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

CICA NOS. 43, 44, 45 AND 50 OF 1994

BEFORE:

The Rt. Hon. Mr. Justice Edward Zacca P.C., O.J., President
The Rt. Hon. Mr. Justice Telford Georges P.C., J.A.
The Hon. Mr. Justice James Kerr J.A.

BETWEEN:

ALVIN GEORGE DAVIS, JOE AL MARTINO BUSH,

JOEL JASON SMITH AND SHELDON MARQUIS BROWN

APPELLANTS

AND REGINA

RESPONDENT

November 29th, 30th, December 1st, 4th 1995 and August 9th 1996.

APPEARANCES:

For the Crown:	Mr. I. Archie
The defendant, Davis	In person
The defendant, Bush	In person
The defendant, Smith	In person
The defendant, Brown	In person

KERR J. A.

JUDGMENT

The appellants were jointly charged and convicted in the Grand Court before Smellie, J. and a jury on an indictment containing the following counts: **Count 1** charged the four appellants and one Mark Smith with conspiracy to commit robbery contrary to section 292 of the Penal Code for that they on divers days between December 26, 1993 and February 14, 1994, in Grand Cayman and Jamaica, conspired together and with other persons to rob the Cayman National Bank, Galleria Plaza, Grand Cayman; **Count 2** - the appellants, Alvin Davis and Joel Smith, for robbery contrary to section 219 of the Penal Code for that they on February 14, 1994, robbed the Cayman National Bank, Galleria Plaza, Grand Cayman of CI$53,550.97; **Counts 3 and 4** charged Davis and Smith, respectively, for that each carried a firearm with intent to rob the bank; **Count 5** charged Mark Smith with accessory after the fact to robbery; **Count 6** charged both appellants, Brown and Joe Bush, with accessory after the fact in relation to the robbery of the bank by appellant Davis.

The appellants declined an offer for legal aid representation. They all expressed themselves as ready and prepared to argue their case. This they did commendably.

In relation to Mark Smith, the learned trial judge upheld a submission of no case to answer on the first count and on his directions a verdict of acquittal was entered by the jury and after a retirement of five hours the jury

remained divided four to three in relation to the count charging him with accessory after the fact. In relation to the appellants the following verdicts were entered and sentences imposed:

Appellant Davis : Guilty on Counts 1, 2 and 3 and sentenced, respectively on each count to five years, 14 years and 14 years imprisonment - sentences to run concurrently.

Joel Smith : Guilty on Counts 1, 2, 4 and sentenced on each count, respectively to 7 years, 17 years and 17 years imprisonment - the sentences to run concurrently.

Brown : Guilty on Counts 1 and 6 and sentenced to 7 years and 2½ years, respectively, on each count - the sentences to run consecutively.

Bush : On Count 1 - no verdict was returned - jury being divided 4 to 3. On Count 6 - Guilty and sentenced to 2½ years imprisonment.

From these verdicts and sentences the appellants in person appealed.

On February 14, 1994, between 10:30 a.m. and 10:55 a.m., while the bank was open for business and there were many customers in attendance two men armed with handguns entered

one after the other, held up the tellers and customers, robbed the bank of money amounting to $53,550.97 and made their escape on a red motor-scooter which was parked outside. The police who quickly responded to the call on information they received and aided by clothing abandoned by the robbers, the skid marks from the scooter and the abandoned scooter, traced the escape route to the Harquail Theatre compound. There in a bushy area they found the bulk of the stolen money in a freshly dug hole in the ground covered by leaves. Their investigations led to the nearby Cayman Islander Hotel and to room 115. The prosecution case was that the room that day was the pre-arranged hideout for the appellant, Davis.

The time frame and particulars of the conspiracy as set out in the indictment and as indicated by Crown Counsel in his opening was intended to cover activities of appellants, Brown and Davis, in Jamaica as well as in Grand Cayman. The prosecution sought to establish the Jamaican connection through the evidence of Paul Wignall and a statement of Peter Dunkley who was absent at the trial. Wignall who went back on his statement, on the application of counsel, was permitted to be treated as hostile. The application of Crown Counsel to have Dunkley's statement read into evidence on the basis that his absence was contrived, was properly refused by the trial judge, who declined to import English Legislation into the Cayman Law.

and dealt with the merits of the application in the following manner:

> "Finally, I feel obliged to note that had it devolved to a matter of the exercise of my discretion, I would have been hard put to allow the witness statement into evidence in any event, for two reasons.
>
> One is the consideration that the statement would implicate another defendant who is alleged to have done nothing by way of the preconditionalities of Section 127 of the Criminal Procedure Code, which would justify depriving that defendant of the right to cross-examination of the witness Douglas.
>
> Another is the natural hesitation this Court would have to invite a jury to convict on the unsworn, untested statement of a witness who has demonstrated the sort of flippancy shown and expressed by Douglas about his important obligations and responsibilities as a witness".

The manifest failure of the prosecution to prove this segment of their case, referred to as the recruiting of Davis in Jamaica, was made the subject of submissions to the trial judge by defence counsel for Brown and for Davis and these submissions will be dealt with later.

But for the inclusion of Brown, Bush and Mark Smith, the count for conspiracy would be unnecessary and unjustified as the alleged illegal purpose of the conspiracy, the robbery of the bank was carried out. See Verrier V.D.P. [1967] 2 A.C. 195.

Accordingly, as a finding of a prima facie case on the count of robbery against both or either of the appellants charged therein is the fulcrum on which the existence of the other counts rested it seems convenient to review the evidence of the robbery and such evidence tendered with intent to implicate both or either appellants in the robbery of the bank.

Evidence of the robbery was given by certain tellers and customers in the bank at the material time. Georgina Williams, the teller at position 8, at 10.30 a.m., while attending to a customer, Carolyn Foster, said that she heard a male voice saying "everybody get down". She obeyed, pressing the emergency button under her booth as she went down on the floor. She then saw a man on top of her counter who ordered her to get up. The man jumped off on her side, repeated his order to get up and kicked her in her lower back. He put a black plastic bag in front of her and told her to fill it up. He had a gun pointing at her. As ordered, she placed C.I. moneys in notes from her till in the bag. While doing so, another man armed with a gun came up and from the customers' side he pointed his gun at her forehead touching it. She had placed in the bag all the money from her till together with a cheque book and also Canadian Dollars which were on the counter. The second gun-man picked up the bag and both walked away. She had risen to her knees while putting the money in the bag. After the men left she returned to lying on the ground.

She described the first man as being about 5 feet, 9 inches, slim, wearing a glossy black helmet with tinted hood and a light blue jeans pants. The second man had a black full-face helmet and a dark long-sleeve shirt. On February 14, at the George Town Central Police Station, she was shown a helmet that looked like the one the second man was wearing. Subsequently she was shown a bag that looked like the one she saw at the robbery. The moneys which she put in the bag included "bait money" that is notes noted and marked for subsequent identification in case of a robbery. They were not to be given to customers in ordinary transactions. In cross-examination her description of the bag in her statement to the police was put to her. She admitted that the bag exhibited differed from her description in that particulars, namely, the exhibited bag did not have "different little compartments" and it was not plain - "it has writing on it".

To Mr. Furniss for Joel Smith, she admitted in cross-examination, that when she went to the police station on February 14, she did not remember about a white shirt. She admitted that when she was shown the helmet and the white shirt her memory was prompted. The helmet she identified, she could not say which of the two men was wearing it. There was nothing special about a white shirt she identified at the police station as similar to the one

the first robber was wearing. To Mr. Harrison for Brown, she said that it was not a white wind-breaker type shirt.

It is the prosecution's case that the first robber was Joel Smith and the second, Davis.

Patricia Chung-Ebanks, the teller at No. 7 said that sometime after 10.00 a.m. she saw a man whom she described as about 140-145 lbs, 5 feet 9 inches, wearing a white long-sleeve shirt and had on a black helmet with red around the mouth. He was standing in front of her - he had a gun which he was shuffling and all the customers were on the ground - he said "get down" in a rough loud voice. She got off her chair, slamming shut her drawers and went down under her wicket. Bridget Bodden who came towards me from the bathroom asked if I pressed my button. He threatened to shoot Bodden who had gone down on her knees; he took a spray can from her and sprayed back and forth before leaving.

On February 22, 1994, she attended at George Town Police Station where she identified the white shirt and helmet as those the robber was wearing. The witness, a Jamaican by birth said that the robber spoke with a Jamaican accent.

In cross-examination she admitted that she first described the shirt as a white jacket, because things weren't recalled until she went home and was lying down and the event came before her and everything was like a replay. She would

not describe the shirt exhibited as a jacket. She said that she saw none of the two robbers wearing a white jacket. She gave her statement on the 14th the day of the robbery and "just seconds after" at the bank when the police came.

Angela McLean, Bank Clerk, was at work at the time of the robbery. She said that she saw a man walked into the bank and lifted up the glass of the helmet he was wearing and said, "It's a robbery". She caught sight of a white shirt which contained the colours red, green and yellow - the shirt was underneath the helmet and covered his mouth. He had a little handgun and ordered all to get down. She went down on the floor. He went down to the cashier, Gina Williams of position 8 and went over to the counter and heard him say "the bag is on the way down, fill it up". She saw no bag; she took bait money from her till and placed it on the counter with Sterling and Canadian money. The robber came down and took them away. She described him as being about 5 feet 6 inches tall, medium built and of dark complexion. After taking up the money off her counter, he went towards the Foreign Exchange area.

On February 22, 1994, she identified a helmet and a shirt as similar to the ones she saw the robber wearing. In cross-examination, she said that his voice sounded like a Jamaican accent. She did not see more than one robber. It was only when the scooter was being ridden away she saw two persons on it. She admitted remembering that when she first

gave her statement to the police she said that the man was wearing a jacket with a zipper in the front. She gave that statement to the police on February 17 - three days after. The events were then fairly fresh in her mind.

Christopher Bodden, Customer Service Representative of the bank, was on the telephone when he saw the two figures with dark tinted helmets in the bank. He next saw one of them scuffling with Bridget Bodden on the floor on the tellers' side; when he saw the robber looking at him he turned away. Later when a customer approached the door that robber ran past and out by an exit gate. At sometime he had seen both robbers putting money in a bag. After they left the bank he looked through the window blinds and saw them getting on to a motor-scooter - registration number 31859. He said that robber that ran down by his section had on a long green sleeve shirt - slim built, between 5 feet 7 inches and 5 feet ten inches tall. In cross-examination, he said that he saw two robbers on the cashiers' side of the bank. The robber scuffling with Bridget Bodden had on a shirt with green sleeves.

