

10-04-03

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN IN GEORGE TOWN, GRAND CAYMAN

SCA #28 OF 2000

DERON LEWIS

VS

REGINA

Reasons for Judgment delivered by THE HONOURABLE

MR. JUSTICE KELLOCK on Thursday, April 10, 2003,

at George Town, Grand Cayman.

APPEARANCES:

For the APPELLANT:

MR. L. FREEMAN

For the RESPONDENT:

MR. A. ROBERTS

1 COURT COMMENCED ON THURSDAY,

2 APRIL 10TH 2003 AT 3:50 P.M.

3

4 THE COURT: Deron Lewis appeals from his
5 conviction and sentence on charges of violating
6 the Misuse of Drugs Law (2000 revision). The
7 offences are said to have been committed on
8 April 3rd, 2000.

9 After a trial which proceeded over several
10 days, but with lengthy adjournments in between,
11 Lewis was found guilty on July 10th, 2000 of
12 two offences, and found not guilty of two other
13 offences.

14 Several grounds of appeal have been
15 raised, but the argument before me was
16 ultimately restricted to the circumstances
17 which led the learned Magistrate to amend the
18 charges upon the basis of which the trial had
19 been conducted, and that was done pursuant to
20 section 73 of the Criminal Procedure Code
21 which, for our convenience I will refer to as
22 the "CPC".

23 The relevant charges read as follows
24 (before amendment):

25 1. Deron Lewis on the 3rd day of April
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1 2000 at George Town, Grand Cayman had in his
2 possession whether lawfully or not, with intent
3 that it be supplied, whether by himself or some
4 other person and whether in the Islands or
5 elsewhere, to another person a controlled drug
6 namely cocaine, being more than two ounces
7 namely, 2.446 kilograms.

8 2. Deron Lewis on the 3rd day of April,
9 2000 at South Church Street had in his
10 possession whether lawfully or not, with intent
11 that it be supplied, whether by himself or some
12 other person and whether in the islands or
13 elsewhere, to another person a controlled drug
14 namely cocaine, being more than two ounces to
15 wit 487 grams.

16 The two charges that were dismissed
17 alleged that Lewis had on the same date
18 (April 3 2000) imported more than two ounces of
19 cocaine.

20 Section 3(1) of the Misuse of Drugs Law
21 provides as follows:

22 "Whoever, without lawful excuse or without
23 being authorized in that behalf

24 (a) imports;

25 (b) exports;

1 (c) produces;
2 (d) stores;
3 (e) sells, buys or otherwise deals in;
4 (f) supplies;
5 (g) distributes;
6 (h) dispenses;
7 (i) issues a prescription for;
8 (j) administers;
9 (k) possesses, constructively or
10 otherwise;
11 (l) consumes; or
12 (m) has in his possession, whether
13 lawfully or not, with intent that it
14 be supplied whether by himself or some
15 other person and whether in the Islands
16 or elsewhere to another person in
17 contravention of this subsection,
18 (and I'll skip some language that is not
19 important for this case)
20 any controlled drug, or who attempts,
21 assists or is concerned in any such
22 matters is guilty of an offence."
23 I note that for the purposes of a charge
24 under section 3 (1)(k) possession includes
25 constructive possession, but the word

1 "constructive" or "constructively" is
2 conspicuously absent from section 3 (1) (m).

3 The evidence at the trial was completed on
4 June 26, 2000 and counsels' submissions were
5 then made on June 28th, 2000.

6 On July 10, 2000 the learned Magistrate
7 read her Reasons for Judgement in open court.
8 She reviewed the evidence given by the police
9 officers and defence witnesses, including the
10 evidence given by Lewis. She accepted the
11 Crown's evidence and rejected Lewis' version of
12 critical events.

13 She found that on the day in question
14 Officer McLaughlin of the Royal Cayman Islands
15 Police force received a telephone call and
16 discussed with the caller the purchase (by
17 McLaughlin who was working undercover) of a
18 quantity of cocaine. It seems that an
19 agreement was reached between McLaughlin and
20 the would-be seller and as a result McLaughlin
21 went in an unmarked car to a parking lot in the
22 vicinity of Smith Cove. He was accompanied in
23 the car by another police officer.

24 The parking lot had by then been put under
25 surveillance by additional police officers.

1 Shortly thereafter another vehicle, which
2 contained three members of the crew of the
3 cruise ship "Splendour of the Seas" arrived.
4 These three (which included Lewis) got out of
5 the car. Lewis approached McLaughlin and a
6 conversation between them ensued. Lewis said
7 he had the "stuff" and McLaughlin said he had
8 the cash.

9 Lewis then gave instructions to one Nelson
10 (another member of the crew) to get into
11 McLaughlin's vehicle, which Nelson proceeded to
12 do. Nelson handed a package to Officer Secord
13 who was in the vehicle with McLaughlin and
14 thereupon all three of the sailors were
15 arrested.

16 The content of the package was
17 subsequently analysed and found to be cocaine.
18 Later on the same day the arrested men were
19 taken to the cruise ship and a further quantity
20 of cocaine was found in a location pointed out
21 to the officers by Nelson.

22 Lewis was interviewed by the police and
23 his statements were written down by Officer
24 Tatum.

25 The foregoing recital of the facts is

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1 taken from the learned Magistrate's judgment.

2 At trial Lewis took the position that he
3 had not made the statement so recorded and said
4 that while he was interested in acquiring some
5 ganja that day, he knew nothing about cocaine.

6 According to the notes of evidence taken
7 by the learned Magistrate, Lewis was tried
8 together with the other members of the cruise
9 ship crew, one Julian Ceaser and the aforesaid
10 Nelson.

11 The learned Magistrate found that there
12 was no case against Ceaser to answer and he was
13 accordingly discharged.

14 The Magistrate's notes indicate that
15 Nelson pleaded guilty to the charges against
16 him and did not testify, although the notes
17 indicate that the Crown had considered calling
18 him as a prosecution witness. That may or may
19 not be significant in the light of what I will
20 have to say in due course.

