

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

23.6.2000
Drugg (Cocaine)

2/5.

Neil

David Stewart

Vs.

Regina

Ms, Cheryl Richards for the Crown
Mrs. Samuel-Brown for the Appellant
Instructed by Mr. Peter Polack



RULING

This is an appeal against conviction and sentence in the Summary Court on a charge of Being Concerned with the Importation of Cocaine.

In order to have a clear understanding of the nature of this appeal, and the numerous grounds filed and argued therein, it is necessary at this point for me to provide a succinct summary of the facts as adduced at the trial.

On Wednesday 26 October 1997, a Customs Officer while profiling passengers from Kingston, Jamaica, and acting on information he had received, approached a passenger who had given her name as Jean Kelly and requested a search. The woman was taken to the search room and while her luggage was being searched she denied swallowing any drugs. She was asked to go the hospital for a x-ray, and while still being questioned, she admitted swallowing 50 pellets of cocaine,

and that they were for one Kevon Black. She also admitted that her real name was Carol Hamilton. Black, was also questioned by an Officer.

Hamilton was then arrested, taken to the George Town Hospital where, over a two-day period, she passed a total of 56 pellets. Customs Officer Bush who with her there for part of the time, saw 21 of the pellets expelled.

Black was transported to the Central Police Station where he later admitted to Senior Customs Officer Jeff Jackson that he had full knowledge of Hamilton swallowing the drugs to bring to Cayman, and that his role was to oversee the transaction of the drugs. Black also agreed to assist the officers in apprehending the person to whom the drugs were coming. He named this person as the Appellant David Stewart, (alias Prento) who was a local businessman. Black was charged with Importation of Cocaine, and later allowed to make phone calls to Prento, two of which were taped by the police.

Later that day the police went to the Appellant's store and arrested him on suspicion of Importing Cocaine. A search of his premises revealed nothing.

On Thursday 30th October, after passing the pellets, Hamilton was discharged and taken to the Central Police Station where the 56 pellets were heat-sealed, labelled and weighed in her presence.. They were later sent to the laboratory in Miami for

analysis.

These are the facts leading up to the trial of the Appellant in the Summary Court during which Black, who had pleaded guilty, testified for the Crown. In the course of the hearing both tapes of the telephone conversations and the transcripts thereof were entered in evidence. The Appellant was convicted on a charge of Being Concerned with the Importation of Cocaine after a trial that lasted some ten days over a period of ten months.

Several grounds have been laid before this Court and argued in support of this appeal. Arguments against sentence have been reserved. At the commencement of the hearing of this appeal, Counsel for and on behalf of the Appellant applied for, and was granted leave to adduce and argue Further Supplemental Grounds. These are in addition to the four original grounds filed on November 25, 1999, and nine Supplemental Grounds filed May 19, 2000. I propose to deal with each ground in the order in which they were argued.

I will now deal with the first ground and the number of sub-grounds contained therein. It is based on the admission in evidence of the drug and the analyst's certificate. This ground is as follows

That the Learned Magistrate erred in admitting the certificate of analysis (Exhibit 9) and Exhibit 5 into evidence in circumstances where there were substantial and material differences between:-

- (a) the package and weight analyzed by the qualified chemist.
the package label and weight of Exhibit 5 submitted by
H.M. Customs to the Learned Magistrate.

(b) the actual weight of exhibit 5.

- (c) the number of packages actually observed by Customs Officer
Bush who prepared the label of Exhibit 5 (21) and the number
of packages presented for analysis (56).

The circumstances that have led to grounds 1 (a) (b) and (c) above relate to the weighing of the cocaine, firstly by the Customs Officer, then by the Chemist. The label on exhibit 5 describes the weight of the Exhibit as being 404 grams, gross. The chemist certificate as required by section 7 of the Misuse of Drugs Law, shows the weight of the drug to be 256.5 grams. The thrust of this submission goes to the identification of the exhibit. It is submitted that the Appellant was charged for importation of a particular quantity of the drug, and having regard to the passing of the drugs from one hand to another, and the uncertainty of the amount drugs. The contention is that Exhibits 5 and 9 were not properly admitted. The points raised by the Learned Counsel for the Appellant are by no means novel. In a case cited in support of this contention, that of *Dilbert v. R.* 1988-89 C.I.L.R (Grand Court: Schofield and Harre JJ.) it was held that "It is essential that the prosecution adduce evidence as to how the sample was labelled by the police and that the analyst's certificate refers to the sample so labelled. It is not necessarily fatal to the

