

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 2 of 1992

BETWEEN:

GREGORY FORBES
and - Appellant

THE QUEEN
- Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Dr. Nicholas J.O. Liverpool - Justice of Appeal
The Honourable Mr. Satrohan Singh - Justice of Appeal

Appearances: Mr. Kenneth Foster for the Appellant
Mr. Rafiq Khan for the Respondent

1993: January 13, 14
June 21.

JUDGMENT

SATROHAN SINGH J.A.

On March 15, 1991, the appellant arrived at Beef Island Airport, Tortola from St.Maarten on Air BVI's flight 456. He approached Customs empty handed and when asked by Customs if he had anything to declare, said no and left the Airport. Six passengers disembarked from this flight at Beef Island. The Airline manifest showed the names of seven passengers on that flight. The appellant's name was the only "G. Forbes" mentioned therein. The manifest read "Forbes G1, 1 piece 19 kilos." After the passengers were processed and had left, Customs discovered that a bluish grey Diplomat suitcase remained unclaimed. They inspected the tag on it and found the name "FORBES" with the serial number "0513714" written thereon. This serial number matched the serial number on the baggage tag attached to a ticket voucher pulled by the Airline Authorities in St.Maarten for the aforementioned flight and which ticket voucher carried the name of the appellant. Inside the suitcase were found 10 kilos of Cocaine.

The appellant was then contacted and he produced his ticket voucher for the said flight. The name and number on his ticket

voucher corresponded with the name and number on the ticket voucher pulled by the Airline Authorities in St. Maarten on the day when the appellant travelled from St. Maarten to Beef Island and on which ticket voucher the baggage tag was attached. There was no baggage tag on the appellant's ticket voucher but it had indications of a baggage tag being removed therefrom. The evidence shows that the words "Forbes G1 1 piece 19 kilos" on the manifest meant that there was one passenger on that flight by the name of G. Forbes and that he travelled with one piece of luggage weighing 19 kilos.

On these facts, the appellant was on May 8, 1992, convicted by a Jury before Williams J of the offences of (1) **Drug Trafficking** contrary to section 5(1)(a) and in contravention of section 16(1) of the **Drugs (Prevention of Misuse) Act, No. 9 of 1988 of the Laws of the Virgin Islands (the Drugs Act)** and (2) **Possession of a Controlled Drug (Cocaine)** with intent to supply it to another in contravention of section 6(1) and contrary to section 7(3) of the **Drugs Act**. He was sentenced to concurrent terms of imprisonment of 12 years and 10 years respectively.

At the trial, the appellant's Counsel, Mr. Foster, at the close of the case for the prosecution, wished to make a submission of no case to answer in the absence of the Jury, but, the trial Judge having refused his request for the Jury to be absent, Mr. Foster declined to make the submission as he felt that it was likely that the appellant would have been prejudiced if the Jury heard his arguments on the submission. The appellant then elected to say nothing by way of defence. This appeal is from these convictions and sentences.

From the above facts, the prosecution sought to prove the vital element of possession of the Cocaine in the appellant by documentary hearsay evidence i.e. a copy of the flight manifest, the ticket coupon pulled by the airline employee in St. Maarten and the baggage tag attached thereto, also the baggage tag on the

suspect suitcase. Several Grounds of Appeal were filed by the appellant but at the end of the day, after abandonment of the majority of these grounds, the issues that were left to be decided by the court concerned:

1. The admissibility of the documentary hearsay evidence (the flight manifest, the baggage tags and the ticket coupon).
2. The trial Judge's directions to the Jury on the question of the Burden of proof.
3. The refusal by the trial Judge of the request of Counsel for the appellant to have the Jury absent while he made submissions of no case to answer.

