IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

C# 1389/92

CICA (CRIMINAL) APPEAL # 26/93

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, PC., OJ., PRESIDENT
THE RT. HON. MR. JUSTICE TELFORD GEORGES, PC., JA.
THE RT. HON. MR. JUSTICE JAMES KERR, JA.

DENTON McANDREW POWERY V REGINA

Mrs. Priya Levers with Mr. Graham Hampson of Messrs. Paget-Brown Quin & Hampson for the appellant

Mr. Ivor Archie for the Crown

On 28th March 1994, 1st & 2nd August 1994, 9th & 12th December 1994 and 20th April 1995

JUDGEMENT

KERR, J.A. :

The appellant was convicted in the Summary Court at George Town on September 29, 1992, of the offence of possession of ganja with intent to supply contrary to section 3(1)(i)(m) of the Misuse of Drugs Law and sentenced to three years imprisonment and, in addition, fined $5,000.00 or six months imprisonment in default of payment and the motor vessel "Hustler", used in the transportation of the ganja, forfeited and a confiscation order made against the appellant pursuant to section 16A of the said law. His appeal to the Grand court against conviction and sentence having been dismissed, he brought a further appeal to this Court. His appeal against conviction was dismissed and the conviction affirmed. His appeal against sentence was allowed in part - the confiscation order being set aside and the sentence in all other respects affirmed. Herein are the reasons for our decision.

The appellant was part-owner of the motor vessel "Hustler". On January 11, 1992, at about 9:00 p.m., the Hustler set out from Governor's Harbour, Grand Cayman, ostensibly on a fishing trip in the seas around Grand Cayman. However, at about midnight, the fishing was abandoned for a trip to Jamaica. The boat arrived there the following day at Negril Bay.

The crew for the voyage consisted of James Ebanks, Erlon Ebanks, David Smith and Presley Degan. At Negril, with assistance of men from shore, fuel, food and a cargo of ganja were taken on board. The boat returned to Cayman with its illegal cargo on January 13, 1992, arriving at North Sound about 6:00 a.m. and then on to a little cove three miles from Morgan's Harbour. Later that morning about

9:30 a.m., acting on information, Detective Charles Bush and Gregory Thompson, boarded the Hustler at Governor's Sound. Patrick Ebanks was on board. They searched and found small quantities of ganja seeds and the bud of a ganja plant. In the course of investigations, Detective Corporal Gregory Thompson interviewed and took statements from David Smith. At 5:00 p.m., accompanied by other officers, he went with Smith to Sand Rock and recovered pieces of plastic and a sack smelling of ganja. Later they returned with Powery to the same area where a scale and some plastic bottles were found.

On January 15, 1992, Detective Constable Kim Evans accompanied Presley Degan to Sand Rock area about one mile from Morgan's Harbour. While there, with the help of the police dog, Blitz, a five-gallon bucket was found in the bushes. In it was ganja weighing about ten pounds.

The four crew-members were charged on separate informations with possession of ganja with intent to supply and being concerned in the possession of ganja. Smith and Presley Degan pleaded guilty to the lesser offence of being concerned in possession of ganja and, for cooperating in the investigations, received comparatively modest sentences. They gave evidence for the Crown. James and Erlon Ebanks were jointly tried and convicted with the appellant. Their appeals to the Grand court were dismissed.

Details of the voyage were given by Presley Degan, a farmer and licensed pilot and the cousin of the appellant. In response to appellant's invitation to go fishing, he joined the crew of the Hustler. James Ebanks was the pilot. The appellant was at Governor's Harbour and saw them off. After fishing on the inside of the reef, on James Ebanks' instructions that they should go to the main bank to fish for groupers and they had proceeded through the main channel James Ebanks then announced that they were going to Jamaica. The fishing gear

with the fish caught were jettisoned. Degan's protest and request to return to Cayman were ignored. Among the things taken on board at Negril were corned beef, hard-dough bread, fuel and three white five-gallon buckets similar to the one with ganja subsequently found by the police. On their return to Cayman, he left the boat and went to sleep. About 11:30 a.m., he saw appellant and James Patterson. He was taken to where there were three containers and a scale. James Patterson started to weigh the contents of the garbage bags and the sacks. He again went to sleep and woke about 8:00 p.m. He did not see what was in the garbage bags.