reception of the results of the analysis that no evidence has been given as to how the sample has been transported from the police to the analyst's laboratory." The Learned Judges held that there was no strict proof of this element so that it could not be shown to relate to the urine of that appellant. It is not difficult to distinguish between the facts in that case from that now before this Court. The Dilbert case (*ibid*) concerned a charge of consumption of cocaine and the certificate produced at that trial related to a sample of urine taken from Dilbert which had been sent to the U.S.A. for analysis. That sample was not returned after examination and was not exhibited. The only evidence from the officer who sent it for analysis was that he had heat-sealed and labelled the sample before dispatch. In this case we have the certificate, drugs and testimony of the Officer. The only distinguishing feature concerns the weights shown. Here the following dictum from the Learned Judge in the Dilbert case (*ibid*) is most relevant.

"It is sufficient identification of a drug taken from an accused and later tendered in evidence at the trial if there is police evidence as to the labelling and sealing of the packet containing the drug, even though there is no evidence as to what is written on the label, if (i) the drug, after being subject to analysis, is returned to the police with the certificate of the analyst and together with the certificate it is produced in evidence; and (ii) the police officer who had written the label then positively identifies the packet as the same one that he had labelled, sealed and dispatched for the analysis.

In this matter the weight stated by the customs officer (Exh. 5) is in terms of gross weight, whereas that by the chemist, (Exh. 9) is clearly the weight of the actual drug. In addition to this the certificate produced by the chemist unambiguously identifies the accused Carole Hamilton, the sealing officer Karen Bush, the item reference number and the date of dealing. I find also that the label placed on the exhibit by Officer Bush was the direct link between it and the certificate and there can be no valid question regarding the identification of the drug. Furthermore, although there was a lacuna between the time of sealing and the time of analysis, this is not necessarily fatal. There is absolutely no evidence, or even a suggestion that the exhibit was interfered with during the interval. As far as the number of pellets is concerned, there is evidence from Hamilton that 56 pellets were sealed and labelled in her presence. There is evidence that they were sent for analysis, and that the analyst received a sealed package. There is evidence that the package was produced in conjunction with the certificate, and both were available for examination and comparison. I can see no reason why this packet, labelled, analysed and properly identified should not have been admitted into evidence.

Ground 1(d) is in relation to the number of packages. The submission in support of this ground is that the prosecution must establish three things before the drug can be admitted into evidence. (1) Provenance (2) an unbroken chain of custody to attest to the integrity of the substance, eliminating the possibility of tampering. (3) the stipulations of the law must be met before the certificate is put in evidence. The Appellants contention is that the evidence shows that Customs Officer Bush was at the hospital and saw 21 pellets expelled. She was then relieved of duty by Officer Wilson who was never called to

testify, and no statement taken from her. Later Officer Bush testifies that 56 pellets were expelled. Accordingly there is a gap between the 21 and the 56. How did the 56 get in her possession? It is submitted that no evidence is given by her as to how she came to collect the other 35 pellets; no evidence given by her that she sealed and secured them, no evidence adduced as to how the exhibit got from her to the lab; no accounting as to what happened in between the two gaps, i.e. between her possession of the 21, and the 56, and between the time she had the 56, and the 56 days later when they turned up at the laboratory.

I find this submission somewhat extraordinary considering the fact that at the trial the Appellant was represented by Counsel. Notwithstanding this, the evidence itself does not support this contention. In the statement of Carol Bush that was admitted in evidence she states that at the end of Ms. Hamilton's stay in hospital she passed 56 pellets in all. It was not challenged, neither was the tendering of the drug and its subsequent admission in evidence. This is all evidence that was adduced unchallenged during the trial, and deemed to have been accepted facts. Furthermore there is no evidence to suggest that the exhibit was tampered with. Finally the appellant himself adduced into evidence a

Summary of Facts in which it is stated, I quote, "Hamilton was admitted to the George Town Hospital where, over a two day period, she passed a total of 56 packages. A field test showed positive for cocaine." In view of all of this evidence it is difficult to see what significance there is to the failure of the witness to say how she came in possession of the other 35 packages. Hamilton herself, the then accused person testified that. I quote, "The officer took the 56 pellets after I passed them out. The Officer took them and sealed them

up in my presence.” Although cross-examined, no question was put to Officer Bush concerning the pellets and their chain of custody. I find that not only was section 7 of the Misuse of Drugs Law complied with, but that there was also sufficient evidence adduced for the pellets to be properly admitted into evidence. As far as the time lapse between the labelling and the dispatch for analysis is concerned, during the trial there was no suggestion or evidence of any impropriety, and as I have said, such a gap does not necessarily make the evidence inadmissible.