(1) The documentary hearsay evidence

The learned trial Judge treated all these documents as being statutorily excepted from the hearsay rule and admitted them in evidence at the trial pursuant to the powers given him under s.12 of the Evidence Act Cap. 24 of the Laws of the British Virgin Islands (the Evidence Act). Mr. Khan for the respondent in his arguments, supported fully this ruling of the trial Judge. Mr. Foster's objection to the admissibility of the copy of the Flight Manifest was that the original document was "alive" at the immigration office at the time of the trial, that no explanation was given for its non-production, and that the copy tendered was not signed and certified as a true copy of the original by the Chief Immigration Officer to whose custody the original was entrusted. Learned Counsel categorises this document as a public document and contends that its production in evidence was in breach of the provisions of s.22 of the Evidence Act. Referring to the baggage tags and the ticket coupons, the objection of Counsel to their admissibility is set out in Ground 3 of this appeal which reads as follows:-

"The Learned Trial Judge erred in law by ruling that the Baggage Tags affixed to the suitcase, the ticket-coupon, as well as the ticket-coupon with the tag affixed thereto, were

admissible in evidence pursuant to the Criminal Justice Act 1988 of the United Kingdom when read with sections 12 of Cap. 24 and 48 of Cap. 20 of Vol. 1.

It is respectfully submitted that:

- i) Imperial Legislation does not apply per se to the BVI unless so expressed by Order of Her Majesty-in-Council, or otherwise adopted by the local Legislature.
- ii) The said Criminal Justice Act of 1988 makes no mention of BVI.
- iii) The Common Law Principle enacted by the House of Lords in *Myers v D.P.P.* (1964) 2 All E.R. 881 prevails, more particularly as the Common Law of England forms part of the Law of the BVI by Statute."

From the evidence on record, I would not categorise any of these documents as being documents of a public nature. I do not agree with the submission of Counsel for the appellant that the flight manifest is a public document. Learned Counsel arrives at this conclusion because, as he submits, the manifest involves a report of everyone entering the State, that the original is kept with the Immigration Authorities, that it does not deal specifically with a particular passenger and that every Airline is bound to have this document. I do not agree that these are the requirements necessary to categorise a document as a public document.

In *Sturla v Freecia* (1880) HL 5 App. Cas.623 at p.643, Lord Blackburn defined Public Document, from the point of view of the law of evidence, as a document that is made by a public officer for the purpose of the public making use of it and being able to refer to it. Earl Jowitt in his *Dictionary of English Law* 2nd Ed. Vol.2 at p.1458 gives "Public Document" a similar definition. The evidence on record does not show that the purpose of the manifest was for the public making use of it or that the public had a right to its use. Airline Officer Norbert O'Neal in his evidence described it as a standard document used by all Airlines for

presentation to Customs, Immigration and other organizations in various countries of the world. It contains the names of the passengers, the bags they carry in terms of weight, the Aircraft registration number, flight number, date, origin and destination of flight and it is prepared in the ordinary course of business. It is my opinion that the flight manifest and the other challenged documents are private documents within the airline travel business with only the airlines, customs, immigration and organisations connected to that business having a right of access to them and with the public generally having no such access as of right even upon payment of a fee. Having so found, I hold that **s.22 of the Evidence Act** has no controlling effect upon the production into evidence of the copy of the flight manifest. **S.22** reads as follows:

"22. Whenever any book, or other document, is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any Court of Justice, or before any person now, or hereafter, having by law, or by consent of parties, authority to hear, receive and examine evidence; provided it be proved to be an examined copy or extract, or provided it purports to be signed and certified as a true copy, or extract, by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy, or extract, to any person applying, at a reasonable time, for the same, upon payment of a fee for the same of eighteen cents for every folio of ninety-six words."

It is not disputed, and I find, that the challenged documents were documents created by Air BVI in St.Maarten and received by Air BVI and Customs and Immigration at Beef Island in Tortola in the normal course of their business and that the information contained in them were supplied by personnel of the same Air BVI who had, or may reasonably be supposed to have had, personal knowledge of matters dealt with therein. There is an abundance of evidence led by the prosecution especially through the witnesses Norbert Edison O'Neal the Air BVI employee and Customs Officer Dean Fahie, which

for the purpose of brevity I will not repeat here and which would support this finding.

Having so found, and having found that they were not public documents, I hold that the challenged documents would have been admissible in England as statutory exceptions to the hearsay rule by virtue of s.24 of the English Criminal Justice Act 1988 and additionally, with respect to the copy of the flight manifest, under s.27 of the said Act.

