

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 - 6 of 1990

BETWEEN:

1. PABLO SIERRA
2. ENRIQUE BOURICAUDY
3. JUAN GOMEZ
4. JUAN QUINTANA
5. MIQUEL RODRIQUEZ
6. WILLIAM SANABRIA

Appellants

and

THE QUEEN

Respondents

Before: The Honourable Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice Byron J.A.
The Honourable Mr. Satrohan Singh, J.A. (Ag.)

Appearances: Dr. Lloyd Barnett for Appellants Pablo Sierra,
Enrique Bouricaudy and Juan Gomez
Mr. Kenneth Foster for Appellants Juan Quintana,
Miquel Rodriguez and William Sanabria
Mrs. Robinson with Mr. L. Khan for the Crown

1992: January 14, 15, 16, 17;
June 22.

JUDGMENT

BYRON, J.A.

This is an appeal against convictions made on 4th December, 1990 for conspiracy to possess a controlled drug with intent to supply and sentences imposed of 15 years on the No. 2 appellant and 12 years on the other appellants.

At the trial the Judge had overruled submissions that the Court had no jurisdiction to entertain the case. At the hearing of the appeal Counsel for the appellants specifically abandoned the allegation that the Court had no jurisdiction. The appellants had elected to lead no evidence and to make no statement. The prosecution's case briefly put was that the appellants were caught red-handed waiting in two boats in the British Virgin Islands off

Virgin Gorda pursuant to an agreement to collect a consignment of 1000 kilos of cocaine to be dropped from an aircraft that flew it from Colombia and then ship it to Puerto Rico for distribution there and in the USA. The evidence revealed that on 4th February, 1990 Commander Davis, a U.S. Coast Guard Pilot, responded to a call from Miami Radar made about 4.20 a.m. and took off in a Falcon jet to locate, track and identify a target aircraft. He intercepted the aircraft approximately 30 miles South of Puerto Rico at 12,500 feet and tracked it to Virgin Gorda where it approached the 2 boats in the water and descended to about 500 feet. When the boats were slightly in front of or beneath the aircraft it turned sharply right and gained altitude. The boats accelerated and separated. He then closed to within 50 feet, took photographs and followed the aircraft for about 160 miles on a heading that would take it to the Guagira Peninsula on the North Coast of Colombia.

Other U.S. aircraft had joined in the mission. A Piper Cheyenne flown by pilot Mark Harisson and co-pilot Robert Makowski linked up with the Falcon jet and was just behind it when the target aircraft turned, gained altitude and flew away. It stayed in the area and kept the two boats and the appellants, under observation until a U.S. customs helicopter with officers Weaver and Kelly came on the scene and took over the observation.

By 10.00 a.m. the British Virgin Islands police assisted by U.S. customs officers had the two boats and the six appellants in custody and the investigations which led to these proceedings began.

The men were interviewed and they said they were fishing. Statements in the form of questions and answers were recorded, and two of them were admitted in evidence as part of the prosecution's case.

Two witnesses. Edwin Cataquet and Justino Colon who by their

own admissions were accomplices to the operation gave direct evidence of an agreement, made in Puerto Rico where they all lived, to which all 6 appellants were parties to import 1000 kilos of cocaine from Colombia, which was to be dropped from an aircraft off Virgin Gorda, picked up by boats and carried back to Puerto Rico for distribution there and in the U.S. by the said Cataquet and Justino Colon for an estimated value in excess of US\$28,000,000.00. They said that they too were parties to the agreement. They gave details of meetings with all accused, radio calls to Colombia, and ancillary information such as the ownership and alteration of the boats, radio communications that took place between early November 1989 and 5th February 1990.

Their evidence also included a description of their role on the 3rd and 4th of February 1990, manning radio equipment to maintain contact with the boats as well as with Colombia and direct evidence of radio conversations they held. These conversations included a message from the boats that the aircraft from Colombia was being tailed with a request to pass on the warning, and another message shortly after, that the plane had veered off. It was part of the prosecution's case that when the boats were picked up the equipment on board included a cellular telephone with sufficient range to reach Puerto Rico and a locator device that could pick up signals from a low powered transmitter in packages on the water.

