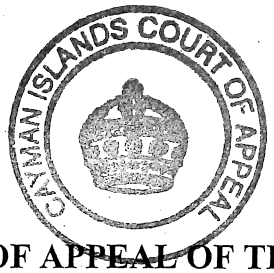

18-11-05

Criminal Appeal 1 of 2005
(Ind. 18/02)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

BETWEEN:

PATRICK THOMAS TIBBETTS

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Before: The Rt. Hon. Mr. Justice E. Zacca, President
The Hon. Mr. Justice M. Taylor
The Hon. Mr. Justice I. Forte

Michael Wood, Q.C., and Simon Dickson for the Appellant.
Samuel Bulgin, Q.C., Cheryll Richards and André Mon Désir for the Crown.

Heard: November 7, 8, 9, 10 & 15, 2005 Decided: November 18, 2005
Reasons released: January 24th , 2006

REASONS FOR JUDGMENT

TAYLOR, J.A.

The appellant appealed his conviction, following a lengthy trial before the Chief Justice and a jury, on two counts of 'money laundering' arising out of the collapse of a United States car-loan business that became a so-called 'Ponzi' scheme, in which money

raised from new investors was used to pay interest due to earlier investors and also misappropriated by the promoters for their own purposes.

The four grounds of appeal were: (i) the possibility of bias on the part of a juror; (ii) failure of the judge to disclose, prior to defence counsel's address to the jury, the evidence that he would identify in his charge as capable of corroborating that of an accomplice witness called by the Crown; (iii) error by the judge in identifying evidence capable of providing such corroboration; and (iv) delivery by the judge of a summary of the evidence of prosecution witnesses when the trial resumed following a two-month interruption caused by a major hurricane that devastated Grand Cayman Island immediately after close of the Crown case. Counsel for the appellant conceded that he did not expect to succeed on ground (ii) if the Court were to find no merit in ground (iii), and we will deal with these grounds together. A fifth ground, involving definition of the term "suspicion", was abandoned at the hearing.

Following an adjournment to consider submissions of counsel we dismissed the appeal, saying that we would later give written reasons.

(a) The Background

The scheme alleged by the Crown was directed by two residents of the United States, Michael Gause and Charles Homa; both were prosecution witnesses at the trial and

both were then serving lengthy sentences in the United States for crimes committed in connection with the operation of the scheme.

Money was raised from investors on the understanding that it would be used as capital to be loaned out to car owners, at rates exceeding 20 per-cent *per month*, through loan shops in the United States operated under the name "Cash 4 Titles", with repayment secured on titles to vehicles. It was obtained from investors in the United States and the Cayman Islands by way of advances, secured in some cases by promissory notes, at interest of 25 per-cent *per annum*. The money was raised in the Cayman Islands by the appellant and a co-accused Lewis Rowe, in the names of companies controlled by them, on the representation that it would be transferred to the Cash 4 Titles business in the United States. When they found it impossible to use in the car loan business all the money invested, because of enactment of state usury laws or for other reasons, Gause and Homa diverted funds from new investors to Cayman companies that they controlled, for payment of interest to earlier investors or use by them for unrelated purposes. The scheme collapsed when investigation by United States regulatory and law enforcement agencies became publicly known and the principals there were arrested. Substantial losses were suffered by investors, including those in the Cayman Islands.

The charges against the accused alleged breaches of ss. 22(1)(a) and 22(1)(b)(i) of the *Proceeds of Criminal Conduct Law* (2001 Revision). The first alleged that, while knowing or suspecting that Homa and Gause were engaged in criminal conduct, or had

benefited from criminal conduct, he was concerned in an arrangement that facilitated retention by them of the proceeds of such conduct. The second alleged that with such knowledge or suspicion he was concerned in an arrangement whereby proceeds of criminal conduct were used to place funds at the disposal of Gause and Homa. In opening his defence at trial counsel for the appellant conceded elements of the offences other than the necessary knowledge or suspicion. The appellant's case was that he gained such knowledge or suspicion only after the period covered by the charges, at a time when the criminal nature of the scheme had become public knowledge.

