

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT**

CICA (Crim.) Nos 27/2013 and 29/2013

BEFORE

**The Rt Hon Sir John Chadwick, Justice of Appeal
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Bernard Rix, Justice of Appeal**

BETWEEN

H.M THE QUEEN

Respondent

and

**DAVID TAMASA
ANDRE NICHOLAS BURTON**

Appellants

RYAN ADRIAN EDWARDS

Applicant

**Mr James Curtis QC with Ms Lucy Organ of Samson & McGrath for the Appellant,
David Tamasa**

**Mr Anthony Akiwumi and Mrs Margaret Facey-Clarke for the Appellant, Andre
Nicholas Burton**

**Ms Keva Reid for the Applicant, Ryan Adrian Edwards
Mr Neil Dennison QC and Ms Candia James for the Crown**

Hearing: 17, 18 and 19 November 2014

Judgment: 21 November 2014

Reasons for Judgment: released 29 January 2018

**REASONS FOR JUDGMENT
(WEST STAR ROBBERY)**

Sir John Chadwick, Justice of Appeal

- 1 On 23 October 2013, following a trial before Mr Alastair Malcolm QC, sitting as an additional judge of the Grand Court without a jury, David Tamasa and Andre Burton were convicted of offences of robbery, contrary to section 242(1) of the Penal Code (2010 Revision), and possession of an unlicensed firearm with intent to commit an offence, contrary to section 18 of the Firearms Law (2008 Revision); a third defendant, George Mignott, was acquitted of those offences; and a fourth defendant, Ryan Edwards, was convicted of aiding and abetting Tamasa and Burton in the robbery.

- 2 On 29 October 2013 Tamasa and Burton were sentenced to substantial terms of imprisonment. Each appealed to this Court on the grounds that his conviction was unsafe and the sentence excessive. Those appeals came before the Court for hearing in November 2014. At the conclusion of the oral hearing the Court indicated that it would allow the Tamasa appeal (Appeal No. 29 of 2013); but would dismiss the Burton appeal (Appeal No. 27 of 2013). In a Ruling delivered on 21 November 2014, refusing an application by the Crown for an order for the re-trial of Tamasa, we explained, briefly, the reasons why we had reached the conclusion that the one appeal should be allowed and the other dismissed. We stated that we would set out those reasons more fully at a later date. I now do so.

- 3 The robbery had taken place on the afternoon of 24 May 2012 at the offices of West Star Television Company in Eclipse Drive, off Eastern Avenue, George Town. As the judge explained in his Reasons for Judgment, there was little or no dispute at the trial as to the events which had taken place at the West Star offices: they were recorded on CCTV footage and were the subject of direct evidence given by a number of independent witnesses, who were in, or just outside, those offices at the relevant time. Put shortly, at about 14.50 on that afternoon a red Mitsubishi RVR turned into Eclipse Drive from Eastern Avenue. It pulled up outside the West Star offices. Three men got out of the vehicle and went into the offices. They were armed with what appeared to be firearms. A fourth man remained in the driver's seat of the RVR. Once inside the West Star offices, the men ordered the members of the public who were there to lie down on the floor. One of the men threatened the cashier with a gun and demanded cash. The cashier put the cash tray, which contained Cayman Island and United States Dollar bills to the value of CI\$8,269 or thereabouts, on the counter. The gunman seized the contents of the cash tray and ran out of the offices into the street, together with the others. They jumped into the waiting Mitsubishi RVR and drove off. One of the West Star employees called the police.

- 4 After the robbery the police found a red Mitsubishi RVR, registration 101-878, in a car park off School Road. School Road is (more or less) a continuation of Eclipse Drive, but on the other (western) side of Eastern Avenue: it runs in a westerly direction past the George Town Primary School and across Grescott Lane. An analysis of the CCTV footage pointed to the conclusion that that was the vehicle

which the robbers had used in connection with the robbery. In particular, the CCTV footage established that the RVR had arrived at the offices of West Star, from School Road, shortly after 14.52; had left (after the robbery had been carried out) some three minutes later; and was back in School Road by 14.56. But none of the West Star employees, nor any of the members of the public who were at the offices of West Star at the time of the robbery were able to identify the robbers; and, as the judge noted in his Reasons for Judgment, the police had no leads as to their identity until 4 July 2012, when, following an interview in connection with a second robbery, they obtained a statement from Marlon Dillon.