21 The magistrate found that it was Lewis who
22 had spoken to McLaughlin on the telephone and
23 that he was the person who had arranged the
24 transaction in the parking lot. She also found
25 that Lewis told McLaughlin in her telephone

1 conversation that he was in a position to
2 provide additional quantities of cocaine which
3 he, Lewis, could obtain -- I presume from the
4 ship.

5 In addition, she rejected Lewis' evidence,
6 preferring the evidence given by the police
7 officers. She went on to hold that the
8 evidence did not support a finding that Lewis
9 had possession of either the cocaine delivered
10 to Officer Secord or the cocaine recovered from
11 the vessel "Splendour of the Seas". She could
12 not therefore find Lewis guilty as charged.
13 She held instead that the appropriate charge
14 against Lewis was in both cases "that of being
15 concerned in the possession of cocaine with
16 intent to supply". The learned Magistrate then
17 concluded her judgment as follows:

18 "I find Mr. Lewis not guilty of
19 both charges of importation of
20 cocaine. The charge of being
21 concerned in the possession of
22 cocaine with intent to supply is
23 substituted for each charge of
24 possession of cocaine with
25 intent to supply pursuant to

1 section 73 of the Criminal
2 Procedure Code and the required
3 procedure following said
4 subsection will be followed."

5 The learned Magistrate's notes indicate
6 that she then amended the two charges in issue
7 on this appeal and Lewis was arraigned on those
8 amended charges.

9 He pleaded not guilty and was then advised
10 that he had a right pursuant to section 73 of
11 the CPC to have witnesses recalled. The
12 learned Magistrate then adjourned court at
13 12:20 p.m. on July 10th until 2:20 p.m.

14 It seems clear from this account that the
15 defence had no opportunity whatever to address
16 the court on the question of whether or not the
17 amendments made by the Magistrate should or
18 should not be made. They were not, of course,
19 amendments proposed by the Crown, they were
20 amendments made by the court ex proprio motu.

21 When court resumed, counsel for Lewis
22 advised the court that his client wished to
23 call Nelson to testify. However, the notes of
24 the trial also indicate that Lewis' counsel
25 advised the court that on his reading of the

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1 law, "that situation is not provided for".

2 At that point the learned Magistrate ruled
3 that section 73 of the CPC did not allow Lewis
4 to call fresh evidence from a new witness and
5 the application to call Nelson was therefore
6 refused. Counsel for Lewis then advised the
7 court that Lewis did not seek to call any other
8 witness.

9 After hearing submissions, the learned
10 Magistrate sentenced Nelson to eleven years on
11 one charge and seven years concurrent on
12 another charge indicating that the first
13 mentioned sentence reflected Nelson's
14 cooperation with the police.

15 Lewis was sentenced to thirteen years in
16 respect of the charge involving 2.446 kilograms
17 of cocaine and nine years concurrent with
18 respect to the charge involving 487 grams. (I
19 gather that the former quantity was the amount
20 found on the ship).

21 The grounds of appeal. Mr. Freeman
22 originally put forward at least three grounds
23 for the appeal from Lewis' convictions. During
24 the argument before me, the third ground was
25 withdrawn so I need to deal only with the first

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1 two.

2 Ground one is that the learned Magistrate
3 erred in law in substituting the words "was
4 concerned in the" for the words "had in his" so
5 that as amended Lewis was charged with being
6 concerned in the possession of cocaine 2.446
7 kilograms in one charge, and 487 grams in the
8 other. I note that the latter charge seems to
9 also have been amended by adding the quantity
10 of cocaine, but no issue was taken with that
11 amendment.

12 Ground two is that the charges were
13 amended too late in the proceedings and that
14 this necessarily caused prejudice or injustice
15 to Lewis, and that the learned Magistrate
16 failed to exercise her discretion to adjourn
17 the trial.

18 As I stated earlier, the learned
19 Magistrate's written judgment, which she read,
20 concluded by finding Lewis not guilty of both
21 charges of importing cocaine. She then
22 substituted for each possession charge a charge
23 of being concerned in the possession of cocaine
24 with intent to supply, and stated that the
25 procedure dictated by section 73 of the CPC

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1 would be followed.

2 The notes of trial indicate that the
3 substituted charges were then put to Lewis and
4 he entered pleas of not guilty to both.

5 It was at this point that Lewis was
6 advised of his right to have witnesses recalled
7 under section 73 of the CPC. The court did not
8 seek any submissions from the defence as to
9 whether or not the charges should be amended.
10 At the time defence submissions were made the
11 amendments were a "fait accompli".

12 In his submissions, counsel for Lewis
13 seems to have suggested -- and these are the
14 submissions he put before the Magistrate
15 adjourned to consider her judgment -- that the
16 evidence established a case of being concerned
17 in the possession rather than being in the
18 actual possession. It seems to me that that
19 submission was directed to persuading the court
20 to acquit Lewis of the charges he was facing.
21 It was not put as an invitation to amend the
22 charges. However, no submissions were made to
23 me on that point.

24 It is necessary now to set out section 73
25 of the CPC in its entirety.

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Section 73

(1) Where, at any stage of a trial it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration or addition of a charge, as the court thinks necessary to meet the

circumstances of the case:

Provided that where a charge is altered, added or substituted as aforesaid, the court shall thereupon call upon the accused person to plead to the altered or new charge.

Provided further that in such case the accused person shall be entitled, if he so wishes, to have the witnesses (or any of them) recalled to give evidence afresh or to be further cross-examined by the defence, and, in such last mentioned event, the prosecution shall

1 have the right to re-examine any
2 such witness on matters arising
3 out of such further
4 cross-examination.

