelling house with persons therein.

**The Hon. Mr. Justice Davidson Kelvin Baptiste**

**Judge (Ag) of The Supreme Court.**