- 5 It is necessary to refer to the circumstances in which that statement was obtained. On 28 June 2012 there had been a robbery at the Buckingham Square branch of Cayman National Bank (“CNB”). The vehicle used in the getaway, a burgundy Chevrolet Equinox, was registered in Dillon’s name. In the early evening of the same day Dillon was found hiding in some bushes near to his home. His car was nearby; so also was CI\$100,000 in cash and (in a bin) the clothes that (as appeared from CCTV footage from cameras inside and outside the branch) he had worn in the course of the CNB robbery. He was arrested. On 29 June 2012 he was interviewed by the police. Dillon denied any involvement in the CNB robbery: stating that he had been abducted by four masked men, forced to strip off his clothes and get into the trunk of his car, and driven in that car for about half an hour before being released and told that, if he said anything to the police, he would be shot and his wife raped. He was interviewed, again, on the following day, 30 June 2012: on that occasion his account was challenged, but he responded with no comment. But, after consultation with his attorney, a further interview took place later on that day at Dillon’s request. At the outset of that third interview, Dillon stated that he had not told the truth in his earlier interviews; and accepted that he had been involved in the CNB robbery. He gave information about the others who (as he said) had also been involved. In the subsequent trial of those charged in respect of the CNB robbery, the trial judge (Justice Henderson) observed that the manner in which the second and third interviews had been conducted left him in no doubt that the Judges’ Rules had been violated (and, in his view, deliberately so); and in little doubt that “at a trial of Mr Dillon his second and subsequent interviews would be found to be inadmissible”. Nevertheless, thereafter, Dillon was treated by the prosecution as a witness of truth.

Indeed, he was the principal witness of fact called in support of the prosecution case at the CNB trial and at the West Star trial.

- 6 At the time of the interviews in June 2012 to which I have just referred, Dillon was not suspected of any involvement in the (earlier) robbery at the West Star offices. But shortly thereafter, on 4 July 2012 following a further interview, he made a witness statement in which he named the four men who (as he said) had been in the Mitsubishi RVR on 24 May 2012; and who had been involved in that robbery. Those named were Tamasa, Mignott and Burton - who were, he said, the three who entered the West Star offices - and a fourth (Beau Clarke) who was the getaway driver and had remained in the vehicle. He further stated that the RVR had been provided by Edwards. Further short statements were made by Dillon on 30 July 2012 and 24 August 2012 in which (as the judge observed at paragraph 21 of his Reasons for Judgment) he purported “to add to and clarify the 4th of July statements”. After he had made those statements he was charged in relation to the West Star robbery. He ultimately pleaded guilty to an offence of handling \$400, being proceeds of that robbery.
- 7 The trial of those charged in respect of the CNB robbery (amongst whom were Tamasa, Mignott, Burton and Edwards) took place before Justice Henderson and a jury between 9 April and 9 May 2013. The trial of four of those charged in respect of the West Star robbery (Tamasa, Mignott, Burton and Edwards) was due to commence immediately thereafter, on 13 May 2013. It did not do so. The West Star trial was adjourned to enable the police to make further enquiries in the light of a statement which had been volunteered by Edwards immediately following his conviction in the CNB trial. In that statement Edwards admitted his own participation in the West Star robbery; alleged that Dillon and two others (said to be Jamaicans) were co-participants, but asserted that none of Tamasa, Mignott or Burton had been involved. In those circumstances Dillon was re-interviewed on 13 and 19 August 2013. As the judge pointed out in his Reasons for Judgment, Dillon “altered significantly the statements he had made in July and August of 2012”.
- 8 As I have said, Dillon was the principal witness of fact called by the prosecution called in support of their case at the West Star trial. At paragraphs 22 to 25, 29 to 31 and 33 to 38 of his Reasons for Judgment, the judge summarised the evidence as to