The trial started May 11, 2004, and continued to September 11, 2004, when it was interrupted by a major hurricane that severely damaged or destroyed 40 per-cent of the homes on the island, and disrupted all essential services there. The trial re-started two months later, on November 11, 2004, at which time the judge gave the jury a summary, occupying in total 5½ hours, of the examination and cross-examination of the 53 Crown witnesses heard prior to the interruption. The case for the accused was then presented. The trial concluded with a lengthy summing-up, given between January 11 and 31, 2005, and delivery of the jury verdicts on February 3, 2005.

By unanimous verdicts, the jury convicted the appellant on both of the counts, and acquitted the co-accused, Rowe.

(b) Apprehension of Bias

The allegation of possibility of jury bias was based on the discovery, after verdict and before sentence, of a friendly association that at one time existed between one of the jurors and a Crown witness who invested in the venture through the appellant and who gave evidence of an allegedly inculpatory statement by the appellant.

Prior to jury selection counsel jointly prepared a questionnaire by which prospective jurors were asked to disclose associations with either side, or with any of 58 proposed Crown witnesses. In the case of persons involved in preparation or presentation of the prosecution, or with the accused or their legal representatives, prospective jurors were asked whether they or their immediate family or close friends had *ever* been associated with any of them. With respect to proposed Crown witnesses they were asked: "Please indicate if you, your immediate family, or any close friends are associated with any of these people". It appeared that prospective jurors would not be unacceptable by reason of having had any direct or indirect association with a proposed Crown witness, provided that the association had ended. The unusual surname of the Crown witness concerned is mis-spelled on the list, and pronounced neither as properly spelled nor as spelled on the list. The juror in question said in an affidavit produced on appeal that he did not recognize the name. While he did not indicate any association with this witness, he did however indicate that he was a friend of the wife of the witness, listed as a Crown witness immediately below her husband, but by her unmarried name.

Affidavits sworn by the juror, by his former girlfriend and by both Crown witnesses showed that the juror had been associated with the couple before their marriage by reason of close friendship between his then girlfriend and the wife. The two couples had shared a holiday in Canada and the United States almost five years earlier, although travelling separately and not always staying in the same place, and the four were members of a larger party that made an earlier weekend trip to Central America. The husband had been fishing with others on the juror's boat, and the couples dined together from time to time, often with others, during a two-year period that ended, a little more than three years before trial, when the juror and his then girlfriend 'split up'. Although the questionnaire seems to have called for disclosure only of current association with witnesses, and this was plainly a past association, the juror nevertheless marked "yes" beside the wife's unmarried name on the list, adding the word "friend".

Counsel for the accused knew from witness statements that husband and wife would both be Crown witnesses and would testify that they invested in the Cash 4 Titles venture through the present appellant. Counsel knew that the husband would testify that the appellant made what the Crown would allege to be an inculpatory statement, after the collapse of the scheme. The juror was the last of the 12 to be selected, out of a panel of more than 100, and accepted by counsel without further inquiry. From his answer to the questionnaire it would reasonably be concluded that he was a current friend of the wife

but had no current association with the husband; in fact, his association with both had, by all accounts, ended at least three years earlier.

The former association of the juror with the male witness became known, after conviction of the appellant, when the former girlfriend -- by then an employee of the appellant's attorneys -- told defence counsel of it. She later swore an affidavit in which she said the two witnesses had at some time discussed their investment in the Cash 4 Titles venture with the juror and herself. She said also that there had been a meeting between the juror and male witness during the trial.

The juror swore one affidavit in March, 2005, after learning of the allegation of bias and concluding from news reports that he was the juror concerned, and a second five months later after he read the affidavit of his former girlfriend.

In his first affidavit, the juror said that when the husband was called as a witness he realized he had not recognized this person's name on the witness list. Had the wife's married name appeared there, he said, he would not have recognized hers either. He decided not to raise the matter when the husband was called because he had identified the wife as a friend, and no objection had been raised. He concluded that there was no material difference between the two associations, and that it would be unnecessarily disruptive of the court proceedings for him to say at that point that he also knew the husband, a person he described as "barely an associate, let alone a friend". Of the

vacation together, almost five years earlier, he said that this was something arranged by the two women and that he had forgotten about it.

