IN THE CAYMAN ISLANDS COURT OF APPEAL
CAYMAN ISLANDS CRIMINAL APPEAL NO. 25/85

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE K.C. HENRY J.A.
THE HONOURABLE MR. JUSTICE TELFORD GEORGES J.A.

WELLESLEY SHANE ELDEMIRE

VS.

REGINA

Mr. Norman Hill, Q.C. and Mr. David Ritch for the Appellant
Mr. Anthony Smellie and Miss Brooks for the Crown

March 17-21st, 24-25,27, 1986 & August 6th, 1986

J U D G M E N T

The appellant was indicted on six counts relating to three separate incidents. As regards each incident there were two counts in the alternative,one of attempted rape and one of indecent assault. Mrs. Barbara Cargill was the victim in two of the incidents, the first of which took place on February 11, 1984, and the second on October 29, 1984. In the third incident which took place on December 29, 1984, the victim was Mrs. Jennifer Kaufman.

The trial judge directed the jury to return a verdict of not guilty on the counts relating to the incident of October 29, 1984. The appellant was found guilty of indecently assaulting Mrs. Cargill on February 11, 1984, and of attempting to rape Mrs. Kaufman on December 29, 1984. He was sentenced to terms of four and a half years for the attempted rape and two and a half years for the indecent assault, the terms to run concurrently.

In each of the cases in which he was convicted, the appellant was identified by fingerprint evidence. On the Count on which he was acquitted, the sole evidence connecting him with the crime was expert evidence identifying hair allegedly found on the scene as his. The

acquittal was directed because the prosecution expert testified that the sample of hair he had received labelled as hair taken from the appellant differed from a sample he had taken with the concurrence of the prosecution and the defence in the course of the trial.

The defence did not dispute that finger impressions alleged to have been lifted from the scene of the crime were those of the appellant. Evidence was, however, led and cross-examination directed to cast doubt on whether those impressions had indeed been found on the scenes. The implication was that the lifts tendered at the trial as having been made from impressions found at the scene had been made from impressions of the appellants fingerprints obtained otherwise by the police. Bluntly put, it was a case of deliberate deception on the part of the police. The fact that an inference of such deception could be drawn from the evidence relating to the hairs was urged as reinforcing this implication.

The original ground of appeal filed was that the verdict of the jury under all the circumstances was unreasonable and could not be supported having regard to the evidence. This ground was framed as it then appeared in section 6 of the Court of Appeal Law. This section was amended by Law 25/85 to empower the Court of Appeal to set aside a conviction if it appeared unsafe or unsatisfactory. The appeal was argued on the basis of section 6, as amended.

Supplemental grounds were filed with leave on the first day of the hearing alleging misdirections by the trial judge. All of these, save two, were substantially based on the manner in which the trial judge purported to deal with the facts of the case and can be evaluated only against the background of a review of the evidence.

Opening the appeal, Mr. Hill moved pursuant to notice of motion filed on March 14, 1986, for the admission of fresh evidence. This consisted of an enlarged print of a lift alleged to have been taken off a fingerprint impression found on a poster on Mrs. Kaufman's outer door. One of the affidavits in support was sworn by Miss

Rosemary Irving, an English solicitor then employed by Messrs. Truman Bodden and Company, the attorneys then acting for the appellant. She stated that Inspector Neilson had handed her that print and another in an envelope on or about the month of May, 1985. The enlargement bore the date March 14, 1984, stamped on the reverse side. She was then acting for the appellant and up to the beginning of July, 1985 she had had in her possession an envelope containing photographs, negatives and other materials pertaining to the case. The case began in the Grand Court on July 22, 1985. She appeared at the trial but left the country before it was concluded. Mr. Roger William replaced her. At some stage she had misplaced the envelope with the photographs and the negatives and had not, despite searches, found it before she left.

Mr. Roger, in his affidavit stated that in the course of handing over the papers in the matter to Messrs. Ritch and Conolly, who now act for the appellant, he searched an office formerly occupied by Miss Irving and found on the floor at the back of a desk at which Miss Irving sat and between that desk and a book-case an accordion file containing an envelope with photographs, negatives and other materials relating to the trial. Among them was the enlarged print Miss Irving had received from Inspector Neilson in May.

Mr. Broderick, a photographer, stated in his affidavit that he had photographed in the offices of Inspector Neilson the original exhibits tendered during the preliminary inquiry into the charges. On December 2, 1985, he had photographed in the offices of the Registrar of the Court of Appeal the exhibits tendered at the trial in the Grand Court. Among the exhibits in the Grand Court was one numbered 32. This was an enlargement he had made of a lift of a fingerprint impression which had been tendered at the preliminary inquiry and also in the Grand Court where it had been marked Exhibit 2. He had examined all the negatives of the photographs he had taken at Inspector Neilson's office and they did not include a negative of the

photographic enlargement attached to the affidavits of Miss Irving and Mr. Roger.

Clearly the misplaced enlargement and Exhibit 32 were both enlarged prints of the lift tendered as Exhibit 2. There was, however, an obvious difference. On the upper part of each enlargement, above the area with the fingerprint impressions were a triangle and an arrow. The position of the triangle was not the same in both pictures, nor did the shorter sides of the triangle appear as they do in Exhibit 2.

Inspector Neilson filed an affidavit stating that the arrow had originally been in the position in which it appeared in the misplaced enlargement. He had placed it there to direct the photographer with regard to the angle from which he should make his exposure to produce the best results for purposes of comparison. Later he had erased that arrow and replaced it with that now appearing on Exhibit 2 and shown enlarged on Exhibit 32. The misplaced enlargement and Exhibit 32 were both enlarged prints of the fingerprint impressions in Exhibit 2.

Mr. Hill contended that the fresh evidence was vital because on that particular enlargement legible letters and numerals could be discerned with the naked eye. The defence had urged that such numerals were also discernible in Exhibit 32 and that since there were no numerals on the poster their presence was inconsistent with the lift having been taken off the poster from which it was said to have been taken. Even if Inspector Neilson's explanation was not accepted the evidence was still crucial since it would tend to establish that a lift of the appellant's palmar print other than that shown in Exhibit 2 had been in the possession of the police. In that event the prosecution would have misled the Court by not tendering the photograph and explaining how that lift had come into their possession.

Mr. Smellie argued that Inspector Neilson's explanation should be accepted and on that basis the misplaced print would be just another

enlargement of Exhibit 2 and as such not fresh evidence. The issue as to whether letters and numerals were discernible in Exhibits 2 and 32 had been abundantly canvassed at the trial with the aid of magnifying glasses and microscopes. In that sense the misplaced enlargement could not be said to be relevant.