S.24 of the Criminal Justice Act reads as follows:-

"Business etc. documents -

- (1) Subject -
 - (a) to subsections (3) and (4) below;
 - (b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968; and
 - (c) to section 69 of the Police and Criminal Evidence Act 1984,

a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied -

- (i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and
 - (ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.
- (2) Subsection (1) above applied whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it -

- (a) in the course of a trade, business, profession or other occupation; or
- (b) as the holder of a paid or unpaid office."

And **S.27** states:

"Proof of statement contained in documents. Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved -

- (a) by the production of that document; or
- (b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

authenticated in such manner as the court may approve; and it is immaterial for the purposes of this section how many removes there are between a copy and the original".

The crucial question left to be answered is whether these provisions of the **English Criminal Justice Act** can form part of the **Laws of the British Virgin Islands**. If they cannot, then there being no specific local statute in existence excepting these documents from the hearsay rule, they will have to be ruled inadmissible under the well-known Common Law principle established by the House of Lords in **Myers v D.P.P. (1964) 2 All E.R. 881**.

Mr. Khan for the respondent contends that in the context of this matter **S.12 of the Evidence Act** imports into the British Virgin Islands **S.24** and as a consequence **S.25**, and by extension, **S.27** of the **English Criminal Justice Act**. Learned Counsel for the appellant disagrees and submits that the Common Law situation as dealt with in **Myers v D.P.P.** still prevails in this colony and is the proper law to be applied in the context of this matter.

S. 12 of the local **Evidence Act** reads as follows:

"Every document, which, by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any Court in the colony, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence."

I find the language of this section clear and unambiguous and wide enough to have the ambulatory effect of importing future English legislation relating to the admissibility of documents of all kinds. Such legislation includes the provisions of **SS.24, 25** and **27** of the **English Criminal Justice Act, 1988**. I do not find **S.22** of the local **Evidence Act** limiting the application of **S.12** and I do not find the importation of the aforesaid law offensive to any other existing law in the Colony. It does not purport to import every statute law in England. It limits its importation to English statute law governing the admissibility of documents and it in no way offends the provisions of **S.3(1)** of the **West Indies Act 1967** which provision applies to an Associated State only and not to a colony. This latter Act specifically in **section 3(5)** draws a distinction between a Colony and an Associated State. It is accepted that the British Virgin Islands is still a Colony and that

it has not as yet been granted the status of association with the United Kingdom.

S.3(1) of the West Indies Act 1967 states:

"Except as provided by subsections (2) to (4) of this section, no Act of Parliament of the United Kingdom passed on or after the appointed day shall extend or be deemed to extend TO AN ASSOCIATED STATE as part of its law, unless it is expressly declared in that Act that that state has requested and consented to its being enacted."

and **S.3(5) enacts:**

"Notwithstanding anything in the Interpretation Act 1889, the expression "colony" in any Act of Parliament of the United Kingdom passed on or after the appointed day shall not include an associated state."

It is not the situation here that every English statute is automatically being made applicable in the British Virgin Islands, because it is still a Colony or otherwise. **S.12 of the Evidence Act** is specific local legislation, importing **SS.24, 25 and 27 of the Criminal Justice Act** into the British Virgin Islands.

For these reasons I find no merit in the submission of learned Counsel for the appellant that the proper law to be applied in seeking to admit the copy of the flight manifest into evidence was **S.22 of the Evidence Act**, and that the proper law in relation to the other challenged documents was the Common Law as enunciated in **Myers v D.P.P.** I hold that the documents were properly admitted by the learned trial Judge under the provisions of **SS.24, 25 and 27 of the English Criminal Justice Act 1988** on authority from **S.12 of the local Evidence Act**.