The issues which were raised in this appeal could be summarised as follows:

- (1) (a) That Justino Colon's deposition should not have been admitted in evidence and read;
(b) That the Judge's directions to the jury as to how to deal with that evidence were inadequate.
- (2) That the judge made serious errors of law in his directions as to corroboration.

Justice Singh will deal with these two issues in his judgment which I have read and agreed with the conclusions he has drawn.

(3) That the Judge failed to warn the jury to disregard statements which were prejudicial to the accused.

(4) The Judge allowed evidence to be elicited by leading questions, and never warned the jury that such evidence has limited weight and little value.

(5) That the Judge was guilty of usurping the jury's function and displaying a lack of neutrality by leaning too heavily in favour of the prosecution and failing to put the defence to the jury.

Failure to warn against prejudicial statements

Counsel raised two main issues under this head during his argument. The first arose in these circumstances:

During the evidence of the witness Cataquet he explained that he and Justino took the wives and girlfriends of No. 2 and No. 6 accused to the office of one Oracio Sardino after the arrest of the appellants. Prosecuting counsel then asked what did Sardino do? Defence Counsel objected to the question on the ground that the prejudicial value of the evidence about to be led would outweigh its probative value. Prosecuting Counsel argued that it was probative because Sardino was described as the lord of the organisation and evidence of what he did with respect to the dependents of the accused shortly after their arrest would be strong evidence of the relationship between them and the alleged Boss. The Judge upheld the objection of Counsel and refused to allow the question to be answered.

In his summing up the Judge said at p. 207, line 30:

"And then certain questions were asked of him as to whether he had seen the wives or girlfriends of any of the accused and he said he had seen them and they were Mike and Gato's

wife or girlfriend and how he had taken them to Oracio Sardino. Then he was asked by the Court: "Why did you take the two ladies to him"? And he said he did so as a result of a telephone message, and the matter was not pursued."

Counsel for the appellant contends that the jury having heard Counsel discuss this point damage was done to the accused and the Judge should either have discharged the jury or given them a strong warning to disregard what was said.

Counsel for the prosecution pointed out that no information was disclosed that was not already on the record as earlier in his evidence Cataquet had said:

"They were working on the boat on the land. I was told that the land belonged to Oracio Sardino. I was told by Chino. I know Oracio Sardino, Chino told me that Oracio Sardino was the Lord of the Organisation, the boss man."

In my view, the statements made by Counsel in support of the submissions made to the Judge were not prejudicial to the accused because the evidence on which they were based was already before the jury. There was no indication that anything said by Counsel was not already before the jury as sworn testimony. The ruling of the judge which was made in the presence of the jury was a clear indication that in his opinion what Sardino did was not a relevant matter and in fact no evidence was lead on the subject. The comment he made in his summing up that the point was not pursued was in my view sufficient to clinch the effect of his ruling the evidence inadmissible.

The second issue related to contents of the statements of the accused which were admitted in evidence as part of the prosecution's case. The statements had been recorded in the form of question and answer and the interviewing officer put certain matters to the appellants and recorded both question and answer. The particular matters about which counsel complained can be briefly described.

The statement made by Mike Rodriguez appellant No. 5 included this extract:

Q: "Let me tell you that the aircraft who flew over you was a target aircraft and that it had been followed all the way from South America, I believe to deliver a consignment of drugs. Why do you think it circled and went down over your

A: "I never saw that plane."

The statement made by Juan Quintana contained these extracts:

Q: "The surveillance aircraft observed when your two boats manoeuvred in the water as if expecting to receive the shipment from the aircraft giving the impression that you were waiting."

A: " The only aircraft I saw was the one with the blue lines."

and

"I think that you came here from Puerto Rico to pick up drugs from Columbia. That is why you didn't clear customs and why you circled in the water, have a radio transmitter and false compartments. And to that he made no response."

Counsel for the appellant submitted that the insinuations of the interviewing officer were unsupported by the evidence and that the Judge should have told the jury that they did not constitute evidence and should be excluded from their consideration.

In the first place it was not accurate to say that the questions put were unsupported by the evidence.