5 (2) Variance between a charge
6 and the evidence adduced in
7 support of it with respect to
8 the day upon which the alleged
9 offence was committed is not
10 ordinarily material and the
11 charge need not be amended for
12 such variance if it is proved
13 that the proceedings were in
14 fact instituted within the time,
15 if any, limited by law for the
16 institution thereof and the
17 actual date is not material on
18 any other ground.

19 (3) Where an alteration,
20 addition, or substitution of a
21 charge is made under subsection
22 (1) or there is a variance
23 between the evidence and the
24 charge as described in
25 subsection (2), the court shall,

1 if it is of the opinion that the
2 accused has been thereby misled
3 or deceived or may be prejudiced
4 in the conduct of his defence,
5 adjourn the trial for such
6 period as may be reasonably
7 necessary in the interest of
8 justice."

9 Let me just say that section 73 seems to
10 contemplate an amendment where at any stage of
11 the trial it appears to the court that the
12 charge is defective either in substance or in
13 form.

14 The proviso to section 73 requires that
15 the charge as altered be put to the accused
16 person who is to be asked to plead to the
17 altered charge. And, the proviso indicates
18 that the accused person shall be entitled, if
19 he wishes to have witnesses recalled, to give
20 evidence afresh or to be further
21 cross-examined. It does not mention who the
22 legislator thought would be recalling the
23 evidence or examining the witnesses. It simply
24 says that the accused can ask to have the
25 witnesses recalled.

1 Subsection (3) of section 73 provides that
2 if the court is of the opinion that the accused
3 has been misled or deceived or may be
4 prejudiced in the conduct of his defence,
5 adjourn the trial for such period as may be
6 reasonably necessary in the interests of
7 justice.

8 I note that while section 73 (1) purports
9 to contemplate an amendment to a charge at any
10 stage of the trial, the provisions concerning
11 the recalling of witnesses and the provisions
12 of subsection (3) concerning the accused being
13 misled or deceived or prejudiced in the conduct
14 of his defence seems to contemplate that
15 amendments to charges will not be made after
16 the completion of the Crown's case.

17 It seems to me that section 73 (1), in
18 referring to the recalling of witnesses, does
19 not contemplate the situation where the accused
20 has already defended the case and is met, as
21 Mr. Lewis was in this case, with the ruling
22 that he could not call a witness who had not
23 already been called. That, in my opinion, only
24 works if the amendment is made prior to the
25 close of the Crown's case.

1 Similarly, subsection 73 (3) in my
2 judgment speaks in futuro when it addresses the
3 problem of the accused being prejudiced in the
4 conduct of his defence. Those words are not
5 apt to describe the situation in which the
6 defence has already been conducted.

7 As there seems to be a paucity of
8 authority with respect to amending charges in
9 this jurisdiction, Mr. Freeman directed my
10 attention to cases decided under the provisions
11 of the English Indictments Act of 1915 which
12 seem to be very similar, if not identical, to
13 the provisions of section 116 of the CPC which
14 govern the practice to be followed in this
15 court in criminal trials based on indictment.

16 That legislation contemplates that
17 amendments may be made to an indictment at any
18 stage of the trial provided that such can be
19 made without injustice. And that is in part in
20 essence what section 73 provides for.

21 The question immediately arises as to
22 whether, how, and by whom injustice, potential
23 injustice or probable injustice is to be
24 demonstrated, or whether injustice may be
25 presumed. I will return to this point in due

1 course.

2 The Court's jurisdiction to amend is
3 expressed in the same language in both section
4 5 of the English act and section 116 subsection
5 (1) of the CPC. Under these statutes, if it
6 appears to the court that an indictment is
7 defective, the indictment shall be amended
8 "unless, having regard to the merits of the
9 case the required amendments cannot be made
10 without injustice". In contrast, section 73
11 (1) provides that amendments "may" not "shall"
12 be made.

13 As I've said, I was referred to a number
14 of English decisions, including
15 *Rex v West et al* -- (1948), 1 All England
16 Reports 718, *Regina v Gregory* 1972, 2 All
17 England Reports 861. *R v Johal and Ram* 1992, 2
18 All England Reports 448 and *R v Martins* 1961
19 two All England Reports 747.

20 In *R v Gregory* the defendant had been
21 charged with receiving stolen goods, (in that
22 case a starter motor) for a motor vehicle
23 alleged to belong to one Wickes, the
24 defendant's sometime employer. At the end of
25 the evidence; that is, all of the evidence, the

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1 court amended the charge to delete the name
2 "Wickes" so that the charge would allege
3 instead that the starter motor was the property
4 of a person or persons unknown.

5 The Court of Appeal quashed the conviction
6 on the basis that the defendant had been
7 substantially prejudiced by the amendment. The
8 court thought that mounting a defence to
9 possession of goods of undetermined ownership
10 was a significantly different task than
11 defending against a charge of possessing
12 property stolen from one specified named
13 individual.

14 In *Rex v West* the Court of Criminal Appeal
15 made it clear that before amending an
16 indictment of its own motion, the court should
17 have invited the parties, and in particular the
18 defence, to express their views. It seems that
19 the Court of Appeal's opinion in *Rex v West*
20 represents the law as it was under the English
21 Act of 1915 -- and I assume that is applicable
22 to section 116 of the CPC.

23 In *R v Johal*, Ashworth J. said at page

24 452:

25 "This court shares the view

1 expressed in some of the earlier
2 cases that the amendment of an
3 indictment during the course of
4 a trial is likely to prejudice
5 an accused person. The longer
6 the interval between arraignment
7 and amendment, the more likely
8 it is that injustice will be
9 caused, and in every case in
10 which amendment is sought it is
11 essential to consider with great
12 care whether the accused person
13 will be prejudiced thereby".

14 The required careful consideration must,
15 in my opinion, include any submissions counsel
16 care to make, but in this case no opportunity
17 to make those submissions was provided.