The former girlfriend said in her affidavit that the Cash 4 Titles scheme was discussed between the two witnesses and the juror during the time that the couples socialized together -- 3½ to 5 years prior to trial -- and that the juror had then expressed concern that the scheme might be a "pyramid". There was discussion about it during the September, 1999, holiday, she said, when the juror said he thought the scheme might be a "scam", and that its collapse was inevitable. She said that she was "aware" that the juror and male witness had met each other during the trial, at a restaurant. Cross-examined for the Crown she said she thought the Cash 4 Titles scheme was discussed during the 1999 holiday, but she did not know if the juror then said it was a "pyramid" -- she did not recall any specifics of the conversation in question.

After seeing his former girlfriend's affidavit, the juror swore in his second affidavit that the witnesses were his girlfriend's friends, not his own, that he had little contact with them before 1999, that thereafter they had been on his boat, and that the couples met at dinner during 1999 and 2000, and on a declining basis until early 2001. He had not socialized with the husband separately, had no recollection of discussing the Cash 4 Titles scheme with either, and would have been in no position to express any view on it. His only contact with them during the trial, he said, was in September, 2004, when they exchanged pleasantries on a chance meeting in a bar, and in January, 2005, when

they exchanged greetings while dining at different tables in a restaurant. There was no mention on either occasion of anything to do with the case.

Although the juror was available for examination on his affidavits, counsel declined to cross-examine. The other deponents were cross-examined.

The male witness said his association with the juror resulted solely from the friendship between their companions. He described the juror and himself as people with different interests who "simply dated friends"; they were known to each other by first names, and he doubted the juror knew his surname. He denied that the juror said the Cash 4 Titles scheme was going to collapse and recalled no occasion on which the juror expressed scepticism about it. He agreed in cross-examination that he must have talked of the scheme with the juror; it was the "hottest investment" at the time. He did not recall mentioning to the juror his meeting with the accused. He and the juror had earlier invested in a record business that failed, and both had lost money. They had a chance meeting during the trial at a restaurant, but only exchanged greetings.

The wife said in her affidavit that the couples may have discussed the Cash 4 Titles scheme but not its "workings", of which she knew nothing. They never discussed the person through whom she and her now husband had made their investments. She recalled no discussion between them of the collapse of the scheme. Their only connection during the trial was a chance restaurant meeting.

Counsel summarized the facts of significance, on which he relied as giving rise to apprehension of bias, as follows: (i) the juror failed to disclose that he knew the male Crown witness either in the questionnaire or when the witness testified at trial; (ii) the juror and the two witnesses socialized on an intermittent basis until three years before the trial; (iii) they discussed the investment of the witnesses in the Cash 4 Titles scheme on several occasions; (iv) the juror knew of the collapse of the scheme and that the witnesses had lost money as a result; (v) the male witness and juror had previously lost money in the failure of another business; and (vi) the evidence of the male witness assumed particular importance when it was referred to by the judge in his charge to the jury as potentially corroborative of that of the accomplice Gause.

Counsel for the appellant contended that if all that was now known had been known at the time of jury selection, the Crown would not have opposed the juror being excused, that if the juror had declared his former association when the husband was called, the Crown would not at that point have opposed the juror's discharge, and that any judge aware of the true facts would have discharged the juror.

Because the juror would have been excused or discharged had the facts later learned been disclosed before or during the trial, it does not in our view follow that discovery of those facts after conviction will result in a verdict being set aside. Before or during trial a judge will necessarily resolve any possibility of appearance of want of impartiality in favour of excusing or discharging a juror, if this can be done; at that point

there will be little time to consider the matter. Once a verdict has been given, such an allegation will be submitted to thorough scrutiny.

The Court will then apply with full consideration, and in light of all the facts, the test laid down in *Porter v. McGill*, [202] 2 A.C. 357 (H.L.): whether a fair-minded and informed observer would regard bias as a *real* possibility.

