19/4/89.

CAYMAN ISLANDS

IN THE COURT OF APPEAL

SUMMARY COURT APPEAL NO. 30 OF 1988

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE HENRY, J.A.

REGINA

VS.

DOUGLAS GIBSON

Messrs. F.M.G. Phipps, Q.C. and Keith Collins
for the appellant

Mr. Anthony Smellie for the Crown

24th & 25th November, 1988 and 19th April, 1989

KERR, J.A.:

On February 7, 1988 in the Summary Court at George Town the appellant was convicted of being in possession of cocaine with intent to supply contrary to Section 3.1(i) (m) of the Misuse of Drugs Law and sentenced to seven years imprisonment and a fine of $1,000 or 18 months in default. He had been jointly tried with one Oral Masters, who was charged with being concerned with the possession of the cocaine.

On appeal to the Grand Court, the appellant's appeal was dismissed and his conviction and sentence affirmed while the appeal of Masters was allowed, his conviction quashed and sentence set aside.

The case against the appellant rested primarily on the evidence of one Davis Lawrence, a warehouseman of George Town, and a number of customs officers. Lawrence said that on Friday, November 9, 1987 at 7:30 p.m. he was at the Miami Airport

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for the purpose of checking in for the Cayman Airways flight to Grand Cayman. He saw the appellant and asked him if he was going on the same flight. Appellant replied that he was trying to get on that flight but he was on standby. After checking in and on the way to the departure gate he met the appellant who told him he had not yet got on the flight as there were nearly sixty standby passengers and that he had sent a box containing a car cover and was asking him Lawrence to pick it up for him in Cayman and take it to his home. It should arrive in Grand Cayman on the 8:30 flight and that Oral Masters had given the box to William Watson. Lawrence said he arrived in Grand Cayman at 9:00 p.m.; he went home and returned to the Airport for the box. There he spoke to William Watson. He was unable to pick up the car cover as it had not arrived on his flight. On the following day at about 1:05 p.m. while driving along Sheddon Road, George Town he saw appellant riding his bicycle. They stopped and to appellant's enquiry Lawrence told him that William Watson had said that the box with the car cover had been misplaced with some other luggage and he Watson would not be able to get it until the following day. He was subsequently arrested, questioned and charged with related offences but the prosecution was discontinued.

In cross-examination he said one Odette Johnson and Mitzie Watson were present at Miami when he was speaking to Gibson. The first time he saw the box was in court. He saw Oral Masters at the Miami Airport but he did not know on what flight he returned to Grand Cayman. He did not see either appellant or Masters at the Airport in Grand Cayman. He denied telling the appellant that his sister had sent a car cover for his mother and he should go and check it at the Airport. He spoke to Watson at the Terminal building.

William Watson's evidence was that at the request of Oral Masters, he persuaded his sister Patricia to check through the box with car cover and that Masters handed him a US$50 note to cover custom duty. On his plane to Grand Cayman he saw both appellant and Masters. The box did not arrive with the flight and his sister filed the usual claim. Masters said he had just bought the car cover/and that was why he had not checked it in. Patricia Watson corroborated her brother's evidence.

Tony Whittaker, Customs Officer, in evidence said that as a result of certain information, he took from the baggage convey belt a box apparently containing a car cover. It had arrived on the 11:30 a.m. flight from Miami. The box was sealed and taped. He placed it in the Customs Office.

Randy Whittaker, Customs Officer, said that at about 4:25 p.m. while on duty at the Airport appellant came to the office. He did not know appellant before. Appellant said he was looking for a car cover which had been sent for him. Whittaker said he took him into the office, showed him the box and asked if that was the box. Appellant said "yes", took up the box, asked if there was anything else he had to do and placed the box on the examination bench. Whittaker summoned his senior officer Ebanks who searched the box and found concealed therein a package of cocaine of weight 1001 grams, of strength 82% cocaine hydrochloride. Appellant when asked by Ebanks said the box was for his mother.

Ebanks gave evidence of his finding of the cocaine. He said that after he found the cocaine appellant said his sister "called" him and told him she was sending the box with a person by the name of Watson.

Gene Hyde corroborated Whittaker as to appellant identifying the box and the finding of the cocaine by Ebanks. In cross-examination he admitted hearing the appellant say he had come to get a car cover that his sister had sent.

Senior Customs Officer Dave Christian said that he went into the office and Ebanks made a report of his finding the cocaine in the presence and hearing of the appellant and to his query, appellant said he knew nothing about it, his sister had phoned him on Friday and said she was sending the car cover down by someone named Watson. On arrest he said that he was set up by Dave Bonner in Miami.