At the time these interviews were taking place the reason for the detention of the appellants was the fact that the surveillance aircraft followed the target aircraft to Virgin Gorda to an apparent rendezvous with the appellants in the two boats. The whole arrest was based on the presence of the appellants in the boats, equipped as they were, and the conclusions which the investigating officers drew from the observations of the surveillance aircraft. The questions put to the appellants were the crux of the case against them at that time, and it was perfectly proper to give the appellants an opportunity to answer the accusation.

At the trial, before these statements were put in evidence direct evidence had been given by Commander Davis and Robert Makowski as to the behaviour of the target aircraft and the boats in which the appellants were. There was also direct evidence that the appellants had not cleared customs, that there was transmitting equipment and secret compartments on the boats. The questions asked, reflected no more than the case of the prosecution, and all the information put was adduced in evidence prior to the admission of the statements.

In addition the prosecution led the evidence of the accomplices who gave direct evidence of the agreement by which a consignment of cocaine was to be flown from Colombia to Virgin Gorda and dropped for the appellants to pick up in the boats. The questions put merely represented the case against the accused. In my view there was no prejudice to the appellants by the admission of their statements in that form. I reject this ground of appeal.

Leading Questions

The ground of appeal which challenged the admission of evidence from leading questions arose in this way:

Cataquet had given evidence of various discussions he had with the six accused between the middle of November 1990 and the 3rd of November 1991. He gave the details of what was said and the prosecution were relying on his evidence to prove the exact nature of the agreement that the accused had made in order to establish the conspiracy. When the prosecuting counsel was winding up his testimony a series of questions were put to him, in this form:

Q: "Did No. 2 accused speak to you about his part in picking up the cocaine?"

A: " Yes."

Q: "What did he say his function was?"

A: "To collect it."

By the Court:

Q: "Where did he indicate he was to collect it?"

A: "In the area of Virgin Gorda."

Counsel submitted that in the context of this case the Judge should have prevented the questions from being put in that form which was manifestly unfair and that the Judge should have warned the jury that evidence elicited in that manner has little weight and value.

The weakness of this criticism is that the witness had given that evidence several times before in his testimony. He gave evidence how he and Justino were recruited in the middle of November 1989. He said:

"At that meeting Chino No. 1 spoke. He said that it was necessary to hire some people to work. To collect a cargo of cocaine from the sea. He spoke to Justino telling him that he

vicinity of Virgin Gorda. Chino No.1 told me that he wanted me to sell it, i.e. the cocaine. I was to sell it in Puerto Rico and the United States. The cocaine was to go from Virgin Gorda to Puerto Rico in a boat. The amount of the cocaine was 1,000 Kilo. This was to be one cargo. Chino and the other accused told me so, they told me so at a later meeting."

He gave evidence of meetings and discussions surrounding trips that were aborted because of bad weather on 16-17 December 1989, 14th January 1990, 28th January 1990, and also of meetings on 3rd February 1990 the date of the trip which led to the arrests. In this case the leading question, which I agree ought not to have been allowed did not elicit any information. The information was already on the record and in my view there was no prejudice to the accused.

Usurpation - Lack of neutrality

Counsel submitted that the judge in expressing opinions on the evidence usurped the functions of the jury and seemed to order them to make particular findings on particular issues and that he leaned heavily in favour of the prosecution and did not put the case for the defence.

Counsel for the appellants pointed out certain particular passages in the summing up to support these submissions but in my view none of them demonstrated a usurpation of the functions of the jury nor a lack of neutrality or impartiality by the Judge.

(1) Counsel alleged the Judge withdrew the question from jury as to whether Justino sent a radio message to the aircraft to say that it was being tailed.

The Judge said.

"You will have to ask yourself whether in fact he sent the message. He does not say because no question was put to him apparently on that aspect, whether he did send the message or not. So the evidence on the deposition is blank so far as that issue is concerned."

The prosecution had asked that the inference be drawn that Justino had sent a radio message to the effect that it was being tailed from the evidence of Justino that he received messages (i) that the aircraft was tailed and to send a warning and (ii) that the aircraft veered off, around the same time that Commander Davis

did was point out to the jury that there was no direct evidence on this issue. Counsel's allegation was quite unjustified.

(ii) Counsel criticised the Judge for telling the jury:

"And all the witnesses who have given evidence on behalf of the prosecution have described this situation as a very unusual one in a boat of this nature. So there again you will have to ask yourselves why was this console fitted up that way with hydraulics to be lifted up - was it for the purpose of having this secret compartment to secrete contraband, as this case cocaine? It is a matter for you to determine that."