Under **S.27 of the English Criminal Justice Act 1988**, the authentication necessary before the copy of the manifest could have been admitted, was authentication in such manner as the Court may approve. That provision is wide enough not to limit authentication to being that on the face of the document but to extend it to viva voce evidence of authentication as was done in this matter. The evidence on record satisfies this requirement not only in relation to the copy of the manifest but also to the ticket coupons. This

requirement even though satisfied also in relation to the baggage tags was not necessary as the evidence shows that these tags are prepared as three originals, one being placed on the suitcase, one being attached to the ticket voucher pulled by airline employee and the third being affixed to the passenger's ticket voucher retained by him. This ground of appeal accordingly must fail. I would venture to say here though, that even if it can be successfully argued that the flight manifest was a public document or a document of a public nature as contemplated by S.22 of the **Evidence Act**, the trial Judge would still have been correct in admitting a copy of it under the English Statute, it being a document that also satisfied the requirements of s.24 of the **English Criminal Justice Act**.

(2) Burden of Proof

The appellant's second ground of appeal was:

"That the Learned Trial Judge's directions (general and/or specific) on the "Burden of Proof" were erroneous. In consequence thereof, the said directions confused the Jury in returning a guilty verdict, whereby the appellant suffered a grave and serious miscarriage of Justice."

Count one of the Indictment charged the appellant with the offence of Drug Trafficking contrary to **S.5(1)(a) of the Drug Act**, the particulars being that he unlawfully imported cocaine into the Territory. On count two he is indicted for the offence of Possession of the Cocaine with Intent to Supply it to another in contravention of **S.6(1) and 7(3) of the Act**, the particulars being that he unlawfully possessed the cocaine with intent to supply it to another. Count three indicted him for simply having the cocaine unlawfully in his possession, contrary to **S.7(1) and 7(2) of the Act**. Counsel for the appellant challenges the trial Judge's directions to the Jury on the burden of proof with respect to Counts 1 and 2 of the Indictment and contends that the directions given in relation to Count 1 were totally irrelevant and in relation to Count 2 completely wrong.

In order to prove the offences of which the appellant was indicted, the burden rested solely on the prosecution to prove

beyond a reasonable doubt that cocaine was a controlled drug and that cocaine was found in the possession of the appellant, the element of possession thereby necessitating proof by the prosecution of knowledge in the appellant that he had control of the "thing" in question, as decided by the House of Lords in **Warner v Metropolitan Police Commissioner (1968) 52 Cr. App. R.373** and in relation to Count 1, the further proof that it was imported into the Territory by the appellant. Having discharged that burden, and having proved the cocaine to be some ten kilograms, then with respect to the Second Count, the burden shifted to the appellant to prove on a balance of probabilities that it was not in his possession for the purpose of supplying it to another. This onus is placed on the appellant by the provisions of **S.7(4)** of the **Drugs Act** which provides *inter alia* that a person found in possession of more than five grammes of cocaine shall be deemed to be in possession of such cocaine for the purpose of supplying to another in contravention of **S.6(1)** unless the contrary is proved, the burden of proof being on the accused. **S.31(2)** of the **Drugs Act** referred to by learned Counsel for the appellant, and which would be referable to Counts 2 and 3 does not in any way lessen the onus placed on the prosecution alluded to above. It merely provides a defence that an accused can prove in order to negative the *prima facie* case of the prosecution. **S.31(2)** states:

"Subject to subsection (3) in any proceedings for an offence to which this section applies it shall be a defence for the person charged to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."

In his Summation to the Jury, the learned trial Judge having given proper general directions on the burden of proof, proceeded to deal with the issue as it applied to each of the different offences. Counsel for the appellant challenged the directions in so far as they were given in relation to Counts 1 and 2. Referring to the Second Count, the trial Judge told the Jury that the Crown must prove possession and that in order to establish possession the prosecution must prove that the accused was

knowingly in control of the thing and that if he was unaware of what he had, there would be no possession. He then went on to relate these directions to the evidence and then elaborated on the elements of possession, knowledge and control with proper directions. The learned trial Judge referred the Jury to the provisions of s.7(4) of the Drugs Act and to the shifting of the burden of proof mentioned therein. Having done that, he told them *"if the Crown has established these matters which I have outlined to you then the burden shifts to the accused and he must then satisfy you that cocaine was in his possession without his knowledge or consent."* I find these directions in keeping with the provisions of SS.7(4) and 31 of the Drugs Act and are accordingly unimpeachable.