18 It seems that the authorities I have just
19 referred to were not taken into account by
20 counsel or by the court in this case. Based
21 upon these authorities, I have reached the
22 conclusion that at least in the case of
23 indictments the court should seek input from
24 counsel before making amendments. I also
25 conclude that whether or not an amendment will

1 cause injustice is a matter the court must
2 consider carefully in the light of counsel's
3 submissions.

4 I should say that no reason occurs to me
5 to support the proposition that a person
6 charged in the Summary Court, especially with
7 offences that carry the heavy sentences that
8 Mr. Lewis was charged with should be afforded
9 anything less in terms of the law's protection.

10 I would also conclude from the authorities
11 that it is the likelihood, rather than the
12 probability of injustice which must be examined
13 and considered and, accordingly, doubtful cases
14 must be resolved in favour of the accused.

15 The Court's decision as to whether or not
16 to amend an indictment or charge must take into
17 account all the circumstances including the
18 desirability of adjournments, and the need to
19 call or recall witnesses to testify. It is not
20 difficult to imagine cases in which in order to
21 avoid injustice, amendments will have to be
22 refused.

23 The foregoing, of course, relates to
24 amendments to indictments and not to the
25 amendment of charges pursuant to section 73 of

1 the CPC, but as I have said, I cannot see any
2 reason for affording those persons who are
3 accused in the Summary Court with fewer or
4 lesser rights.

5 There is only one reported Cayman Islands
6 decision concerning the amendment of charges
7 which was referred to in argument, and that is
8 *R v Merren*, reported as *RL Merren and CB Merren*
9 *v R*, 2000 Cayman Islands Law Reports 234, a
10 decision of Mr. Justice Sanderson.

11 In that case Mr. Justice Sanderson reached
12 the conclusion that the charges against the
13 defendant ought to have, but had not been
14 amended. He said at page 240 that the court
15 had invited the Crown to consider whether an
16 amendment should be sought, but the Crown had
17 advised that no amendment was necessary because
18 as Miss Clarke put it "the actual wording is
19 immaterial so long as the spirit of the charge
20 is readily understood and the essential
21 ingredients are proved".

22 Mr. Justice Sanderson then said:

23 "The result is the court did not
24 hear any submissions from the
25 appellant's counsel as to the

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1 prejudice they might suffer
2 should the court grant an
3 amendment, although it would
4 probably have been a difficult
5 task to persuade the court that
6 prejudice would occur. Because
7 of the suggested amendment, no
8 such amendment was sought either
9 on appeal or at trial."

10 I would say that Mr. Justice Sanderson's
11 observations in that case were obiter and from
12 the authorities I have been referred to I would
13 not think that there is much support for the
14 proposition that the onus is on the accused to
15 establish prejudice but rather the onus is on
16 the Crown to refute it, and I will come to the
17 authorities in that respect momentarily.

18 The first point to be determined in this
19 case is whether or not the court should consult
20 the parties before amending a charge under
21 section 73, and I am firmly of the view that
22 the court is obliged so to do.

23 The second point is the need to address
24 the prejudice issue in this case.

25 As I have said, as is apparent, section

1 73(1) of the CPC is couched, in part in
2 language, very similar to that found in section
3 5 of the 1915 English Indictments Act and
4 section 116 of the CPC. But section 73(1)
5 after providing for amendments to charges stops
6 before the words found in those sections
7 following the word "unless" so that the
8 question of injustice is not mentioned in
9 section 73(1).

10 The two provisos requiring the accused to
11 plead to the amended charge and explicitly
12 entitling the accused to have witnesses
13 recalled seem to assume that prejudice is
14 likely but it can be remedied by affording the
15 defence the opportunity to recall witnesses.
16 But section 73(1) also clearly contemplates
17 that if amendments are made, it will be before
18 the defence has adduced its evidence, and
19 certainly before the completion of the evidence
20 for the reasons I have already given.

21 Section 73(1), as I have said, does not
22 speak of prejudice that is left to section
23 73(3). That subsection bears repeating:

24 "Where an alteration, addition
25 or substitution of a charge is

1 made under subsection (1) or
2 there is a variance between the
3 evidence and the charge as
4 described in subsection (2), the
5 court shall, if it is of the
6 opinion that the accused has
7 been thereby misled or deceived
8 or may be prejudiced in the
9 conduct of his defence, adjourn
10 the trial for such period as may
11 be reasonably necessary in the
12 interest of justice."

13 Section 73(3) does not state what purposes
14 an adjournment is intended to serve, and does
15 not explicitly allow the defendant to call
16 fresh evidence. Section 73 taken as a whole
17 contemplates only the recall of witnesses who
18 have already testified.

19 If I am wrong, and section 73 does
20 contemplate amendments to the charges after the
21 completion of all the evidence, including the
22 evidence that the defence has chosen to adduce
23 in response to the charge it has been facing,
24 then there is no obvious reason why the defence
25 rights are to be limited to recalling evidence

1 adduced in a different context. It seems to me
2 that the interpretation one is driven to by
3 reading section 73 as a whole is that
4 amendments other than highly technical
5 amendments of form not substance are not
6 contemplated after the close of the Crown's
7 case. If that is not right, then it would be
8 my opinion that section 73 requires the court
9 to refuse an amendment, if the remedies for
10 potential prejudice, which are limited by
11 section 73(1) and 73(3) appear to be
12 inadequate. On that interpretation the court
13 would be bound to hear from counsel before
14 amending the charge, and this obligation would
15 be essential if the amendment was to be made
16 after the completion of the Crown's case.

17 It seems to me that in all criminal cases,
18 there is an overriding principle to be applied,
19 and that is the right of all accused persons to
20 make full answer and defence.