At the close of the argument the Court ruled that the misplaced enlargement should be admitted as fresh evidence. There had been no challenge to the assertion that it had not been available at the trial. It was indisputably credible. It came from the prosecution and by implication was acknowledged to be authentic in Inspector Neilson's affidavit. It appeared also to be relevant. It could support the inference that the police had in their possession a lift of the appellants palmar prints other than that tendered as Exhibit 2. If it was merely another enlargement of Exhibit 2, then it would be relevant in so far as it showed more clearly letters and numerals not heretofore as clear.

The gist of Mr. Hill's contentions on the appeal may be summarised as follows. The system of gathering and preserving fingerprint evidence on the scene of a crime in the Caymans was flawed. In this case that deficiency was aggravated by other factors which raised specific doubts as to the credibility of the police officers who testified as to the discovery and the preservation of fingerprint impressions on the scenes. These doubts were reinforced by the disintegration of the case for the prosecution as regards the offences said to have occurred on October 11, 1984. Exhibits had plainly not been adequately safe-guarded, or had been dishonestly rigged. All of this made the verdict of the jury unsafe and unsatisfactory. Additionally, the trial judge in his summing-up had adopted an unusual approach. In dealing with the facts he had relied heavily on the summaries put forward by the attorneys in their addresses to the jury, or on summaries which he himself had made. He had not made reference to the evidence as given. The jury had not been reminded of that evidence nor had they been adequately instructed as regards the inferences to be drawn from it.

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One was left with the impression that the issue had been oversimplified into one of accepting or rejecting the credibility of the police officers who ought normally be regarded as witnesses of truth. The summing-up had contributed to the unsafe and unsatisfactory verdict reached by a majority of 5 to 2. An analysis of these contentions require a close examination of the evidence.

Barbara Cargill retired to sleep about 11:30 p.m. on February 11, 1984, having in the normal manner secured her house. Some time in the course of the night she had a sensation that some person was lying on top of her. She woke up to find that someone was indeed on top of her. The person said he wanted to make love to her. She screamed and kept on screaming though the person placed a hand on her mouth. Eventually the person got up and ran off. The room was dark. She was unable to recognize the person, but it was a man dressed only in what she described as "loose shorts". Neighbours, alerted by the screams, had rung the police who arrived very shortly after.

She noticed that the back door which she had closed before retiring was open. There was a screw driver on the ground near the utility room. On a ledge leading into the kitchen there had been an ice bucket and a small stone jar, referred to in the evidence as a cook's nips. The ice bucket had been moved and placed on the water heater. The cook's nips was still on the ledge but not where it had been the night before.

Later that morning, shortly after 8:30 a.m., Sgt. Roger Ebanks dusted the premises for fingerprints. He raised impressions on the cook's nips and the ice bucket and the water heater. He lifted the impressions on to clear plastic tape which he affixed to cards. These cards he labelled and had Mrs. Cargill sign. Mrs. Cargill confirmed that she saw the fingerprints develop when the power was applied and that she signed a card. These cards Sgt. R. Ebanks testified that he kept locked in a drawer of his desk until October, when he handed them to Inspector Neilson who joined the Cayman Islands Police Force then.

The lifts were tendered and Mrs. Cargill identified her signature. She could not remember the condition of the card when she signed.

In her statement given on February 11, 1984, she had not mentioned the fact that she had been present when the fingerprints had been raised, nor that she had signed the card.

Sgt. R. Ebanks took away the screw driver and that was tendered in evidence. He also took away the ice bucket but not the cook's nips. He had not photographed either of these objects and could not remember on what parts he had raised the finger impressions. The cook's nips was produced and tendered but the ice bucket was not. This was a matter for comment and will be considered later.

The second incident with Mrs. Cargill took place on October 12, 1984. She woke up about 3:30 a.m., that morning and became aware that the room was completely dark. Louvres which she had left open had been shut and curtains completely drawn. Someone else appeared to be in the house. Suddenly a person threw himself on top of her, the movement pulling her off the bed on to the floor. At the same time the person was stuffing a sheet down her throat. She screamed and her assailant told her he would kill her if she did not stop screaming. She struggled and continued screaming. Her assailant sucked her breast and inserted a finger in her vagina. The telephone ran and he fled. She never really saw the assailant, so dark was the room, but she managed to pull his hair which was long and caucasian. She could not tell whether he had any clothes on. She was terribly shaken. All she remembered was that the police took away a sheet which was covered with blood.

Constable John Ebanks was one of the first policemen on the scene. He identified the point of entry as a dining room window on the northwest side of the house from which four louvres had been removed. He saw a naked footprint there, somewhat indistinct. He dusted the scene for finger impressions but raised none. He found some hairs on Mrs. Cargill's bed which he collected and placed in a plastic bag. He also collected a sample of the hair from Mrs. Cargill's head. That too he placed in a plastic bag. On his return to the station he placed each plastic bag in separate plastic bags which he sealed and labelled.

He kept them in his possession until around January, 1985, when he handed them to Detective Inspector Johnson. He did not note in his investigation diary the fact that he had found the hairs. The labelling on the plastic bags was not uniform. On one he had noted only the date received. His explanation of these lapses was that he had been working since midnight, was tired and was handing over to Sergeant Forbes.

Also found on the scene near Mrs. Cargill's bed was a man's underpants. Constable Ebanks placed it in a plastic bag which he sealed and handed to Inspector Johnson. It is not clear exactly when he did this.

The evidence does not indicate that any person was pinpointed as a suspect in either of these cases.

About midnight on December 29, 1984, Mrs. Kaufman retired to bed. She was awakened in the course of the night when a body landed on hers and a towel was placed over her face. The assailant was a man who threatened to kill her if she made noise. She reacted by struggling. She had originally been lying on her back but she managed to turn on to her stomach. She thought at one time that she was biting the man's arm, but he had a towel over it. In the course of the struggle the man rolled off the bed. He then ran from the bedroom, down the passage to the front door which Mrs. Kaufman had closed but was at that stage open.

Mrs. Kaufman ran after him. He crossed the garden at an angle and jumped a low fence, bending over as if to pick up something as he did so. In her statement to the police that morning she described her assailant as "about 6 feet tall, light complexion, dark wavy hair and slightly hairy". In her evidence she stated that he was 5'9" or 6' tall.

Mrs. Kaufman immediately called the police. First on the scene was Constable Smith of Traffic. He received a description from Mrs. Kaufman. Later he spoke to Mr. Moore who worked as a security guard in the area. This led him to suspect Jason Cox, a person known

to Mrs. Kaufman and fitting the description she had given.