the events on 24 May 2012 which Dillon gave at that trial. So far as material in the context of the appeals which came before this Court, it was Dillon's evidence that he had returned to the Cayman Islands, after a week's absence in Jamaica, on the morning of that day; and that, while waiting at the airport to be collected by his wife, he discovered from his mobile telephone that he had missed calls from both Tamasa and Mignott. He returned Tamasa's call and was asked to meet him at Tamasa's yard in West Bay. He drove there (on his own) in his burgundy Chevrolet Equinox; arriving shortly after 14.00. He found Tamasa there, with Burton, Mignott and Clarke. He was told, by Tamasa, that they were about to rob the West Star Television Centre in Eclipse Drive; and asked if he wished to take part in the planned robbery. He said that he did not want to get involved; but he agreed to drive Tamasa and the others to a car park in School Road. As the judge observed in his Reasons for Judgment, Dillon described in great detail the route which they took from West Bay to an area known as the Swamp at Kennedy Drive, a short distance to the north of School Road. Dillon's evidence was that, on their arrival at Kennedy Drive, they met Edwards, with a white Toyota van and the red Mitsubishi RVR: Clarke got out of the Chevrolet Equinox, in which they had travelled down together from West Bay, and into the driver's seat of the RVR, having taken the key from Edwards: the three vehicles - that is to say, the Chevrolet Equinox (driven by Dillon), the Mitsubishi RVR (driven by Clarke) and the white Toyota van (driven by Edwards) - moved off in convoy towards School Road, travelling along Grackle Road, Godfrey Nixon Way and Eastern Avenue before turning right into School Road. When the Chevrolet Equinox and the Mitsubishi RVR reached the car park in School Road, Tamasa, Burton and Mignott got out of the Equinox and into the RVR. Dillon remained in the Equinox; having been told by Tamasa to await their return. He did not see the Toyota white van or Edwards while he was in the School Road car park. The RVR drove off, in the direction of Eastern Avenue and Eclipse Drive. It returned a few minutes later, with Clarke, Tamasa, Burton and Mignott. They all got out of the RVR and into Dillon's Chevrolet Equinox; leaving the RVR parked (and unoccupied). Dillon drove east along School Road, to the junction with Eastern Avenue where he turned right. As he did so, he saw that he was followed by Edwards in the white Toyota van, which turned left that junction. Dillon said that he dropped Clarke off at his house in Fern Circle and then continued to a yard at Palm Dale, where they met Jason (or Jay) Banks, who was said to be a friend of Tamasa and who (it was said) had supplied him with a handgun.

They spent a little less than half an hour at Jason's yard; and then drove (still in the Chevrolet Equinox) back to West Bay. When they reached Burton's address in West Bay, they went into the bedroom and shared out the proceeds of the robbery. Dillon was given eight \$50 notes as his share, which he took because (as he said) "I was terrified if I didn't take the money they would think I would snitch on them to the police". He then left in order to pick up his wife and children.

- 9 The judge pointed out (at paragraph 3(k) of his Reasons for Judgment) that Dillon was an accomplice. He went on to observe (at paragraph 3(m)) that Dillon had signed a number of previous statements which were inconsistent with his evidence at the trial, on which he had been cross-examined thoroughly. He directed himself (*ibid*) that what was contained in those statements did not become evidence of the truth unless Dillon adopted them in the course of his evidence at trial; but that the previous statements could be relevant to Dillon's credibility and to the weight, if any, which could be placed upon his testimony at the trial; and, further, that - although section 41 of the Evidence Law had removed the need for a judge to warn of the dangers of convicting the accused on the uncorroborated evidence of an accomplice merely because he was an accomplice - the circumstances that Dillon was an accomplice and had given apparently differing accounts in previous statements (the explanation for which differing accounts might be untrue) led to the conclusion that it would be dangerous to convict any defendant on his unsupported evidence. At paragraph 68 of his Reasons for Judgment the judge said this:

"68. I have considered all the criticisms of Marlon Dillon, a lot of which are well founded. As already indicated, in my view, it is dangerous to accept his evidence and convict unless I can find some support."

- 10 The judge was satisfied that Dillon was telling the truth as to the supply, by Edwards, of the Mitsubishi RVR used in connection with the robbery. The judge had explained, earlier in his Reasons for Judgment, that independent evidence established that, in February 2012 (some three months before the robbery), the RVR had been sold by the then owner to "a mobile car washer who drove a white Toyota van". The purchaser was described by the seller as "a black Jamaican male, five-six to five seven in height" who wore his hair "in a cornrow style". At paragraph 63 of his Reasons for Judgment, after describing the movements of the Chevrolet Equinox (which, as was accepted by the defendants, was driven from West Bay to the School Road car park

by Dillon) and the RVR, the judge said that he was sure that Dillon did not bring the RVR to the area for use in the robbery. The description of the purchaser of the RVR in February 2012 (he said) fitted Edwards, and not Dillon. He went on to say this:

“63.10 Dillon has been rightly criticized for the changes to his account, but I do note that in the 4th of July statement he said that Edwards supplied the getaway vehicle. He did not alter that passage in August 2013. Of course, a consistent statement cannot prove its truth, but it is a matter which goes to his credibility as he made it a time when nobody knew what the evidence of Nicholar Kerr [the seller of the RVR in February 2012] would be or what the CCTV footage would show.

63.11 It follows, to that extent, when he [Dillon] says Edwards supplied the RVR he is telling the truth. That is a fact I can take into account when assessing the rest of his evidence.”