The learned Magistrate rejected the submissions of no case to answer and the appellant gave evidence on oath. He said that on the evening in question he was among the last passengers to get on the last of the two flights from Miami to Grand Cayman. Among the several persons at the counter at the Miami Airport were Davis Lawrence, Oral Masters and Odette Johnson. He did not see the box there nor had he any discussion with Lawrence about it. After clearing immigration and customs in Grand Cayman he went home. The following day, when on his way home for lunch, he saw the witness Davis Lawrence in his van. Lawrence stopped and told him that he had a message from his sister to the effect that she had sent him the car cover by someone named Watson. Lawrence advised that he should go to the Airport and collect it. He went. He told the Customs Officer there, he had come to collect a box his sister had sent for his mother. At the officer's invitation he looked for the box first in the baggage room and then in the office where the Customs Officer picked up the box and asked the appellant if this was it and he replied that it looks like it. Watson's name was on the box. It was Whittaker, the Customs Officer, who took up the box and put it on the bench and enquired if appellant was going to pay duty on it. Whittaker said he was going to find out why the box was in the office. Whittaker returned with Ebanks. Ebanks cut the tapes binding the box, pulled out the car cover and in the box was a package which when opened contained some white stuff. He told them he knew nothing about it. He denied saying that his sister had telephoned him on Friday. He admitted telling the officers that Dave Bonner had set him up. He did not arrange with anyone to bring cocaine to the Cayman Islands.

In cross-examination by Master's counsel he admitted speaking to Masters in Miami Airport but denied asking Masters to carry the box on the plane. He denied giving Masters US$100 to give to Watson. He saw Watson on his flight. He did not recall having a conversation with Lawrence in Miami. He saw Lawrence at the ticket counter not at the departure area.

In cross-examination by Crown Counsel he reiterated that it was Whittaker who picked up the box. At Miami Airport he was standing with Odette Johnson.

Odette Johnson in evidence said that in her presence nothing was said by appellant to Masters about a car cover being sent to Grand Cayman or to Lawrence about collecting the box and taking it to appellant's home. She did not hear any conversation about any box with car cover that evening in Miami.

Then came the evidence of Oral Masters and his witness. His evidence was to the effect that that evening at the Airport appellant told him he was on standby and did not know if he would make the flight. Appellant asked him to check in the box but he told appellant he had already checked in. Appellant asked him if he knew anyone in the line. He saw William Watson and asked him if he could check in the box for a friend. Watson agreed subject to Watson's sister's confirmation. The box was right to the front of the checking counter. It had been pointed out by appellant. He told appellant that Watson would check the box and appellant then gave him $100 US (2 @ 50) for customs fees. He gave Watson one of the US$50 notes and kept one for himself. The box had the picture of a car cover on it. Appellant had told him that a car cover was in the box. He did not know appellant was on the flight.

In cross-examination he said that Odette Johnson was nearby when appellant spoke to him.

Dina Scott corroborated Masters in relation to appellant asking Masters to check in the box, of Masters advising appellant that he had got "someone" to check it in and of appellant handing Masters "some money". In cross-examination she said Dave Bonner was standing nearby.

The first ground of appeal argued, reads:

> "The Learned Trial Judge misdirected himself with respect to the law relating to possession in so far as it applied to the box which had contained the controlled substance. It is submitted that there is no evidence that Gibson had possession of the box in law."

In support of this ground Mr. Phipps launched his first attack on the Magistrate's reasons for ruling "case to answer". On this the Grand Court approved of the reasoning and conclusion of the Magistrate.

At the trial defence counsel had submitted that there was no competent evidence of possession of the box. Gibson said that he merely went to claim something in possession of the Customs authorities. At no stage was the box relinquished from the possession of the authorities so that at no stage did he have possession of box. Just to claim something would not give him possession.

The claim was made on the basis of information that had been given to him. This case is distinguishable from a case where someone was claiming something he had shipped. In this case someone had sent the box and he went to claim it. To these submissions the Court ruled thus:

> "Dealing now with Mr. Phipps second submission that there is no competent evidence of possession of the box Exh. 2. in Gibson.
> Section 7a of the Misuse of Drugs Law reads:

> 'Where it is proved beyond reasonable doubt that a person had in his possession, custody or under his control anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person was in possession of such drug.'