Entry had been gained through the back door. Glass louvres had been removed and a screen cut. Other policeman arrived on the scene, among them Sergeant Roger Ebanks who dusted for fingerprints. Mrs. Kaufman saw him doing this around her bed head and around the front and back doors. She had Christmas posters on both sides of her front door. She saw impressions raised on the poster on the inner side of the front door. She watched the police as they lifted the impressions. Photographs were taken. She signed cards on which there were clear tapes with impressions which had been lifted. When she signed the cards there were clear tapes on them.

The chronology of events was investigated in detail in cross-examination —— the purpose being to pinpoint when the dusting had taken place, when the lifting and when the photographing.

Mrs. Kaufman had gone to the hospital in the course of the morning with Constable Michelle Terry and had also given her a statement. The likelihood was that she had gone to the hospital at about 6:30 a.m., and had been back about 7 a.m. Her recollection was that Sergeant Ebanks had dusted, then waited for light, the better to see such impressions as were raised. He had then lifted impressions. She thought that the lifting had been done before she left for the hospital. When she returned they were taking photographs. They had been there for hours. She was not positive as to sequence.

Sergeant Ebanks testified that Mrs. Kaufman was there when he developed and lifted the impressions. He had waited until there was daylight to take pictures —— beginning from the carport.

In the final analysis, Mrs. Kaufman was quite sure that whether it was before or after she had gone to the hospital, she was there when the impressions were raised and that she had signed the cards as soon as the tapes with the lifted impressions had been placed on them. Later, on another occasion, the police had returned to take her fingerprints, those of her son Christopher and other persons whose fingerprints could, in the normal course of events, have been expected

to be found about the house. On that occasion they had taken no photographs.

Sergeant Ebanks handed the lifts taken from Mrs. Kaufman's premises to Inspector Neilson on December 31, 1984.

Sergeant Ebanks tendered a photo album containing 13 colour prints. He testified that he had made all the exposures from which these prints had been developed on the morning of December 29, 1984. In examination-in-chief, he stated that he had come with his camera loaded with a roll of film. He did not know how many exposures he had made nor could he say whether there were 12, 24 or 36 frames for exposure on the roll. On inspection of the negatives under cross-examination he concluded that he must have used two separate rolls. This was put beyond doubt by the evidence of Bruce Orr, the Manager of One-Hour-Photo, the firm which developed the exposures. Films are given batch numbers and the negatives showed two different batch numbers, one covering exposures 27 - 37 and another set covering exposures 1 - 15. On the other hand, Tricia Henning, the employee who had actually operated the machine to produced the negatives from the exposures, testified that she had handled only one roll of film.

Mr. Orr produced invoices sent to the police for work done for them. They were in no way conclusive on the issue as to the date of processing of films nor could Mr. Orr swear that it was not possible that a single roll may have been developed in January, 1985. Processed film can be tracked by a number stamped on the envelope into which the films are placed and also on the beginning of the film roll. The film had, however, been cut, presumably, by the police since Mrs. Henning stated that she never cut films developed for the police, and the bag had been thrown away. The relevance of this evidence as far as the defence was concerned centred on the possibility which it was said to leave open that photographs may have been taken on two occasions, once on the date of the incident and once thereafter.

The photographs themselves are not controversial save for that numbered 13 which showed the inside of the front door covered with

the poster. Two hands appear in that picture with index fingers resting on the poster on areas showing darker patches which indicate fingerprint impressions raised by dusting powder. The evidence of Mrs. Cargill was that the hands were those of her son, Christopher. Although her identification was positive, she stated that it depended in part on identification of the watch. If it was Christopher's hands then there would be cogent evidence that the picture had been taken on the day of the incident.

Jason Cox was taken to the police station on December 29, 1984, but was released. There is no evidence as to what investigations led to his release but he was asked to give a hair sample. The appellant was asked to come to the police station on January 2, 1985. He was interviewed by Inspector Johnson in the presence of Chief Inspector Kenrick Hall. He was also asked to give a specimen of his hair but he was not asked for fingerprints. The issue of fingerprints had been raised when the appellant asked whether giving hair was like giving fingerprints —— meaning, no doubt, a positive method of identification. Inspector Johnson states that he believed that the appellant had something to drink when he came to be interviewed. The container may have been a glass or a can. It was possible that the appellant's fingerprints could have been left on that container as well as on the desk at which he was interviewed, but he had not raised any such impressions.

The appellant next went to the station on January 7, 1985, in connection with a report he was making about a confidence trickster who had been defrauding persons of small sums. The appellant brought in a cheque for $25.00 and stated that he could recognise the culprit if he saw him. The evidence as to how the police came into possession of the cheque is somewhat contradictory. Inspector Johnson stated that the appellant did not bring the cheque in when he made the report, but Inspector Neilson stated that he received the cheque from Inspector Johnson. Inspector Neilson treated the cheque and raised a fingerprint on it. He then took elimination prints from him —— digital prints, not

palmar prints. The fingerprint on the cheque was the appellant's. At the preliminary inquiry he had stated that the appellant had not been fingerprinted in relation to the fraud case. The record contains no explanation of that discrepancy. Inspector Neilson testified that he had destroyed the elimination prints. There is no note of the date on which he had done this. Inspector Neilson could not recall the date. By March 8, 1985, the fraud case file had been closed.

The appellant was arrested on January 15, 1985. On that date, on the prosecution's case, no comparison had yet been made of his fingerprints with those found on the scene nor had any comparison yet been made of his hair with that taken from Mrs. Cargill's bed. He could not, of course, have been identified by either of the virtual complainants.

After his arrest Inspector Neilson took his fingerprints on a police fingerprint form. He compared them with the fingerprints lifted form the front door of Mrs. Kaufman's house and from the cook's nips and ice bucket from Mrs. Cargill's house. The print on Mrs. Kaufman's front door matched a portion of the left palmar print of the appellant. The impressions on the ice bucket and the cook's nips matched right thumb impression and part of the left palmar impression of the appellant.

As has been mentioned, the appellant had given samples of the hair from his head and pubis to Inspector Johnson on January 2, 1985. Mrs. Cargill had given a sample of the hair from her head on October 29, 1984. Constable Michelle Terry had obtained a sample of her pubic hair on February 19, 1985. On that day she also obtained samples of Mrs. Kaufman's pubic hairs. All these samples Inspector Johnson took to Miami in sealed bags with labels. He also took the underpants found at Mrs. Cargill and at Mrs. Kaufman and the bed linen from the complainants' beds. In examination-in-chief the expert, Dr. Nippes, concluded that three hairs found in Mrs. Cargill's bed linen could have come from the appellant. The others did not. Two hairs from among 60 found in a package containing bedding from Mrs.

Kaufman's house had microcharacteristics indicating that they could have come from the appellant.