I now come to ground 2 which is as follows:-

The Learned Magistrate erred in law in admitting the certificate of analysis (Exh.9) in circumstances where the certificate (Exh.10) was defective and in breach of the requirements of section 7(3) of the Misuse of Drugs Law.

Section 7(3) of the Misuse of Drugs Law is as follows: _

No certificate shall be received in evidence unless the party intending to produce it has given the other party three days notice of such intention and has furnished with such notice a copy of the certificate.

The notice complained of, (Exh.10) states, *inter alia*, that on the 2 day of July 1998 (or such adjourned date as may be decided by the Court, the Magistrate Court sitting at George Town, Grand Cayman will hear evidence relating to the charges (and the charges are named.) The submission is that the notice refers to date of hearing before it had been

served, and it was not cured by the phrase “or such adjourned date as may be decided by the Court.”

In support of this submission the learned Counsel for the Appellant cited the case of *Nicoletta v R* 1990-91 CILR at 152, in which it was alleged that the drug had been planted on him and that he had never been served with copies of the certificate or the notice. These documents were admitted in evidence and despite his counsel’s objection, before he had been given the opportunity to cross-examine the police officer that said that he had attempted to serve the documents. The appellant was convicted of the possession of cocaine. On appeal it was held that since the prosecution had not satisfied the court that there had been proper service of the notice and the analyst’s certificates, a condition precedent to their admissibility under the the Misuse of Drugs Law (Second Revision), s. 6(3), the trial had proceeded without any properly admitted evidence that the appellant had been in possession of cocaine.” The Learned Judge went on the say of the appellant, “In particular, he may have been denied that opportunity to call the analyst in an attempt to prove that he had no knowledge of the existence of the drug because it was mixed with another substance of similar appearance.” The appeal was therefore allowed and the conviction quashed.

The position in the present case is somewhat different. The notice was served in August. The trial date set by the court was 18 November 1998. The accused had over a month of notice. It is therefore clear that the requirement of section 7(3) of the law (*ibid*) was complied with. Here we have a defendant who received the analyst’s certificate and notice, and signed that he received it. I may also add that when the case came to trial, if

the defendant was not satisfied as to the production of the certificate, he could still have objected (as did counsel in the Nicoletta case (ibid), to the admission under section 4 of the Law. He did not do so. There is no evidence to show that he had been misled in any way, or that there was any prejudice to him. Accordingly I find no merit in this ground

The third ground concerns the verdict of the learned Magistrate was unreasonable and/ or unsafe having regard to the evidence. The learned Magistrate failed to give any adequate consideration to:-

- (a) The fact that the witness Keron Black gave conflicting evidence in several respects and was unreliable.
- (b) That there was insufficient evidence in proof of the charge against the appellant.

In her judgement the Learned Magistrate stated that she did not find Keron Black to be an impressive witness because he gave subsequent statements in which he denied the involvement of the Defendant. She however went on to say that he had explained that the inconsistent statement resulted from the fact that he had been threatened at Northward prison and his mother had been threatened in Jamaica.

It does appear that the Learned Magistrate, notwithstanding the inconsistencies, believed the material evidence in the testimony of that witness. Indeed, she goes on to

elaborate on this by pointing to the fact that his testimony that the drugs were intended for the Appellant was first volunteered from the very afternoon of his arrest. She also points out that Black's statement is corroborated by the transcript of the telephone conversation in that it not only contained the voice of the Appellant, but also that the conversation appears to relate to the arrival of the drug in the Cayman Islands.

The issue raised by Learned counsel for the Appellant is whether the witness, having admitted making inconsistent statements, was so thoroughly discredited and could not be relied on, and accordingly, whether the approach taken by the Learned Magistrate is correct. The testimony of a witness, particularly that of an accomplice, should not be assessed *in vacuo*. In *Denton Power v. R.* a Cayman Island case reported at 1994-5 CILR 373, a case argued before the Court of Appeal it was submitted that the magistrate had incorrectly applied the law relating to the evidence of the accomplices because (i) corroborative evidence could not give validity to evidence which, like the accomplices', was suspect; and (ii) the only evidence implicating the appellant was his presence at the weighing of the ganja and the discrepancy between the accomplices' testimony on the point was such that it should be considered unreliable. It was held, dismissing the appeal, that the magistrate had adopted the correct approach to the testimony of the accomplices. It was precisely because the evidence of some witnesses was suspect that corroboration of it was valuable. The court went on to say that the magistrate was entitled to choose which parts of each accomplice's testimony to accept or reject and he was entitled to conclude from the evidence as a whole that the accomplice's testimony was credible in its essential particulars as to the appellant's presence when the ganja was being weighed. In the instant case the Learned Magistrate in her judgement made it clear that she believed

Keron Black, and in addition to this she found that his evidence was supported by other evidence, particularly the contents of the tape, which tended to connect the Appellant with the crime charged. In accepting the tape as corroborative evidence, it was not required that the Learned Magistrate considered it to be direct evidence that the Appellant committed the crime, it is sufficient if it confirms, or tends to confirm in some material way the accused's involvement as related by the accomplice Black.