Referring to the First Count, the trial Judge having told the Jury that they must first find the substance to be cocaine, gave these directions to the Jury:

"The Crown must also satisfy you that the act of the accused was unlawful, that is, he had no lawful or legal right to bring cocaine into the territory, because there are persons who the law sometimes give a right to bring drugs in. You may have a drug business or you may run a drug store and you may have a licence to bring a certain type of drugs, so it must be shown that you weren't acting unlawfully, but once the Crown has established that you brought in the drugs then the burden shifts to the accused. Once the Crown has established that it is a controlled drug, that drug was brought into territory, because that is what the implication is about, and that it was brought in unlawfully, then the burden shifts to the accused. This is one of those unusual circumstances where the burden shifts to the accused. It is always the burden on the prosecution in most cases. It doesn't mean here, of course, that the prosecution doesn't have a burden. All I'm trying to explain to you is that the law says once the prosecution has established certain things, if the prosecution has established that it is a controlled drug that was imported, and if the prosecution established that it was imported, that is being brought inside the territory and that it was done unlawfully, then the law then say the burden now shifts on the accused to show that it was in his possession without this knowledge or consent. If he can show you that it was in his possession without his knowledge or consent, then he's not guilty, or he must show that he's a person authorised to have such a drug, that is, he's authorised to bring it in. But the burden on the accused is on the balance of probabilities, not the same as the burden on the Crown. The burden on the Crown is that the Crown must satisfy you so that you feel sure of the accused guilt. When any burden goes on the accused that burden is on a balance of probabilities. It is not as high a burden as that which is placed on the Crown. So that is what the Crown must prove."

Counsel for the appellant challenges that part of these directions where the trial Judge shifted the burden of proof on the appellant to prove "*possession without his knowledge or consent*" or that "*he's a person authorised to have such a drug, that he's authorised to bring it in*". Learned Counsel for the appellant contends that no such burden is placed on the appellant, **s.31 of the Drugs Act** having no application to **s.5 or S.16**.

I agree with learned Counsel for the appellant that the provisions of **s.31 of the Drugs Act** have no application to the charge in Count 1 of the Indictment. I also hold that no express statutory burden of proof is placed on a person charged with such an offence. I hold as a matter of law that it was a misdirection to direct the Jury that there was a burden on the appellant to prove on a balance of probabilities "*possession without his knowledge or consent*". The prosecution having *prima facie* placed possession of the cocaine in the appellant, the furthest the trial Judge's direction should have gone was to say that it was open for the appellant by way of defence to dispute the possession or to explain the innocence of his possession if he so wished, but not that there was a burden cast on him to do so. In **R v Warner (1969) 2 A.C. H.L. 256** Lord Wilberforce in dealing with question of possession has this to say at p.312:

"In all such cases, the starting point will be that the accused had physical control of something - a package, a bottle, a container - found to contain the substance. This is evidence - generally strong evidence - of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession. Of course it would not be right, or consistent with the terms of the Act, to say that the onus of showing innocent custody rests upon the accused. The prosecution must prove the offence, and establish its ingredients. But one starts from the point that the Act itself has exempted the great majority of cases of innocent possession, so that once the prosecution had proved the fact of physical control in circumstances in which this was required or held, this, in the absence of explanation, may be sufficient to enable a finding of possession to be made."

As regards the second limb of that direction "*or he must show that he's a person authorised to have such a drug, that he is*

authorised to bring it in", I agree that the **Drugs Act** does not expressly place such a burden on the appellant. However, I do not consider that statement of the trial Judge to be a misdirection.

S. 5 of the Drugs Act enacts:

"5. (1) Subject to subsection (2)-

- (a) the importation of a controlled drug; and
- (b) the exportation of a controlled drug, are hereby prohibited.

(2) Subsection (1) does not apply -

- (a) to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or as the case may be, paragraph (b) or subsection (1) by regulations under 9, or
- (b) to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Minister and in compliance with any conditions attached thereto.