In the course of cross-examination Dr. Nippes agreed to take new samples of the appellant's hair. He did so. A preliminary examination indicated that this sample had characteristics different from those of the standard of the appellant's hair which he had used for comparison. He was allowed to take the samples away for further examination in Miami. On his return he was positive that the standards he had previously used as being those of the appellant differed from those of the sample he had taken in the course of the proceedings. The hair found in the bedding from Mrs. Kaufman and Mrs. Cargill did not match the samples he had taken from the appellant in the course of the proceedings.

This development led to a no case submission on the charges relating to the incident of October 29, 1984. This submission was successful. The record disclosed no explanation of the developments which led to the disintegration of the evidence as to hair identification. Mr. Smellie for the Crown is recorded as stating in his address that the prosecution could offer no explanation.

The defence relied primarily on what it contended was the generally unsatisfactory state of the case for the prosecution supported by the testimony of its expert witness, Mr. Herbert Leon MacDonald. Stripped to its essentials, their case was, the appellant had been framed. His fingerprints were said to have been found in places where the appellant had never been. The lifts tendered in evidence had been obtained from impressions which the appellant may have unwittingly left on the occasions when he visited the police station. Grave as these charges might be, they could not be shrugged off because there was evidence that the hair samples may have been tampered with. It could also be contended that the police witnesses directly involved in the preservation and comparison of fingerprints had been less than candid in their testimony in court.

Since the charges depending on hair-identification had been dismissed, no time was spent during the argument on appeal examing the

evidence directed to them. The record shows that Mr. Hill's cross-examination of Dr. Nippes opened with questions intended to establish that his opinions would not hold if the sample assumed to be the appellant's hair was not, in fact, the appellant's hair. Subsequent events indicated that the assumption was false. It seems reasonable to expect that a police officer of moderate intelligence and experience wishing falsely to implicate an accused person in a crime by means of hair identification would ensure that that person's hair would be found in samples of hair said to have been recovered from the scene. The simplest way to do this would be by introducing samples of the victim's hair into the exhibits said to be taken from the scene. Blindly substituting another sample for that said to be taken from the suspect could be completely counter-productive, since there could be no certainty that that sample would contain hairs, matching hairs, taken from the scene. There may be some point in substituting for the sample taken from the suspect some of the hair taken from the scene. Since this in any event involves some interference with the packaging of the samples taken from the scene, it is much simpler, once there is interference, merely to introduce the intended victim's hair into these samples. This approach seems the only sensible approach even in the situation in which it is not foreseen that the defence might retain an expert to challenge the evidence. This is so because it is the fool-proof method ensuring that the suspect's hairs are among those found in samples taken from the scene.

The evidence establishing substitution of the hair samples could support an inference of a conspiracy to implicate the appellant, but the sheer ineptness of the method may also indicate that there was some other explanation. It does not inevitably follow from that substitution that the entire case against the appellant is so tainted as to be unworthy of acceptance beyond doubt. The evidence in relation to fingerprints could, by itself, be adequate if satisfactorily proved.

The method of presenting fingerprint evidence was seriously challenged. Mr. MacDonald testified that the presence of fingerprints

on an object could most convincingly be demonstrated by producing in court the object with the print once that was moveable. If it was not, then the next most convincing method would be to have a photograph taken of the object on site to show the location of the fingerprint. He states that this is the practice of the Federal Bureau of Investigations in the United States of America. Mr. MacDonald's propositions seem difficult to dispute.

Inspector Neilson testified that the practice in England was otherwise. Lifts of finger impressions were also made from impressions raised on the scene. These lifts were placed on cards, labelled and signed by an independent person so as to verify their authenticity. This method was adopted so as to reduce the need to store and preserve for production in court the many items on which fingerprint impressions may be found. The appeal to convenience is not completely convincing. Exhibits do in any event have to be preserved. The cost of their preservation and the administrative problems are part of the price of ensuring justice by providing irrefutable proof.

It cannot be said, however, that the method used in England and in the Caymans is so flawed as to merit immediate rejection. In the article tendered by the defence the lift method authenticated by a witness is referred to on page 13 as a method of proof where the object cannot be brought into court.

The fact is that fingerprint impressions can be transferred from one surface to another. On page 4 of that article a possible method is stated to be that of allowing a person to use a drinking glass and then lifting the finger impressions left on the glass and transferring them to another object —— say another glass. The impressions left there can then be raised. The latent print on the object to which the transfer has been made would be faint, but that is true of most latent prints. It follows from this that production of the actual object on which the print was alleged to have been found does not totally eliminate the possibility of forgery.

The lifts tendered in this case were authenticated by the signatures of Mrs. Cargill and Mrs. Kaufman on the backings to which they were attached. It seems beyond doubt that if there were tapes on these backings when these witnesses signed, those tapes could not have been removed and other tapes substituted without leaving clear evidence of such substitution. Deception would have been possible only if Mrs. Cargill and Mrs. Kaufman had been induced to sign blank cards on which tapes had subsequently been placed. Nothing on the record indicates that the appellant was a possible suspect at the stage when the scenes of the crimes were being examined and the procedures being followed to preserve what was considered necessary evidence. The hypothesis of the procurement of the signing of blank cards would require that the police were at that stage envisaging the need falsely to implicate some innocent person and were carefully preparing the basis for doing that. In the incident of February 11, 1984, the prints must have remained for months in a drawer before being examined. At that date no printed cards were yet in use on which tapes were to be placed. Suitably shaped pieces of backing were used. This would mean the preparation and preservation of appropriate pieces of backing from that date for the entrapment of an unknown innocent victim.

The other hypothesis is that Mrs. Cargill and Mrs. Kaufman signed cards made up afterwards. This was never suggested and there could be no basis for such a suggestion that they were participants in a conspiracy.

It was contended and with reason that there were occasions on which Inspector Neilson was less than candid. The record shows that he denied knowing any method whereby processed latent impressions could be transferred from one place to another, or whereby an impression could be lifted, developed on a document and placed elsewhere. Later he admitted that the case of de Palma, the focus of the article tendered by the defence, had been well publicized and that he was well aware of it.

Inspector Neilson also denied that he used the finger impressions taken from the appellant when he came to the station on

January 7, 1985, in connection with the reported fraud for purposes of comparison with the impressions taken from the scene. This is highly unlikely. Indeed, if he is believed, then it follows that the appellant was arrested on January 15, 1985, when there was no admissible evidence whatsoever of his connection with the crimes.

It is also significant that when Inspector Johnson saw Mr. Whittaker in Miami en route to taking the exhibits to Dr. Nippes he told him of the fingerprints found at the scenes of the crime and of the fingerprints in relation to the "swindle victim". This clearly referred to the fingerprints given by the appellant on January 7, 1985. There would have been no need to mention this if that information had not been relevant to the inquiry into the offences.