In his evidence, David Smith's details of the journey to Jamaica, the appellant seeing them off and the description of the things taken on board in Jamaica, were similar to Presley Degan's. He said that on arriving at the cove in Grand Cayman one of the buckets was opened by Erlon Ebanks and its contents of ganja removed and placed in a bag. The boat was unloaded. He heard a voice that sounded like Powery but when cross-examined admitted that in that he could be wrong.

James Patterson who was charged and had previously pleaded guilty to being concerned in the possession of the ganja and sentenced to 12 months imprisonment gave evidence as witness for the prosecution. He said that on that morning he saw the appellant with a scale and at appellant's request he went with the appellant in a car driven by Victor Swaby to Yacht Club Road to where there were some Dykes. There they came out the car and at the appellant's request he took the scale from the car. Swaby then drove away. At the Dyke side he saw Presley Degan beside some white buckets sealed with tapes around the cover. Presley Degan and appellant weighed the buckets while he stood 5-10 feet away. He and appellant walked away leaving Presley with the buckets. Before parting appellant told him that if police asked, he was

to tell them "we went to look for a cow". Three days after he was taken to the spot on the Yacht Club Road but the buckets were no longer there.

The following grounds of appeal outlined the main contention that the conviction was unsafe or unsatisfactory, having regard to the evidence:

1. That the Learned Judge of the Grand Court erred in Law in holding that the Learned Senior Magistrate had sufficient circumstantial evidence before him to come to a finding of guilt on the charge of Possession with Intent to supply against the Appellant.

2. That the Learned Judge erred in Law in holding that the Learned Senior Magistrate applied the Law relating to circumstantial evidence and accomplice evidence accurately in assessing the evidence.

Now after reviewing the evidence, Harre, C.J., who exercised the appellate jurisdiction of the Grand Court, in his judgment said:

> "There was evidence from which, if he found it credible, the learned magistrate was entitled to find the following facts proved -
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> 1. Powery was the co-owner of a boat.
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> 2. He loaned the boat to persons who went on a trip to Jamaica to pick up ganja which began on the evening of 11th January 1992 and continued until the morning of the 13th.
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> 3. He invited a person who had been a licensed pilot to go on that trip.
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> 4. He was there to meet the boat on its return, not at its point of departure but at a little cove some three miles from Morgan's Harbour.
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> 5. On the morning of the vessel's return he was present at the weighing of something which had been unloaded from the boat.

6. Degan, a person whom he had invited to go on the trip, and who had done so, and Patterson, who had not, were present at the weighing.

7. Powery was the only person present on both occasions when Degan and Patterson were picked up by car on the morning of 13th January.

8. Powery told Patterson that if asked by the police he should say that they had been looking for a cow.

From all those facts the magistrate was entitled to draw the conclusion that Powery was aware of the purpose of the expedition and an active participant in it."

Counsel for the appellant dealt with each of these separately. On ownership of the boat, she submitted that that could not establish possession and that this was conceded by the learned Chief Justice in his judgment; that his lending of boat by itself, the invitation of his cousin, the pilot, to join the crew, the meeting of the boat on its return, could not by themselves establish or lead to establishing possession of the ganja. As regards his mere presence at the weighing of the illegal cargo, that could not establish custody or control and was not material to possession though may be in relation to knowledge. Findings numbers 6 and 7 could not take the matter any further. Re 8, which stood on its own, assuming it was a lie, in the circumstances it could not amount to corroboration or be probative of guilt because it may be explicable for other reasons than involvement in possession of the ganja. Further, those findings taken cumulatively could not establish guilt because independently they were equally consistent with innocence.

Now, to treat each bit of evidence in isolation may be astute tactics but this approach overlooks two basic propositions: (1) that the probative value of circumstantial evidence rests on the cumulative cogency of the circumstances; and (2) that the verdict in the end rests upon a consideration of the evidence in its totality.