What is the evidence on which the Crown is relying to prove possession on Gibson, Andy Whittaker, a Customs Officer, testified that the accused told him he was looking for a car cover which someone had sent for him. The said(sic) brought him into the office and asked if this was the box he was looking for, he said yes. He then picked up the box and asked if there was anything else he had to do. He then put the box on the examination bench just a matter of two steps away.

The evidence is that the accused went to claim a box. He not only claimed it by word of mouth but took it into his physical possession, custody or control even for two brief steps. At that point having claimed the box and taken it into his possession he was obliged to allow the officer to carry out search. The only duty the Customs Officer had was to search the box which Gibson had claimed as his own and having done so allow him to pass through with it if it contained nothing illegal or no duty owing. It is no different from one who picks luggage up from the converser (sic) belt and takes it to the examination bench. It has been likened to a shop (sic) in a supermarket who picks up goods. This is quite different. No one in a supermarket can claim the goods to be his own until he has paid for it. The box never became the property of the Customs nor had the cocaine been removed from the box by the authorities and thereby placing it in their custody. Although the Customs still had a degree of control in so far as he could not take it out of the hall unless it was submitted for searching. Gibson had possession."

In support of this ground Mr. Phipps submitted that the Grand Court erred in:

(i) accepting the analogy of a passenger claiming his goods from the carousel as applicable to the facts of the instant case; and

(ii) that with respect to the box in the Customs Hall the appellant was not a person who had possession, custody or control, and that a consignee only obtains possession when it is released by the customs official.

Mr. Smellie in reply argued that for the purpose of this appeal the Court should consider the case at two stages:

(a) At the close of the prosecution

(b) At the end of the trial.

With respect to (a) he submitted that the evidence of Davis Lawrence as to appellant's admission of his involvement with the box in Miami and its shipment to Grand Cayman, and his advising him of its arrival, together with what transpired at the Customs Office was sufficient to establish a prima facie case. R v Cavendish (1961) 45 Cr. App. R. 374. At that stage the Magistrate would not be required to say whether or not he accepted Lawrence's evidence.

With respect to (b), at the end of the trial the case for the prosecution was strengthened by the evidence of Masters and his witness Dina Scott.

With the indulgence of the Court and the consent of counsel for the prosecution Mr. Phipps was permitted to argue the following additional ground:

> "That the learned Magistrate wrongly applied the provisions of section 7 of the Misuse of Drugs Law at the end of the Crown's case, thereby in effect convicting him before the defence was heard. (He submitted) that the presumption could only be applied upon consideration of all the evidence relating to possession, custody or control."

Because of the preliminary nature of this new ground of appeal, it merits first consideration.

To appreciate the meaning and effect of Section 7 of the Misuse of Drugs Law and to identify the changes brought about by its enactment, the position antecedent to its advent must be considered.

In the Jamaican case of R v Cyrus Livingston (1952) 6 J.L.R. 95, the appellant was charged with possession of ganja contrary to Section 7(c) of the Dangerous Drugs Law(s). He was employed as a baggage man by bus owners who were common carriers. He took into custody from a consignor for carriage on the bus on which he travelled as baggage man a sack which was found to contain ganja. It was argued that there could not be possession within the contemplation of Section 7(c) without knowledge of the thing possessed. O'Connor, CJ who delivered the judgment of the Court of Appeal identified the following questions as arising for determination. (p. 97).

> "(1) Could the temporary dominion or control which the appellant had over the ganja as baggageman on the 'bus amount to possession within the meaning of section 7 (c) or was it merely custody or charge?'
>
> (2) Does "possession" in section 7(c) of the Dangerous Drugs Law require that a defendant before he can be convicted, must be shown to have had knowledge that he had the thing in question?
>
> (3) If so, must a defendant, before he can be convicted, be further shown to have had knowledge that the thing which he had was ganja?
>
> (4) If the answers to questions (1), (2) and (3) are in the affirmative, was there evidence of knowledge by the appellant in this case upon which the learned magistrate could properly find him guilty of the offence charged?"

In the course of his judgment he said: (p. 98)

> "To ground a conviction under section 7(c) the Magistrate must be satisfied that the accused had knowledge not only that he had the thing, but had knowledge also that the thing possessed was ganja. In other words, we are of opinion that the prohibition is not absolute and that guilty knowledge is necessary to constitute an offence under section 7(c) of the Law."