It seems far more likely that the prints obtained on January 7, were used for purposes of comparison, that the identification was established and that the arrest then followed. It is a matter of grave concern to conclude that the likelihood is that a senior police officer may have misled the Court and told an untruth. The motive for this is reasonably clear. It was considered a breach of the law to use fingerprints obtained for one purpose from a member of the public for a totally different purpose. The denial would have been intended to conceal this breach. It is not, however, reasonable to conclude that the credit of the prosecution is thereby totally destroyed and that there are grounds for doubting the authenticity of the lifts tendered as having been taken from the scene. Inspector Neilson was not involved in that process and there are the authenticating signatures of Mrs. Cargill and Mrs. Kaufman.

A sustained attack was mounted on the fingerprints on the basis that expert examination of the lifts, some of it microscopic, revealed internal evidence that they could not have come from the surfaces from which it was testified that they had come. This was, of course, not possible in the case of the lift said to have been taken from the ice bucket. That exhibit had not been produced. It was also pointed out that the evidence relating to its non-production

was not altogether satisfactory. In examination-in-chief, Sergeant Ebanks stated that he never had intended to keep the bucket as an exhibit. He had taken it away because it was warped and Mrs. Kaufman had asked him to get rid of it. This approach was consistent with the method of preserving fingerprint impressions followed in the department. He had not taken possession of the cook's nips either. This remained with Mrs. Kaufman and was produced at the trial. He admitted, however, that at the preliminary inquiry he had said that the ice bucket had been misplaced because the department had just moved. He had searched for it in the Exhibit Room and had not found it. This gave the impression that he had attempted to preserve the ice bucket, but for reasons over which he had no control he had failed.

The failure to produce the ice bucket fitted in with the pattern of preserving fingerprints, though it was argued that it was a deliberate suppression of evidence directed at depriving the defence of an opportunity to scrutinise it. The cook's nips was left with Mrs. Kaufman and was produced. Mrs. Kaufman confirmed that she did not wish to keep the warped ice bucket.

In relation to the cook's nips, Mr. MacDonald testified that there were two more or less straight lines on each side of the print. He could find no such lines on the cook's nips. The distance from the bottom edge curve to the top edge was 2.455 inches. The distance between the straight lines on the tape measured 2.75 inches. In his view, good tape should not have any elasticity. He did not accept an offer to test whether the tape used by the Criminal Investigation Department in the Caymans did have elasticity.

The critical examination of the fingerprint impression stated to have been found on the poster on the inside of Mrs. Kaufman's door was more sustained. Looking at a photograph of the door showing the alleged fingerprint impression of the appellant, Mr. MacDonald testified that when he compared the lift photograph with the photograph of the poster, he noted that there was a gap or a void in the area which, according to the lift photograph, should have shown ridge identification

characteristics. He also noted a dot on the lift which on microscopic examination showed up as an intermixture of black with tinges of red and green. The poster had not been made up by overlaying the colours red, green and black. Wherever there was red, or green, or black that was the only colour at that point through and through. A possible intermingling of colours could be found only in areas where the different colours happened to meet. The lift had not been taken from such an area. The area from which it was stated to have been taken was red. The presence of that dot showing microscopic traces of green and red in his view indicated that the lift could not have come from the area from which it was said that it had come. Additionally, enlargements of the photographs of the lift and even the lift itself showed a pattern of letters and numerals. The evidence was that the poster was a clean poster with no letters or numerals. The presence of discernible letters and numerals in the finger impressions showed that they must have been lifted from a surface on which these letters and numerals had been written or printed and not from the poster. The prosecution's explanation was that any letters or numerals which might be thought to be there were merely random patterns formed by the dust as it settled on the ridges and bifurcations of the latent print. This explanation was supported by the fact that letters and numerals could also be discerned in lifts taken of Christopher Kaufman's impressions from that very poster.

As regards the dot showing an intermingling of black, red and green, Sergeant Ebanks explained that this may have been due to a contaminated particle of dusting powder adhering to the latent print. This was possible because the excess powder on a surface which had been dusted would be brushed off and placed in the receptacle from which powder would be taken to dust another surface. Thus a particle which had picked up some colouring on one surface could be found on a surface which had none of that colour.

The defence placed some emphasis on the labelling of the lifts. One of the lifts from the outside of Mrs. Kaufman's bedroom

door was dated "29/10/84". The offence had taken place on December 29, 1984. That print was insufficient for purposes of identification. The crucial lifts of the finger impressions on the inside of the front door were both dated "29/12/84", but there are clear indications that "1" had been written where the "2" of "12" now appeared, and that the "2" had been superimposed on the "1". One of these prints was identified as that of Mrs. Kaufman's son Christopher. The defence argued that the error in the date could only have arisen because the prints had not been lifted and the labels written on the date of the offence. In that context the fact that the error also appears on the label of Christopher Kaufman's prints is significant.

It will be evident from this brief review that the issues raised by the defence were many and did not easily fit into a simple pattern. The testimony had necessiatated examination by the trial judge and by the jury of several exhibits, some of them under microscopes.

Mr. Hill argued that Mr. MacDonald's evidence was in effect uncontraverted and should have been accepted. Once that approach was used all other issues would be subsidiary. The fact is, however, that the jury, examining for themselves the exhibits being discussed, would have formed views as to what they themselves observed and those may not have been identical with what they were told was capable of being observed.

The trial judge stated that his summing-up would be divided into different parts which he labelled as general considerations, definition of charges, the Crown's case as he understood it, the defence case as he understood and his own comments.

The first supplemental ground of appeal was that the trial judge had failed adequately to put the defence to the jury and the second was that he had failed to remind the jury of the evidence of the witnesses on the important issues and to relate that evidence in a logical way to the appellant's case. These grounds can be dealt with together since the second appears merely to particularise the

area in which the inadequacy and the impropriety lay.

The trial judge did not read to the jury the evidence as he noted it. He put to the jury summaries which the attorneys for the prosecution and the defence had advanced in their addresses. In principle, such an approach should be acceptable once the summaries are accurate so that there is no misdirection of fact. No such misdirection has been alleged. The case had lasted 19 days, but the basic issue was clear. It was one of identification. The method was by way of comparison of hair and of fingerprints. Identification by comparison of hair had collapsed. There was no dispute as the accuracy and correctness of the comparison of the fingerprints. At the heart of the matter was the soundness of the process by which they had been preserved and integrity of the officers who testified as to where they had been found and when. The defence contended that there were matters which led to suspicions strong enough to raise doubt that the fingerprints presented to the Court had been otherwise obtained by the police and falsely alleged to have been found on the scene of the crime.