Of this the learned Chief Justice was clearly aware as in dealing with the following grounds which involved similar questions:-

> "The Learned Senior Magistrate erred in law in not upholding the no case to answer submission made by defence on behalf of Denton Powery, the appellant"

and

> "The Learned Senior Magistrate erred in law in holding that the appellant was at all material times in possession of the vessel "Hustler" in circumstances where on the evidence presented by the Crown, the appellant loaned the vessel to persons who were neither his servants nor agents"

he stated:

> "I agree that it is going too far to say that mere ownership of a boat will always, without more, invest the owner with possession and give rise to a presumption under S. 7 of the Misuse of Drugs Law, however easily rebutted. But that is unimportant in view of the fact that if he was right in accepting the prose-cution evidence there was in fact much more - enough for a finding of a case to answer and indeed, in default of a plausible defence, of guilt on the charge of possession of ganja with intent to supply. I do not think it can be said that Powery had possession of any drug while it was on the boat - since knowledge is an essential element of possession and he could have have had no more than a hope or expectation at that stage. However, he must have had knowledge of what was being weighed on shore. In my judgment he had joint possession of the containers at that stage and it is fanciful to say that he could not have had knowledge and possession of contents which he did not see."

We do not agree that his reference to co-ownership of the boat was intended to minimise its probative value but merely that, by itself, was not conclusive of possession of the illegal cargo. Before the magistrate, though briefly and without resort to authority, counsel for the prosecution submitted that this was a case of constructive possession. Before us counsel in support of his submissions that the facts supported a finding of con-structive possession referred to R v Cavendish [1961] 1 All ER 856.

The principle of constructive possession and the relevant facts to which that principle was applied were adequately summarised in the headnote thus:

> "For a man to be found to have had possession of goods, something more must be proved than that the goods were found on his premises; it must be shown either, if he were absent, that on his return he became aware of them and exercised some control over them or that the goods had come, albeit in his presence at his invitation or by arrangement with him'.
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> "A lorry driver took six drums of oil, which he should have delivered to a customer, to the appellant's yard where they were unloaded by an employee of the appellant. The appellant, who was away at the time, was questioned by the police on his return and at once denied that he knew anything about the matter. He was charged with receiving the oil knowing it to be stolen. At the end of the prosecution case a submission was made that there was no case to be left to the jury that the appellant had possession or constructive possession of the oil or that he knew that it was stolen. This submission was rejected, the trial proceeded and the appellant was convicted.
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> On appeal,
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> **Held:** the submission of no case had been rightly rejected".

From the judgment of the Chief Justice it is clear that there were lengthly submissions on circumstantial evidence. However, the realities are that this is not a case resting in the main on circumstantial evidence but on the acceptance of direct evidence on certain primary facts summarised in the judgment of the Chief Justice and set out above and the cardinal question was whether the inferences to be drawn from the totality of the evidence in the end were probative of guilt beyond reasonable doubt.

In our view, it was open to the magistrate on the evidence to find these facts and they were sufficient to establish a prima facie case of constructive possession in accordance with the essential elements identified in **R v. Cavendish**. Indeed in the instant case the evidence was even more probative of

constructive possession. As co-owner of the Hustler, appellant saw it off, met it on its return at the discreet anchorage in the cove, was present at the weighing of the illegal cargo in a scale obviously brought there for that purpose. There was sufficient evidence from which the reasonable inference of pre-arrangement may be drawn and in the words of the Chief Justice "it is fanciful to say that he could not have had knowledge and possession of contents which he did not see". In the circumstances, it was unnecessary to pray in aid the provisions of Cayman Law (Section 7 of the Misuse of Drugs Law) which provides that on proof of the possession of the container of prohibited drugs there is as against the possessor a rebuttable presumption of knowledge of its contents.

There remains the alternative question raised by the grounds of appeal, namely, although it was open to the magistrate to make these findings, that in so doing he failed to apply the principles relating to the acceptability of the uncorroborated testimony of accomplices.