21 Assuming for the purposes of illustration
22 only, that the defendant in the case at bar
23 could not make full answer and defence to the
24 amended charges, unless he could rely on the
25 evidence to be given by Nelson, and that

1 section 73 prohibited him from calling Nelson,
2 there would, in these circumstances, be a
3 miscarriage of justice, and a miscarriage of
4 justice mandated by the provisions of section
5 73 of the CPC. I have great difficulty coming
6 to that conclusion. It therefore seems to me
7 that the better view is that while section
8 73(1) authorizes the court to amend charges,
9 its language is permissive; that is to say,
10 "the court may" make amendments but the court
11 may also decline to amend the charge and must
12 direct its mind to that issue. Unfortunately,
13 it does not appear that the learned Magistrate
14 directed her mind to these considerations in
15 this case.

16 It is important to point out that neither
17 section 5 of the 1915 U.K. Indictments Act, nor
18 section 116 of the CPC explicitly requires the
19 court to consult the parties before making
20 amendments to indictments; nevertheless, the
21 law requires that to be done. There is no
22 apparent reason why amendments to charges under
23 section 73 should not be subject to exactly the
24 same requirement.

25 I come now to the question of prejudice,

1 given the lateness of the amendments in this
2 case, and I will first refer to the judgment of
3 the Lord Chief Justice in *R v Hughes*, 1927, 20
4 Criminal Appeal Reports page 4.

5 In that case, the accused was charged with
6 falsely pretending to be a person in a position
7 to hire managers of public houses and he
8 represented to those persons that he could so
9 appoint them and, as a result, obtained sums of
10 money from them. The following appears in the
11 Lord Chief Justice's judgment at page 7.

12 "The matter having proceeded to
13 the end of the case for the
14 prosecution upon the footing of
15 the false pretences as stated in
16 the indictment, namely, 'By
17 falsely pretending that he would
18 appoint'... an application for
19 amendment was made, and at that
20 stage of the case the learned
21 judge thought it right to amend
22 every one of those counts
23 relating to false pretences by
24 re-stating each of them in this
25 way: 'By falsely pretending that

1 he, the said Robert Hughes, was
2 in a position to appoint' - in
3 other words, clearly
4 substituting a representation of
5 an alleged existing fact for
6 words which in themselves were
7 consistent with the making or
8 the offering of a mere promise
9 about the future."

10 I pause here to say that that amendment
11 does not appear on the face of it to be
12 dramatic, (and it was argued in this case that
13 the amendment was not dramatic.)

14 The Chief Justice continued at page 9 as
15 follows, referring to a provision of the 1915
16 Indictments Act:

17 "That subsection makes it
18 abundantly clear that those
19 words 'at any stage of the
20 trial' are sufficiently wide to
21 permit amendment at a time when
22 it is no longer possible for the
23 grand jury in fact to find the
24 indictment in the amended form.

25 But regard must be had to the

1 remaining words of subsection
2 (1) of this section 'unless,
3 having regard to the merits of
4 the case, the required
5 amendments cannot be made
6 without injustice.'

7 In the opinion of the Court,
8 that subsection is dealing with
9 what it speaks of, namely, a
10 case where an indictment is
11 defective. The function of the
12 subsection is to enable the
13 Court, in order that justice may
14 be done, to remedy a defect in
15 the indictment. That is a
16 wholly different matter from
17 revising and altering the
18 substance of what is charged.

19 As this indictment was copied
20 and passed, it alleged the false
21 pretence which was no false
22 pretence at all. The evidence
23 that was given was largely
24 consistent with the view that a
25 representation of that kind, and

1 not of another kind, was made,
2 and in our opinion it would be a
3 bad precedent in the
4 circumstances of such a case as
5 this to permit the re-writing of
6 the false pretence at the
7 conclusion of the case for the
8 prosecution so as to introduce
9 into the indictment for the
10 first time the fundamental
11 ingredient of a representation
12 of an alleged existing fact. It
13 was not correcting a defect in
14 the indictment, it was altering
15 its substance and it was
16 altering its substance in
17 circumstances in which, as it
18 appears to us, the defendant was
19 prejudiced by the alteration.
20 In those circumstances we have
21 come to the conclusion that the
22 verdict of guilty on all of
23 counts of this indictment that
24 have to do with false pretences
25 fails and to that extent the

1 convictions must be quashed."

2 The court went to say at page 9:

3 "What might have happened if
4 another course had been taken is
5 not useful to speculate, and
6 indeed it may well be that upon
7 the moral merits of this case
8 there is little to be said on
9 the part of the appellant. But
10 we are satisfied that it would
11 be a dangerous precedent if this
12 amendment, being what it is, and
13 made when it was, should be
14 upheld. We have therefore come,
15 not without reluctance, to the
16 conclusion that his appeal
17 succeeds, and that this
18 conviction must be quashed."

19 I observe, firstly, that the amendment in
20 that case was made before the defendant was
21 called upon to adduce evidence in defence, and
22 that the alteration was not dramatic; that is,
23 the alteration of the charge was not dramatic.

24 In *R v Cross and Channon* 1971 55 Criminal
25 Appeal Reports page 540, Mr. Justice Waller had

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1 before him charges against a Mr. Channon and a
2 Mr. Cross. Mr. Justice Waller said at page
3 541:

4 "The applicant Channon, who was
5 a member of the Stock Exchange,
6 was separately convicted on six
7 counts of fraudulent conversion
8 and Channon and the applicant
9 Cross, who was a solicitor, were
10 both convicted of the offence of
11 fraudulent conversion by
12 trustees."

13 He then (at page 542) refers to count 7,
14 which related to both applicants and indicates
15 that they were charged as trustees of the Blake
16 Trust and they were charged with converting
17 part of the Trust estate, namely £16,289 to
18 their own use and benefit.