- 11 The judge was satisfied, also, that Dillon’s evidence of his own movements on 24 May 2012 - and, in particular, his evidence that he drove in his Chevrolet Equinox to a destination in Palm Dale immediately after the robbery - should be accepted. He reached that conclusion on the basis of what he had described as “the telephone evidence” set out in exhibits to the witness statement of Joanne Woods, an intelligence analyst employed by the Royal Cayman Islands Police Service.
- 12 The telephone evidence contained a record (on a cell phone by cell phone basis) of the calls made on 24 May 2012 to and from cell phones registered to Dillon, Tamasa, Mignott, Burton and Clarke, including (in particular) the cell mast through which each call was routed. In the present context, it is sufficient to identify the West Bay, Saf haven, Seven Mile Beach, George Town, North Sound Road, Windsor Park, Red Bay and Linford Pierson masts. The name of each mast indicates the location at which it was situate. The judge explained (at paragraph 56 of his Reasons for Judgment) that the telephone evidence established in relation to each of the subject cell phones “what phone was called, for how long, and on which mast the phone was connected at the time of the call”. He pointed out that: “It does not help as to who was using the phone, but the inference is it is the person whose phone it is in the absence of other evidence”.
- 13 After summarizing (at paragraph 57 of his Reasons for Judgment) the cell phone calls made or received by Dillon, Tamasa, Mignott and Burton (amongst others) on 24 May 2012, the judge went on (at paragraph 58) to make the following findings of fact as to their movements on that day:

(A) As to Dillon's movements:

(i) that, between 10.00 and 13.09 Dillon was either at the airport, George Town or in the south of the island; (ii) that, by 13.54, he had moved towards West Bay and was locked onto the Safehaven mast; (iii) that, at 14.57, he was listening to a voice mail through the George Town mast; (iv) that, at 15.52 and, again at 15.57, he was connected to the Red Bay mast; (v) that, by 16.47 he was in West Bay; and (vi) that, by 17.34, Dillon was back south (on the George Town mast) and, by 18.00, at Bodden Town.

(B) As to Tamasa's movements:

(i) that, at 08.33, Tamasa was in West Bay; (ii) that, between 09.33 and 10.39, he was in the south of the Island, in cell phone contact through the Linford Pierson and the Red Bay masts; (iii) that he then moved back towards West Bay in the north of the Island, being in contact through the Seven Mile Beach mast (at 10.51) and the West Bay mast (at 10.58); (iv) that he remained in West Bay until 14.16; (v) that, at 14.33, he was in cell phone contact through the Red Bay mast; (vi) that, at 15.05, he was in contact through the Windsor Park mast and, at 15.22, he was, again, in contact through the Red Bay mast; and (vii) that, by 17.13, Tamasa was back in West Bay.

(C) As to Mignott's movements:

(i) that, until 08.45, Mignott was in West Bay; (ii) that, from 09.28 until 10.30, he was in the south of the Island, in cell phone contact through the Windsor Park, the Red Bay and the Linford Pierson masts; (iii) that he was back in West Bay from 11.00 until 13.54; (iv) that, at 14.24, he was moving south and in contact with the Seven Mile Beach mast; (v) that, at 14.39, he was in contact with the Linford Pierson mast and, at 14.49 and 14.50, he was in contact with the George Town mast; and (vi) that, by 16.28, Mignott was back in West Bay.

(D) As to Burton's movements:

(i) that, from 02.58 until 13.57, Burton was in West Bay; (ii) that, at 14.45, he was in cell phone contact through the North Sound Road mast; (iii) that, at 15.51, he was in contact through the Red Bay mast; and (iv) that, by 17.27, Burton was back in West Bay.

14 In considering what conclusions could properly be drawn from that analysis of the movements of Dillon, Tamasa, Mignott and Burton on 24 May 2012, it is important to

have in mind that (as I have said) the CCTV footage established that the robbery was carried out between 14.52 and 14.55; that Dillon's evidence at trial was that he had met Tamasa, Burton and Mignott (with Clarke) in West Bay shortly after 14.00 and driven them (in his Chevrolet Equinox) to the car park in School Road; that the CCTV footage established that the Chevrolet Equinox arrived at that destination shortly before 14.50, remained there until about 14.57 and then returned (east) along School Road to the junction with Eastern Avenue. The telephone evidence was consistent with Tamasa, Burton and Mignott being in West Bay at the time that Dillon said that he had met them there; was consistent with Dillon and Burton travelling together from West Bay to School Road between 14.00 and 14.50, but (as I shall explain) was difficult to reconcile with Dillon's account that Tamasa and Mignott were with them in the car; was consistent with Dillon, Tamasa and Burton being at Palm Dale, in the south of the Island, between, say, 15.20 and 15.55 but, although not inconsistent with Dillon's account that Mignott was with them, did not support his evidence on that point.