In his judgment, the learned magistrate expressly recognized the need for the tribunal of fact to be mindful of the dangers of convicting on the uncorroborated evidence of an accomplice. However, in support of the relevant ground of appeal, we were adverted first to the following statement in his judgment:

> "The danger lies not only in the likelihood that a Court of superior jurisdiction may overturn conviction, but in the possibility that a body of laymen, inexperienced in the assessment of evidence, may be deceived by the uncorroborated testimony of a mendacious witness who has in common parlance an axe to grind thereby resulting in the conviction of an innocent party."

On this Harre, C.J., said:

> "In its immediate context that passage appears to refer to the danger of convicting on uncorroborated accomplice evidence. I prefer to take the view that the magistrate was referring albeit in an elliptical way to two dangers arising from a failure to warn the jury of that. First that the superior court may, for that technical omission, be constrained to overturn a verdict on a guilty man even though the accomplice evidence was truthful, and in fact corroborated, and secondly, in the opposite case, that an innocent man may be convicted."

This is a fair and reasonable interpretation of the passage. However, the observations of the magistrate were clearly unnecessary and hardly more than a supercilious and unjustified comments upon the credulity of a jury of laymen.

The other passage to which our attention was adverted reads:

> "--- their stories support each other in all material details. Although there does not appear to be anything in the law to enable such to be considered as corroboration, this de facto adds credibility to each witness' testimony".

On this the learned Chief Justice commented thus:

> "Like Mrs Levers, I find difficulty in distinguishing between that which corroborates and that which adds credibility".

There is, of course, a subtle difference between evidence which supports and corroboration. Corroboration is supportive evidence but not all supportive evidence is corroboration. For evidence to amount to corroboration it must meet the following criteria: (i) it must be evidence from a source independent to evidence for which corroboration is essential or desirable; (ii) it must go not only to the commission of the offence but also (iii) directly implicate the accused in the commission of the offence - R. v. Baskerville [1916] 12 Cr. App. R. 81. Evidence may be supportive in complying with (i) and with (ii) above where it is a live issue as to whether or not the offence

alleged was committed, but would not be corroborative unless it directly implicates the accused. Because of this technical difference between "support" and "corroborate", to obviate the risk of confusion, the use of these words or their cognates in the same passage or context should be avoided. Such confusion could result from the infelicitous statement of the Learned Magistrate. However, as will be indicated later, the magistrate's acceptance of the evidence of the accomplices in the end rested mainly on the want of challenge from the defence to the salient facts.

In support of the submission, that the learned magistrate should not have accepted the evidence of the accomplices, appellant's counsel before the Grand Court had referred to the following statements of **Lord Morris** of **Borth-y-Gest** in DPP V. Hester [1972] 2 All ER at page 1065:

> "It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent person is lessened if conviction is based on the testimony of more than one acceptable witness."

and:

> "The purpose of corroboration is not to give validity of credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible".

The dicta came in for critical examination in the case of the Attorney General of Hong Kong v Wong Muk Ping [1987] and the following comments were made:

> "More difficulty arises from the passage cited from the speech of Lord Morris of Borth-y-Gest in Reg. v. Hester [1973] A.C. 296. 315, particularly the last sentence. It is possible to read the sentence as supporting the proposition that corroborative

> evidence cannot "give validity or credence to evidence which is ... suspect." If this was indeed a proposition which Lord Morris of Borth-y-Gest intended to enunciate, it is one from which their Lordships feel constrained respectfully to dissent. It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called "suspect witnesses" may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence."

In our view, the learned Chief Justice was right in his interpretation of the effect of the statement in the later case when he said:

> "So the principle which it was sought to extract from that case was, in my view, very far from that which was stated in it. It must not be forgotten that the accomplice evidence is not the only evidence in this case. There is the police evidence as to what was found on the vessel, and concealed in the bush. On the evidence as a whole the magistrate having reminded himself of the danger concluded that the evidence of each accomplice was credible in its essential particulars in relation to the involvement of all the appellants."