19 He comes then to the case of *Cross* at page
20 543 and states as follows:

21 "In the case of *Cross*, however,
22 different considerations arise.
23 He was a co-trustee with the
24 applicant Channon, and the
25 nature of the case against him

1 was that he was a party to the
2 breach of trust and to the
3 fraudulent conversion of the
4 money. The prosecution sought
5 to say that because of his
6 behaviour in 1967 and in 1968
7 when he was not answering
8 enquiries in relation to the
9 Trust affairs with great
10 promptitude... he was party to
11 the issue of share certificates
12 in AJC in the name of the
13 trustees and there were other
14 instances which it is
15 unnecessary to go into in
16 detail -- The case for the
17 prosecution was that because of
18 that behaviour it would be open
19 to the jury to draw the
20 inference that he, Cross,
21 although he did not receive one
22 penny benefit from the money,
23 was concerned in the actual
24 conversion of the money
25 fraudulently in 1966."

1 At page 544, Mr. Justice Waller
2 said:

3 "After the jury had convicted,
4 the learned judge interrupted
5 Mr. Marriage, who was mitigating
6 on behalf of the defendant
7 Cross, to say: 'I take the
8 jury's verdict, and certainly my
9 own view of the matter is that
10 he did not know that the
11 conversion was actually going
12 on; he knew of it after it
13 happened.' So it was quite
14 clear that the learned judge
15 thought that it was very
16 difficult for the jury to be
17 satisfied that Cross knew the
18 money was being dishonestly
19 used.

20 Although there had been no
21 cross-examination in the course
22 of the case to support a case
23 under section 4 of the Criminal
24 Law Act 1867, the learned judge
25 interrupted Mr. Havers when he

1 was making his final speech to
2 the jury to say that he thought
3 that the case was really covered
4 by section 4 of the Criminal Law
5 Act. We have been told that
6 that was a complete surprise to
7 Mr. Havers."

8 ("Mr. Havers" was Michael Havers QC, later
9 Lord Chancellor.)

10 Section 4 of the Criminal Law Act provided
11 as follows:

12 "Where a person has committed an
13 arrestable offence, any other
14 person who, knowing or believing
15 him to be guilty of the offence,
16 or of some other arrestable
17 offence does, without lawful
18 authority or reasonable excuse,
19 any act with intent to impede
20 his apprehension or prosecution
21 shall be guilty of an offence.

22 2) If on the trial of an
23 indictment for an arrestable
24 offence the jury are satisfied
25 that the offence charged (or

1 some other offence of which the
2 accused might on that charge be
3 found guilty) was committed, but
4 find the accused not guilty of
5 it, they may find him guilty of
6 any offence under section 1
7 above of which they are
8 satisfied that he is guilty in
9 relation to the offence
10 charged."

11 That was the section that the judge in the
12 *Cross and Channon* case thought the jury should
13 properly have substituted for the conviction
14 they registered which the learned judge thought
15 had been improperly registered.

16 Mr. Justice Waller then continues at page
17 545 as follows:

18 "When one regards the case as a
19 whole, in our view, there are
20 four difficulties in the
21 approach of the learned Common
22 Serjeant.

23 1. The judge clearly thought
24 that the offence under count
25 seven as charged was not proved,

1 but the verdict showed
2 apparently that it was, and, in
3 our view it is clearly wrong
4 that there should be that kind
5 of confusion about a verdict in
6 a case such as this. The count
7 charged specific knowledge by
8 the applicant in relation to a
9 fraudulent conversion by
10 trustees, whereas the judge was
11 apparently allowing the jury to
12 return a verdict of guilty on
13 that count although he intended
14 that it should be a verdict of
15 guilty of an offence by virtue
16 of section 4(2) (of the Criminal
17 Law Act).

18 2) In our view, it is most
19 undesirable and wrong for the
20 issue of section 4 to be raised
21 after the evidence is closed.
22 If the prosecution foresee that
23 a charge under section 4 may be
24 the proper way in which to deal
25 with the facts, there should be

1 a specific count on the
2 indictment charging it. But if
3 in the course of the case, by
4 reason of the evidence that is
5 given in the case, the nature of
6 the case for the prosecution
7 changes, where, for example, the
8 defendant gives evidence which
9 would exculpate him from the
10 offence charged but would
11 provide a case covered by
12 section 4 and, therefore, a
13 verdict could be brought in by
14 section 4(2), there would
15 obviously be no objection to the
16 prosecution raising the question
17 of an offence under section 4.
18 But that matter should be raised
19 before the evidence has been
20 completed so that the defence
21 may have an opportunity to deal
22 with it. When it is raised in
23 the course of counsel's speech,
24 the defence has had no proper
25 opportunity of dealing with it.

1 Where section 4 is to be
2 considered as a possible
3 verdict, if it is foreseen in
4 advance that an offence under
5 section 4 would be an
6 appropriate charge, it should be
7 specifically charged. If this
8 is not foreseen in advance, but
9 emerges in the course of the
10 case, then the defendant should
11 be told before the evidence is
12 closed of the possibility of a
13 verdict under section 4 and he
14 should be offered the
15 opportunity of an adjournment,
16 if he so wishes, in order to
17 enable him to meet that
18 particular charge."

19 In the result, Mr. Justice Waller said at
20 page 547:

21 "Accordingly, therefore, we are
22 of the opinion that this verdict
23 is both unsafe and
24 unsatisfactory...

25 Accordingly, this Court will

1 grant leave to appeal, will
2 treat his hearing as the hearing
3 of the appeal and will quash the
4 conviction."