His criticism was that it amounted to a direction that the boat was fitted for the purpose of secreting cocaine.

I do not think that this passage contains any such direction. The prosecution adduced evidence from two witnesses that the boat was altered for the purpose of secreting the cocaine. The boats were exhibited and the jury saw the console. The appellants gave no evidence to explain the situation. In the statement Quintana had made to the police he denied knowledge of the existence of the console or secret compartment. The judge's comments were perfectly reasonable in the circumstances.

(iii) When the Judge reviewed a point made in the cross-examination of Ewan Stewart, comptroller of customs, that a company in Tortola rents cellular telephone, he commented that:-

"The evidence is that a cellular telephone was taken on this boat from Puerto Rico. That is the evidence, you have to determine whether you accept it or not."

Nothing said by the Judge justifies the criticism that he made a sarcastic innuendo that it was improper for the appellants to be in possession of a cellular telephone from Puerto Rico but not from Tortola.

(iv) In his statement to the police the appellant, Mike Rodriguez, said that he only saw the customs aircraft and denied seeing the target aircraft. The Judge commented:

"Now this accused says that the only aircraft he saw was the Customs Aircraft. Is he

speaking the truth or not? Is he conveniently ignoring the presence of what is described as a target aircraft or not? It's a matter for you, but you have to look at the whole picture of the evidence and look at its totality and then you come to your conclusion. If as the prosecution say, all three aircrafts were there, how come he only saw the Customs Aircraft, or the Coast Guard Aircraft as he describes it?"

I do not agree that this is a usurpation of the jury's function or an improper or one-sided comment. I think that the Judge put the issue the jury had to consider on that statement quite succinctly and fairly.

(v) When dealing with the locator device the judge said:

"And he said, for example, if a man was coming from Colombia to drop the drugs when it fell in the sea and there was some instrument put on the container with the drugs when it fell in the water, that instrument would be able to trace where it was, so it is a matter for you."

This was criticised as being a hypothetical and prejudicial translation of what the witness Richard Warner, Electronic Engineer had said:

"In layman terms given the right environment this device in my opinion would be used to locate such low powered transmitters as radio bugs, short range tracking devices such as placing a low powered transmitter in a package or similar article this device would locate it.....if such a transmitter was placed on an object in the water."

In my view the Judge's comment was a fair representation of the idea the witness expressed.

(vi) In commenting on the testimony of the accomplices Cataquet and Justino Colon, the judge said:

"Do you believe that these two witnesses fabricated all of that and made up the story and just picked it out of thin air or did it actually take place, and they are now reporting what eventually had been arranged. It's a matter for you. These are all issues of fact which you have to determine. If they made up all of this about the communication equipment and the various conversations to Colombia and all of that then they would be extremely clever indeed, but it's a matter for you. You have to determine the facts, but in looking at these matters you look at them realistically and you assess them."

This passage does not bear out Counsel's criticism that the Judge left the jury with no alternative but to believe

of those witnesses. There was no alternative story for the judge to put to the jury because no evidence was adduced by the defence. The judge quite properly focused the attention of the jury on the issue of the credibility of the witnesses.

That the Judge failed to put the defence.

At the trial the accused did not make any statement nor adduce any evidence. The only evidence before the Court was that led by the prosecution. It emerged from the statements taken from Rodriguez and Quintana and also from suggestions put in cross-examination that the accused were denying that their presence in the waters off Virgin Gorda was related to the alleged conspiracy. They were on a fishing expedition. The Judge pointed this out to the jury several times and he also explained that they were not to draw any adverse conclusions from the fact that the accused elected to say nothing in their defence. Some examples of how the Judge put the defence:

"The case for the defence in brief is that there was no such agreement, that their presence in the British Virgin Islands was a purely innocent one, for the purpose of fishing. Further that, even if there were such an agreement, which is denied, they have committed no offence against the B.V.I. law, because any such agreement would have been entered into in Puerto Rico. That in brief is what the defence is saying."