There are two approaches that a magistrate can take in dealing with the testimony of an accomplice. Firstly, he can warn himself, or clearly demonstrate that he is aware of the dangers of convicting on such evidence in the absence of corroboration, and should he find that testimony credible, he is at liberty to convict on it. The second approach concerns testimony that may, as in the present case, be inconsistent, but found to be corroborated by the Learned Magistrate in some material way. This is not to say that a two stage approach should be taken as was done in the Privy Council case of Attorney General v. Wong, reported at (1987) LRC, 315, the Court of Appeal quashed the conviction on a charge of conspiracy to traffic in drugs. The basis of their decision was that the trial judge's direction to the jury on the issue of corroboration of accomplices' evidence was wrong, in that he did direct them to approach the matter in two stages. His direction was that the first stage was to consider whether the witnesses were credible before moving on to the second stage of considering whether the witnesses' evidence was corroborated. On appeal by the Attorney General it was held that it was dangerous to assess the credibility of the evidence given by any witness in isolation from the other evidence in the case which was capable of throwing light on its reliability. As Lord

Hailsham of Marylebone L.C. in R.v.Kilbourne, (1973)AC 729 said, *inter alia* :-

The credibility of a witness whose evidence requires corroboration is judged not on his evidence alone, but on all the evidence of the case.....”

This does not mean that if the witness is not credible his testimony can be cured by corroboration, this is not the case at all. No amount of corroboration can cure the evidence that is deemed to be wholly unreliable. Corroboration must be independent testimony that affects the accused by connecting or tending to connect him with the crime. It is evidence that confirms in some material way, not only that the crime was committed, but also that the accused committed it. Although the Learned Magistrate found that he was not an impressive witness, his testimony was found to be of not such a nature that it could not be, and was not cured by corroboration. At no time did the Learned Magistrate categorise him as an incredible witness.

This now brings me to the submission that on this evidence the prosecution had failed to prove its case to the required standard and that the learned Magistrate erred in ruling that there was a case to answer.

The circumstances where a submission that there is no case to answer may be properly made and upheld are well established. These are (i) when there has been no evidence to prove an essential element in the alleged offence; (ii) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could reasonably convict on it.

The criterion here is whether a reasonable tribunal would convict on the evidence, and accordingly the issue here is whether the Learned Magistrate acted reasonably on the evidence that had been adduced before her. I have already dealt with the requirements regarding the veracity of a witness, the need for corroboration and its presence in this case, and the admissibility of essential exhibits. The presence or absence of corroboration rests solely on the admissibility of the tapes.

The Learned Magistrate found that the contents of the tape and the transcripts thereof provided the necessary corroboration. This now leads me to Ground 4 of the Appeal that is based on the admission of the tape into evidence. This ground is as follows:-

The Learned Magistrate erred in admitting two tapes of telephone conversation and transcript thereof (Exhibits 7, 7A, & 8A) in Jamaican dialect without an interpreter or translation as provided for by Section 25 of the Summary Jurisdiction Law. This section is as follows:-

In any proceedings before a court in which the language spoken by any witness or party requires to be interpreted into English, the presiding magistrate may appoint a suitable person as interpreter, and shall record the name of such person in the record of the court.

The first point to be noted here is that the appointment of an interpreter is at the discretion of the magistrate. The only obligation placed on the magistrate by this section



is the recording of the name of the interpreter. Having said that I now come to the nature of the language used and the context in which it was used. I certainly think that I am entitled to take judicial notice of the fact that the Jamaican dialect, though difficult for many foreigners to comprehend, is an offshoot of the English language. Although not spoken by all Jamaicans, a vast majority, if not all who are born and brought up there have a good understanding of that dialect. In this instance, not only were the accused and the witness Jamaicans, but so were the magistrate, the defense counsel and the prosecutor. There is no record of anyone complaining of a lack of comprehension. Indeed, the court went to the trouble of going through the recordings along with the transcripts, and correcting the latter accordingly.

In the world of today the courts are often called upon to hear cases of a multinational, multi-lingual nature. Section 25 (*ibid*) gives the magistrate discretion to cope with such instances. In this matter the magistrate quite rightly found no necessity to appoint an interpreter, and accordingly I find no merit in this ground.