Finally, appellant's counsel on the question of the unreliability of the evidence of the accomplices submitted that the only evidence that could be said to have directly implicated the appellant, was the weighing of the ganja and on this there was such a discrepancy between the accomplices, Degan and Patterson, that their whole evidence should be considered unreliable.

The learned Chief Justice dealt with this in the following manner which merits recital:

> "Juries are constantly reminded that because they accept or reject some part of a witness' evidence they do not have to accept or reject it at all. Obviously that applies equally to a magistrate acting as judge of fact and law, and it applies no less to the evidence of accomplices than to that of any other witness.

> So it is in my view wrong to say that the learned magistrate should be looking for veracity on all material aspects from accomplice evidence. Common sense must be applied to assessing the value of an accomplice's evidence no less than to any other. The magistrate in this case believed the evidence of each accomplice in its essential particulars, as he was entitled to do."

The evidence on this issue was that the finger-prints on the scale when expertly examined were Patterson's. There is no conflict here because Patterson admitted taking the scale from the car. Degan, however, said it was Patterson who did the weighing while Patterson said it was Degan and the appellant. In general, it is open to a magistrate where there is a discrepancy between witnesses on a particular issue to prefer the evidence of one witness to another. However, in the manner of King Solomon, the magistrate, instead of so resolving the discrepancy, extracted from the woof of their evidence the common inculpatory thread, namely, that the appellant with both witnesses was present at the scene of the "illegal activity", that is, the weighing of the illicit cargo from his ship. It was open to the magistrate to do so as there was no real challenge to appellant's presence there and then. In the light of his impeccable approach, the learned Chief Justice was justified in the conclusion to which he came in the passage quoted above.

Accordingly, we reiterate the view that there was credible and acceptable evidence to establish a prima facie case and the learned magistrate was correct in calling on the appellant to answer. No answer was forthcoming. It was open to him to find the facts as identified in the judgment of Harre, C.J., and the verdict thereon cannot be faulted.

For these reasons we dismissed the appeal and affirmed the conviction.

The appeal against sentence was limited to the custodial sentence of three years imprisonment and to the Confiscation Order.

In support of the submission that the sentence of imprisonment was manifestly excessive, in addition to the usual matters such as his age of 25 years, that he was the father of five children and that this was his only conviction for an offence of possession of drug with intent to supply, which were all before the Magistrate, Counsel added that the appellant was not a major party in the illegal enterprise. With this we do not agree. His was an entrepreneurial position in the venture. In all the circumstances the sentence of three years imprisonment was far from being excessive.

The Confiscation Order was made pursuant to the specific provisions of the Amending Laws - Law 8 of 1988 and Law 3 of 1989. A more detailed reference to the provisions directly relevant to the instant appeal will be made later.

At the hearing of the confiscation proceedings a statement of real estate and other acquisitions by the convict (as appellant then was) which were within the contemplation of the Act, was prepared and presented to the Court by the prosecution. The defence admitted service of the statement but broadly stated that the statement was not accepted and, accordingly, the procedure advocated in the following statement in R v Dickens [1990] 2 All ER 626 which dealt with similar provisions were followed:

> "It is clear from these provisions that, where the prosecution statement is not accepted by the defendant, the prosecution, if they wish to rely on any of its contents, must adduce evidence to establish them."

per Lord Lane, C.J., at p. 630.

After hearing submissions from both sides, the learned Magistrate had called on the prosecution to adduce evidence.

Stephen Hill, Detective Sergeant of Police, attached to the Drug Profit Confiscation Unit, gave evidence that from investigations into the affairs of the appellant he prepared the statement and tendered in support the following documents:

(1) the entry in the Cayman Islands Land Register showing that on November 30, 1991, the appellant acquired parcel 413-355 in Section West Bay, North West, from Deborah Ann Veleta Bernard and that on March 27, 1992, for the consideration of $1,000.00, he transferred the said property to Ann Numes Swaby and that at the time of transfer it was free from encumbrances;

(2) an entry in the said Register that on August 3, 1980, the appellant acquired Parcel No. 413-354, Section West Bay, North West, from Elsie Bodden and on April 10, 1992, for $11,000.00, he transferred it free of encumbrances to Vernell Ebanks;

(3) a number of Bank books and/or statements which it is not necessary to itemise here because of the learned Magistrate's treatment of this evidence.