The judge dealt extensively with the cross examination of the prosecution witnesses who found and examined the boat and which elicited information as to the existence of some fishing equipment and a fish found on the boats. With regard to this cross-examination the Judge said:

"He was asked all these questions I suppose to show or to try and indicate that the purpose for which the boats were out there was for fishing, but you will have to determine that. One can have fishing equipment on board a boat and yet go out to do something else as well as one can have fishing equipment purely for the purpose of fishing. You have to look at the whole complexity of the situation, look at all the surrounding circumstances of the evidence and then come to your determination. Was the fishing equipment purely a cover for the carrying out of the purpose, which is to collect drugs or was there a genuine purpose of fishing, that is a matter for you. You will have to determine that."

I do not agree that Judge usurped the jury's function or was unduly favourable to the prosecution. The summing up has to be

read as a whole. The defence led no evidence. The only indication of their case came from the statements put in as part of the prosecutions case, and the inferences to be drawn from questions put in cross-examination.

I thought that the judge put all of these fairly and squarely to the jury and identified in clear terms all the areas of controversy which appeared to arise and invited the jury to consider and determine what is the truth. I reject the contention that the Judge either usurped the function of the jury or betrayed a lack of neutrality in the way he marshalled the evidence and directed the jury.

I am satisfied that these grounds should be rejected and that the appeal should be dismissed.

SINGH, J.A. (Ag.)

The appellants herein were convicted at the Criminal Assizes in Tortola on December 4, 1990 of the offence of Conspiracy to possess a Controlled Drug with intent to supply. Enrique Bouricaudy was sentenced to imprisonment for 15 years with hard labour and the other appellants to twelve years imprisonment with hard labour and the other appellants to twelve years imprisonment with hard labour. Two boats, a cellular telephone, a locator device and two thousand dollars were ordered by the trial judge to be forfeited to the Government of the British Virgin Islands. These appeals arise out of the aforementioned convictions and sentences.

The case for the Crown was that all six appellants between November 1, 1989 and February 5, 1990, entered into an agreement in Puerto Rico whereby they would transport cocaine by air from Colombia, for the purpose of supplying the cocaine market in Puerto Rico and the U.S.A. The arrangement was to airlift Cocaine from Colombia, drop the cocaine from the Aircraft into the sea by Virgin Gorda Tortola where it was to be picked up by two waiting motor boats specially altered to accommodate the cocaine. Those boats would then take the cocaine to Puerto Rico where they would be sold by two accomplices to the crime Edwin Cataquet and Justino Rivera Colon.

In pursuance of this agreement the six appellants came to the British Virgin Islands on February 3, 1990 and were in two boats on February 4, 1990. A plane allegedly bringing the cocaine was sighted in the Air by Drug Enforcement Agents from the U.S. and followed by these agents in the Air to a point above the sea where

waters of the British Virgin Islands. The Crown's case was that the appellants discovered that the plane was being followed. They telephoned their accomplices in Puerto Rico to warn the suspect plane. As a result the plan diverted without dropping the cocaine and the drop was aborted. However, American Drug Enforcement Agents and British Virgin Islands Police patrolling the territorial waters arrested the six appellants. The Crown's case is that upon turning away the suspect plane then headed in the direction of Colombia.

The appellants denied any involvement in the alleged conspiracy and explained their presence in the BVI territorial waters as an innocent fishing expedition.

The Crown's case rested on evidence from the U.S. Drug Enforcement officers, local Customs and police officers, accomplices Edwin Cataquet and the deposition of another accomplice Justino Colon. These two accomplices gave evidence of the agreement to commit the unlawful act and the other witnesses spoke of the movement of suspect aircraft in the operations and of the presence of the six appellants in their two boats in the area.

At the trial before Williams J. an accomplice to the crimes, Justino Colon, was not available to testify and his deposition at the Preliminary Inquiry was admitted in evidence by the learned trial judge. The first ground of appeal argued by Dr. Barnett was that this deposition was wrongly admitted and read whereby the appellant suffered a serious miscarriage of justice.

Dr. Barnett submitted that relevant factors were not considered by the trial judge nor did he apply the correct principles of law. Mrs. Robinson for the Crown disagreed and argued that the deposition was properly admitted.