I now come to the Supplemental grounds, the first two are directed at the admission of the tapes and transcripts. They are as follows:-

- (1) The Learned Magistrate erred in admitting the two tapes being Exhibits 7 & 8 into evidence as no legal or factual basis had been established for doing so.

(2) That the Learned Magistrate erred in admitting the two transcripts of the said tapes being Exhibits 7A and 8A as no legal or factual basis had been established for doing so.

In support of this ground it is submitted that the evidence must be identified before it is admitted, and that the Appellant was not identified. It is also argued that before the tapes can be admitted into evidence it had to be established that they were original recordings.

In support of this contention the case of *R. v. Stevenson, R. v. Hulse R. v. Whitney*, reported at (1971) 1 All ER, p. 678 another case in which the admission of tape recordings came into issue. In that case it was held that before the court would admit them in evidence it had to be established that they were the original recordings. If sufficient doubt was raised by the defence to indicate that it was likely that they were not the originals, and so not the primary and best evidence, the court had no alternative but to reject them. In the face of the evidence before this court, it is difficult to see the basis of this submission. Firstly, unlike the *Stevenson* case, (ibid), there was no doubt raised by the defence to indicate that it was likely that they were not originals, and so not the primary and best evidence. Secondly, Officer Jeff Jackson, who had heard the recording, and listened to the tape in court reiterated that recognised the voice as that of David Stewart, the Appellant. a man who he knew for approximately seven years previously. The Learned Magistrate clearly took this as sufficient identification for the admission of the tape. In addition there was no objection to the statement of Delroy Davis being read into evidence, nor was there any to the admissibility of the tape, although there was an initial objection to the playing of it during the testimony of the witness Black. It has been submitted that Black did not recount accurately what was on the tape. It seems clear that

he gave a general account of the conversation during those calls. It would be of some concern should a witness be able to recall accurately a conversation that he had months before. Furthermore, there was no attempt by the Crown to have Black identify the voice, this was done by Officer Jackson. The Learned Magistrate must also have taken into consideration the fact that during the course of his interview the Appellant accepted that it was his voice on the tape, and attempted to explain to the officer what he was saying. He admitted that he was talking to a man on the phone and directed his testimony, not to any alleged errors on the transcript, but to the explaining its contents. In *Regina v. Magsud Ali* (1966) 1 Q.B. 688, it was held that there was no difference in principle between a tape recording and a photograph; accordingly a tape recording was admissible in law provided that the accuracy could be proved and the voices properly identified, that the evidence was relevant and otherwise admissible. There was no challenge to the accuracy of the tape, and the voices were properly identified. These fact alone were more than sufficient to justify the admission of the tape into evidence.

Part (11) of the ground relates to the admission of the transcripts into evidence. It is submitted that the inferences arrived at by the Learned Magistrate adverse to the Appellant were based on the transcripts of the telephone conversation and in law she was not entitled to rely on such transcripts. The offending assertion comes from the following statement by the Learned Magistrate in her judgement:-

The transcript of this taped conversation makes it clear that the defendant did indeed identify the voice to which he was speaking. Nowhere does the defendant inquire "Who is this?" of "Who am I speaking to." Further the defendant

continues the conversation upon some common or mutual basis of understanding between them. Defendant also demonstrates to speak explicitly or clearly on the telephone.”

In *R v. Ali* (ibid) Marshall J in delivering the judgement had this to say about the transcript of a tape:-

“Having the transcript of a tape recording is, on any view, a most obvious convenience and a great aid to the jury, otherwise a recording would have to be played over and over again. Provided that a jury is guided by what they hear themselves and upon that they base their ultimate decision. We see no objection to a copy of the transcript, properly proved, being placed before them.”

The Learned Magistrate, being both judge and jury had the opportunity to hear the tape and compare them with the transcripts. The corrections made by her on her transcript are indicative of her awareness of the errors contained therein, and that she made the relevant, necessary correction. Whereas it may be true that in her judgement she makes no direct mention of the tape recording, it would be in my view, ridiculous to say that the Learned Magistrate based her findings solely on the transcript before her. She specifically referred to the transcript, but it cannot be said that she did so in isolation from the tape or other evidence. I hold that the fact that she referred to the transcript and not the tape is not fatal as she had the opportunity to compare both. There were not a significant number of material differences between the transcript and the tape that would render such a reference by her fatal. It is clear that having heard the tape, and having the assistance of

the transcript, the Magistrate was fully qualified to come to her findings on that basis.