Franco Plona, an Italian and a waiter, was a customer in the bank at the time of the robbery. He said that he saw the entry of the first robber with bag and gun with silver grey barrel and dark handle. He wore full-face black helmet with red stripe and tinted visor and under the helmet a reddish bandanna covering his nose. He had on a dirty

long-sleeve biker's jacket with zippers, black trousers and dark gloves. He saw when the second robber armed with a gun, entered. He wore a similar helmet with bandanna underneath and wore dark green shirt and dark trousers and shoes. He also was lying on the floor during the robbery and on leaving, one of the robbers trod on his fingers. He then observed that the shoe, though black, had a light coloured sole and was muddy. After the robbers left he accompanied Mike Flowers in his car and went along the West Bay road. Their futile efforts ended on a dyke road that was a dead-end for vehicular traffic.

On February 19, he attended the Central Police Station and there he was shown and identified a helmet, the shoes with the brown muddy sole and the dark green shirt, the pair of gloves and the bag. The bag which looked like a photograph bag was like the one the first man carried. The green shirt was similar to the one worn by the second man.

In cross-examination he said that the biker's jacket the first man was wearing was done up at the front and it was a dark nylon jacket with a kind of zipper.

Michael Flowers, a customer in the bank at the time of the robbery described the first robber as having on a long-sleeve shirt, a motor cycling helmet with visor shield and armed with a semi-automatic pistol. He had multi-layered clothing - he had one shirt with another shirt under it. The

outside shirt was an off-white. The helmet was black and his trousers either dark-blue or dark-black. He had on light brown gloves. He went down on the floor in response to the order "everybody down". The second robber was dressed approximately the same way and also armed with a handgun. The first robber snatched from him his money bag containing about $15,000.00 or $16,000.00. After they left he got up to see them riding away on the red scooter. Plona accompanied him in his van in his futile attempt to chase or track down the robbers.

The bag produced in Court was his. In it he saw exhibit slips written up by him. This was the bag in which the stolen money was recovered. He had been shown a number of things at the police station on February 22. They include the white shirt produced in Court and which is similar to the one the first robber was wearing and also their helmets. He saw two helmets.

In cross-examination, he said that the white shirt was unbuttoned and it was over another shirt. The fact that it was over another shirt was the most outstanding thing about it. One of the robbers went over the counter - he could not not say which one.

According to Sandy Bush, about 10.00 a.m. he was about to enter the bank when through the glass door he saw persons lying on the floor and a gunman jumped over the counter and

came to the door and stuck a gun in his face. He ran across the street and made an alarm. He then looked towards the bank and saw the two robbers leaving on the red scooter. They wore black helmets. He made an effort to chase them in his black jaguar but like Mike Flowers he ended in a no-through way section of the dyke road.

Michael Battaglia's statement read into evidence with the consent of the defence was to the effect that while on the street he saw the robbers when they arrived and parked the scooter parallel to the exit passageway outside and also to the West Bay Road. The rider was wearing a white nylon windbreaker and the pillion rider a turquoise long-sleeve loose fitting shirt - both wore full-face masks. Minutes after, while in a nearby jewellery store he heard an alarm. He went out to see the man in the white jacket getting on the scooter. With his camera he took pictures of him. The man in the turquoise jacket got on to the back; he had a duffle jacket bag over his shoulders. He also took pictures of him and these were exhibited. He had had that bag when he first saw him.

Janet Dixon, senior trainee draughtsman in the Cayman Government Lands and Survey Department tendered in evidence a large mosaic plan of the relevant area made from aerial photographs showing the location of the Galeria Plaza, the Cayman Islander, the Harquail Theatre and the dyke roads. She also tendered a small mosaic of the Harquail Theatre.

Now the evidence to prove Brown's recruitment of Davis in Jamaica having failed to prove that both Davis and Brown were in a conspiracy to rob the bank prior to the 14th, the prosecution relied on evidence of their continued association in Grand Cayman and activities in Cayman from which they sought the inference that they were in pursuance of the illegal purpose of the conspiracy. In their statements to the police both admitted a social acquaintance that was made in Jamaica sometime before and that on February 6, 1994, they travelled from Jamaica to Grand Cayman on the same airline flight. Davis said that on the night of his arrival he was booked in the Rankin Airport Hotel. The booking was done by Bush as he did not know the procedure.

According to Shervin Rankine, the grey 1980 Chevrolet Caprice Classic motor car exhibited, was formerly owned by him. Rankine's statement of February 16 read in evidence was to the effect that negotiations between appellant Brown and himself were concluded on February 13 after 6:00 p.m. when the appellant came to his home and paid him CI$750.00 for the car. He removed his personal belongings from the car and handed over the keys to the appellant, who drove it away. The arrangements for a formal transfer of ownership on Monday 14 were not effected. He did not see Brown that day.

The statement of Kenneth Corsbie, Media Consultant from Barbados read in evidence was that between 8:30 a.m. to 9:00 a.m., he was standing with Mark Matthews. A red scooter was ridden past where they were standing at the actors' entrance to the theatre. The rider had on short-pants with ankle socks, a shirt and full-face helmet (either blue or black), a white towel on his left shoulder with perhaps a red stripe at the button. He indicated on the exhibited photograph where he was standing and the route of the red scooter. He described the rider going into an open area where there was gravel and started spinning tyres and going around in circles. This he did for about four times, then rode off down the dyke road to the left of the theatre. Immediately a grey coloured car - not new - like an American car drove by at speed heading towards the dyke road. This witness said that there were several persons in the car. The person on the scooter he described as dark-brown in complexion with noticeable hair on his legs, of medium-built and about average height.

On the following day at the police station, he identified the grey Chevrolet, registration number 12757, from among other cars as being similar to the car he saw the morning before.

Mark Matthews, a dramatist of Georgetown, Guyana, in February 1994 was staying at the Harquail Theatre.

On February 14, 1994, between 9:00 a.m. and just after 10:00 a.m. along with Ken Corsbie he was at the side of the theatre near a side door. He saw someone on a darkish red motorcycle riding in circles just off the car park - the motorcycle then went around the theatre once and left from the car park followed by a large greyish American car. The rider on the motorcycle had a crash helmet with visor down and short pants.

On the exhibited photograph of the area, he indicated his position and that of the red scooter. He was unable to see anyone in the car as it was moving fast and the windows were up. On the following day he and Corsbie went to the police station and in the car park there among other cars he saw a car similar to the one he saw at Harquail. He looked through the window of a van that had motorcycles and "things inside". He saw a scooter similar to the one he saw at the Harquail.

In cross-examination, he said that he and Corsbie had an appointment for 10:15 to 10:30 a.m., and therefore, it would be sometime between 9:30 and 10:00 a.m. or shortly after. With respect to the photograph of Harquail he would be about fifty yards away from the scooter. The scooter moved first and the car came right after.

According to Dawn Russell, the receptionist at the Cayman Islander Hotel, appellant Brown booked room 115 on the night of February 13, 1994, i.e. at about 1:00 a.m. on the 14th, for one night paying the rental plus $10.00 security deposit for the key which she handed to him. She produced the registration card signed by him. She identified the key which was found in the Hyundai car on the night of February 14 as the key with 115 printed on it as the key delivered to Brown.

Linda Rankine - the reservation clerk at the said hotel, about mid-day on February 14 called the room by telephone to check if the registered guest Sheldon Brown was staying over. A male voice, not Brown's, with a strong Jamaican accent answered.

Mavis Hooker, the housekeeper/cleaner of the Cayman Islander said that on February 14 she was responsible for "A" block. In that block was room 115. At about 11:00 a.m. she knocked and a male voice answered that he did not want room service. As she was leaving with the trolley she saw another man entered the room. He had two drinks of stout in his hands.

On the following day at noon she entered the room to clean and "strip the beds". She saw blood stains on one sheet. She put the sheets she removed from the bed in a

garbage bag together with other items from the room including two T-shirts, a small bible, a pack of rizla paper for wrapping cigarettes and a receipt. It was about noon she delivered the bag and contents to the supervisor, Lucinda Campbell. In cross-examination she said that she had been given a check-out paper for room 115.

Lucinda Campbell, housekeeping supervisor, gave evidence of Hooker the cleaner on the Thursday, the day after Valentine's Day, leaving with her the garbage bag. On Friday 16, she gave the bag to Detective Constable Harris. Mavis Hooker was present. She identified the key and the hand towel with CIH found in the Hyundai motor car as belonging to the Cayman Islander Hotel. Constable Harris identified in court the white sheet produced as one of the items in the bag. She delivered the bag and contents to Inspector MacKay at the Crime Office. She said that there were two sheets in the bag. There were also a half of pants and a Bob Soto plastic bag inside the garbage bag and a bible. She made an evidence tag of the articles. These include: (1) a receipt from Bob Soto; (2) a bible; (3) half of pants; (4) a Bob Soto plastic bag; and (5) the other half of pants. Constable Colin Pryce accompanied her to the Cayman Islander Hotel and he assorted and labelled the exhibits.

Pryce was called and he corroborated her statement as to the package and labelling of the exhibits. Both witnesses

said that one sheet in Court now had holes in it that were not there when it was packaged.

Detective Inspector Dennis Brady accompanied by Detective Sergeant Bodden acting on information he received, said in evidence that he drove to the White Hall area and then proceeded to walk along the dyke road going towards Harquial Theatre compound. On the road he saw tyre tracks on the marl surface of the road. At an intersection he saw skid marks, pieces of plastic from a reflector, red smudges and paint marks on the road. From the skid marks and the banked earth on the left it appeared that the motor-cycle had fallen on its right-side. Further on, near a wall which divided the dyke roads from the Harquail Theatre premises, he saw the red motor-scooter, registration number 31859, half submerged in the dyke waters on the right, about ten to 15 feet from the wall. Near the wall was a black motor-cyclist helmet and a brown glove. He went around the wall and entered the Harquail Theatre grounds. There on the edge of the bushes he saw a blue and yellow glove, a pillow, a white dress shirt and a pair of black shoes. He saw tyre tracks of a vehicle and a shoe print. Under a piece of plywood he saw a pair of dark-coloured jeans. Luke McCoy took possession of these exhibits and took photographs of where they were found. About 12:35 p.m. Police Constable Scott arrived with his dog Zac and with the

assistance of the dog, on the Harquail grounds, they found a black bag in a shallow hole under a covering of leaves. In that bag was the bulk of the stolen money. The bag with money was removed by Sergeant Bodden.