The cross-examination by counsel for the defence did not challenge the accuracy of the entries in the documents produced but was confined (i) to eliciting admissions as to appellant being a fisherman, builder, and stock farmer; and (ii) to show that he was not able to rebut or challenge evidence of appellant's earnings from legitimate sources.

Notwithstanding this effect of the cross-examination, the appellant, who was in the best position to give evidence of his income from his varied means of livelihood was never called, despite the fact that as no income tax was payable here, there would be no obligation on him to keep accurate accounts of his earnings. He was probably deterred from giving evidence by the difficulty of giving an exculpatory explanation to rebut the inference that the sudden divesting of his property was on the erroneous belief that by so doing he could frustrate the Court from making a confiscation order.

The defence clearly sought to rebut by the evidence of several witnesses the statutory assumption that the property referred to in the statement was acquired by the proceeds from drug trafficking. Blondie Skimontie, his aunt, said that in 1991 she paid him $3,000.00 for building construction and on the death of his father he received a legacy of $300.00. The following witnesses made payments to appellant thus: Imogene Ebanks, between 1987 and 1988 - $12,000.00; Lydia Barrett, between 1975-87 - $10,000.00; Clinton Powery, in 1990 - about $3,000.00; Joseph Austin, in 1990 - about $5,000.00 to $6,000.00; Duncan Powery, his half-brother, in 1990 - two payments - $1,000.00 and $7,000.00; and Michell Ebanks, in 1991 - $6,000.00; all payments were for building construction or work as a mason.

Lengthy submissions from Counsel on both sides on the credibility or otherwise of the evidence tendered was made before the Magistrate. Although in his judgemnt there was no detailed review of the evidence of the witnesses for the appellant it was clear from his findings that he accorded little or no weight to that evidence. Instead he specifically referred to the sudden divestment of property by the appellant while the charge was pending and concluded:

> "In view of these facts and the Law relating to them there is a clause [sic] and strong presumption that these properties are derived from the proceeds of drug trafficking and liable to be subject to a confiscation order."

The confiscation order was challenged by a single ground of appeal to the effect that the learned Judge erred in law in holding that the learned Senior Magistrate applied the proper standard of proof and/or correct principles.

It was agreed by Counsel on both sides that the learned Senior Magistrate did not follow the correct procedure. It was clear from the record that despite the reference to R v Dickens (supra), the Court and Counsel on both sides were unfamiliar with this type of proceedings and the attendant procedures. One can detect in the submissions and their treatment by the Magistrate, the sort of uncertainty that beset voyagers venturing upon unchartered seas. It is, therefore, necessary to examine in greater detail the relevant provisions of the Law to determine wherein the Magistrate omitted to do what ought to have been done or erred in doing what he in fact did and what effects his failure to comply had on the order which he eventually made.

Section 6 of the Amending Act, Law 3 of 1988, introduced as an addition to section 16 comprehensive provisions setting out the jurisdiction, proceedings and procedure and was purposefully aimed at depriving drug traffickers of the use and enjoyment of their ill-gotten gains. The provisions of the Cayman Act are so similar to the English Act, The Drug Trafficking Offences Act, 1986, that it is fair to say that that Act was **mutatis mutandis**, the precedent for the Cayman Law.

The following provisions of the Cayman Misuse of Drugs Law is directly relevant. Section 16A(1) provides:

(1) "Where a person, who has not previously been sentenced or otherwise dealt with in respect of his conviction for that offence, appears before a court to be sentenced in respect of a drug trafficking offence, the court shall act in accordance with subsections (2), (4) and (5).

(2) The court shall first determine whether he has benefited from drug trafficking.

(3) ----------

(4) If the court determines that he has so benefited, it shall, before sentencing or otherwise dealing with him in respect of the offence, determine in accordance with section 16E the amount to be recovered by virtue of this section.