5 In *R v Radley* 1973, 58 Criminal Appeal
6 Reports at page 394, the Lord Chief Justice
7 referred to *R v Martin* and *R v Smith* and
8 continued at the bottom of page 401 as follows:

9 "From those two passages, I
10 derive two conclusions, first of
11 all, that the indictment may be
12 defective if it fails to allege
13 an offence disclosed by the
14 depositions, or alternatively it
15 alleges an offence not disclosed
16 by the depositions, and
17 furthermore from the words used
18 by Humphreys J. (in *R v Smith*) I
19 take the point that, in view of
20 the fact that justice lies at
21 the back of all these
22 considerations and that no
23 amendment is to be made if it
24 cannot be made without
25 injustice, one ought to give a

1 fairly liberal meaning to the
2 language of section 5. That is
3 not being done in this Court for
4 the first time. The tendency in
5 the last ten years has been to
6 relax the technicalities of
7 criminal pleading, bearing in
8 mind that injustice to the
9 defendant from any proposed
10 amendment must be refuted. With
11 those matters in mind, I cite
12 MARTIN'S case as a good example
13 of the width of meaning of
14 'defective' in section 5. But
15 the case is of interest on the
16 second point as well, because
17 obiter the Court considered the
18 question of an amendment being
19 made after arraignment, and on
20 page 206 and 228 of the
21 respective reports, Lord Parker
22 C.J. said: 'After arraignment
23 it is doubtful whether a new
24 count can be added at all, as
25 the defendant will not have

1 pleaded to it nor, if the trial
2 has started, have been put in
3 charge of the jury on it; and if
4 it were made, injustice, as the
5 case of *Errington* and *Hughes*
6 show, would almost certainly be
7 caused.' The Court's reluctance
8 to allow, at a late stage in the
9 trial, an amendment which
10 alleges a new offence is also
11 illustrated in *Harden* 1962, 46
12 Criminal Appeal Reports at page
13 90."

14 And then there is the judgment of the
15 Court of Criminal Appeal in *R v Collison* in
16 1980, 71 Criminal Appeal Reports at page 249.
17 In this case, Mr. Justice Thompson read the
18 judgment for the court and referred to the
19 judgment of Mr. Justice Ashworth in *Johal and*
20 *Ram* which I have referred to earlier, and he
21 also refers to *R v Radley* and indicates that
22 Lord Widgery, C.J. said the following, and I am
23 quoting from page 254:

24 "Now it is accepted... That it
25 was a good indictment in the

1 sense that there was no defect
2 in regard to form, but the fact
3 that the indictment was not
4 liable to be quashed on that
5 ground does not mean that it is
6 not defective, because
7 'defective' in the context of
8 section 5 has got a very much
9 wider meaning."

10 A little later the learned Chief Justice
11 said this at page 401 to 402:

12 "... the indictment may be
13 defective if it fails to allege
14 an offence disclosed by the
15 depositions... and furthermore
16 from the words used by
17 Humphreys J. I take the point
18 that in view the fact that
19 justice lies at the back of all
20 these considerations and that no
21 amendment is to be made if it
22 cannot be made without
23 injustice, one ought to give a
24 fairly liberal meaning to the
25 language of section 5. That is

1 not being done in this Court for
2 the first time. The tendency in
3 the last ten years has been to
4 relax the technicalities of
5 criminal pleading, bearing in
6 mind that injustice to the
7 defendant from any proposed
8 amendment must be refuted."

9 That suggests to me that in the case at
10 bar, not only was the learned Magistrate
11 required to consult counsel before making the
12 amendment, but because the amendment was made
13 at such a late stage, it was up to the Crown to
14 convince the court that the conviction could be
15 safely registered on the amended charges
16 without prejudice.

17 Lastly, I will refer to a recent judgment
18 *R v Piggott and Litwin* 1999 EWCA Crim 755,
19 decision of 18th March 1999. Again it is the
20 Court of Appeal Criminal Division. The
21 judgment of the court was delivered by Lord
22 Justice Waller. He says at page 9:

23 "Finally we were referred to

24 *R v O'Connor* 1997 Criminal Law

25 Reports 516. In that case the

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1 appellant was managing agent of
2 a company which owned a fishing
3 vessel which foundered at sea in
4 February/March 1991 with the
5 loss of all six members of the
6 crew. The original indictment
7 contained six counts alleging
8 manslaughter in identical terms
9 save that each related to a
10 different member of the crew.
11 The particulars of each offence
12 alleged that the appellant had
13 caused the death of each crew
14 member by allowing the vessel to
15 go to sea in an unseaworthy
16 condition and with no or no
17 adequate life saving equipment.
18 On the 27th day of the trial,
19 and after a submission of no
20 case to answer by the defence,
21 count 7 was added by amendment
22 which alleged that the appellant
23 unlawfully killed a person
24 unknown, a member of the crew,
25 by failing to take reasonable

1 care of their safety. The
2 appellant was subsequently
3 convicted of manslaughter on
4 that count alone. The Court of
5 Appeal held that the effect of
6 the amendment was unfair because
7 the factual basis of the Crown's
8 case on causation changed very
9 significantly and confronted the
10 appellant with a different and
11 more difficult case. The
12 appellant was deprived of the
13 opportunity to mount the defence
14 he would have mounted had the
15 Crown's case been put in this
16 way from the beginning; that it
17 was for the Crown to decide how
18 to put its case and it could not
19 rely on the court granting it
20 leave to chop and change as the
21 trial progressed; that the
22 defence were entitled to confine
23 their attention to the case
24 against the appellant as framed
25 and were not entitled, let alone

1 obliged, to fashion their
2 defence to meet charges which
3 the Crown might later choose to
4 prefer and that the Crown having
5 resisted the need to amend until
6 the bitter end, there was
7 nothing in the conduct of their
8 case which could have led the
9 defence to regard the amendments
10 as their preferred course and
11 accordingly the conviction was
12 unsafe.

13 The review of the above
14 authorities demonstrates that
15 the courts have in more recent
16 years construed the power to
17 amend more liberally. Even
18 however if 'defective' has been
19 given a more liberal reading,
20 certain matters strike us in
21 relation to the authorities. In
22 no case where an amendment was
23 being sought or allowed once the
24 Crown case was completed was
25 there any suggestion that one

1 consequence could be the
2 discharge of the jury and a
3 retrial. The concentration in
4 all the authorities has been on
5 whether the trial itself can be
6 continued without injustice.