In view of all the above circumstances I find that the Learned Magistrate came to her conclusion from all the evidence at her disposal, and not solely on the basis of the transcript.

Ground (3) of the Supplemental Grounds is directed at the burden of proof, and is as follows:-

That the Learned Magistrate erred in law on several instances in dealing with the evidence by reversing the burden of proof.

It is submitted that the Learned Magistrate first looked at the defense to convince herself, and after being so convinced she looked at the Crown's case. It is also contended that the judgement concentrated on aspects designed to demonstrate the improbability of the Appellant's version of events, and that the Learned Magistrate failed to weigh in the balance the inconsistencies of the Crown's witnesses or the numerous discrepancies in the evidence. It is argued that the Learned Magistrate must specifically take into account the discrepancies and resolve them.

If in assessing the evidence the magistrate believes the defendant, then that is the end of the matter, there is no need to go the Prosecution's case. The analysis of the conversation by the Learned Magistrate at the start of her judgement does not indicate a reversal of the standard of proof, but rather a careful analysis of the taped evidence which was an essential part of the case for both the Crown and the defense. The Learned Magistrate

before considering the Crown's case merely said whether she believed the defendant's explanation. There was no challenge by the defense to the actual drug, the defence was that the drug did not concern him, he knew nothing about it, and was not involved. I have already found that at the close of the prosecution's case the Learned Magistrate found that there was sufficient evidence on which a reasonable tribunal might convict. Subsequently the Appellant himself confirmed that it was his voice on the tape, which further strengthened the evidence of the accomplice. I find that the Learned Magistrate applied the correct standard of proof after having reviewed the evidence.

Now come to the first of the Further Supplemental Grounds which is as follows:-

That the Appellant was prejudiced in his defence in that he was deprived of the opportunity to cross examine the main witness against him as to his conduct in prison and breach of the Misuse of Drugs Law while giving evidence against the Appellant. The aforesaid conduct was and is pertinent to the character of the witness and to his state of mind while giving evidence.

This ground is based on a report received that the Crown's witness Keron Black had been punished by the Prison Authorities for the use of ganja during the course of the trial. This information was not brought to the attention of the court. It is submitted that had this been done the credibility of the witness could have been impugned, and the defence has been deprived of the opportunity it otherwise would have had. There have been several incidents where failure to disclose by the prosecution has been considered a material irregularity. In one such case, that of *R. v. Maguire and Others* reported at (1991) LRC

(Crim) 227, it was held, *inter alia*, that failure by the prosecution to disclose material that was known or possessed by it and which ought to have been disclosed to the defence was a material irregularity.... It was an irregularity 'in the course of the trial' since the duty to disclose was a continuing one. In that case neither the prosecuting counsel nor those instructing them knew of the forensic tests. In considering the prosecution's duty to disclose the question is who was embraced by the word 'prosecution.'" The court went on to hold that there was nothing to distinguish between members of the prosecuting authority and those advising it in the capacity of a forensic scientist. In another case cited, that of *Seymour Williams and Patrick Smith*, reported at (1995) 1 Cr.App. R. 74. was cited. In that matter the appellants were convicted on offences of conspiracy to rob and robbery. The Crown's case was based on admissions which each of them was alleged to have made to the officers. The defence was that the confessions were false. On appeal it was argued that the evidence given by the same interviewing officers had in subsequent cases been discredited and the convictions were unsafe. It was held that the court would take into account that relevant questions could not have been put to the interviewing officers at trial because the other cases which cast doubt on the credibility of the police officers had not yet taken place. The criteria for the admissibility remained the same. The convictions would be quashed,

The basis of this ground is the duty of disclosure. Learned Counsel for the Appellant argues that the Prison Authority had a duty to disclose to the Court that Black had been charged and punished by them for the consumption of ganja. In the case cited above the court or prosecution had a duty to disclose that in subsequent cases the same interviewing officers had been discredited. Did the Prison Authorities owe such a duty. It clearly

cannot be considered a part of the prosecuting authority or one advising it. Although it had charged and punished the witness for an offence that could have been dealt with by the court, they were not carrying out a judicial procedure, but rather an administrative one. There was no conviction, nor any action taken for which the prison authority was obliged to inform the Court, and indeed no one in the Court was aware of it. The incident was only brought to the notice of the Court when Defence Counsel contacted the prison. What Black did never became a concern of the court, but strictly one dealt with by the Prison Authority. The urine of the witness was tested and they elected to deal with the matter internally.

The Prison Authority has its own set of rules, it is not an extension of the Court or Police. By the same reasoning it is not an extension of the Prosecution, and therefore owes no duty to disclose to the court what it has done in its administrative capacity.