- 15 In reaching his conclusion that he could be sure that Burton and Tamasa had participated in the robbery, the judge placed reliance (at paragraph 70 of his Reasons for Judgment) on what he described as "the movements of the phones from West Bay down to George Town at the time of the robbery"; and (at paragraph 71) on "the detour to Jason, the supplier of the gun". In relation to the latter, he said this:

"71. . . . The visit to Jason's Yard is important for this reason: Tamasa and Burton do not have any obvious connection with Palm Dale – Tamasa and Burton living in West Bay. When Dillon was making his statement, he could not have known, if he was making it up, that Tamasa happened to have phoned Jason and that Tamasa and Burton's phones would be locked onto the Red Bay mast which covered Palm Dale in the same half an hour as he was. This evidence supports Dillon's evidence that he was transporting Tamasa and Burton to Jason's yard before returning to West Bay. That is under an hour after Dillon had been involved in the robbery and, in the absence of any explanation, what inference can be drawn from that fact other than the people he was with were involved in the robbery."

It can be seen, from Exhibit JW/3b to the witness statement of the intelligence analyst, Joanne Woods, that the judge's reference to evidence that "Tamasa happened to have phoned Jason" was to the calls made on Tamasa's cell phone at 14.33 and 15.22 through the Red Bay mast; and, from the analysis in paragraph 58 of the Reasons for Judgment, that his reference to "the same half an hour" during which "Tamasa and

Burton's phones would be locked onto the Red Bay mast which covered Palm Dale" was to the period from 15.22 to 15.57.

16 Although the judge relied on "the movements of the phones from West Bay down to George Town at the time of the robbery", I have pointed out that it was difficult to reconcile the telephone evidence with Dillon's account that Tamasa and Mignott were with him in the Chevrolet Equinox as he drove from West Bay to School Road before the robbery. In relation to Tamara, that difficulty arose from the call from his cell phone through the Red Bay mast at 14.33: in relation to Mignott, the difficulty arose from the call from Mignott's cell phone through the Linford Pierson mast at 14.39. At the time of those calls, if Dillon's evidence was correct, Tamara and Mignott were with him in the Chevrolet Equinox travelling down the Estherly Tibbetts highway, somewhere north of Camana Bay; and so not (or arguably not) within the range of the Red Bay mast or the Linford Pierson mast (as the case might be.

17 The judge recognised the difficulty of reconciling the telephone evidence in relation to Mignott with Dillon's account as to who was with him in the Chevrolet Equinox as he drove from West Bay to School Road before the robbery when he referred, at paragraph 72 of his Reasons for Judgment, to the phone call [at 14.39] "where he [Mignott] was locked onto a sector of Linford Pierson facing south." That inconsistency, taken with the judge's finding that "as far as Mignott is concerned there is no supporting evidence to show that he was in the Palm Dale area" in the period following the robbery, led him to conclude, at paragraph 75, that:

"75. In the case of Mignott, the large amount of contact between him, Tamasa and Dillon, and his movements, give rise to a great deal of suspicion. But the fact that there is not the support for Dillon, as in the case of the others, and the fact of the Linford Pierson south sector call means that I cannot be sure of his involvement."

18 The judge sought to address the difficulty of reconciling the telephone evidence in relation to Tamasa with Dillon's account as to who was with him during the drive from West Bay to School Road at paragraph 72 of his Reasons for Judgment. He said this:

"72. "I have considered the extent to which Tamasa's phone being locked on to Red Bay [at 1433] undermines the position if I am otherwise sure that Tamasa was part of the robbery. I raised during the evidence that the sector of the mast pointed towards the north and the crime scene and although when the coverage survey was carried out no signal was picked up north of the airport, I

take the view on the evidence that it is not impossible for that phone to be locked on to a mast which was facing north”.

But there was no independent evidence as to whether it was possible or impossible for a cell phone which was in a car on the Estherly Tibbetts Highway at some point north of Camana Bay to be in contact with the Red Bay mast, which is in the vicinity of the Hurleys’ supermarket roundabout. It was explained to us by Mr Dennison QC, for the prosecution, that the evidence which the judge had in mind, when he used the phrase “on the evidence” in that passage, was the evidence of Dillon that the telephone call had taken place while Tamasa was in his car; but that is to adopt the evidence of the witness whose evidence needs supporting as support for his own evidence. As we said in our Ruling of 21 November 2014, the judge’s reasoning in relation to the issue whether the telephone evidence as to the 14.33 call from Tamasa’s cell phone supported Dillon’s account as to who was with him in the Chevrolet Equinox at that time was flawed. In our view, the judge erred in law in making a finding of fact for which there was no evidence.