Relevant recent decisions to which our attention was drawn included *Montgomery v. H.M. Advocate* [2001] 2 W.L.R. 779 (P.C.) and *Pullar v. United Kingdom* [1996] 22 EHRR 391, a decision of the European Court of Human Rights cited by Lord Hope in *Montgomery*. In *Pullar* the majority in the Strasbourg Court upheld the verdict of a Scottish jury a member of which was an employee of a key Crown witness with whom he had come to Court, an employee who appeared to be on friendly terms with the employer although previously given notice he would shortly be laid off. The Court held (at paragraph 38) that it does not follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses that he or she will be presumed to be prejudiced in favour of that person's testimony. The issue will turn in each case on the "nature and degree" of their familiarity.

In opening his defence, counsel for the appellant described the issue for the jury as: "Can you be sure that Mr. Tibbetts knew or suspected that the money he was handling on behalf of Homa and Gause were the proceeds of criminal conduct?"

There was no issue between Crown and accused that the scheme had been operated with criminal dishonesty, that investors' money had been improperly diverted and misapplied and that the accused was instrumental in the diversion of funds. The question that remained was whether the Crown could satisfy the jury that the accused had the knowledge or suspicion of criminal activity necessary to establish guilt on either count. It was in this connection that the Crown was to rely in part on evidence of the Crown witness whose connection with the juror was called into question.

Even in populous jurisdictions there are, of course, cases of notoriety in which some or all jurors have read, heard and seen pictures of people and events involved, and may have discussed, and perhaps expressed opinions about, the issues raised at trial. In a jurisdiction such as the Cayman Islands, with a small and closely-knit population, there is a greater possibility that a juror may also have been associated in some way with one of the witnesses, and this must particularly be so in a trial such as the present, which involved more than 50 Crown witnesses. The jury questionnaire was obviously intended to identify prospective jurors whose connection with a party or witness was close enough to be of concern. The possibility that a potential juror might have knowledge of facts of the case was not raised in the questionnaire. Nor was the possibility that a juror might in the past have been associated with a Crown witness. The fact that the juror in question erroneously declared himself to be a *current* friend of a Crown witness did not, in the event, lead to objection being taken by counsel.

In his opening remarks to the jury at the beginning of the trial the Chief Justice emphasized the importance of the presumption of innocence, the need for proof beyond reasonable doubt and the requirement of their oath that they return true verdicts according to the evidence, a commitment he described as a "sacred duty". In summing-up, at the conclusion of the trial, the judge said:

> Further, you must decide this case only on the evidence which has been placed before you during this trial; that evidence comprising the testimony you have heard from the witness box or by video link, the various statements which were read to you, with the consent of the defence, and the exhibits and many other documents which were tendered or brought up on your screens for examination.

And later the judge said:

> Finally, in relation to these general introductory remarks, which I give you, it is also only consistent with your oath as jurors, which is to return a true verdict according to the evidence so help you God, that you must cast aside feelings of sympathy or prejudice one way or the other, either for or against the defendants or for or against any witness.

The Chief Justice reminded the jurors that their oath required them "dispassionately and objectively to assess the evidence in order to arrive at a true verdict".

No criticism was made before us of the honesty of the juror concerned, either with respect to his recollection of the relationship with the witness in question or the reason why he failed to disclose it in his answer to the questionnaire or when the witness was

called. The position of the appellant was that, perhaps unconsciously, the juror might by reason of the former friendly association, and of sympathy for the loss suffered by the two witnesses, and because he knew the husband had previously suffered an investment loss, be improperly influenced to accept the husband's account of the alleged statement of the accused and to attribute to it an inculpatory meaning, and for this or some other reason be influenced to convict the accused.

The fair-minded informed observer, in whose view the circumstances must be examined for real possibility of bias, was described in *Johnson v. Johnson* (2000) 200 C.L.R. 488 (at p. 509), as a person "neither complacent nor unduly sensitive or suspicious". Such a person would in our view take into account the fact that counsel had accepted the juror understanding him to be a friend of the female witness, who had invested through the accused and lost money, and with the knowledge that she was married to another Crown witness who lost money, and would testify also regarding an allegedly inculpatory statement by the accused. The observer would in our view take into account also that the juror's association with these witnesses had never been particularly close, and had ended more than three years earlier.