About 6:00 p.m., with Sergeant Bodden, while lying in wait in the bushes at Harquail near the area where the money was found, he saw the appellant Joel Smith coming from the direction of the dyke road wall and towards where the money had been found. He wore a dark-grey or blue pants but without a shirt. He went out of sight but he heard a sound of digging. He summoned Police Constable Scott by radio. Scott arrived with his dog about 10-15 minutes later but then Joel Smith had left. He had known Smith since 1984. The sun was still up and the appellant Joel Smith had been about 15-20 feet from where he was.

At about 10:00 p.m. while still in ambush on the Harquail grounds he saw a maroon coloured Hyundai drive into the parking area of Harquail, circled and went out. The car twice repeated the manoeuvre. The halogen lights on the lamp posts were on and he recognized the driver of the car as Mark Smith. The muffler sounded as if it were blown and some seven to ten minutes after he heard its distinctive sound on the dyke road. Shortly after the car stopped he saw appellants Davis and Mark Smith walking from behind the dyke road wall into an open area on the Harquail

grounds; they passed where Bodden and himself were in hiding. Davis had a brown handle-chrome pistol in the area of his left-hip pocket. Both went to the area where the bag of money had been hidden and began digging with their hands. They were about 15-18 feet away. He got up, turned on his flash-light, shouted "police!" and fired a warning shot. He ordered them to drop their weapons. Smith said, "I am coming out" and did so with hands raised. Davis ran. He was chased and caught by Police Scott's dog, Zac. When he arrested and cautioned him, he denied having any firearm. Both men had dirty hands. In the car were the key to room 115 of the Cayman Islander Hotel and a black camera bag. Davis was taken to the Airport Station and from there to the Central Police Station, George town.

On the following day he returned to the area where the money was found and found two freshly dug holes, close to the one in which the money was found (photographs of these holes and of the one in which the money was found were exhibited). Later about 4:00 p.m. that day, along with Detective MacKay, he went to the Rankin's Inn and accompanied by Mrs G. Myles, he went to room 247. From that room MacKay took a bag with clothing and other things. On February 16, 1994, he arrested Joel Smith in the area of South Street, George Town.

In addition to the maps and photographs the jury had the benefit of visiting the locus in quo. According to

Inspector Brady, there had been significant changes - the bushes were thinner and the terrain due to excavations had been changed. The jury, however, had the benefit of the distances pointed out by him, including from where he was concealed to where he first saw Joel Smith. This was approximately 45 yards and when he lost sight of him he was about thirty yards away. This was approximately the same distance and area where the money was found. He also pointed out the tyre impressions, where the red scooter and the other exhibits were found.

The evidence of Sergeant Bodden, who was with Inspector Brady throughout, in general was similar to Brady's as to the finding of the exhibits, the recovery of the stolen money, the recognizing of Joel Smith's presence on the Harquail compound and the presence and arrest of Davis and Smith in the bushes of the Harquail premises. He was also present at the arrest of Joel Smith. On February 23, he measured and weighed the following appellants:

Davis - 5 feet, 11 inches - 140 lbs

Joel Smith - 5 feet, 9 inches - 150 lbs.

The red motor-scooter was the property of Soto Scooters, whose business was the rental of motor-scooters. According to Reginald Richards the mechanic, the scooter - registration number 31859 - was rented on Febraury 12, 1994, at 11:00 a.m.

in good condition to one Joel Jacobs and he produced the contract of rental. The scooter was reported stolen by Jacobs at about 8.30 a.m. on February 13, 1994. Somehow, sometime after, among the stolen scooters he received from the police, was number 31859. It had been badly damaged and was scrapped. On request he had handed over the exhibited registration plate.

Luke McCoy, at all material times, was attached to the Scene of Crime Department of the Cayman Police Force. At about mid-day, he joined Chief Inspector Brady at the scene on the dyke road. He prepared and tendered in evidence an album of photographs, inter alia, of the exhibits on the dyke road and on the Harquail grounds, the bag with the stolen money where it was found, the tyre tracks on the road, the red scooter lying in the dyke water and certain exhibits found on or near the road and on the Harquail premises. He also took possession of the black helmet which was just off the dyke road and by the wall and from the Harquail premises, the black jeans, the white dress shirt, the pair of black shoes, the brown gloves, the black helmet and the blue jeans. He also took possession of the black wind-breaker with hood, found by Constable Javin Powery on the Harquail grounds and the green shirt found by Sergeant Leslie Franklin near the "Lone Star". The tyre tracks and tyre impressions were on the marl surface of the road which was wet at the time. At the visit to the locus in quo, he pointed out where the tyre marks were.

On February 14, at about 2:50 p.m., Constable Kim Ramoon along with other officers was at the Harquail premises on observation duties when a two-tone Chevrolet car drove in

and then turned around and drove out at speed towards the West Bay Road. In the police van which was parked nearby, accompanied by Sergeant Moore and Police Constable Berry, he gave chase. He was assisted by other units from George Town and with their help the car was stopped in the vicinity of the Sleep Inn Hotel on West Bay Road. In the car was appellant Brown, the driver on the left and beside him was the appellant, Bush. Brown was dressed in a green jacket, white shirt and pants. He had a bottle of stout in his hand. The search for drugs, firearm and money was negative. Brown and Bush were escorted to the Central Police Station. He gave the Chevrolet's registration number - 12757. On the photograph of the Harquail area he pointed out the route taken by the Chevrolet in and out. On return to the Harquail he found a brown bag in the bushes nearby. In it was one brown glove, a black tie, a grey tie, a black red and green headband, a T-shirt of colours, white, black and red and a blue and white towel. He handed over the bag with the contents to Detective Luke McCoy.

Sergeant Bruce Moore who was with Officer Ramoon arrested appellants, Brown and Bush, on suspicion of having committed robbery. The car was driven by Constable Dave Pinnock to the police station. Pinnock locked it up and handed the keys to Inspector Rankine. Bush had a C.I.H. Towel hanging over his right-shoulder. In cross-examination he said that it was against the law to be drinking alcoholic beverages while driving or having ganja in possession.

Detective Sergeant Gerald Joseph said that at about 3:00 p.m. he attended an area on the south side of the Harquail Theatre. He was shown by Detective Luke McCoy a tyre impression and a shoe impression. He made casts of both impressions and took photographs of them.

At about 11:00 a.m. he went to the same area at the request of Inspector Brady and took photographs of two seemingly freshly dug holes. He also photographed the red Hyundai car parked below a concrete wall just on the south side of the Harquail. The photographs were exhibited and referred to by him. He indicated on the plan where tyre and shoe impressions were. There was a black camera bag on the floor of the car on the passenger-side.

On February 15, he went to Rankin's Inn, room 247 and took photographs of certain articles in the room. On the blanket there appeared to be spots of blood and also on a comforter. On Febraury 16, 1994, he took photographs of the injuries on the three accused who were in custody - Alvin Davis and Joel Smith (appellants) and Mark Smith. He referred to the photographs in evidence. At 4:30 p.m. that day Dr. Obafunwa gave him the blood samples he took from the three accused. The samples were each placed in separate polythene bags, sealed and delivered to the Metro-Dade Police Crime Lab. On February 2, 1994, he finger-printed and palm-printed Alvin Davis which he delivered to Inspector Stewart MacKay.

MacKay is in charge of the Identification Bureau in Cayman and he has 27 years experience in scenes of crime investigation and has training and experience in finger-print identification. His courses include shoe impressions and tyre impressions.

On February 14 at about 3.00 p.m., he was present when Sergeant Joseph made casts of the tyre impressions and of the shoe impression. Referring to an exhibited photograph of the tyre tracks, he expressed the opinion that they were made by a vehicle travelling in a straight line - the back tyres would over-ride the front tyres. From the tyre impressions he was of the view that the front tyres of the motor vehicle were in very bad condition. He pointed out on the plan where the shoe impression was and where the tyre impressions were. The tyre impressions were consistent with having been made by appellant Brown's car.

He identified the casts provided as those taken by Sergeant Joseph in his presence. He examined the red scooter registration number 31589 and found the right-mirror broken, the left lower-reflector broken with other minor scratches. On February 16, he examined the red Hyundai motor car registered number 43238. In the car was a beige bath-towel, a beige hand-towel and in the glove compartment, a key number 115 and tab 353, and a camera bag on the front floor on the passenger-side. In that bag were four bars of soap,

a kitchen knife and a shampoo bottle. The evidence that the key was for room 115 and the one delivered to appellant Brown when he booked that room was unchallenged.

On the same day, about 12.45 p.m., he examined the Chevrolet Capri at the police station. From the floor at the rear he recovered a paper bag. He recovered four buttons, one from the floor on the left or driver's side and under the driver's seat - two behind the seat cushions on the rear. The buttons produced included one with a piece of thread attached.

The fingerprint impressions on the bag were developed by a chemical process, using the chemical called ninhydrin. They were identical with those of the appellant, Davis.

From his cursory examination of the white shirt he recalled that the sleeves were turned inside out, five buttons were missing and there appeared to be blood stains on the shirt, tears on the right-sleeve at the shoulder and green grass-like stains. The cuffs were unbuttoned. He also examined the black jeans pants which had cuts in the area of the right-knee and a white T-shirt which was tied in the manner he demonstrated. He examined the floral comforter and the blanket from Rankin's Inn. From the comforter he cut two areas that appeared to be blood-stained and one from the blanket. Also on the same day he examined two sheets from the Cayman Islander Hotel and cut from them blood-stained areas.

Robert Hart, Criminalist of Metro-Dade Laboratory specialising in firearms, toolmarks, tyre and shoe impressions, in evidence said that he received from the Cayman Police a plaster cast tyre of impressions and eight standard impressions of tyre tracks (two each of four tyres). a folder of black and white photographs. He conducted an examination of the tyre impressions in the casts with those of the inked standard from the grey Chevrolet. In this he also used the photographs and referred to them in the course of his evidence and pointed out areas of similarities. He concluded that both front tyres were badly worn and of a different make to the rear tyres. He concluded that the impressions made by the tyres on appellant Brown's grey Chevrolet motor car were consistent with impressions taken from the scene behind the Harquail and the tyre of the car could have made those impressions.

The cast of the shoe-print taken at the scene, he concluded that in size and pattern it was identical to the right Travel Fox shoe but the cast did not contain the five individual details which would have permitted him to say that it was definitely made by that shoe.

As regards the photograph of the impressions seen in the bank, there was sufficient detailing to match the print to the left foot of the Sea Mist shoe. He acknowledge that both types of shoe were fairly common place. If there were

no traffic, rain or wind, the tyre impressions could theoretically last forever but breeze would wipe out the impressions. On the basis of this opinion, the photographs taken at the scene were clearly helpful.