One misdirection of fact was noted. The trial judge stated that P. C. Terry had testified that Christopher Kaufman was not there when the pictures were taken on December 29. The record shows that she testified that the hands in Exhibit 13 were not Christopher Kaufman's hands —— not that he wasn't there. This inaccuracy is inconsequential.

In urging this ground Mr. Hill referred to the way in which the trial judge dealt with the sequence of events at Mrs. Kaufman's house on December 29, 1984, after the police arrived. He did not read the evidence. He stated:-

> "But you will recall that when she was being cross-examined by Mr. Hill, as I understood her, her evidence initially was that she had been present continuously throughout the whole process of the raising of the lift and the transfer of it on to the tape and the signing of the tape by her. That was the effect of her

> evidence as I understood it at that point. Of course we're talking about events which happened several months ago. But under cross-examination she, to me, appeared to modify what she said. But I don't say 'modify' with any sinister implication at all. My impression was that she recollected in more detail. She thought harder about what had happened, especially when she was shown that the card had the time 9:15 on it. And as I understand the effect of her evidence, after she had thought about all these things, she was saying no, what happened was that she called the police. The police came. She made a report to them. They carried out a scene of crime. That they were in fact there a considerable time, going around, starting with the back door and working through the front door, checking out the location, raising prints, taking photographs and putting them on to tapes. So she was saying, and her evidence was that she saw every step taken in relation to this particular fingerprint. But it is also quite clear, I think, that she didn't see them take —— she didn't see it all stage by stage. There were times when she wasn't there, and of course the one time that she wasn't there was when she went to the hospital".

The trial judge then refers to matters which he notes that the jury may take as confirmatory of Mrs. Kaufman's recollection and he concludes:-

> "The only inference I would draw —— its a matter for you whether you do draw it —— is that I don't think her evidence establishes (I'm talking about her own testimony) establishes that she was there continuously during the taking of —— the raising and taking of the impression from the door from the poster. But her evidence is that she saw every step all the same, and you're entitled to have regard to that".

This summary of the evidence appears unobjectionable when it is borne in mind that the evidence which would have been read would not have been a verbatim account made by a stenographer, or from a recording, but the trial judge's jottings intended principally to aid his own recollection, the advantages of an actual reading of the notes appear minimal. The judge's summary would no doubt have helped the jurors in recalling their own recollection of Mrs. Kaufman's

evidence and forming their own impressions of its effects. Earlier in the summing-up the judge had specifically referred to Mrs. Kaufman's modification of her evidence as an inconsistency, the effect of which they should consider.

The judge outlined accurately to the jury evidence produced by the defence to cast suspicion on the origin of the lifts and he drew attention to the aspects of the Crown's case which were said to reinforce these suspicions. Mr. MacDonald's criticisms of the lifts from the poster and the cook's nips were fully canvassed as was his criticism of the failure to produce in court the objects on which fingerprints were found. The jury were reminded to look at the photographs carefully to see whether they could discern the letters and numerals which Mr. MacDonald testified that he could see.

The third supplemental ground of appeal was that the trial judge had in effect overemphasized in his directions that police officers were truthful, experienced and professional persons and for that reason worthy of credit. In so doing, he had erred in law by usurping the function of the jury.

This requires a closer analysis of the summing-up to identify the occasions on which such comments were made and the contexts in which they were made.

In his first reference the judge states:-

> "... the first point about their case that I want to make to you is this. It hasn't been put, I think quite as explicitly as I am going to put it by Mr. Smellie but nevertheless I take it to be quite clearly what he was saying. The first point I want to make to you when you are considering the Crown's case is that it's —— those are the facts and what is more, that evidence is to be believed and that the reason it is to be believed is, first of all, that the police officers who gave that evidence are truthful witnesses. They're truthful, experienced, professional police officers. And secondly that it is corroborated by independent truthful witnesses, namely Mrs. Cargill and Mrs. Kaufman who themselves have no reason not to tell you the truth".

That point is repeated and the passage ends:-

> "I think it is important to stress that that is a key part of the Crown's case".

Later in the summing-up, having discussed Mr. MacDonald's evidence touching the letters and numerals on the lift, the void and the multicoloured spot, he states:-

> "... but I think I have to come back because I think its implicit in what the Crown is saying," and moreover you must always bear in mind the planks" —— what I think the Crown see as the real planks in their case —— namely that whatever possibilities may have been raised in the course of the testing of this evidence in court the whole evidence has to be viewed against the backdrop, as it were, that it was given by police officers who you should believe, and that it was given by independent witnesses who you should believe, and that there is really no reason to doubt that what they say as to where the prints came from is true. And if you accept their evidence, then even though the defence may have been able to point out to you things such as a red spot and a green spot, and what is apparently writing, its still not enough to displace the force of the Crown's evidence that this was properly obtained evidence in the circumstances in which the witnesses said it was obtained. Well, of course, that's a matter for you and I'll be giving you both the other side of that particular submission and also my own comments in due course".

Both these passages and the two others which have not been cited deal with the prosecution's case. There are summaries of the arguments advanced and could only have been so understood by the jury. In the second passage the trial judge specifically states that accepting the argument is a matter for the jury.

Some passages later, having among other matters set out at some length the arguments put forward by the defence with regard to the integrity of the prosecution's case, the trial judge states:-

"... Being realistic and not beating about the bush about this, its inevitably going to raise in your minds the question of the conduct of the police in the case. At the least, of course, it raises the question 'Is their evidence correct?' and at the taking it further, I think you will find that it is inescapable to avoid applying your mind to the question as to whether or not the evidence is genuine, with what that word connotes or connotates. And in that respect, when you consider this point, there are a number of general things I want to say to you. And the first point is, and its a restatement of what I have said to you earlier, this is a court of law and in the process, you are taking part in a process of the court of law. You are part of the court of law. And the function of this court in a criminal trial is to examine ... (Tape ends reference is to examining evidence). ... Now in that respect I want to make two particular points to you: the first is that you may, I don't know but you may, experience a certain amount of discomfort. What I want to say is that no one ever said a juror's job, even a judge's job for that matter, is an easy one, so don't be uncomfortable about it. It's one of the issues that has to be examined in this case. The case depends on —— the Crown's case depends on —— the fingerprint evidence. The fingerprint evidence by its nature, I think, can be properly described as scientific evidence, and while I don't in any way indicate my own views on this matter at this stage, if the prosecution indicts a person, relying on scientific evidence, then the prosecution must expect that the evidence will be scrutinized carefully and scientifically.

And it may seem to you rather hard that police officers who come into court and give evidence who carry out investigations have to face questions as to whether they have been candid. Again I am not indicating my views on this at all. I am simply discussing with you what you are going to have to consider. But as I say we are here to examine the facts of this specific case, and the defendant is entitled to know that we will look at this case, or scrutinize this case, scrutinize the scientific evidence and confine outselves to the issue which is whether it is proved or not, without going into other considerations as to whether its embarrassing to consider the possibility of people having been less than candid, or the possibility of things having gone wrong in some way — that's not what we are here to do".