(5) The court shall then, in respect of that offence -

(a) order him to pay that amount".

Subsection (3) provides:

"For the purpose of this section, a person who has at any time, whether before or after the date of commencement of the Misuse of Drugs (Amendment) Law, 1988, received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking."

To facilitate the determining of the purpose in subsection 3, Section 16(C)(1) provides:

"The court may, for the purpose of determining whether the person against whom proceedings have been instituted for a drug trafficking offence has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking, make the assumptions mentioned in subsection (2), except to the extent that any of them are shown to be incorrect in his case."

The assumptions are as now described in subsection (2) as amended by Law 3 of 1989, subsection (3) resulting:

(2) These assumptions are:

(a) that any property appearing to the court -

(i) to have been held by him at any time since his conviction; or

(ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him whether before or after the date of commencement of the Misuse of Drugs (Amendment) Law, 1988, was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him;

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it."

Section 16E.(1) provides:

(1) "Subject to subsection (3), the amount to be recovered in the case of a person against whom proceedings have been instituted for a drug trafficking offence under the confiscation order shall be the amount the court assesses to be the value of his proceeds of drug trafficking.

(2) ----------

(3) If the court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount it assesses to be the value of his proceeds of drug trafficking, the amount to be recovered under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised."

Section 16A, subsection 7, provides that the amount in the confiscation order should be treated as a fine in accordance with sections 24 and 25 of the Penal Code while subsection 8 provides that the term of imprisonment for default in paying the amount of the confiscation order should generally be consecutive to the sentence for the drug trafficking offence.

Although the learned Senior Magistrate was quite right in calling on the prosecution when the defence did not accept the statement the matter does not rest there. Section 16D(1) provides for service on the defence and the tendering of statement [in court] as occurred in the instant case but subsection (2) provides:

> (2) Where -
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> (a) a statement is tendered and paragraph (a) of subsection (1); and
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> (b) the court is satisfied that a copy of that statement has been served on the person against whom the proceedings have been instituted,
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> the court may require him to indicate to what extent he accepts each allegation in the statement and, so far as he does not accept any such allegation, to indicate any matters he proposes to rely on"

and subsection (3) provides sanctions for non-compliance with the requirements. In R. v. Dickens, Lord Lane commenting on similar provisions said: "This will have the effect, one hopes, of controlling the ambit of the enquiry" (page 630).

Accordingly, on the tendering of the statement and the supporting document, it was open to the magistrate to make the assumptions which in fact he made and as the cross-examination did not challenge the accuracy of that part of the statement based upon the documents, it was in the discretion of the magistrate to call upon the defence to indicate the matters on which the appellant intended to rely. The subsection implicitly empowers the magistrate to preclude the appellant from pleading to the statement the general issue as he could do to a charge of a criminal offence and require him to indicate the matters on which the defence intended to rely. This will give the prosecution the opportunity to join issue on such matters that is not accepted and to challenge the evidence on the contested issues and to that end tender

evidence to traverse or rebut the evidence for the defence. In the instant case, no harm was done as there was early indication by the defence that the endeavour to rebut the assumption would be by evidence that the property described in the statement was obtained by money earned by honest toil.

In R v Dickens, Lord Lane, C.J., set out what he regards as the sequence of events thus, at page 628:

> (1) The defendant appears before the Crown court for sentence, having been convicted in respect of a drug trafficking offence. By virtue of s 1(4), to which reference has already been made, the judge must then decide whether or not to pass sentence immediately in the usual way. If it is a case where the defendant may have benefited from drug trafficking, sentence must be postponed until after the necessary inquiries and determinations have been made. These are threefold: (a) whether he has benefited from drug trafficking (s 1(2)); (b) the extent to which he has benefited (s 1(4)); and (c) the amount the defendant shall be ordered to pay under s 1(5)(a).
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> (2) The court determines in accordance with s 2 the amount which represents the benefit he has received from drug trafficking.
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> (3) The court determines the amount that the defendant shall be ordered to pay in accordance with s 4 of the Act.
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> Thus the judge has to make a preliminary assessment whether it is, or is likely to be, a 'benefit' case or not. No doubt the evidence from the trial, if there has been one, or from a recital of the facts if there has been a plea, will be enough for him to form such a preliminary assessment.
>
> If he decides that it is such a case, then comes the task of deciding the three questions which have just been set out. The investigation is not confined to proceeds accruing from the particular offences on which he stands convicted, again an unusual feature of the Act."