Dr. John Obafunwa, the forensic pathologist of Grand Cayman, on February 17, 1994, attended the Central Police Station. There he collected samples of head hair, chest hair and two blood samples from each of the five accused men. In the case of the blood samples, on each bottle he attached a label with his initials followed by the initials of each of the respective accused. Two blood samples were taken, one for use by the serologist and the other for the DNA expert. He also carried out physical examinations on them. On the appellant Davis, he found: (1) on the inner aspect of the right-forearm, three vertically superficial graze abrasions, measuring 3.5 centimetres, 1.5 centimetres and 3.0 centimetres. The photograph of this wound showed scab; (2) at the back of the left-arm, four slightly oblique running linear superficial abrasions measuring 4.0 centimetres, 4.5 centimetres, 2.3 centimetres and 2.8 centimetres, respectively; (3) on the inner aspect of the right-knee joint running downwards to the upper 1/5 of the right leg, irregular scabbed abrasions covering an area of 10x0 x 5.0 centimetres. A photograph of the area showed the approximate condition of the injuries; and

(4) vertical interrupted scabbed graze abrasion on the inner aspect of the junction between the upper and middle third of the left leg - a total length of 8.5 centimetres. Having regard to the scabbing, the injuries were recent, about three to four days old. The grazed nature of the abrasions would point to a relative motion between that part of the body and the impacted surface. The different levels of the graze would suggest that the leg must have moved upwards against the impacted object. Because they are simple linear wounds, he could not say anything with regard to the direction of the movement. One could obtain these injuries from a fall. He would expect those wounds to bleed.

In cross-examination by Mr. Cruickshank for Davis, he said that it is possible that the injury to the left shin could be sustained by a fall from a flight of stairs. To the question whether the injuries to the left arm and elbow could occur before the injury to the right leg, he said that he would put these injuries in the same bracket, give or take, one or two days and that the injuries to the left arm and area could be caused by running through bushes.

On Joel Smith, he found: (1) a grazed abrasion at the lower border to the right deltoid muscle, measuring 6.8 x 5.0 centimetres - he referred to photograph of the wound in evidence. A vertical line on the inside tails towards the outer aspect indicating the relative motion between the body and the surface

or object impacted. The shape of the abrasion indicated a forward motion relative to the object; (2) an oblique running-grazed abrasion just below the right-elbow; (3) abrasions of varying lengths were found on the left-shoulder; (4) overlying the right-knee, a scabbed abrasion measuring 5.2 x 4.8 centimetres and were about three to four days old; and (5) the lower border of the upper-third of the right-leg contained small scattered scabbed abrasions. He would expect bleeding from the injuries to the right-arm to occur shortly after inflictions.

His attention was drawn by Superintendent Lindsay Cacho and Detective Inspector MacKay to a pink stain close to the cuff of the right-sleeve on the dirty white shirt found on the trail. He was of the opinion that it was a blood stain. In September, 1994, he was present at the Metro-Dade Laboratory when the shirt was re-submitted to Mr. Wolson, the serologist.

In cross-examination by Mr. Furniss, he said that he also found injuries on Mark Smith. There were scabbed grazed abrasions on his right-shoulder as shown in photograph 44. He would give the same timing as the injuries on appellants, Joel Smith and Davis. He would not attribute the injuries to Joel Smith as superficial abrasions from a thorn in the bush.

The witness, Toby Wolson, the serologist from Metro-Dade Laboratory said that on February 25 he received certain items of exhibits from the Cayman Police and described in

detail how he handled and examined the exhibits. In that regard, he cut from each item samples on which he performed a presumptive test for the presence of blood. Of the exhibits he cut samples from six items; he numbered each and placed file cards 1-6 and this he did for submission to Dr. Haas, the DNA expert. These include samples from the comforter and the blanket from Rankin's Inn, piece of white sheet from the Cayman Islander Hotel. He described in detail his presumptive test for blood. He also received the two samples of blood in respect of each of the five accused as taken by Dr. Obafunwa. He gave evidence of his careful extraction, handling and labelling of the samples for submission to the DNA expert. Dr. Haas.

He also received the exhibited white dress shirt in a sealed package. To his visual examination it appeared dirty. On March 22, he performed a presumptive test on samples randomly selected from six areas of this shirt. The tests were negative for blood. The shirt was re-submitted on September 19, 1994, when his attention was directed to an area on the right sleeve near the cuff. The presumptive test from the sample from that area was positive. In the interim between March and September the shirt had been submitted to Dr. Borgi of the same Laboratory.

The shirt with the exhibits was first returned to the police on July 25, 1994. According to Inspector Cacho, the

report of Dr. Borgi referred to four buttons missing from the shirt while his report had five.

Although it seemed but a trifling discrepancy that would be resolved when the exhibit was produced in Court, the examination confirmed that he was right. It was then observed that apparently no tests were performed in relation to the pink stain on the right sleeve and it was re-submitted to Dr. Wolson.

In cross-examination Dr. Wolson said that in relation to the white shirt when first submitted for examination the request sheet made no specific reference to any particular area and his attention was not then drawn to the area which he examined in September but if he had then observed the pinkish area, hopefully he would have examined it. As to the six particular spots he had tested in March they had appeared to be darkish-coloured, reddish-coloured stains. He acknowledged that what remained of the stains on the right cuff would have normally called for testing but he had already tested areas similar in appearance with negative results. Except for the area on the left sleeve no other area of stain was as noticeable as that cut from the right sleeve.

Dr. Borgi, the Criminalist in the Trace Evidence Unit of the Metro-Dade Crime Laboratory, said that on April 11, 1994, he received the white shirt from Wolson. There were buttons missing from the shirt and on the 18th he received three buttons,

one of which had a thread attached. He gave evidence in detail of his tests including examination under a stero miscroscope which magnified images one hundred times and allowed him to look at the buttons three-dimensionally. His objective was to compare the buttons and the thread to see whether they were similar to the buttons and thread remaining on the shirt. He found the buttons identical to those on the shirt in terms of colour, thickness and all aspects of construction identical to the buttons remaining on the shirt. In cross-examination he agreed that the shirt was mass-produced and it was possible at the time of production that other such shirts would have similar threads and buttons.

Dr. Haas, the DNA expert of the Metro-Dade Laboratory, gave evidence of his receipt of the blood samples and other items exhibited from Dr. Wolson. He carefully explained the purpose of the DNA's analysis, of the method used and the eliminating series of tests done to determine if the DNA in the exhibited samples matched that of any one of the five accused whose blood samples had been submitted for analyses and comparison; that as a final step the visual match had to be confirmed by the use of a video camera with a computer before the results are regarded as conclusive. The profiles matched the samples from the appellant, Davis' blood. The test represented by the x-ray film was repeated by using the nylon membrane and different radioactive probes. The profiling did not match any of the other four accused. He

illustrated the ten stages of his test with charts. The running of four separate tests or probes was to minimise the possibility of an accidental match. By the end of the fourth test, the possibility of an accidental match was one in one million. Apart from any statistical calculations, the primary basis of this sort of test is the fact that a match or profile is achieved of the precise portions of DNA which are unique to the individual and which would match no other person in the context of the case than the appellant's, Davis. He then resorted to statistics in relation to this test from data compiled from three groups in the Florida area thus: the likelihood of an identical profile matching the appellant's would for Caucasian be 1 in 21 million; for Hispanic - 1 in 400 million; and for blacks - 1 in 500 million.

As regards the white shirt which was submitted to him in September 1994, the DNA was insufficient for the more accurate test he performed with the samples from the Rankin's Inn Hotel and the Cayman Islander. The second class test that he performed in relation to this exhibit was called H2A-DQ, Alpha test. Using this test he said that the DNA in the fragment from the shirt was the same as in Joel Smith's blood - Type 2, Type 4 - and none of the other four accused were of that type. This test goes to type and not to individual. Therefore, the chance of recurrence is much greater - about one in twelve or eight in a hundred.

The grounds of appeal common to all the appellants may be concisely stated thus:

(1) the learned trial judge erred in rejecting the submissions of no case to answer in each case; and

(2) alternatively or in any event, the verdict of guilty in each case was unsafe and unsatisfactory having regard to the evidence.

By arrangement the submissions before the learned trial judge were led by Mr. Delano Harrison for Brown. In his opening gambit he submitted that as the evidence of Paul Wignall and Delroy was necessary to prove the genesis of the conspiracy in Jamaica, the appellant Brown should not be called upon to answer as that evidence was not forthcoming. He argued that the prosecution must prove not only the actus reus - the agreement between the alleged conspirators to carry out the unlawful purpose - but also the mens rea - the intention to do so - and, in the circumstances, in the absence of the evidence of Wignall and Douglas the prosecution had failed.

Mr. S. Cruickshank adapted such of these submissions as were relevant to the appellant Davis. He submitted that it was not sufficient for the prosecution to argue that since the substantive offence of robbery was committed then

there must be an agreement by the persons or some of them to commit that offence; ...there must be some evidence from which such a prior agreement may be inferred.

Ms. Agard, Counsel for the Crown, was plainly right when she said that the broad propositions put forward on this count were not supported by the authorities. She referred to dicta in a number of cases including D.P.P. v Doot & Others [1973] A.C. 807. That case was a conspiracy to import cannabis into the United Kingdom and involved five Americans who conspired in England and also in America.

Lord Pearson reversing the ruling of the Court of Appeal denying the English Court Jurisdiction said at p. 827:

> "When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place: Reg. v. Aspinall, 2 Q.B.D. 48 per Brett J.A., at pp. 58-59. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."

As Lord Dilhorne put it with concise clarity at p. 822:

> "A conspiracy is usually proved by proving acts on the part of the accused which lead to the inference that they were acting in concert in pursuance of an agreement to do an unlawful act."

In the instant case, to prove the conspiracy the prosecution was also relying on the continued association of Brown and Davis in Cayman and their respective activities prior to and on the day of the robbery and were seeking from those acts the inference that they were done in pursuance of the conspiracy alleged. In the circumstances, the failure to prove the Jamaican connection was not incompatible with a continuing conspiracy to rob the bank.

This was apparently not Mr. Harrison's main contention as he went on to submit that the prosecution was relying on circumstantial evidence and that the corpus of evidence adduced by the prosecution would constitute not evidence from which any criminal transaction could be inferred and the highest that could be said of it, that it gave rise to mere suspicion. This submission would be relevant generally to the case of those appellants whose guilt would rest on circumstantial evidence.