He then ended this particular direction by saying:-

> "what I do think is that it is not a case in which the issues have been raised spuriously or speciously, and there again I am not indicating to you what I think of the relative weight of each side of the Crown and of the defence, but what I am saying to you is, in my own mind, this is not a case where those issues have been raised spuriously. I think you will have seen by the way in which the evidence has been led that there are real issues to be considered".

The trial judge is here giving directions as to how the evidence is to be approached. Aware no doubt of the size of the community and the difficulty of making decisions which may seem critical of persons in authority, he warns of the dangers of that approach and emphasizes that the defence has raised issues which they must consider. There is no error in so doing. He warns them in the following paragraph that although they may form a view as to credibility which lead them to conclude that a witness would not speak anything but the truth, they should guard against that. The evidence was detailed and scientific. The jury should examine it and arrive at a reasoned decision.

In the final stages of the summing-up the trial judge stresses that the Crown relies on the truthfulness and the credibility of the witnesses for the prosecution, while on the other hand, they would have to consider:-

> "Whether you think that the hairs, the various points brought out by the defence as to what may or may not be on the fingerprints, and as to the circumstances surrounding the fingerprints, and also as to what transpired in the police station after the event, and also as to the existence of an alternative suspect to your mind raise such reasonable doubt so that you will find it unsafe to convict on either charges or on any of the charges".

It seems plain that the trial judge did not usurp the function of the jury. He did not state his opinion of the truthfulness of

the police officers. He said explicitly that the defence had raised issues which were not spurious and needed consideration.

The fourth supplemental ground takes issue with a passage in the summing-up which reads:-

> "The defence has put in issue the origin of these fingerprints. I don't believe it has done so speciously and I think there is a real question to be considered. And that's all I am really going to say to you in that respect. But what follows from that in my view is this, that you're entitled and you must come to a view on that question. You are going to have to decide that. Do you think that these are if I can put it this way, phony?"

It would have been better had the trial judge added a second question, namely, that the fingerprints might be phony. It is well-known however that the summing-up must be looked at as a whole. There was an unexceptionable exposition of the burden of proof at the opening stages of the summing-up. Some two pages before the passage criticised above the trial judge stated:-

> "Now, I want to come then to the second point, the question of whether these prints were found where they were said to have been found. And as you know the heart of the defence case is that they were not and could not have been found where the prosecution says they were. The defence case really is premised on that proposition. And as Mr. Hill has said, and as I've outlined to you, the defence does not have to show you why the Crown would say they were found there if they were not found there. The defence only has to show you either that they were not in fact found there, or else raise a reasonable doubt in your minds as to whether or not they were found there".

Already cited above is an extract very near the end of the summing-up in which after tersely summing-up the position of each side he asked the jury to decide whether the matters put forward by the defence raised a reasonable doubt so that they would find it

unsafe to convict. Reading the summing-up as a whole, the jury could not have failed to appreciate the nature of the onus on the prosecution as regards the genuineness of the fingerprints.

The fifth supplemental ground of appeal raises an issue not originally advanced by the defence but originating with the trial judge. Examining the pictures of the poster on the front door (Exhibit 12 and 13), it appeared to him that white dusting powder had not been used on the portions of the poster coloured black and that no powder had been applied to the portions coloured green. Without disclosing his purpose, he asked Sergeant Ebanks, using an available poster in court, to demonstrate how as a scenes of crime officer he would approach the task of dusting the area for fingerprints if he had been told that a suspect might have touched it.

Not unexpectedly, Sergeant Ebanks gave a textbook demonstration, dusting the entire top half of the door using black powder on the red portions and white powder on the black portions. The effect of the application of the powder to the poster lasted for a considerable period. In his summing-up the judge alluded to the exercise, drew attention to the difference in appearance between the poster in court and that photographed in Exhibits 12 and 13 and, in effect, invited the jury to draw such inferences as seemed to them proper. In instructing them on the matter he said at one point:-

> "... even though I've drawn that to your attention, its a matter for you to weigh, and to decide whether you think that that's something which would exercise your minds, or whether perhaps I am seeing a problem there which doesn't really exist. That's for you entirely".

Later he added:-

> "And so I never said to Sergeant Ebanks in as many words: 'This is the reason I am asking you to do that test'. He never knew that. And you may think that's fair or unfair; and if you think its unfair, by all means don't take it into account".

This was no invitation to the jury to be the judge of the law. They were in effect being told that they were masters of the facts. The evaluation of the circumstances in which the test was carried out would form part of the background against which they would decide upon the weight they would give it.

The sixth supplemental ground deals with invitations by the judge to the jury to speculate in areas where there was no evidence. It is in two parts. The first alleges that the judge invited the jury to speculate that the officers concerned with preserving the hair found in the Cargill and Kaufman bedding were not those who testified with relation to the fingerprint. The summing-up shows that the trial judge was then putting to the jury contentions of the attorney for the Crown.

The second deals with police practice in relation to taking photographs. The judge was considering the fact that a photograph had been taken of a door on which it turned out that there was a print which was the appellant's print. No photographs had been taken of the Cargill house or of other fingerprints in the Kaufman house. He noted that Sergeant Ebanks had stated that he was interested in that print because of its freshness. He then adds:-

> "And you may, in that context I think, also consider whether or not police practice may be changing as time goes on. When the Cargill incident took place no photos were taken. It may be that as time (sic) the police has decided they should take photos. You'll bear that in mind as well".

Later, he repeated the same remark. It appears that the trial judge was merely putting forward a possible inference from established facts and asking the jury to decide whether it seemed acceptable. No photographs had been taken of the Cargill house, but many pictures, some unrelated to fingerprints had been taken of the Kaufman house. The inference was offered as an explanation and was not a speculation as to a fact.