(3)

And **S.9(1)** provides that:

The Minister may by regulations -

- (a) except from section 5(1)(a) or (b), 6(1)(a) or
- (b) or 7(1) such controlled drugs as may be specified in the regulations; and....."

It is our opinion that subsection (2) of S.5 and S.9(1) have the effect of provisos and create exceptions, thereby introducing averments of a negative nature with respect to offences contemplated under S.5(1)(a) of the said Act. In **R. v Errington Edwards (1974) 87 Cr. App. p.213, Lawton L.J.** in the Court of Appeal of England, in dealing with the proposition that "where one of the elements of a criminal charge consists of an averment of a negative nature, and where the averment relates to a fact which is peculiarly within the knowledge of the defendant, then the burden of disproving the averment falls upon the defendant", said at p.221:

"In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of

pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception. In our judgment its application does not depend upon either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great Treatise on Evidence this concept of peculiar knowledge furnished no working rule (1905) Ed. Vol.4, p.3525). If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the Courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them. Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus; it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden."

We therefore hold that subsection 2 of S.5, and S.9(1) of the Drugs Act, by implication placed a legal or persuasive burden on the appellant to prove, if indeed such were the situation, that he fell within the exceptions contemplated by these provisions of the law. This Court cannot therefore fault this direction of the trial judge.

Counsel for the appellant further submitted that the misdirections "he alluded to in his arguments, confused the Jury in their deliberation on the matter as a whole." We have found only one misdirection. Having regard to the manner in which the summing up of the learned trial Judge was constructed, the fact that he painstakingly dealt with the Burden of Proof in so far as it related to each count separately and the clarity with which he dealt with the issue, we cannot accept the submission that the Jury was confused or could have been confused, thereby affecting their verdict on the Second Count

(3) The no-case submission

The final ground argued by Counsel for the appellant was that-

"The Learned Trial Judge wrongfully refused Defence Counsel's application to make a 'No-Case' submission in the absence of the Jury: This error was compounded when the Learned Judge commented - 'This is a matter of Law, it has nothing to do with the evidence - strictly law.'."

The learned trial Judge was obviously wrong here and Counsel for the Respondent quite properly conceded this ground.

In *R v Smith* (1986) 85 Cr. App. R.196 (at 200) *Watkin L.J.* said:

"Submissions (of no case to answer) are made in the absence of the jury. There is very good reason for that as all who take part in trials know. The question as to whether or not there is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because they think the judge's view is a sufficient indication that the evidence is strong enough for that purpose."

In our judgment however, having regard to the obvious strength of the circumstantial evidence led by the prosecution, the submissions of no case to answer could not have properly succeeded. We therefore find no adverse effect on the convictions from this error of the trial judge.

For all the above reasons we would dismiss this appeal in relation to the Second Count in the Indictment. Regarding the First count, whilst we find that the one misdirection by the trial Judge on the burden of proof can be fatal to the conviction, because of the strength of the evidence led by the prosecution, we feel certain that a reasonable Jury, properly directed would inevitably have convicted the appellant. We would therefore apply the proviso to S.37(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Ordinance 1968 as amended by Act No. 5 of 1973 and also dismiss the appeal with respect to the conviction on the First Count. No arguments were advanced to this Court by Counsel for the appellant on the question of sentence and I can find nothing in the record to justify interference with the sentence imposed.

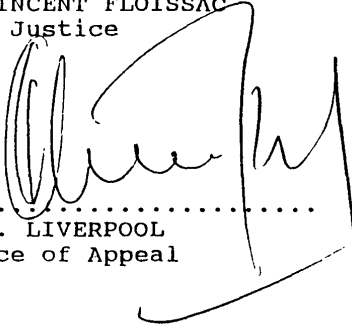
The appeal stands dismissed and the convictions and sentences
are affirmed.


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SATROHIAN SINGH
Justice of Appeal



I concur.

.....
SIR VINCENT FLOISSAC
Chief Justice



I concur.

.....
N.J.O. LIVERPOOL
Justice of Appeal