We agree that while the cogency of circumstantial evidence depends on the cumulative effect of the circumstances, a series of merely suspicious circumstances could not amount to proof beyond a reasonable doubt. In the instant case, as the implication of each defendant on the offences charged would to a great extent depend on circumstantial evidence, it will be necessary to examine the collated evidence against each appellant to ascertain whether

there was credible evidence to prove a fact so inexplicably inculpatory as to infect the other attendant circumstances with the requisite certainty to support the verdicts entered against the appellants.

With the consent of the defence, statements of the appellants Brown, Davis and Bush, in recorded interviews with the police were read in evidence. These were "mixed statements" containing in the main excuses and explanations. The acceptance or rejection of the exculpatory parts of those statements is eminently a matter for the jury - R v Duncan [1981] 73 Cr. App. R. 359. Although Defence Counsel in their submissions of no case to answer referred to the exculpatory parts of those statements, the learned trial judge was, therefore, not obliged to take them into consideration or to determine issues raised by them. We are fortified in this by dicta in R v Storey 52 Cr. App. R at p. 344.

On the basis of this approach by a trial judge to extra-judicial statements we are of the view that the learned trial judge was correct in ruling that there was a case to answer. However, in the case of those appellants, Davis, Brown and Bush, whose cases rested on final submissions so far as those submissions refer to the exculpatory parts of the extra-judicial statements of the respective appellants and seek favourable inferences in relation to the issues raised, we consider them relevant to the alternative gound of appeal -

the verdict is unsafe or unsatisfactory. Incidental to this would be whether the summing up fairly and adequately adverted attention of the jury to the exculpatory parts of those statements in a manner indicating that their acceptance or rejection was entirely a matter for their consideration.

In respect of Joel Smith, the alleged first robber, there were the following pieces of evidence: (1) the general description of the height and built which were in keeping with the height and weight measured and taken by the police; (2) the injuries as found by Dr. Obafunwa and his opinion as to causation; (3) the white shirt: (a) as described and identified by certain witnesses; (b) the DNA expert's finding that of the five accused the blood on the right sleeve was of the same type as the appellant's; (c) the buttons found on Brown's car, which in the opinion of the expert, were from the shirt; and (4) his presence at the locus as described by policemen Brady and Bodden in their evidence.

We are of the view that cumulatively this evidence was sufficient to justify the ruling that there was a case to answer.

This, therefore, brings us to the second alternative ground - that on the totality of the evidence, the verdict of guilt was unsafe and unsatisfactory. In support of this ground we were asked to consider what may be described as

the weaknesses in the case for the prosecution and also the issues in contention as a result of evidence favourable to the defence. Unlike Mark Smith there was no direct evidence of his being associated with Davis, Brown or Bush on the day of the robbery.

Now in the case of the white shirt there are two vital correlative questions - was this the shirt worn by the first robber? If the answer is in the affirmative, is it the shirt of appellant Joel Smith?

In addition to the manifest discrepancies in the description of the first robber's clothes by the witnesses, of those who identified the shirt, Georgiana Williams admitted that when she gave her statement shortly after the incident she did not remember about a white shirt. Her memory was prompted when it was shown to her at the police station. Patricia Chung-Ebanks, the teller admitted that she first described the whirt as a white jacket but some time after when at home and thought about it, it was like a replay. She would not describe the shirt exhibited as a white jacket. Although it is difficult to conceive how one could describe what was not seen, the inconsistency was a matter for the jury and not one to be resolved by the Judge. Angela McLean, the bank clerk admitted that when she gave her statement she described the shirt as a jacket with a zipper front.

The second question depends entirely on the evidence of the DNA expert. As regards the DNA test on the bloodstain on the white shirt, because of the insufficiency of DNA, the less reliable test established that the DNA on the fragment of the shirt was the same type - type 2, type 4 - as the DNA from the blood of the appellant, Joel Smith and that none of the other four accused were of that type but that the risk of accidental match was odds of one in twelve or eight in every one hundred. Having regard to the uncertainties in the identification of the shirt, the inconclusive evidence of the DNA expert would be insufficient by itself to identify him as the first robber. In addition, for the injuries, there is his account to the police officers that he had received the injuries falling from a bicycle. The prosecution is asking for the inference that he sustained his injuries when he fell from the scooter when it skidded and fell. However, surprisingly, the question of this causation was not specifically put to Dr. Obafunwa. It has not been argued and could not have been argued with reason and good sense that those injuries could not have been caused by falling from a bicycle.

The appellant called as his witness, Mrs Ellen Joy Williams, his sister, who said that on the morning of February 14, at about 10:00 a.m., when she was about to go to Court, she had an argument about his being in the bathroom and she had to bathe before going to Court. She had to leave before having her bath. She returned about

noon and he was still at home eating a sandwich in the company of Michelle whom he later married. She had a bicycle which the appellant rode away. When he returned he had injuries - bleeding from somewhere about his knee and body. She gave him peroxide to put on the wounds. She saw the bicycle some two days after with damage to the back wheel.

In cross-examination, she said that her estimate as to her return home was accurate as she saw police cars up and down and heard that the bank was robbed. In re-examination, she said that he received his injuries before the day in Court. He took the bicycle about three days before.

The direct challenge to the visual identification that he was the person seen at about 6:00 p.m. that day on the Harquail grounds was an alibi. For this the defence relied on the witness, Benton Walton. Walton admitted that he was in Court during the course of the trial on two previous occasions. In evidence, he said that he was a tiler. On February 14, he was working at Villa of the Galleon. He left work at 4:00 p.m. and later went to the home of the appellant at Mary Street at sundown. He took appellant and his wife to the laundromat at Windsor Park. They left the laundromat at 10:00 p.m. and he took them back to their home.

In cross-examination, he said that he went home before going to appellant's home. It was "yesterday evening" he

spoke to anyone about giving evidence. To the Court, he said that he is at present working from 7:00 a.m. to 6:00 p.m. at the Marina at Prospect Park. He was not working on the occasions he sat in Court.

It was a question of credibility and the reliability of visual identification on the one hand and a rejection of the alibi on the other. It was still a matter for the jury notwithstanding the police had every opportunity to make an effort to hold the person who came to the grounds instead of sending for the dog and his man who took 15 to 20 minutes during which time the person had left.

With the inconclusive nature of the DNA evidence and the absence of any other evidence implicating this appellant, assuming that they accepted the visual identification of the police officers, Brady and Bodden, his presence at the scene would at its best be proof of knowledge that he knew that the money was buried there.

In addition, there is the case of the synopsis which was never brought to the attention of the jury and which arose in the following manner:- Shortly after the learned trial judge indicated that there was a case to answer, on the insistence of the appellant, his Counsel, Mr. Furniss, raised the matter of a "synopsis" in a manner that clearly indicated that he, Furniss, had no personal faith in so doing.

It appears in the records thus:

> "MR. FURNISS: My Lord, if I can indicate to you the situation is there was a synopis which was handed to all the counsel at the time when the matters were being prepared for -- or prior to committal. In the course of that synopsis, My Lord, there was a statement -- and I refer to the word itself. I will indicate the advice I have given to my client about this in a moment, My Lord, but he has raised the matter --"

The synopsis was a summary of the case against each accused and was headed "INCIDENT ROOM" - " BRIEF CIRCUMSTANCES OF CASE". The single paragraph in relation to Joel Smith reads:

> "21. Joel Smith was arrested as a result of information received. Joel Smith was observed with injuries to his right shoulder, similar to those on Alvin Davis' shoulder and consistent with a fall. Interviewed under caution, Joel Smith has remained silent, except for his injuries, at the moment there is no other evidence available implicating Joel Smith. Exhibits have been sent for forensic analysis to ascertain if Joel Smith as well as any of the others are linked in any way to them."

The Judge apparently took his cue from defence counsel. The synopsis is relevant, not for what it contains but for what is omitted. Implicitly, it was prepared after the appellant was in custody and did not include any reference to the appellant Joel Smith being seen on the Harquail grounds on the afternoon of the day of the robbery. An omission that would certainly call for an explanation and which was never brought to the attention of the jury.

For the reasons set out herein, we are of the view that the conviction of Joel Smith was unsafe and unsatisfactory.

The following ground of appeal common to both Davis and Brown which was in turn argued along the same lines by both appellants may briefly be stated thus:

> That the learned trial judge's directions to the jury as to how they should treat the evidence and statement of the hostile witness, Paul Wignall, were inadequate.

In support reference was made to the following statement of Lord Chief Justice Parker in the case of Golder and others [1960] Cr. of App. at p. 11 :

> "In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act."

It was their submission that the judge omitted to give appropriate directions in relation to the previous statements which the prosecution had tendered in evidence. Now in addition to his earlier proper general directions as to the purpose of putting previous inconsistent statements to a witness and that only such parts of a statement as put to the witness were in evidence, the learned trial judge dealt with the witness, Wignall, in the following manner:

"Now, Wignall gave evidence which was not in keeping with an earlier statement which he had given the police and did not support the prosecution's case. The prosecution was, therefore, allowed to treat him as a hostile witness. That is a witness who had changed sides -- and were allowed to cross-examine him to show that he had earlier made that statement which was inconsistent with the evidence which he gave in court.

Now as to the contents of that statement, you will recall, he was cross-examined about what he said in that statement and those passages were put into evidence as exhibit 14. I do not propose to let you have Exhibit 14 to take with you into your room when you deliberate for reasons which will become apparent as I go on.

Now, those portions of the statement were put before you by the prosecution to throw doubt on his earlier evidence in which he told you that he had no discussion with the defendant Sheldon Brown apart from discussion about bringing girls to Cayman from Jamaica, and no discussions with the defendant Mark Smith about anything apart from the dub plate which he, Wignall, said he had brought from Jamaica and of which Mark Smith said he had been robbed. In other words, not robbed in the sense we would use in the Indictment, but Mark Smith had said that he, Wignall, had not been paid for what it was worth. That was in evidence about the dub plate.

I do not propose to direct you any further about this witness' testimony, Members of the Jury, except to advise you that you should regard it as negligible and your verdict in this case should be founded on the rest of the evidence not on anything that Wignall had to say." (p. 2081-82, Vol. V).

In our view these directions and in particular his denying the jury access to the statement of Wignall was

clearly a withdrawal from their consideration of the statement in its entirety.

We found no merit in this ground of appeal.

Another ground of appeal raised by Davis, which was relevant to the appeals of Brown and Bush was to the effect that the learned trial judge erred in disclosing to the jury his ruling on the no case submissions.

It is now the approved procedure that the submissions of no case to answer should be made in the absence of the jury. This is an exception to the general rule that the jury should hear the whole case.