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and went on to say: (p. 99)

> "It is always open to the Legislature to make a prohibition absolute by express terms and to exclude the operation of mens rea as a constituent part of a crime; but, according to the canons of construction which the Court is bound, upon the authorities to apply, they have not done so in the subsection under review."
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> (Emphasis supplied)

The reasoning and decision in R. v. Livingston (supra) was considered in the Privy Council case of D.P.P. v. Brooks (1974) A.C. 863. On the questions formulated by the Court of Appeal in Livingston's case, Lord Diplock said:

> "their Lordships would observe that questions (1) and (4) are special to the facts of Livingston's case, and that question (1) is not about the knowledge that a person has about a thing that is in his physical custody or control. That is dealt with separately in questions (2) and (3). These two questions are not special to the facts of Livingston's case but deal with principles of law of general application as to the extent of the two different requirements of knowledge on the part of a defendant needed to constitute the mental element in the criminal offence of having in one's possession a dangerous drug."

From this statement, it is clear that the essential knowledge, contemplated in questions 2 and 3 in Livingston's case, constitutes the mens rea and was provable by inference. By the Cayman Legislature, Section 7 of the Misuse of Drugs Law, proof of the requisite knowledge rests no longer solely on inference but on a statutory rebuttable presumption which will arise on proof by the prosecution of the container of the drug in the accused's possession, which in this context expressly includes custody or control. The standard of proof demanded by the statute is proof beyond reasonable doubt. Accordingly, a finding that the burden has been discharged can only be made on consideration of all the relevant evidence including any evidence from the defence. It is therefore when all the evidence has been heard that the presumption may be applied.

Now, in the absence of Section 7, in deciding whether or not there was a case to answer, the Magistrate would be obliged to consider whether the requisite knowledge is a probable inference having regard to the sufficiency and credibility of the evidence tendered by the prosecution. In our view, Section 7 relieves the Magistrate of this duty. Accordingly, when a no case submission is made, the Magistrate has only to consider whether or not there is sufficient credible evidence to establish a prima facie case in relation to possession, custody or control of the container by the accused. It was, therefore, necessary for him to have in mind the provisions of Section 7 and his reference to it in his ruling should not be taken as an application of the presumption. Indeed, the learned Magistrate after quoting the section went on to identify the evidence which he considered capable of establishing possession of the container and the following final paragraph before his ruling indicated that the presumption had not been applied:

> "Although by Section 7 of the law it is no longer necessary to prove knowledge of the contents if the Court finds that Gibson lied when he told the customs officers that his sister in the states had phoned him on Friday and said she was sending the car cover down by someone named Watson. It would be difficult not to attribute this lie exclusively to guilty knowledge."

Notwithstanding, no objection was taken to this passage the language was infelicitous and of ominous tenor. In this regard, in passing, it is enough to say, that in ruling against a no case submission, the Magistrate should refrain from expressing his views or commenting on the evidence in a manner that could be interpreted as a determination of an issue of fact or as being prejudicial to a fair consideration of the defence.

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Now, a no case submission may be successfully made on two broad grounds:

(i) that there was not sufficient evidence to prove an essential element in the offence charged; and

(ii) the evidence for the prosecution was so inherently unreliable that no reasonable jury would, on that evidence, convict.

In Haw Tua Tua Public Prosecutor (1982) A.C. at page 151, Lord Diplock laid down the proper approach by a Magistrate when a no case submission is made thus:

> "The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosectuion's case is mostly easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided, questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence the judge must let the case go on.....
>
> In their Lordship's view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases.) At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction'".

In the light of that commendable approach, we turn to the main contention that there was no prima facie case to answer as possession in the appellant had not been established by the evidence by the prosecution. In our view, the possession of the container contemplated by the Law may be actual or constructive or as expressed, custody or control.

In the instant case, Lawrence's evidence was tendered to prove that the package, which the appellant identified and claimed at the Customs Office, was the one of which he spoke in Miami and which, through or by his couriers or agents had been carried by the Cayman Airways to the destination of his choice. In short, it was his package in which he had possessory title with sufficient measure of control. Accordingly, Lawrence's evidence together with the Customs Officer's evidence would be sufficient to establish a prima facie case of possession in the applicant.

Faced with this, Mr. Phipps countered by contending that at the no case submission stage the Magistrate had rejected the evidence of Lawrence. In support he submitted that:

(i) Although in all probability he addressed on Lawrence's evidence, no reference to it was made in the Magistrate's ruling on the no case submission.

(ii) His treatment of Lawrence's evidence in his reasons for judgment amounted to a rejection of that evidence.