Of importance, too, would be the fact that the apprehension of bias asserted was not said to arise from prior knowledge by the juror of prejudicial facts, but rather from sympathy that the juror might feel for the loss suffered by the witnesses, and from willingness to accept their evidence on account of former friendship.

The adoption in this context of the view of the impartial informed lay person is based on the concern expressed in the oft-cited dictum of Lord Hewart, C.J., in the *Sussex Justices Case* [1924] 1 K.B. 256 (at p. 259), that justice must not only be done but must also in the public eye be *seen* to be done. To the legally-trained person it may sometimes be difficult, having in mind the presumptions that the law makes in favour of the integrity of the individual, to find a real possibility of bias on the part of a juror in the absence of any evidence of bias in fact. By adopting the view of the lay observer the Court is able to apply a less demanding standard than it otherwise might.

Looking at the matter from the point of view of such fair-minded informed lay observer, we were unable to conclude that the evidence would satisfy such a person that there was a real possibility that, despite instructions given by the judge with respect to the nature of the jury function, the juror might, consciously or unconsciously, be influenced by the former friendship in carrying out his duties.

(c) Corroboration

Under Cayman Island law at the time relevant to this prosecution, the judge was obliged to instruct the jury that it would be dangerous to convict the accused on the uncorroborated evidence of accomplice witness Gause.

The first ground of appeal relating to corroboration is that the judge failed to disclose, before counsel addressed the jury, the evidence that he intended to bring to the attention of the jury as potentially capable of corroborating that of the accomplice witness. The second is that the judge erred in suggesting certain evidence to be in law potentially capable of providing such corroboration.

No authority was brought to our attention in support of the proposition that a judge is obliged, as a matter of law, to advise counsel before they address the jury of the evidence that the jury will be instructed they may regard as corroborative. The practice of making such disclosure has merely been commended, for the obvious reason that it enables the judge to obtain the assistance of counsel on the point, and thus assists in avoiding the possibility of error in identifying such evidence.

Before counsel gave their addresses, submissions were made in the absence of the jury regarding witnesses whose evidence required corroboration, and the warning to be given. Counsel could have sought an indication of the evidence that the judge intended to identify as capable of constituting corroboration. There was nothing in this discussion that could reasonably have led to the conclusion that the judge intended to tell the jury there was no such evidence. It was only after counsel had addressed the jury that the matter of potentially corroborative evidence came to be discussed.

Counsel for the appellant in the end told us that he did not expect to succeed on this point if he did not succeed on his second point -- that the judge erred in identifying potentially corroborative evidence for the jury.

The evidence of the accomplice Gause relevant to the ultimate issue in the case was that he had a telephone conversation with the accused from which it was plain that the accused was aware that funds raised from investors were not, in fact, being loaned out in the Cash 4 Titles scheme, but instead used for other purposes.

The evidence to which the judge referred as potentially corroborative of the evidence of Gause included evidence from which the jury could conclude that the accused knew that investors' funds were no longer going by the original route to Cash 4 Titles in the United States, but being transferred instead to companies in the Cayman Islands controlled by Gause. It was accepted by the Crown that this would not, standing alone, necessarily mean that such funds were being misapplied. There was the possibility that there were profits in the Cash 4 Titles business in the United States to which the principals were entitled, and that these were being applied to the loan business in place of money received from investors. The Crown took the position, however, that the accused had no basis for concluding that this is what was happening.