- 19 Given that we were not satisfied that the judge’s reasoning could be supported on that point - or that there was any proper basis on which the judge could reach a conclusion in the case of Tamasa which differed from the conclusion that he reached in the case of Mignott - we took the view that Tamasa’s appeal in the West Star case should be allowed.
- 20 There was no comparable flaw in the judge’s reasoning in relation to Burton. In his case, the judge was entitled to find that the telephone evidence - in particular, the calls from Burton’s cell phone at 1445 (through the North Sound Road mast) and at 1551 (through the Red Bay mast) - supported Dillon’s account, both in relation to the journey from West Bay to the School Road car park before the robbery and in relation to the detour to Palm Dale after the robbery. As I have said, the Court took the view that his appeal should be dismissed.
- 21 In reaching that conclusion the Court had regard to the submissions advanced on behalf of Burton by his counsel, Mr Akiwumi and Mrs Facey-Clarke, in a document headed “Grounds of Appeal and Written Submissions dated 10 October 2014, as developed orally at the hearing of the appeal. Those submissions were advanced in support of Burton’s appeal against his conviction before Justice Henderson (sitting

with a jury) in the CNB trial in May 2013 and in support of his appeal against his conviction by Mr Malcolm QC (sitting alone) in the West Star trial in October 2013. Each appeal was founded upon the same four grounds of appeal: that the trial judge erred in law in (i) failing to stay the prosecutions as an abuse of process on the basis of the second limb identified by the Privy Council in *Warren and others v The Attorney General for Jersey* [2011] UKPC 10; [2012] 1 AC 22; (ii) failing to protect the appellant's right to a fair trial guaranteed by section 7 of Cayman Islands Constitution Order 2009; (iii) exercising his discretion on grounds which were *Wednesbury* unreasonable in relation to the failures described under grounds (i) and (ii); and (iv) concluding that, notwithstanding serious police misconduct, it was fair to admit the unlawful evidence of Dillon at the trial.

- 22 An application to stay proceedings on the basis of abuse of process had been made to Justice Henderson in the CNB trial. In a Ruling delivered on 3 May 2013, Justice Henderson had dismissed that application. He said this:

“Here the application is grounded in the conduct of Detective Constable Rachel Johnson. She was directed by her superior to act as she did.

She interviewed Marlon Dillon on at least four occasions while he was a suspect and under arrest. In the second and subsequent interviews she brought to bear a considerable amount of pressure upon Mr. Dillon which eventually had the desired result. He resiled from his rather far-fetched initial story, admitted full involvement in the robbery, and then identified the five defendants presently on trial as his co-conspirators.

In bringing about that result Detective Constable Johnson offered what I would judge to be inducements to Mr. Dillon and made what I consider to be threats towards him. There is no doubt that the Judge's Rules were violated (and I think intentionally so) and there is little doubt that at a trial of Mr. Dillon his second and subsequent interviews would be found inadmissible. The question, however, is whether the process has become so tainted by unfairness [that] sense of justice and propriety would be offended by allowing the trial of these defendants to continue.

Of course, what I have said goes directly and fundamentally to the credibility of Mr. Dillon and the jury will be told that not only by counsel but by myself.

It seems to me that the practice of putting pressure upon defendants for the purpose of getting them to incriminate their co-conspirators is a wide-spread one in western democracies, which all strive in their own way to conduct fair criminal proceedings. My understanding of the practice in the United Kingdom is that informants who were participants in a crime are used from time to time as Crown witnesses. It goes without saying that their co-operation must be gained through some sort of inducement or threat. It is highly unlikely that such persons will testify because they think it is simply the right thing to

do.

While it can in some ways be seen as troubling that the Judges' Rules would have been breached in Marlon Dillon's case, it is nevertheless a matter which is primarily concerning to Mr. Dillon. The question for these five defendants ultimately is the credibility of Mr. Dillon's evidence. The way in which he was induced to change his story is highly relevant to that. But the rights enjoyed by Mr. Dillon under the Judges' Rules are personal to him. They are not rights enjoyed by his alleged co-conspirators or anyone else whom he may choose to incriminate.

I find that the conduct of Detective Constable Johnson did not go so far that the integrity of the criminal justice system would be damaged by allowing the trial to continue."

A similar application to stay proceedings on the basis of abuse of process was made to Mr Malcolm QC in the West Star trial. He, also, dismissed that application. The judge said this:

"Where there are breaches of the Judges' Rules or statutory regulations, such as the Police and Criminal Evidence Act in England, interviews are ruled inadmissible. It does not follow in those cases that those cases are stayed for abuse. Undoubtedly if the acts complained of were torture, and I posed the question of water boarding in the course of legal argument, then that could be said to be acts that would offend the court's conscience as being contrary to the rule of law and result in a stay.