The next question to be considered is just how pertinent that information would have been in face of the trial. It is clear that the witness was not presented as one of unblemished character, indeed he was portrayed as a distributor of cocaine. Of what significance therefore, could the fact that he used ganja have blemished his already blemished character. It appears to me that it would have been of little weight. In the context of his involvement with drugs, and how the case emerged, which was substantial reliance on the corroborative element of the case, such would have been of little value in the scheme of things.

There has also been some speculation as to the effect of his remission of sentence. The record shows that this was done by the Governor in accordance with his Constitutional power, and took place, not only after the incident at Northward, but also after he had given evidence. Accordingly I find no merit in this ground.

One of the main thrust of this entire appeal is ground 6 of the Supplemental Grounds of Appeal. This ground is as follows:-

The Learned Magistrate failed to take into account that Keron Peter Black was an accomplice and to apply the mandatory caution to herself as a pre-condition to accepting his evidence.

It is now generally accepted that the requirement for the a judge to warn the jury that it is dangerous to convict on the uncorroborated evidence of and accomplice is now no longer a rule of practice, but has become a rule of law. (See *Michael John Davis* a 1954 House of Lords case) It is equally required of a judge sitting alone, or a magistrate to warn himself of such a danger. Nowhere in the judgement of the Learned Magistrate is such a warning articulated. On the issue of corroboration the Learned Magistrate said, "...the Court does believe Mr. Keron Black's testimony that the drugs were intended for the defendant Stewart since this account was first volunteered by Mr. Keron Black from the very afternoon of his arrest, at a time when there was no apparent connection between Stewart and the drugs imported by Ms Carol Hamilton. **The testimony of Mr. Black is corroborated by the transcript of the telephone conversation.**"

I have already held that there was such corroboration. The issue is now whether the Learned Magistrate, having found that it existed, was she still required to voice such a warning to herself. There are several cases dealing with this issue and many have been cited by both Counsel. Here we are not concerned with the mandatory warning required of a judge when sitting with a jury, such a requirement is well established law, and accordingly all references hereafter will be confined to what is required of a judge sitting alone, or a to magistrate. There is nothing in the law that requires such tribunals to perform a ritualistic incantation of the dictum. What is required, as was required of the magistrate in this case, is that she demonstrates that she has directed her mind to the necessity of the risk of acting on uncorroborated evidence of an accomplice. In *Bissessar v. Jordan*, a case reported at (1965) W.I.R. 315, it was held, I quote, "The dictum of the Privy Council on which was restricted to cases in which there was no corroborative evidence at all and in which, therefore, the magistrate should make it appear in his reasons that the consequent risk of convicting was clearly kept in mind." In his judgement Wooding C.J. said, "No particular form of words is necessary for this purpose; what is necessary is that the judge's mind upon the matter is clearly revealed." The Learned Chief Justice took the matter even further when he went on to say, "But where, as here, there is corroborative evidence and the magistrate, or a judge sitting without a jury pronounces that he accepts it as true, the dictum, in our opinion, has no application at all." (see also *R. v. Dacres* reported at (1980) WIR 246)

Notwithstanding the number of cases in which it has been held that the actual articulation of the warning is not necessary, they all illustrate one common principle; a magistrate who neglects to repeat the dictum in his judgement must not fail to take great care in

demonstrating in no uncertain terms that he is fully aware of the danger of convicting on the uncorroborated evidence of an accomplice.

This principle of law was aptly and succinctly summed up by Downer J.A. in R.v. Simpson, R.v. Powell, two Jamaica Court of Appeal cases reported at(1993) 3 LRC at p. 631. In his judgement the Learned Judge said a follows:-

The extract from these two cases emphasises that the trial judge sitting without a jury must demonstrate in language that does not require to be construed that he has acted with the requisite caution in mind and that he has heeded his own warning. **However, no particular form of words need be used.** What is necessary is that the judge's mind upon the matter be clearly revealed.

The above case is easily distinguished from the case of Helner v. R. reported at 1984 CLR, 174. In that case, which was an appeal from the Magistrate's Court to the Grand Court, Sir John Summerfield, C.J. in allowing the appeal said, *inter alia*, "Nowhere in the judgement is there any reference to the proper approach to the evidence of an accomplice or any search for evidence which could be treated as corroboration."

Unlike the above case there is material before this court which clearly reveals that the mind of the Learned Magistrate was directed towards the need for corroboration; that she searched for it; that she demonstrated an appreciation of the relevant legal principles, and therefore satisfied the test that was laid down in the authorities.