In the Privy Council Appeal (an appeal from the Jamaican Court of appeal No. 13 of 1994, Rupert Crosdale v. The Queen delivered 6th April, 1995, **Lord Steyn** who delivered the judgment identified the following three questions as arising:

(i) "Whether there are any circumstances in which a no case submission should be made in the presence of the jury.

(ii) Whether where the defence applies to make a no case submission in the absence of the jury it is right for a judge to refuse the application and to hear the submission in the presence of the jury.

(iii) Whether where the defence applies to make a no case submission in the absence of the jury it is right for a judge to inform the jury of his finding that there is a case to answer."

Although questions 1 and 2 do not arise in the instant case, it is worthy of note that taken together the general answer was in the negative. **Lord Steyn** after approving the practice in England of the submissions being made in the absence of the jury said:

> "The foundation of this practice is to protect the interest of the defendant."

It was once the robust practice in Jamaica for counsel for the defence to make submissions of no case in the presence of the jury, especially when the basis for the submissions was that the evidence from the prosecution witnesses had been so shattered by cross-examination that no reasonable jury would on that evidence convict and, at the same subtly hinting to the jury that if at that stage they were of the view that the accused was not guilty, they could stop the case and return a verdict to that effect. It was a manoeuvre that occasionally brought the desired result. On this practice **Lord Steyn** commented thus:

> "It is necessary to refer to one possible qualification which was mentioned in argument. Counsel suggested that the defence may sometimes invite the judge to rule that the jury should remain.

> If that were to happen, the judge ought to ask the jury to withdraw to hear submissions why he should depart from the ordinary procedure. Their Lordships are sceptical about how realistic the suggestion is that the defence might have a legitimate reason for requesting such a ruling. Certainly, if the defence sought to gain a tatical advantage by making an extra speech before the jury that would not be a legitimate reason for departing from the ordinary practice. Their Lordships are, however, content to assume that in exceptional circumstances the defence might have legitimate reasons for such a request and to leave this point on the basis that the judge in the absence of the jury will hear argument and exercise his discretion on the point." (p. 8)

Although it should be assumed that defence counsel would be in the best position to know whether it would be to the advantage of the accused for the jury to hear those criticisms of the witnesses for the prosecution the determination of a procedure relative to the conduct of the defence now rests on the discretion of the trial judge. Be that as it may, we are here concerned with the answer to the third question and on this Lord Steyn said:

> "There is no reason why the jury should be privy to the judge's reasons for his decision. In order to avoid any risk of prejudice to the defendant the jury should not be present during the course of the judgment or be told what the judge's reasons were. If the judge rejects a submission of no case, the jury need know nothing about his decision. No explanation is required. If the judge rules in favour of such a submission on some charges but not on others, or rules in favour of it in

> respect of some defendants but not others, the jury inevitably will know about the decision. All the jury need then to be told by the judge is that he took his decision for legal reasons. Any further explanation will risk potential prejudice to a defendant or defendants." (p. 9)

It is difficult to see what harm has been done in the instant case as the appellant's case rested on final submissions and the judge took the opportunity to remind the jury that the verdict was entirely a matter for their consideration thus:

> "In the final analysis, you are the sole judges of the facts in this case.
>
> In this context, I must also mention a matter already alluded to by Mr. Collins in his address. You will recall that after certain legal submissions in your absence, it was ruled that the defendants each had a case to answer on the Indictment as it now stands and that Mark Smith had been discharged on the conspiracy count. What that meant, Members of the Jury, was that as a matter of law I considered that there was sufficient evidence for you the jury, who are the judges of facts to consider. It is, therefore, your verdict based on the facts that we seek to arrive at."

In the circumstances portrayed in this passage the jury would inevitably know of the decision and it was in fact brought to their attention by defence counsel.

We find no merit in this ground of appeal.

As against the appellant Davis, the prosecution tendered evidence of the physical description of the second robber and of the clothes he was wearing by the tellers and customers

and their subsequent identification of clothes found on the trail and in or near the Harquail grounds. This evidence provided a distinguishing outline of the second robber. However, in the absence of visual identification, the prosecution sought to establish that appellant Davis was that second robber by circumstantial evidence. This is pivotal to the existence of the counts charging Brown and Bush. In that regard, due consideration must be given to the contentions and arguments put forward by counsel for the appellant as well as the exculpatory parts of his statements to the police so far as they raise contested issues or make assertions favourable to his defence. The bits or links of circumstantial evidence briefly categorised are:

(1) evidence tending to prove opportunity to commit the robbery. This would include conduct sufficiently proximate to the robbery from which the conclusion could reasonably be drawn that from their very nature were indubitably indicative of a pre-arranged plan. These in particular, were:

(a) the injuries described by Dr. Obafunwa and his opinion of causation, the relevance being dependent on a finding that the robbers fell from the scooter, having regard to evidence and opinion of the police officers;

(b) the unchallenged finding that the finger-prints found on the paper bag in Brown's Chevrolet was his - the relevance depending on the inference that this was the car which assisted the robbers after the accident with the scooter;

(c) his occupation of room 115 of the Cayman Islander Hotel on February 14 and which was made available to him by Brown and the inference that it was selected as a hide-away because of its closer proximity to the Harquail grounds than the Rankin Hotel in which he was simultaneously the tenant of room 247;

(d) his visit to Harquail grounds with Mark Smith on the night of the 14th and his activities there as described by Inspector Brady.

The appellant's broad challenge to this evidence tending to implicate him in the robbery and identify him as the robber was an alibi put forward in the interview as recorded by Inspector Branch. The trial judge adverted the jury to this issue with concise clarity thus:

> "He then gave an account of his movements during the day of the 14th of February which would provide him an alibi, if you accept it, until 2.30 p.m. on the 14th

> because he said he remained at the hotel, at the Rankin's Inn, until that time. And you will remember, Members of the Jury, what I've told you about alibis. The defendant by raising an alibi assumes no duty to go in the witness box or to call witnesses to prove it and the onus remains on the prosecution to disprove it to your satisfaction."

The appellant specifically denied ever being in room 115 of the Cayman Islander Hotel and when put to him by Inspector Brady in the interview refuted the statements of Brown that he (Brown) had made the room available to him. So despite both appellants, Brown and Bush, in their statements placing him in the hotel on February 14, the learned trial judge consistent with his earlier directions that "a statement or interview is only evidence against or for the maker of that statement or interview" and "what one defendant told the police cannot be used as evidence for or against any other accused" on this particular issue said:

> "Now, as regards to any connection between the defendant Brown, the defendant Davis and the Cayman Islander Hotel, the prosecution must there rely on other evidence."

and later in his collation of the evidence against the appellant Davis, said:

> "Now, to refute this alibi about the morning of the 14th February, the prosecution relies primarily on the DNA evidence which if you accept it, shows conclusively that the blood on the sheets at the Cayman Islander Hotel came from Davis. This was DNA as you have just heard which the chain of custody suggests

> and if you accept the evidence of the witness Mavis Hooker came from the sheets from Room Number 115 at about noon or check-out time on Tuesday, the 15th."

He then referred to the evidence of Mavis Hooker and the receipt for the cap and T-shirt bought by Bush and found in room 115 of the Cayman Islander. The cap and T-shirt described therein were found at the Rankin Hotel but the appellant Davis denied receiving them from Bush at the Cayman Islander. He said in his interview that they were handed to him at Windsor Park.

He then reminded them that though not challenged, the fingerprint expert's opinion on the bag found on Brown's Cheverolet, the appellant while admitting that he had driven with Brown in other cars denied ever being driven in the Chevrolet. On his injuries, he denied ever having any injuries when he left the Rankin that day. The appellant raised the question that in any event the finding of the bag in the car cannot determine the time he was in the car. In that regard, it was but after 6:00 p.m. on the evening before the robbery that Sherwin Rankine, the previous owner, removed his belongings and handed over the car to Brown.

On his interviews with the police the learned judge advised the jury:

> "You are also, of course, urged by the defence to say that you accept or at least are in doubt whether he was not where he told the police he was on the morning and early afternoon of the 14th of February, that is at the Rankin's Inn.
>
> You are also urged to reject the evidence of Officers Brady and Bodden about seeing Davis with a firearm on the night of the 14th and to find that one reason for doing so would be what has been described by Mr. Cruickshank as being Officer Brady's failure to put the matter of the gun pointedly to Davis when he was first being interviewed."

He reminded them of the submission of his Counsel to the effect that Mavis Hooker's evidence as to the Jamaican accent was equivocal as the witnesses at the bank had said that the first robber spoke in a Jamaican accent.

However, the most damaging piece of evidence against Davis is his return to the scene where the stolen money was found. This evidence was the linchpin to all the other compatible circumstances. Its probative value was challenged by Counsel for the appellant in the no case submission on two grounds: (1) that the period of time between the robbery and Davis' presence was too wide to ask the jury to infer that he was the robber; and (2) in addition, the evidence of the route taken as given by Inspector Brady was not in keeping with the theory of the prosecution that they went straight to the point where the money was earlier discovered. In our view, the answer to the question: "what is proximate conduct", depends on the

circumstances of the particular case. Here, it would be indicative of prudence for a robber to wait until night, when discovery is unlikely, to remove his loot from its cache. As to the route taken, although that was eminently a matter for the jury who had the benefit of visiting the locus in quo, this submission evoked from the Judge in his exchange with Counsel the following pertinent comment:

> "That certainly doesn't indicate a lack of knowledge of the location. I would think to the contrary. A more elaborate path, but very direct nonetheless."

The jury were adverted to the challenge to the acceptance of that evidence by the defence in the explanation offered by the appellant to the police as supported by Smith in his evidence. Mark Smith's testimony so far as it is relevant to Davis' case was properly left for the consideration of the jury. It was to the effect that on the night of February 14, he was taking appellant Davis, to the Harquail Theatre to retrieve some ganja he had hidden there and that appellant Davis, had no firearm.

In cross-examination he said that it was about 6:00 to 6:30 p.m. he spoke to Davis whom he knew about two or three days before. Andrea Ebanks, appellant Brown's girlfriend was there. At that time he heard of Brown's arrest and in company with her he visited Brown in custody at the Central Police Station. He returned to Brown's home at Windsor Park. There he saw Davis

in a hammock. He told him of Brown's arrest. Davis asked him if he had anything to burn and he told him he had nothing close by - he had to dig it up. He borrowed the Hyundai from Brown's sister.

In cross-examination extracts from his recorded interview were put to him. He admitted giving the answers in his interview to the effect that the ganja for which they were searching was Davis' but he said that he was wrongfully blaming Davis. He also admitted meeting Davis on the night of appellant Brown's return from Jamaica at Brown's house and appellant Bush was present. In re-examination he said that his reason for saying in his statement that the ganja they were looking for belonged to Davis was because he had previous convictions for drugs and he was on probation and the Judge would not be lenient with him if he were found in possession of ganja.