In my judgment, the actions of the police officers which resulted in Dillon first confessing to the CNB robbery and then implicating others in that and in the Weststar robbery do not come anywhere near the description of the acts which offends the court's conscience as being contrary to the rules of law.

It follows, therefore, that I reject the second limb of the submissions on behalf of Mr. Burton."

23 In support of the first and third grounds of appeal upon which Burton relied, it was submitted on his behalf that "overarching the admissibility question is [the question] whether the Court's undoubted discretion to stay the proceedings as an abuse of process is engaged and, to the extent that it was, whether the failure to stay the proceedings in the circumstances of this case was *Wednesbury* unreasonable". We were taken by counsel to the re-statement of principle in the judgment of Lord Dyson, Justice of the Supreme Court, in *Warren* . At [2011] UKPC 10, [21] Lord Dyson set out his earlier statement, when giving judgment in the Supreme Court of the United Kingdom in *R v Maxwell* [2010] UKSC 48, [13], that:

"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the

first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will ‘offend the court’s sense of justice and propriety’ (per Lord Lowry in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will ‘undermine public confidence in the criminal justice system and bring it into disrepute’ (per Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112F).”

He went on, at [2011] UKPC 10, [23]:

“In *Latif*, at p 112G, Lord Steyn said that the law in relation to the second category of case was ‘settled’. As he put it, at pp 112G-113B:

‘The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42. *Ex p Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex p Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge’s discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.’”

24 It was submitted on behalf of Burton that it was difficult to reconcile the passages which have been cited from the judgments of Justice Henderson and Mr Malcolm QC, when (respectively) dismissing the applications for a stay in the CNB case and in the West Star case, with the final sentence in the passage cited from the judgment of Lord Steyn in *Latif*. It is said that:

“Having found an intentional and deliberate breach of Dillion’s privilege against self incrimination . . . the conclusions of the Learned Judges in response to the application[s] before them was perverse and conveying to the approach (*sic*), that in the circumstances particular to this case, the court has adopted the approach ‘that the end justifies any means’”.

I was not persuaded that there was any force in that submission. In my view it sought to resurrect the “but for” analysis that Lord Dyson had rejected in subsequent passages of his judgment in *Warren*.

25 At [2011] UKPC 10, [25] Lord Dyson stressed what he described as the “salutary words” of Lord Steyn in *Latif*: “that an infinite variety of cases can arise and how the discretion should be exercised will depend on the particular circumstances of the case”. He rejected the submission (advanced by counsel in *Warren* that it is possible to identify categories of cases where the court will always grant a stay. He went on, at [2011] UKPC 10, [26], to say this:

“The Board recognises that, at any rate in abduction and entrapment cases, the court will generally conclude that the balance favours a stay. But rigid classifications are undesirable. It is clear from *Latif* and *Mullen* [*R v Mullen* [2000] QB 520] that the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. . . .”

At [2011] UKPC 10, [27] Lord Dyson referred to the observations of Lord Brown of Eaton-under-Heywood in *Panday v Virgil (Senior Superintendent of Police, Trinidad and Tobago)* [2008] UKPC 24, [28]; [2008] AC 1386 that the factor common to the second category of abuse of process cases and the central consideration underlying the whole principle was that:

“. . . the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the court at all”

and in *R v Maxwell* [2010] UKSC 48, [108] (dissenting) that, in that in the “but for” cases, even though it would be possible to try (or retry) the defendant fairly, it would “usually” be inappropriate to do so:

“. . . essentially because, but for the executive misconduct, either there would never have been a trial at all (as in the wrongful extradition and entrapment cases) or (as in the present case) because the situation would never have arisen whereby the all important incriminating evidence came into existence (which is not, of course, to say that the ‘fruit of the poison tree’ is invariably inadmissible). . . . Essentially . . . it is the executive misconduct involved in this category of cases which, I suggest, most obviously threatens the integrity of the criminal justice system and where a trial (or retrial) would be most likely to represent an affront to the public conscience.”

But Lord Dyson went on (at [2011] UKPC 10, [28]) to say that, in the latter case (*R v Maxwell*) the majority in the Supreme Court considered that the fact that the confessions on which the retrial would be based would not have been made but for the prosecutorial misconduct was not determinative of the question whether there should

be a retrial: this was no more than a relevant factor. Lord Dyson said this (at [2011] UKPC 10, [30]):

“The Board does not consider that the ‘but for’ test will always or even in most cases necessarily determine whether a stay should be granted on the grounds of abuse of process. The facts of the present case demonstrate the dangers of attempting a classification of cases in this area of the law and of disregarding the salutary words of Lord Steyn. For reasons which will appear, it is the Board’s view that the Commissioner reached the right conclusion in this case, or at least a conclusion which he was entitled to reach. And yet it was accepted at all times by the prosecution that but for the unlawful and misleading misconduct of the Jersey police in relation to the installation and use of the audio device, the prosecution in this case could not have succeeded and there would have been no trial unless the police were able to obtain the necessary evidence by other (lawful) means.”