In his reasons for judgment in relation to Lawrence's evidence so far as is relevant the Magistrate had this to say:

"The only issues now to be determined are:

(1) the facts of this case as they apply to Section 7 (b) of the law, and that is whether after hearing the defendants and their witnesses, the court finds beyond reasonable doubt, that the first accused was in possession of the box containing the drug.

(2) If there was possession, whether it was with intent to supply.

(3) Whether the second defendant .... [Not relevant]

Learned Queen's Counsel on behalf of Gibson very astutely recognised the ramifications of the evidence by his complaint that the prosecution has not charged the defendants with conspiracy or importation. I cannot, however, agree with him that the absence of these charges in anyway weakens the case. On the contrary, there is ample evidence to support all four charges. Be that as it may, the prosecution is not obliged to lay charges of a more serious nature on any accused, the interest of Justice can at times be served by lesser charges. That they have done so should provide no ground for complaint by counsel for the defence.

In support of their case the prosecution called seven witnesses. It has been submitted by Mr. Phipps that the first of these is no more than an accomplice. Whether or not this is so, his testimony is not vital to the charges laid, and would only have been of significance had there been a charge of importation. It is for this reason that I do not propose to place emphasis on it.

In my ruling on the no case submissions made by counsel, I indicated that should I accept the testimony of Customs Officer Randy Whittaker, the charges of possession would be proved. After hearing the accused Gibson testify, I have no doubt that the "Account given by Whittaker is a true and accurate one."

We do not agree that the Magistrate rejected the evidence of Lawrence in his reasons for judgment. The reasonable interpretation of this treatment of Lawrence's evidence is that distracted or influenced perhaps by the emphasis placed by defence counsel upon the omission of the prosecution to charge the appellant with importation of cocaine he considered Lawrence's evidence irrelevant and declined to make a positive assessment of its credibility.

In our view, Lawrence's evidence provided the appellant's Miami connection with the box which he subsequently claimed at the Customs Office. It was vital to the Crown's case as presented. Indeed, notwithstanding the evidence for the defence by defendant Masters and Dina Scott, no where in his judgment did the learned Magistrate refer to the appellant's Miami connection with the box. In our view, in treating Lawrence's evidence as irrelevant, and failing to assess its credibility the learned Magistrate erred.

Did this indicate a similar state of mind at the no case submission? An affirmative answer seems the only reasonable one as it is clear from his findings that his ruling of a case to answer rested entirely upon what transpired at the Customs Office.

In approving of the Magistrate's reasons and ruling the Grand Court said:

> "The true legal position seems to us to be that as soon as such goods are claimed, as for instance by a travelling passenger at a conveyor belt or carousel, by removing and appropriating them, then possession of those goods has been taken or retaken as the case may be from the airline carrier in whose custody they have been and this despite the restriction which still circumscribe the right of the passenger to remove them out of the area pending eventual clearance. There is no logical difference between that situation and one in which the goods have been held in customs custody waiting to be claimed. So soon as a claimant identifies such goods as his and asserts his right to possess or repossess them by putting his hand upon them, then despite the restrictions still affecting his ability to remove them from the customs office, he has effectively taken possession of them to himself. For these reasons we hold that the learned Magistrate was clearly right in coming to the

> conclusion that the appellant, Gibson, was in possession of the box at the relevant time when the suspicious substance was found inside."

With due deference to the Grand Court the analogy with a travelling passenger is forced and unhappy. The travelling passenger surrenders no more than temporary custody of the baggage which he checks in. The airline carrier is his agent. The goods remain in his possession as he maintains a measure of control and his possessory title is indefeasible; when he takes his baggage from the carousel he merely resumes custody and in those circumstances the goods were never ever in the custody of the customs. Nor would it matter if through some unforseen circumstances the baggage did not accompany the passenger. The baggage would, nevertheless, be his and his claim would merely identify the goods in question and/be an admission of his title. In the passage quoted above the Grand Court seemed to have seen no difference between the resumption of custody by a travelling passenger and a person attending for the purpose of clearing goods that came without his prior arrangement or request. In the first, there is the antecedent possession and the uninterrupted possessory title, while in the latter in the absence of prior arrangement it would mean that the mere identification of the package to be cleared and the casual or incidental lifting it to the examination desk for custom inspection would place a person in de facto possession custody or control and out of the custody and control of the Customs. We have not been adverted to any authority to support the proposition that mere casual handling is sufficient to confer de facto possession of goods on the casual handler. What if as the appellant contended he did not touch the box? Would it have made a difference? If he was a "constructive possessor" it would be immaterial, but to be so categorised there must be some evidence of prior arrangement or possession.