Now there was no inescapable obligation on the jury to accept the statement of Davis and the testimony of Mark Smith as to the reason for going to the Harquail grounds. On the contrary, Davis' statement being exculpatory and having regard to the inconsistency in Mark Smith's evidence, his admission that his first statement involving Davis was a lie and the dishonourable

motive he gave as an explanation, there was ample reason for the jury's rejection of the entire explanation. In that regard, the learned trial judge had directed the jury thus:

> "The question for you is whether from all the evidence, the main elements of which it affects the defendant Davis, I have just attempted to outline for you, the real question is whether you are drawn irresistibly to the conclusion that the prosecution invites you to draw. If you have any reasonable doubt about that conclusion, then the defendant Davis is entitled to that doubt."

We have come to the conclusion that the Judge's review of the evidence and the issues raised by the defence from the statement of the appellant and the evidence of Mark Smith were fairly and adequately put to the jury. In the end, we hold that there was ample credible evidence to support the verdicts against the appellant Davis on both counts.

In the appeal of Brown, before dealing with the common ground of appeal and the submission challenging the evidential worth of the case for the prosecution, it is convenient to deal with the following ground intended to show there was a denial of a fair trial:

> "That the Judge wrongly excluded the calling of his witnesses.

On an application of the appellant in person the learned trial judge had refused to reopen the case for the defence after he had commenced his summing up. The appellant had complained that his counsel failed to carry out his instructions in relation to calling the witnesses including himself in support of his alibi.

The circumstances are unusual. The addresses to the jury ended with that of Mr. Delano Harrison, Counsel for Brown on Thursday, November 24, 1994. The learned trial judge began his summing up on the following morning at 10:57 a.m. and continued to the adjournment at 1:06 p.m. for continuation on Monday 28. On resumption, in the absence of the jury, the appellant raised the question of the conduct of his counsel. His complaint was to the effect that in addition to himself he had wished the following witnesses, Marlon Mothersill, Bonnie Gilpin, Shane Conner, Steven Conner, Delroy Ramoon, Luis Hernandez, his girlfriend Angela Ebanks and Ruby Wilson, whose testimonies would be supportive of his alibi to be called. This complaint had been reduced to writing and delivered to the Judge. It was admitted by the appellant that after the discussions referred to by counsel he did in fact agree to the course pursued by counsel but on reflection he had changed his mind. The learned trial judge took time out to read the statements of the witnesses named.

The records disclose the following:

> "MR. HARRISON: My Lord ----------
> I have represented Mr. Brown up until Friday afternoon to the full hilt of my expertise. I had come to believe in a professional bond between us developing over the last few weeks. But what I considered -- based rather on what I considered to be mutual trust and confidence, professional mutual trust and confidence, I'm saddened to hear that this is not so. Because it is -- because of the trust and confidence, combined with my expertise and my reading and understanding of the case against Mr. Brown, that I had advised that the Crown case was tenuous against him in my respectful legal view. And that in such a case, in my experience and judgment, an accused can only worsen his situation by attempting to state his defence. That is as regards to Mr. Brown giving evidence. It was a matter canvassed thoroughly between us and he seemed to agree and understand.
>
> As regards to the witnesses, Your Lordship has quickly reviewed their statements. And you will see, for example, Luis Hernandes, friend. He is not -- he is visiting the accused between 9:00 and quarter to ten and not seeing him.
>
> So that when I looked at the witnesses, friends, relatives and other, intimates, and when I look at the important time period for the prosecution case, I thought, one, that there was not one witness who could help the accused case any more than he had done in his statements to the police; in his interview answers. I thought he had done exquisitely well in his answers to the police for himself.
>
> I explained my judgment to him. That cross-examination of witnesses might result in just one slip, error or failing that could go toward making the Crown case look somewhat stronger than it would have been relating to the time issues.
>
> As Your Lordship has noted between 10:00 and 11:00, we have strong evidence on the record from witnesses Colin Wilson supporting Carolyn Rankine. Between 9:00 and 10:00, there were some witnesses among those named who purport to have seen the accused between 9:00 and 10:00. Others like Luis Hernandez who didn't see him, although he attempted to.

Others like Ruby Ann Wilson who didn't see him until after 10:30 and, therefore, wasn't any more helpful than Carolyn Rankine which was powerful evidence of him being in Windsor Park at ten to 11:00.

In addition, my analysis of the case was such that between 9:00 and 10:00 -- in any event, the Crown weren't saying anybody saw him. And as I repeat, he had represented his position well, compellingly well, in his statement.

And we -- My Lord, trust that we canvassed all of these matters together in those long passed days when we used to discuss this with each other.

I repeat my view that there is no witness among those named who would have helped the accused one way or the other better than he had represented himself while carrying the possibility with him of helping his case down."

"THE COURT: I think I'll have to take a view of that, Mr. Harrison, particularly as we have reached the stage of the proceedings that we have reached. ----------

Now, Mr. Brown, having reviewed the statements of the witnesses named by you and taking what they would have had to say into account, I'm compelled to express the view -- although it is a pity that it should need to be expressed -- that Mr. Harrison's assessment of what they would have had to say in the context of the case presented by the Crown against you is entirely correct. Having regard to what he told you, to what you told the police in your interview and the independent evidence presented in the case, I'm of the view that the exercise of Mr. Harrison's professional judgment in that regard was entirely appropriate.

Accordingly, I can find no merit in the complaint filed by you and you should understand that advice given by your attorney may not always accord with your view of how the case is to be conducted. And even if the proceedings could be reopened at

this late stage to allow the calling of further witnesses, I'm satisfied that there is no proper basis for it. The case for you would not be advanced and indeed you should be advised that it may even be impaired by what those witnesses would have to say going from what is in their respective statements."

In Dean Clinton's case [1993] 97 Cr. App. R., Rougier J, at p. 325 in his delivering the judgment of the Court said:

"The current edition of Archbold at 7-107 suggests that if the conduct of counsel is ever to be made the basis of a successful appeal then the only way this can be done, consistently with the legislation and the authorities, is by bringing the case within section 2(1) of the Criminal Appeal Act 1968, which provides as follows:

> "Except as provided by this Act the Court of Appeal shall allow an appeal against the conviction if they think:
>
> (a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory ..."

We too would respectfully suggest that this is the correct approach and that to speak in terms of material irregularity in such cases is likely to be misleading. Subsequent decisions have emphasised that cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional.

With that we are in full agreement. During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is whether or not to call his client to give evidence.

> Some of these decisions turn out well, others less happily. In **Gautam** this Court concisely explained why such decisions could not generally afford valid grounds of appeal. They held that, provided counsel had properly discussed the case with his client, the court would not permit the defendant to have another opportunity to run an alternative defence which had not been run at his trial. In **Ensor** [1989] 89 Cr. App. R. 139 [1989] 2 ALL E.R. 586, the Court considered both **Irwin** and **Gautam** and expressly approved the approach in the latter case subject only to the qualification which had been inserted in an intervening case called **Swain** (note) [1988] Crim. L.R. 109, that if the Court had any lurking doubt that the appellant might have suffered some injustice as the result of flagrantly incompetent advocacy by his counsel, then it would quash the convictions. In the case before them they decided that what was described as "counsel's carefully considered decision", even if erroneous could not possibly be described as incompetent, let alone flagrantly incompetent advocacy."

In the instant case the learned trial judge exonerated counsel of any blame. He had the benefit of being present throughout the trial and with his personal awareness of the issues raised was clearly of the view that the decision of counsel rested on reasonable grounds. Counsel had the benefit of the statement of two witnesses, Carolyn Rankine and Colin Wilson, read into evidence without being subject to the test of cross-examination. As to the appellant's desire to give evidence, counsel's apprehension that it would likely worsen his position was bona fide and reasonable.

When the application to re-open was made, the learned trial judge had gone significantly into his summing up, having given directions on, inter alia, the functions of judge

and jury, the general direction on burden and standard of proof, the essential elements of the counts in the indictment, the nature of circumstantial evidence and had begun his general review of the evidence. In exercising his discretion not to reopen the case we are unable to say that the learned trial judge was wrong in principle or that he took into account irrelevant considerations or omitted relevant considerations.

In the end we are of the view that in the circumstances the learned judge's decision to refuse the application could not by itself render the conviction unsafe or unsatsifactory.

The appellant Brown in support of his ground that the convictions were unsafe and unsatisfactory in relation to Gount 1, submitted that up to the time of the robbery, the acts attributed to him taken separately or cumulatively at their highest would not be evidence from which a criminal transaction could be inferred but could only give rise to suspicion and the Court should not be concerned with "suspicion however grave nor with theories however ingenious".

The Crown sought to prove his involvement in the crime as to both counts, (1) with his association and conduct with Davis prior to and up to the day of the robbery and in particular, his making available to Davis room 115 of the

Cayman Islander Hotel; (2) the inference to be drawn from the totality of the relevant evidence tending to show that it was his grey Chevrolet Capri driven by him that rendered assistance to the robbers after their accident with the red scooter; and (3) his visit in the company of Bush to the Harquail grounds at or about 2.30 p.m. on the day of the robbery. He admitted in his interview with the police that the association with Davis continued after the return from Jamaica by exchange of visits, his to Davis at Rankin's Inn and Davis to his home, that there were occasions that Davis along with others were driven by him in his car.

Now his making available room 115 to the appellant Davis, is one of the plinths on which the case for the prosecution rested. The jury was fairly adverted to the appellant's explanation that it was about 8-9:30 p.m. on the 13th that he booked the room for a one-night assignation with a married woman and on returning home Davis and Mark Smith were there and he offered the use of room 115 of the Cayman Islander to save Davis money for Rankin's Hotel. He retracted his first denial that when he did so he was unaware that Davis was still at the Rankin's but explained that he thought he had not paid for that night. As against that there was the evidence of Dawn Russell of his renting the room at 1:00 a.m. on February 14 and the evidence of the other employees that the room was occupied by someone else other than Brown between 11:00 a.m. and noon of the 14th and the

evidence of the DNA expert. It was open to the jury to reject the exculpatory explanations given in his extra-judicial statement and on their doing so, the inference that the room had been made available to Davis with intent that it should be used and was used as a hide-away near to the buried loot would be a reasonable one.