26 There was obvious force in the submission that the present case was one in which, but for the intentional violation of the Judges’ Rules by members of the Royal Cayman Island Police Service in their questioning of Dillon in connection with the CNB robbery, the defendants would not have been charged and tried as participants in the West Star robbery. But it was clear, in the light of the judgment of the Board in *Warren*, that that factor did not lead, necessarily, to the conclusion that a stay of the proceedings in the West Star case should have been granted on the ground that those proceedings were an abuse of process. The relevant question for the judge, as he plainly appreciated, was whether the breach of the Judge’s Rules in relation to Dillon in the CNB case was such that a trial of Burton (and the other defendants) for the West Star robbery would “offend the court’s sense of justice and propriety” or “undermine public confidence in the criminal justice system and bring it into disrepute”. The judge asked himself that question and concluded that it should be answered in the negative. In my view, his conclusion was correct; or, at the least, was a conclusion which he was entitled to reach.

27 In developing the second and fourth grounds of appeal in this Court, it was submitted on behalf of Burton that it was common ground that, in a trial of Dillon, his interviews/statements would have been ruled inadmissible on the grounds that they were obtained by oppression. But Dillon was not a defendant in the West Star trial; and - as the judge correctly pointed out - his pre-trial statements were not evidence of the truth of the matters stated unless Dillon adopted them in the course of his evidence at trial. In those circumstances, it was said by counsel on behalf of Burton that “the

unresolved issue is whether, in a trial of [Burton], a failure to apply [the rule that would exclude the pre-trial statements in a trial of Dillon] or a modified version of [that] rule renders his trial unfair and in breach of [Burton's] constitutional right to a fair trial". But the answer to that "unresolved issue" was obvious: it would be the application of the exclusionary rule - not the "failure to apply the rule" - that would render unfair a trial of Burton and the other defendants that would otherwise be fair. The contents of Dillon's pre-trial statements - and evidence of the circumstances in which they were made - were of relevance to Dillon's credibility and to the weight, if any, which could be placed upon his testimony at that trial. If there were to be a fair trial, then it was essential that Dillon's pre-trial statements - and evidence of the circumstances in which they were made - could be put before the jury (or taken into account by the judge, if sitting alone). A trial of Burton (and the other defendants) in which Dillon gave evidence, but from which evidence of Dillon's previous inconsistent statements and the circumstances in which those statements were made was excluded, would, plainly, be unfair to the defendants.

28 If a fair trial were not possible if Dillon gave evidence, then (given that the prosecution could not proceed without his evidence) the proceedings had to be stayed; as Lord Dyson had pointed out in *Maxwell* when referring to "the first category of case". The relevant question, in the context of the West Star trial, was whether the manner in which Dillon's evidence had been obtained made it impossible for Burton (and the other defendants) to have a fair trial if Dillon gave evidence. There was no place for the exercise of judicial discretion.

29 In addressing the question whether a fair trial was possible if Dillon gave evidence, it was necessary for the judge to ask himself whether the evidence that Dillon would give at trial would be so tainted by the circumstances in which it had been obtained that, notwithstanding that some support for that evidence could be found in the CCTV footage, the telephone records and other independent testimony, it could not be accepted. If the judge were satisfied that Dillon's evidence was not so tainted by the circumstances in which it had been obtained, that - notwithstanding support from other sources - it was incapable of being accepted, then he was entitled to conclude that (with the need to find such support firmly in his mind) a fair trial was possible. That was the conclusion which he reached. In my view, there was no basis on which

this Court could hold that he was wrong to do so.

30 At the commencement of the hearing of the Tamasa and Burton appeals, counsel for Edwards - who had not previously sought to appeal - applied for an extension of time to do so. The submissions advanced on behalf of Edwards - who, as I have said, was convicted of aiding and abetting the principal robbers - was, in effect, that if the appeals of both Burton and Tamasa were allowed, then his appeal should also be allowed because the persons with whom he was said to have aided and abetted had not been found to be guilty of the crimes with which they were charged. In the circumstances that we did not allow the appeal of Burton, that ground falls away. We refused leave for Edwards to be joined in the appeals relating to the West Star robbery.

Chadwick, JA

Mottley, JA

Rix, JA