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R. v. Cavendish (supra). In the instant case the Miami connection was a contested issue and the appellant positively alleged the box came unbidden and without prior arrangement.

At the close of the case for the prosecution, the credibility of his statement as to his reasons for attending at the Customs Office for the box can only be deferred and was only challengeable by Lawrence's evidence. Thus this issue of his Miami connection with the box was the pivotal point in the case and demanded a determination by the learned Magistrate.

Can his omission be cured by an Appellate Court? In the circumstances we think not. Lawrence's evidence was essential to establishing a prima facie case against the appellant. The ultimate assessment of such oral testimony was eminently a matter for the Magistrate who saw and heard the witnesses. His reasons for judgment indicated that there was no finding against the appellant as to the Miami connection and this omission was not curable by an appellate tribunal.

Accordingly, on this ground, the appeal succeeds.

Another ground argued was that in admitting an alleged statement amounting to an admission against interest by the appellant, the learned Magistrate misdirected himself as to the onus of proof.

The records reveal that in the course of examination-in-chief of Arthur Ebanks, the Customs Officer, prosecuting Counsel sought to elicit a statement made by the appellant after Ebanks found the package of cocaine. Defence Counsel objected on the grounds that the officer was a person in authority and the prosecution had not laid the necessary foundation for admissibility of the statement. Prosecution Counsel in reply said that the only onus on the Crown was to show that the statement was made voluntarily. Defence Counsel maintained his stand and the Court ules thus:

"Evidence admissible at this time -
No evidence that statement was not
voluntary."

Now the test for the admissibility of the statement of an accused as an admission against interest is well settled and is as stated in the headnote in D.P.P. v Ping Lin (1975) 3 All E.R. 175 thus:

"Where an objection was raised in criminal proceedings to the admission of an alleged confession by the accused, the onus was on the prosecution to satisfy the judge beyond reasonable doubt that the statement in question had been made voluntarily by showing that it had not been obtained either by fear or prejudice or hope of advantage excited or held out by a person in authority .....

It was not sufficient for the Crown to show that the person in authority had not intended to extract a confession or that there has been no impropriety on his part; what was necessary was to show, as a matter of fact, that the statement in question had not been obtained in consequence of something said or done by him which amounted to an express or implicit threat or promise to the accused.'

This ground when argued before the Grand Court was given the following treatment:

"In his ruling, the learned Magistrate said that there was no evidence that the statement was not voluntary. If by so saying, it was intended by him to place the burden of proving that the statement was not voluntary upon the defence then this was, of course, a misdirection since the burden is always upon the prosecution to prove the voluntary nature of any statement of an accused person which it tenders in evidence. However, we doubt very much whether any such meaning was intended. Crown counsel had just specifically referred the Magistrate to the onus of proof resting upon him in that respect. Furthermore, the remark attributed to Gibson had not been elicited by any question from the Customs Officers but was apparently spontaneous. As such there was no room for any suggestion of threats or promises inducing the making of the remark. We do not, therefore, find this established as a good ground of appeal but even if it had been, no reliance was placed upon the remark by the learned Magistrate so that no substantial miscarriage of justice could actually have occurred."

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This was very gentle treatment indeed, as the notes were recorded by the Magistrate and the statement as alleged was capable of an inculpatory interpretation. However, the objection was apparently not pursued with the other witnesses and in his reasons for judgment the Magistrate did not refer to the admissions. Were this the only ground argued we would hold, as the Grand Court did, that no substantial miscarriage of justice was occasioned by this ruling.

In the final ground argued by Mr. Phipps he sought to bring under the umbrella of "fair hearing within a reasonable time" his complaint that the appellant, despite request, had not been provided with a list of the prosecution witnesses and the nature of the evidence to be given by them. This question, when raised in the Grand Court, was effectively answered with commendable and concise clarity. It is enough to refer to the following passage:

> "This, however, is established summary procedure and senior counsel for the appellant, Gibson, conceded that there is nothing in the Cayman Islands Constitution or statute law upon which a right to such information could presently be grounded. This argument was not pressed before us by counsel. Any unfairness involved should be regarded as a matter for consideration by the legislature rather than for correction by this Court."

In allowing the appeal on the main ground we gave careful consideration to the consequential order that would be appropriate. We considered the Magistrate's treatment of the important evidence of Davis Lawrence as irrelevant and his consequential omission to positively determine the issue of the appellant's connection with the box in Miami as well as the gravity of the offence and we are of the view that the interests of Justice will be best served by quashing the conviction and ordering a new trial and accordingly we so order.