In the leading case of *R. v. Baskerville* [1916] 2 K.B. 658, Lord Reading, C.J., (at p. 667) described corroborative evidence as evidence that "shows or tends to show that

the story of [the suspect witness] that the accused committed the crime is true, not merely that the crime has been committed but that it was committed by the accused". The evidence accepted as corroborative in *Baskerville* did not establish commission of a crime; it did not confirm what the accomplice witnesses had said regarding the criminal acts alleged. In *R. v. Hills* (1988) 86 Cr. App. R. 26, it was held that to be corroborative evidence need only go "some part of the way" towards proving guilt by "tending to show that the offence was committed and that the accused committed it". The Lord Chief Justice there cited the statement of Lord Reid in *R. v. Kilbourne* [1973] A.C. 729 (H.L.) (at p. 750) that questioned evidence will be corroborated "to a greater or lesser extent" by independent evidence of statements or circumstances "with which it fits in". In the decision of the Privy Council in *A.G. (Hong Kong) v. Wong* [1987] A.C. 501, the same passage from Lord Reid's speech in *Kilbourne* was cited by Lord Bridge of Harwich (at p. 511), who there put the matter in this way:

> The corroborative evidence will not, of course, necessarily authenticate the evidence of the suspect witness. But it may at least allay some of the suspicion. In other words it may assist in establishing the reliability of the suspect evidence.

In the present case the evidence of two investors referred to as potentially corroborative of the suspect evidence, like the supporting evidence in *Baskerville*, was evidence that fell short of actually proving any crime alleged.

The accomplice Gause testified that he told the accused by telephone towards the end of 1998 that new legislation in Florida limited the maximum interest chargeable there to 22 per-cent per annum, plainly inadequate to pay investors what was due to them, but that it was hoped this problem would be resolved within a year. Gause said he told the accused that it would be necessary in the meantime to "roll over monies". He said the accused told him he was uncomfortable with this but realized it had to be done. Gause said the accused told him he realized that new capital investment funds were being used to make interest payments to investors, because he could see from the accounting records that not enough money was generated from the loan business to make the interest payments. He testified that the accused agreed to "roll over" money, meaning "use new monies to pay off investors", and that the accused made the necessary bank transfers for this purpose. In cross-examination Gause agreed that this telephone conversation could have taken place in the spring of 1999.

The independent evidence to which the judge referred as potentially corroborative was that of two investors and of a Cayman Islands Monetary Authority investigator. All testified regarding conversations they had with the accused in late 1999, after the arrest of the principals in the United States had become public knowledge.

The first investor said the accused told him that he had moved investors' money from one Cayman account to another and not, as they intended, into Cash 4 Titles, and that it was "paid back to investors". The witness said the accused admitted taking money

from the account of a company called Interworld into which investors' money was put for transmittal to the United States for investment in the loan business, that this was used instead to pay interest to investors, and that it "never made it to Cash 4 Titles as an investment in the company itself". The second investor testified that when he asked the accused "why the money had not been transferred to Cash 4 Titles as we had invested in", the accused replied that he had been instructed not to do so because "they didn't need the money at the time". The witness said the accused showed on a diagram "how he had moved the money horizontally within the companies instead of moving them up". These statements were said to have been made while the accused was seeking to explain the charges laid against the principals in the United States as recorded in court documents. The aspect of the evidence of the investors on which the Crown relied was that the accused was describing to them what he himself knew and did, and the instructions that he followed, at the time that he made the money transfers he described.

The monetary authority witness testified of a meeting he had with the accused, after the collapse of the scheme, during which the accused admitted that he knew at the time of misapplication that "funds were not going to Cash 4 Titles investment" but being directed "into companies that were controlled by Mr. Gause", and that he saw this as "a temporary situation" and was simply doing as Gause had instructed him. The witness said the accused agreed that diverted funds were in some cases being invested in assets such as airplanes and condominiums, so that it would not be available should investors seek

repayment. He testified that the accused said he realized this, but felt it was "just temporary". In cross-examination the witness agreed that the accused said that he did not think there was anything wrong in doing as he did.

The evidence of the first investor went no further than to show that the accused knew, at the time he was dealing with it, that investors' money was no longer being sent to the United States for the purpose for which it was invested, but was going instead to Cayman companies controlled by one of the promoters. For this there could have been the innocent explanation mentioned. The evidence accepted in *Baskerville* as corroborative was capable of an innocent explanation which the accused had offered. In this context Lord Reading said (at p. 664) that evidence of an accomplice need not "be confirmed in every detail", as that would mean that the accomplice's evidence was merely confirmatory of evidence given by others. It was sufficient, Lord Reading said (at p. 665), that the independent evidence be "confirmatory as to a material circumstance of the crime and of the identity of the accused in relation to the crime".