In the instant case the magistrate failed to comply with the three-stage requirements identified by the Chief Justice In R v Dickens. As in the English law, the investigation under the law here is not confined to proceeds accruing from the particular offence for which the person is

convicted; nor is the magistrate in relation to the extent of his benefit from drug trafficking limited to the value of property presently owned by him but may include any property he holds or has held within the relevant period. The law in its wisdom requires the confiscation order to be expressed in monetary terms and treated like the pecuniary penalty for conviction of an offence.

In the instant case, the magistrate has not complied with (b) and (c) in Lord Lane's sequence as well as methods (2) and (3) of the passage quoted ante. All he did was to make a confiscation order against two parcels of real estate that were no longer the appellant's.

In Dickens case Lord Lane, C.J., applying well-established principles said at page 629:

> "In our judgment the context of the Act and the nature of the penalties which are likely to be imposed make it clear that the standard of proof required is the criminal standard, namely proof so that the judge feels sure or proof beyond reasonable doubt. The evidence on which the judgment is based will come in part from the trial, if there has been one, in part from the statement tendered by the parties to the court under s 3 of the Act (with which we shall deal later in this judgment) and in part from evidence adduced before the court -----"

and after dealing with the lightening effect the statutory assumption had on this heavy burden of proof continued:

> "The words 'appearing to the court' [which appears in the corresponding Cayman Legislation] mean that, if there is prima facie evidence that any property has been held by the defendant since his conviction or was transferred to him since the beginning of the relevant period, the judge may make the assumption that it was a payment or reward in connection with his drug trafficking."

The learned Senior Magistrate concluded his reasons for judgment thus:

> "To the extent listed above, this court find that there is a strong presumption that the defendant has benefited from the proceeds of drug trafficking."

This is clearly not the same as the standard of proof in criminal proceedings and as held applicable to confiscation proceedings by Lord Lane in R v Dickens (supra). While this statement of the law by Lord Lane, resting as it is on well-established principles, is unchallengeable, it cannot be denied that the criminal standard has definitely rendered the law less draconian and less likely to effect the purpose for which it was clearly intended. This apparently moved the English Legislature to over-rule R v Dickens by amending the Act of 1986 by specific provisions in Part II of the Criminal Justice Act, 1993, thus:

By adding as Section 7A the following:

> "The standard of proof required to determine any question arising out of this Act as to:
>
> (a) whether a person has benefited from drug trafficking; or
>
> (b) the amount to be recovered in his case by virtue of t his section,
>
> shall be that applicable to civil proceedings."

Until there is similar amendment to the Cayman law, the prosecution here will continue to be saddled with the more onerous standard of proof in criminal proceedings.

Counsel for the crown submitted that notwithstanding that the magistrate did not make the findings demanded by the procedure, there was on the records sufficient evidence (waiving aside as he did the evidence of the Bank Accounts) for this Court to make the findings necessary to found a proper confiscation order. This we declined to do. It would involve dealing with issues that were never raised at the proceedings before the magistrate and finding facts for which there was no

evidence. There was no previous conviction against the appellant for an offence within the contemplation of the law and there was no evidence, not even an estimate, of the value of the cargo brought in by the Hustler.

On the other hand, Mrs Levers for the appellant, surprisingly suggested as an alternative, a reference to the magistrate for the proper procedure to be followed. Apart from the impracticality due to the learned Senior Magistrate who tried the case being no longer in service in this jurisdiction, this procedure would "give the prosecution a second chance to make good evidential deficiencies in its case" per Lord Diplock [1979] 2 All ER p. 907.

For these reasons, we set aside the Confiscation Order.