But relevant to both counts would be the finding that his Chevrolet motor car was used by him to aid the robbers in their plight. The prosecution relied on the evidence from the testimony of Matthews and the statement of Corsbie and, in particular, their description of the vehicle and its manoeuvring behind the red scooter on the morning of February 14 at a time shortly before the robbery and their subsequent identification at the police station of the grey Chevrolet among a number of cars there. In addition, there was the opinion of the expert Mr. Hart on the basis of the casts and photographs as to the tyre impressions on the dyke road being made by the tyres of Brown's car and Brown's admission that he was the only person who drove that car during the relevant period.

His challenge to that evidence was concisely identified to the jury by the learned trial judge thus:

> "He gives an account of his whereabouts in this interview, which if you accept it or are left in doubt about it, provides him with an alibi for the times between 8:00 a.m. on the 14th February and 3:00 p.m. when he was stopped by the police. He said he went to West Bay to pick up his car which had been left there overnight. He said he picked up -- he

> then picked up the defendant Bush at Bush's home in West Bay at about 7:30 a.m. to 8:00 a.m. and gave him a ride to town. After that, he said he returned to his home to clean up the yard." (p. 2208)

The appellant sought support for this alibi in the statement of Colin Wilson and Carolyn Rankine read into evidence with the generous consent of Counsel for the Crown. The learned trial judge in his directions adverted the jury to the relevance of their evidence and defence submissions to its importance thus:

> "As to his alibi, the defence say that the independent evidence from the manager of CITN, that is Mr. Colin Wilson, when taken with the statement of Miss Carolyn Rankin and you will recall Mrs Rankin's statement was read into evidence. She was the witness who was watching the TV show "The Price is Right", and she said at that time the defendant Brown came to her home in Windsor Park." (p. 2214)

and later -

> "You will recall that Mr. Colin Wilson's statement is that "The Price is Right" was aired on the 14th of February, between 10:00 a.m. and 11: a.m. We know that the robbery took place at about 10:51 a.m. from the statement of Cheryl Foreman, which was also read to you, the witness from Island Electronics who are the people who monitor the security for the bank and where the alarm was received."

and after:

> "Mr. Harrison invites you to reject the tire impressions because tires of that kind are very commonplace and those impressions were not shown conclusively on Mr. Hart's evidence to have been made by the defendant's car. (p. 2215)

The cross-examination of the previous owner of the car, Shervin Williams elicited the simple admission that there were a lot of big American cars in Grand Cayman. It was eminently a matter for the jury of Caymanians as to the probability of a mistaken identification having regard to the distinctive features of the car and the evidence of expert Hart as to the impressions made by used tyres of Brown's car as were described in detail by Detective Stewart MacKay.

As regards the visit at 2:30 p.m. to the Harquail grounds by appellant in the company of Bush, it is enough to say that the relevance and interpretation of the evidence depended entirely on the jury drawing inculpatory inferences in relation to the occupation of the room in the Cayman Islander Hotel and the evidence identifying the said car as the one that was used to assist the robbers. Even if this evidence was absent there would be sufficient credible evidence to establish a case against the appellant Brown.

The relevant issues were fairly left by the learned trial judge for the consideration of the jury. There was sufficient credible evidence upon which the jury could properly and reasonably have founded their verdict against the appellant on both counts. We found no merit in this ground of appeal.

For these reasons his appeal against the convictions is dismissed and the convictions affirmed.

The case for the prosecution against the appellant Bush depended to a great extent on the admissions made by him in a series of recorded interviews with the police and which were tendered in evidence by consent. In his first interview he gave an explanation of his visit with Brown to the Harquail premises similar to that of Brown's. On that afternoon of February 14, they had been smoking spliffs of ganja and had gone into the Harquail premises to turn around to head back to George Town when they saw the police. During the chase he disposed of his spliff by swallowing it. The views expressed before in relation to Brown's appeal concerning the relevance and interpretation of this evidence apply equally to this appellant's appeal. There must be other independent and more inculpatory evidence to found a case against the appellant in respect of the count on which he was convicted.

On his second interview on February 16, after first denying knowing appellant Davis, he later admitted that at the request of Brown he had booked Davis in Rankin's Inn the night he arrived from Jamaica. The booking was in his name and he paid for the night's lodging as Davis had no money. He saw Davis with tags for sale. As the booking was in his name he returned about two days later to find out if everything was alright. His only

visit to Harquail was that afternoon he and Brown were stopped by the police on the West Bay Road near the Sleep Inn. However, at the interview of February 19, he said that it was about 8:00 a.m. that appellant Brown picked him up at his own home in the Chevrolet Capri. Later that day at about noon he was driven by Brown to the Cayman Islander Hotel and went to room 115 where Davis was. He knew the room from what Brown told him. Davis was wearing a white T-shirt and boxer-shorts. At Davis' request and with money he provided he went to Bob Soto's Diving Shop and bought two shirts and a hat and he returned with the receipt from the shop. On rejoining Brown he reported "Yardie was safe" (meaning Davis).

In addition to his admissions, there were the description and identification of the Chevrolet Caprice by witness Matthews and Corsbie that shortly before the robbery they saw the Chevrolet car driving behind the red scooter and the opinion of Robert Hart that the cast of the shoe-print there in his opinion was identical in pattern of the right travel shoe which appellant was wearing when he was taken into custody.

The learned trial judge reminded the jury of the submission made to them by counsel for the defence thus:

> "First of all, as I understand it, you have been asked to take account of his age, he is now 19 years old and would have just turned 18 a few months before the date of the offence. By this I

understand Mr. Levy to be suggesting two things for your consideration. The first is that because of his age and because he was unrepresented when he was interviewed by the police, any lies you may find he had told the police -- if you so find, are explainable by reference to that, that is his age and inexperience -- in that it is suggested his age and inexperience would make him more susceptible and more likely to lie or to cover up any connection at all with anything or anyone else who might be thought to be associated with the robbery and without betraying any knowledge of his own simply because he may have thought that others may have been associated.

Now, the second factor, as I understand it, is his age. He is four years younger than the next youngest defendant and six years younger than the defendant Brown. That those factors would make him more likely to do the bidding of others. Mr. Levy suggests that when the evidence against Bush is viewed in that light, it amounts only to suspicion because Bush may well have been acting without knowledge of any plan and without agreeing to anything illegal.

He emphasised that Bush was not in control of the Chevrolet motor car at any time on the 14th of February and that, at the most, he would have been a passenger in it. He also emphasised that from Bush's account, he went to the Cayman Islander Hotel on the 14th to room 115 because he was taken there."

In his directions, to the jury the learned trial judge said:

"-- if you find or if you are in doubt whether Bush joined in a conspiracy to rob the bank before the robbery was actually committed. So, if you are in doubt about that, then the prosecution urges you to look at Count 6 and to focus in that context on anything said or done after the event which would indicate that

> the defendant knew, in particular, that the robbery had been committed and that the defendant Davis had been involved.
>
> Now, although some of the evidence, such as the visit to the defendant Davis at Room Number 115 to ensure, as Bush said he reported, that he was safe -- although that may point, when taken with everything else, you find proven -- may point to knowledge and involvement beforehand -- if you are left in doubt about that knowledge and involvement beforehand, but you feel sure that there was knowledge after the event and that Bush went to Room Number 115 to help to harbour and help the escape of one of the two robbers, and went to the locale behind the Harquail with the intent of assisting in the complete success of the robbery, then in that event, where it is knowledge after the event that you find, you may convict on Count 6.
>
> Of course, if you are in doubt about his knowledge and his intentions before as well as after the event, he would be guilty of no offence."

In the light of these fair and clear directions, the finding of guilt as an accessory after the fact is explicable only on the basis that the jury found that the appellant Bush, had the necessary knowledge and intentions. In our view there was ample credible evidence to support their verdict of guilt on that count.

For these reasons his appeal is dismissed.

Counsel for the Crown, Mr. Archie, requested an authorative interpretation of Section 292 of the Penal Code. The present relevant legislation in Section 305 of the Penal Code (1995 Revision) which is of no material difference to Section 292 reads:

> "Whoever conspires with another or others to commit any offence or to do any act in any part of the world which if done in the Islands would be an offence punishable with imprisonment and which is an offence in the place where it is proposed to be done is guilty of an offence and liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to imprisonment for such lesser term."

Before the learned trial judge he had submitted that if the intention of the Section was to limit the sentence in respect of all conspiracies to seven years it would simply have said so and that to put that interpretation on the provision would be to render otiose the words "if no other punishment is provided" and that, he argued, would be against the fundamental canon of interpretation that where a legislator put words into a statute it was done deliberately and with the intention that meaning be given to those words; that logically the words "if no other punishment is provided" can only be read as meaning "provided in relation to the relative substantive offence"; that is to say, the offence in respect of which the defendant conspires with others to commit. He reasoned with references to Archbold's towards his ultimate conclusion that the maximum sentence for conspiracy in the instant case was that applicable to the substantive offence - life imprisonment.

To this argument the learned trial judge said:

> "I would have hoped to be able to give full written reasons on the point of construction of Section 292 of the Penal Code which has been raised by the Crown and will do so at a later time.
>
> For now, I simply stress my conclusion that that clause of Section 292 which read, "where no other punishment is provided", can only mean where no other punishment is provided in the Penal Code itself. Therefore, where, as in this case, conspiracy is one to commit robbery, which is an offence for which no other punishment is elsewhere provided in the Penal Code, then the maximum punishment is seven years as Section 292 itself provides."

Smellie, J, was simply and plainly right. The inchoate crime of conspiracy from its very nature has been generally regarded as an offence of lesser gravity than the substantive offence which is its illegal purpose. So a conspiracy to commit a felony was categorised as an indictable misdemeanor at Common Law. Section 292 of the Criminal Code was in keeping with modern legislative policy to enact provisions for criminal sanctions, generally the maximum sentence for the specified offence. The intent of the section is to provide a general penalty for the offence of conspiracy and the inclusion of the words "if no other punishment is provided" was no more than the express acknowledgement that the 'generalibus' of this provision in relation to conspiracies must give way to any 'specialibus' dealing with specific conspiracies.

With reference to the sentence against the appellant, Brown, he received the maximum sentence for the conviction for conspiracy. As accessory after the fact, he was merely carrying out his role in the conspiracy. To single him out for a consecutive sentence in the circumstances seems unwarranted. Accordingly, his sentence is varied by ordering the sentences on both counts to run concurrently.

The Appeals by Davis, Brown and Bush against convictions are dismissed, convictions affirmed and the sentences of Davis and Bush are affirmed.

The sentence of Brown is varied - the sentences are to run concurrently.

The appeal of Joel Smith against conviction is allowed - conviction quashed and sentence set aside.