Evidence that funds had been diverted in the way the first investor described was, in our view, evidence with which that of Gause "fitted in". It tended to prove ingredients of the crimes charged, and that the crimes had been committed by the accused.

The evidence of the second investor went further, in that it included admission by the accused that, in changing the flow of the investors' money, he was following

instructions received from the promoters. That of the investigator confirmed the evidence of both investors and involved also an admission by the accused that he knew that investors' funds were used by Gause for wholly unrelated improper purposes, including the purchase of condominiums and airplanes.

We were of the view that the judge was correct in instructing the jury that it could, if it thought fit, accept the evidence of these witnesses as corroborative of that of the accomplice Gause as to the knowledge of the accused.

(d) The 'Mini Summing-Up'

Providing the jury with some summary of the evidence given prior to the hurricane emergency appears to have been accepted in principle by counsel for the other accused, although objection was taken to the extent of the summary the judge intended to give; counsel for the present appellant asserted that he had not consented at all.

The judge's reasons for undertaking this unusual task were based not only on the length of the adjournment that had followed completion of the Crown case and the number of Crown witnesses who testified prior to the adjournment, but also on the impact that the intervening emergency had had on the jurors and their families, so many people on the island having been driven from their homes.

At the beginning of his summary the judge said that he intended to give a "brief overview" of what earlier witnesses had said, with the picture of each witness referred to appearing on the computer screens before the jury, and to say less with respect to the more recent witnesses. Towards the end of his summary the judge emphasized the purpose of the exercise, and gave this caution:

> We have been stalled in this trial for nine weeks in rather extraordinary circumstances, and we have all been distracted by them. So I thought it important that we undertake this exercise. But you must of course keep open minds until you have heard all the evidence in the case. And this is essentially the prosecution's case that we are reviewing simply because it is the prosecution's case that you have heard before the break. You will be hearing evidence on behalf of the defence in this matter. So you will reserve any conclusions at all until you have heard all of the evidence.

While the expression "mini summing-up" was used, the summary was not one in the nature of the ordinary summing-up, in which a judge may marshal, and perhaps contrast, the evidence of different witnesses on individual points, and sometimes comment on its significance, or its strength or weakness. The Chief Justice recalled and summarized without comment the examination and cross-examination of the witnesses one by one, in the order in which they testified. It was not suggested before us that he performed the task otherwise than fairly and accurately.

The present appellant's counsel objected at trial to the length to which the judge intended to go in his review, and to the inclusion of a summary of the evidence of the

Crown's forensic accounting expert, and emphasized that the judge was proceeding without the consent of counsel after indicating that he would only proceed with counsel's consent. Before us counsel described the procedure as unprecedented, and prejudicial to the accused in that it resulted in the Crown case being summed-up twice -- once over a two-day period prior to presentation of the defence and a second time, over 13 days, as part of the usual summing-up two months later, at the conclusion of the trial. Counsel contended that in this way the judge "unfairly highlighted" and emphasized the Crown's case. The appropriate course, in counsel's submission, was for the judge to sum-up in more than normal detail at the usual time, or to discharge the jury.

Whether or not consented to by counsel, the course adopted was in our view an appropriate response to a most unusual situation profoundly affecting the lives of the jurors, and fell within the discretion that a trial judge may properly exercise in the best interests of the administration of justice. It cannot in our view be said that an accused is entitled to have the jury consider his defence with less than proper recollection of the case presented for the Crown, nor indeed that the accused will necessarily benefit from the presentation of his case in those circumstances.

(e) Conclusion

We found no basis, in any of the grounds raised by the appellant, for concluding that the verdicts were either unsafe or unsatisfactory. Accordingly and for these reasons we dismissed the appeal and affirmed the convictions.

E. Zacca, P.

M. Taylor, J.A.

I. Forte, J.A.