Supplemental ground No. 7 appears to indicate that the trial judge had merely directed the jury that they could consider and accept the Crown's case on the fingerprint, even though the evidence regarding the hair had collapsed. This was not what he did. He summarised Mr. Hill's argument at some length, pointing out that initially the appellant faced charges relating to four women. At the preliminary inquiry charges relative to two of these were thrown out. At the trial in the Grand Court two of the charges in relation to one of the women had been thrown out because patently bad evidence on hair identification had been given. He then stated:-

> "And so I think its clear that its fundamental to the defence in this case that the Crown's case is tainted. I think it has to be said that is what the defence is saying to you. They are saying that if you cannot rely on the hair evidence that was adduced not only in respect of the incident of the October incident but also in respect of the incident of the 29th of December to some extent, then you can't safely rely on anything else. That's the gravamen of the defence, a basic defence in this case. And they say that this is especially so as the hairs were also relied on in relation to the Kaufman case. In other words it wasn't just the question of the October case in isolation. The Crown did also seek to rely on the hairs in respect of the Kaufman case on the 29th of July (sic). The defence is saying that the law as I have already pointed out to you requires you to be satisfied beyond all reasonable doubt in relation to each and every charge before you return a verdict of guilty, and the defence is saying that because of the hair evidence you cannot say to yourselves —— that you can rely on the rest of the Crown's case. The defence is saying that it is reasonably possible at least —— it is at least reasonably possible —— that the fingerprint evidence itself is also not good evidence, and that if you accept that as reasonably possible, then applying the principles I summarised for you earlier on, you must give the defendant the benefit of the doubt".

Shortly before this, the trial judge had outlined the Crown's contentions on this issue:-

> "Mr. Smellie also acknowledges that the Crown cannot explain why there was a mismatch ... And he goes on, and says 'And in any event that that cannot affect the worth of the fingerprint evidence'. And in that respect he makes two points to you. He said first of all, its really the point I have just made, that although the Crown cannot offer you an explanation ... they are not conceding that there was any impropriety; and secondly in any event, when you turn to the fingerprint evidence, different people were involved ... And what Mr. Smellie is saying is that, whatever the position has turned out to be in relation to the hairs, it doesn't follow from that that these two officers have not come into court and told you the truth".

Towards the final stages of the summing-up the judge again referred to the 'hair evidence'. He said:-

> "... you will bear in mind that whereas hair evidence didn't feature in the attack on Mrs. Cargill in February of 1984, hair evidence was initially part of the Crown's case in respect of the incident involving Mrs. Kaufman. Initially, the Crown, didn't simply rely on fingerprints. The Crown also relied on the hair evidence. And it has been shown that the hair evidence did not connect the incidents, did not itself connect the incidents with Mr. Eldemire. And I think the defence haven't made this point in as many words, but I think I am bound to put it to you on their behalf that you may consider especially in relation to the Kaufman case since the hair evidence was part of that case at one stage and since its been shown that its not satisfactory evidence, does the thread unravel further. Do you have, entertain doubts in relation to the fingerprint evidence in that case for the same reason? Well that's a matter for you".

The trial judge thus made it plain that it was open to the jury to find that the Crown's case was so tainted by the collapse of the attempt to identify the appellant by hair samples, that all of it should be rejected. He left it to the jury to form their view.

If it was not in law possible to sever the aspects of the case dealing with the hair from those dealing with fingerprints, then

the no case submission should have succeeded in respect of all the charges. If the overruling of the no case submission in relation to the charges supported by fingerprint evidence was thought to be wrong, then that should have been advanced as a ground of appeal. This was not done and, indeed, could not have been attempted.

The eighth supplemental ground complains that the trial judge erred in law in drawing to the attention of the jury the possibility that Mrs. Kaufman may have been a party to the impropriety. This issue has been adverted to in the review of the evidence. It was not an error to raise that possibility. It was fairly certainly established that once a lift had been placed on a card it could not be removed and replaced by another without leaving some trace. This meant that to have Mrs. Kaufman's signature on a card with a tape proved to be the appellant's in a situation where the print had not been genuinely lifted on the scene, Mrs. Kaufman must either have unknowingly signed a blank card or have signed a card sometime afterwards and then denied on oath that she had done so.

At the close of his summing-up the trial judge told the jury that they should try and reach a unanimous verdict. They retired at 11 a.m., and returned at 12:33 p.m. to announce that they were unanimous that the appellant was not guilty on the charge of raping Mrs. Cargill, but not unanimous on the others. They were directed to retire and seek a unanimous verdict. They returned at 1 p.m. and were still not unanimous on the others. They were told that the Court would accept a majority verdict. After a retirement of 15 minutes, the verdicts of conviction 5 - 2 were accepted. Mr. Hill suggested that they should have been told that they should not unduly compromise their views to achieve unanimity. There is no indication that they did.

The final supplemental ground raises an issue of some novelty. In the Caymans the right of an accused person to make a statement from the Dock has been abolished. He may remain silent or give evidence on oath. Where the accused person is represented, the judge need not inform the accused person of the choices open to him ——

namely, remaining silent or giving evidence on oath and facing cross-examination. Accordingly, the judge did not inform the appellant of the choices. The fact that the appellant remained silent passed in effect unnoticed.

It is not unusual in dealing with the burden of proof to emphasize that the accused person is not bound to say anything and that the burden of proof rests squarely on the Crown. The formula used here was as follows:-

> "... this being a trial of an alleged criminal offence or offences, the burden of proving the case, as I think you probably all know, lies on the Crown. That is our law. The prosecution has to establish to your satisfaction that the person who is charged with these offences is, in the case of each offence, guilty of that offence. He is innocent until the Crown proves that he is guilty".

In a sense, a direction on the issue of the appellant's silence may quite possibly have drawn attention to a feature which, having regard to the way in which the case developed just had not loomed important. The appellant had been interviewed shortly after the incident of December 29, 1984, and he had denied having anything to do with it. It was clear that he would not have been able to mount a corroborated alibi.

In the circumstances of this case the failure to make a specific comment on the appellant's silence was not a misdirection. The nature of the burden of proof had been adequately canvassed.

There remains the issue as to whether the jury's verdict should be set aside on the ground that it was unsafe and unsatisfactory. The question which would have been asked immediately before the change in our law in order to determine whether a jury's verdict should be upset was whether a reasonably minded jury properly directed could have convicted. The somewhat detailed review establishes in our view that the answer to that question would certainly have been "Yes". A reasonable jury properly directed could have concluded that

Sergeant Ebanks had spoken the truth about the lifting of the finger impressions and that any patterns visible in the photographs were chance patterns. The law in the Caymans has now been brought in line with that of England. The decision to be made by an Appeal Court is now subjective. The principle is well encapsulated in the formulation in Cooper [1968] 53 A. App. R. 167 - is there a lurking doubt that the case based on the entire feel of it, a reaction which may not be based strictly on the evidence. Subjectively, we have had no doubts about the fact that the verdict was satisfactory. We have, of course, carefully considered the expert testimony led by the defence. We are aware that the police may have attempted to conceal the fact that they put to use for purposes of comparison in this case the fingerprints which the appellant made it possible for them to have as a result of his fraud report. The jury was satisfied that the police officers had not deliberately framed the appellant by fraudulently and perjuriously swearing that his fingerprints which had been otherwise obtained had been found on the scene of the crime. We had no lurking doubt as to the propriety of that verdict.

Accordingly, we dismissed the appeal.