7 *O'Connor* furthermore supports
8 the view that the Crown should
9 not be allowed to chop and
10 change in the way that it puts
11 its case and hope that leave to
12 amend will be given if it has
13 got it wrong."

14 In conclusion at page 12 the court said:

15 "In the circumstances we are of
16 the view that to allow
17 amendments at the stage where
18 they were allowed in this case
19 after a trial lasting some ten
20 days and which could only be
21 proceeded with by ordering a
22 retrial which would traverse the
23 same ground as the first trial
24 but on counts which the
25 appellants were entitled to

1 think had been withdrawn, did
2 cause an injustice to the
3 defendants. In those
4 circumstances we are of the view
5 that the amendments to the
6 indictment should not have been
7 allowed."

8 As I have said in the circumstances of
9 this case I am firmly of the opinion that the
10 learned Magistrate ought to have provided
11 counsel for both parties with the opportunity
12 to make submissions as to whether the charges
13 against Lewis should or should not have been
14 amended, and as to the consequences of such
15 amendments, if made, before making the
16 amendments that were made. And in my judgment,
17 those amendments should not have been made
18 unless the court could safely conclude that no
19 injustice would ensue.

20 In this case, I do not know what evidence
21 Nelson would have given had Lewis been able to
22 call him.

23 The notes of the evidence record that a
24 statement taken from him was handed up to the
25 Magistrate after she had found Lewis guilty.

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1 The Crown apparently advised the court
2 that the statement implicates both accused. I
3 have not looked at that statement. It was not
4 evidence at the trial as to guilt or innocence
5 before the learned Magistrate and I do not
6 consider it as properly before me. As I have
7 said, Nelson did not testify. His statement
8 was not put into evidence, and it is not before
9 me. It may be likely or unlikely that Nelson's
10 evidence would have assisted Lewis in his
11 defence. I do not know, and I am not prepared
12 to speculate.

13 Section 74 of the CPC comes immediately
14 after section 73 and provides as follows:

15 "The court, having heard both
16 the prosecutor and the accused
17 person and their witnesses,
18 shall either convict the accused
19 and pass sentence upon or make
20 an order against him according
21 to law or shall acquit him, at
22 its discretion, or may with or
23 without recording a conviction,
24 if it is of the opinion that it
25 is not expedient to inflict any

1 punishment notwithstanding that
2 it finds the charge against the
3 accused is proved, make an order
4 discharging the accused
5 absolutely or conditionally."

6 Now, the trial in this case reached that
7 point. The court had heard the prosecutor and
8 the accused person and their witnesses. In my
9 judgment, the only course open to the judge in
10 the circumstances was to convict and pass
11 sentence or acquit.

12 Again, that reinforces in my mind the
13 construction to be placed on section 73
14 concerning the time at which amendments to
15 charges may be made. So, it seems to me there
16 is an alternative ground for interfering with
17 the judgment in the court below in this case.
18 It is possible to conclude that the amendment
19 was made without jurisdiction.

20 In all the circumstances, and bearing in
21 mind the provisions of section 179 of the CPC,
22 I am not prepared to conclude that no
23 substantial miscarriage of justice has
24 resulted.

25 I think it important to repeat once again

1 the famous words from the famous case of Rex
2 and Manchester justices which I will
3 paraphrase. "Not only is it important that
4 justice be done, but is important that justice
5 be manifestly seen to be done."

6 Consequently, I will allow the appeal. I
7 hasten, however, to add that the learned
8 Magistrate dealt with the amendment in strict
9 accordance with the literal provisions of
10 section 73(1) of the CPC. It does not appear
11 that the authorities cited to me were brought
12 to her attention, and the record shows that she
13 listened attentively to the evidence and
14 reviewed it carefully in her judgment.

15 In the circumstances, the decision of the
16 learned Magistrate must be reversed, and the
17 charges dismissed, and the appellant is
18 discharged from custody.

ADDENDUM

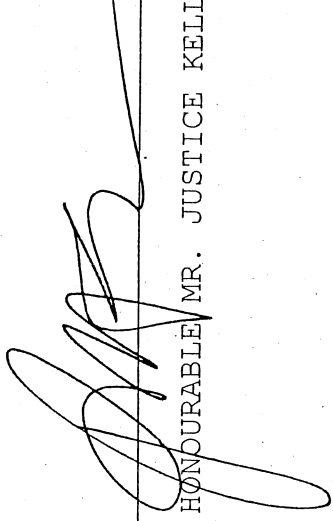
1 THE COURT: The above judgment was
2 delivered in open court on April 10, 2003. I
3 should have mentioned that earlier that day I
4 heard counsel's submissions on several issues
5 which I thought required some further
6 elaboration. I took those submissions into
7 account and should have said so. In particular
8 I asked for counsels' assistance as to whether
9 or not the Summary Court was clothed with
10 jurisdiction to give an alternative verdict
11 such as is contemplated by section 4 of the
12 English Criminal Law Act 1967. I was advised
13 that such was not the case. That means of
14 course that counsel for an accused person need
15 not defend against any offence other than the
16 offence charged. That is significant for the
17 determination of this case. Counsel for Lewis
18 was entitled to concentrate on whether or not
19 the Crown's evidence established that Lewis had
20 physical possession of cocaine and he had no
21 need to cross examine the prosecution witnesses
22 in order to meet an entirely different case
23 i.e., being concerned in the possession of

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1 cocaine. Accordingly Mr. Roberts' submission
2 (made during the argument of April 10 2003) to
3 the effect that the evidence adduced by the
4 Crown established the case for a conviction of
5 being concerned in did not address the
6 important issue of the fairness of the trial.
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9

10 THE HONOURABLE MR. JUSTICE KELLOCK
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6 important issue of the fairness of the trial.

A handwritten signature in black ink, appearing to be 'J. Kellock', is written over a horizontal line.

THE HONOURABLE MR. JUSTICE KELLOCK