I now come to the final Supplemental Ground of Appeal which is as follows:-

That the Learned Magistrate having ruled on 24th. May 1999 that a prima facie case was only made out in regard to the charge of importation of cocaine she could not therefore proceed to convict the Appellant on any other charges.

Accordingly the conviction on charge 2444/98 for being concerned in the importation of cocaine was unlawful and/or a nullity.

There seems to be some confusion over the number of charges before the Court, and the exact nature of the charges for which the Appellant was called to answer. It is submitted by the Appellant that after a no-case submission was made at the closing of the Crown's case the Appellant was only called upon to answer charge number 4453/07 for the Importation of Cocaine. The records of the court support this in that it reveals that the Learned Magistrate's ruling on that submission addressed that charge only. No mention is made of the other charges and accordingly the learned Magistrate called upon him to answer that specific charge. A defendant in a criminal case can only be convicted on a charge that he has been called upon to answer. What makes this matter more confusing is that the heading of the Learned Magistrates ruling on the admissibility of the tape recording refers to two of the charges, to wit, "2453/97 Importation of Ganja, and 2443/98- Being in Possession of Cocaine. Nowhere is charge number 2444/98 mentioned, and that is the only charge on which the Appellant was found guilty. I can only conclude that no submission was made in respect of any of these other charges. Although the two "Being Concerned" charges were laid several months after that for "Importation," this was all done before the trial commenced. As can be seen 2453/97

was laid in 1997, before the date of his first appearance in November 5, 1997. The other charges were laid some eight months later, the first date in Court being July 8, 1998. The records on the file jacket indicate that the Appellant pleaded not guilty to these charges but no indication as to when. However at the commencement of the Learned Magistrate's judgement delivered after the final hearing on August 27, 1999, no mention is made of 2444/98, nevertheless she concluded by finding him guilty on that single charge.

In an effort to have this matter clarified I have had all the records of the Learned Magistrate brought before me. She has also supplied a memorandum of her recollections of what transpired. I would have been happier had it been done in affidavit form, but what she has produced does support what my perusal of the records reveals. In her memo the Magistrate states as follows:-

The trial of all the charges was commenced on 18/11/97. The trial continued on the following dates – 6/1/99, 4/2/99, 5/2/99, 26/3/99, 23/4/99, 4/5/99, 13/8/99 and was finally concluded on 27/8/99.

On 4th . May 1999 Mr. Murray who represented the appellant made a submission of no case to answer in relation to charge 4453/97- importation of Cocaine only. This is why the ruling on the no case submission is headed 4453/97- Importation of Cocaine and refers exclusively to that charge without mention of the other charges which were also being tried at the same time.

At this point all appears to be well. However the Learned Magistrate goes on to say:-

At the stage of closing addresses on August 13th 1999, it became apparent to the Court that no pleas had been recorded on the charges. Out of an abundance of caution on August 13th 1999 charges 2443/98 and 2444/98 were put to the defendant and pleas of not guilty recorded.

This means that it was not until the ninth day of a ten days trial that the appellant was pleaded on the very charge on which he was convicted. On all previous eight days the trial was conducted without a plea being taken on that charge. The fact that the appellant agreed to enter a plea before the case ended does not validate what transpired on the previous eight days. From the Magistrate's account and the records before me it does appear that the trial proceeded with all parties believing that the accused had been pleaded on all charges. The proceedings will be held to be a nullity if a no plea has been taken, (see Archbold 1999 Ed.) or taken after the hearing of the relevant evidence. The plea must be taken before the trial commences, not after the evidence has been adduced. Sections 65 (1) and 67 of the Criminal Procedure Code (1995 Revision) regulate the procedure at the commencement of the trial. Section 65(1) provides:-

If both parties appear, the court shall proceed to hear the case and the substance of the charge or complaint shall be read to the accused person by the court and he shall be asked whether he admits or denies it.

Section 67 provides, *inter alia*:-



If the accused person pleads not guilty, the court shall proceed to try the case as hereinafter provided.....

In view of the above circumstances I hold that the failure to plead the appellant to charge 2444/98 before the commencement of the trial meant that the defendant had not been effectively tried on the charge laid against him and the proceedings were therefore a nullity. (see Gonzalez v. R. 1986 CILR. 143, (at page 144) The conviction is accordingly quashed.

On the question of whether or not a new trial ought to be ordered, the hardship to the appellant must be weighed against the public interest, which is best served by bringing to justice those charged with serious crimes and not allowing them to escape merely by a technical error. I am therefore ordering a new trial.

Dated 23rd June 2000



KIPLING DOUGLAS

Judge of the Grand Court