S.185 of the Magistrate's Code of Procedure Cap. 45 prescribes the statutory requirements for the admission of the deposition of a witness taken at a preliminary enquiry before a Magistrate:

"If upon the trial of the person accused it be proved on the oath of any reliable witness that any person whose deposition has been taken is dead, or so ill as to be unable to travel, or is absent from the Colony, and if it be also proved that such deposition was taken in the presence of the accused and that he or his counsel or solicitor had a full opportunity of cross-examining the witness then if the deposition purports to have been taken it shall be read as evidence in the prosecution without further proof thereof unless it be proved that such deposition was not in fact signed by the Magistrate purporting to have signed the same."

Notwithstanding compliance with the statutory requirements,

the trial judge had a Common Law judicial discretion to exclude such a deposition.

Before admitting the depositions, the trial judge heard evidence which revealed that this witness testified before the Magistrate at the Preliminary Inquiry and that he was cross-examined by Counsel for the appellants. The judge also heard evidence that the witness left Tortola on June 8, 1990 and that efforts were made to locate him but without success. He then ruled that he was satisfied that the requirements of S.185 were satisfied. The learned trial judge then proceeded to the exercise of his discretion whether or not to exclude the deposition. He recognised that the issue should be dealt with in a way which was fair and without prejudice to the appellants and that he should take into account the overall interests of justice. He did not consider that the accused would be prejudiced if the depositions were admitted and read provided a proper warning was given the jury with respect to the dangers involved and how they should approach and treat the evidence. He then exercised his discretion and admitted the depositions in evidence.

Dr. Barnett submitted that on the totality of the evidence on this issue the absence of Justino Colon was not satisfactorily explained. I do not agree. The evidence shows he is a foreigner to the BVI and that unsuccessful efforts were made to locate him. I fail to see in those circumstances what is the explanation that Dr. Barnett is looking for.

Dr. Barnett also submitted that it was reasonable to conclude that the witness was keeping away from the trial and that this circumstance intensified the suspect nature of his testimony. The record shows no evidence upon which such a conclusion could be reached. I would therefore agree with the finding of the trial judge that the provisions of S.185 have been complied with.

I turn now to the exercise by the judge of his Common Law discretion. I agree with the submission of Dr. Barnett that where evidence of a witness is of critical importance and his credibility is vital and clearly open to doubt that his deposition should not be admitted. I would also accept the submission of Dr. Barnett that in applying his mind to the exercise of this discretion the essential duty of the trial judge is to examine the quality of the evidence in question.

Learned Queen's Counsel referred to several authorities on the issue:

In *Hamilton v R* (1963) 5 WIR 361 it was held by the Jamaica Court of Appeal that where identification of the person charged was in issue and there was no positive identification it was unsafe to allow a conviction to stand based only on the deposition of an absent witness who had not known the person before and who had not attend an ID parade. In *R v Donald White* (1975) 24 WIR 305 the Jamaica Court of Appeal held that since B's deposition was the only evidence which sought to link the applicant with the crime, the trial judge ought not to have allowed the deposition to be put before the jury.

In *Scott and Barnes v Regina* (1989) CAR 153 the Privy Council recognised the Common Law power of a Judge to refuse to allow the prosecution to adduce depositions in evidence even though the statutory requirements have been met. But their Lordships opined that such a power should be exercised with great restraint. At p.161 Lord Griffiths said:

" In light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been

one witness had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will in addition be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury. Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely upon the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury; then if there is no corroborative evidence the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict upon it. But this is an extreme case and it is to be hoped that prosecutions will not generally be pursued upon such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."

In my opinion, Scott's case can be properly described as the *locus classicus* on the issue of the exercise by the judge of his Common Law discretion and I adopt it as the law on the exercise of such a discretion.

The deposition in issue is the deposition of an accomplice to the Conspiracy. His deposition is not the only evidence speaking of the Conspiracy. It is evidence parallel with the evidence of another accomplice who gave *viva voce* testimony and whose testimony

important but not vital to the Crown's case. It is evidence of reasonable quality. I find that the contradictions alluded to by Dr. Barnett between the evidence of Cataquet and the depositions of Colon do not exist.

On the authority of Scott's case the law seems clear that the Common Law discretion in the judge is a discretion to exclude and it is a discretion that should be exercised with great restraint and this power to exclude can be exercised even though the provisions of S185 have been complied with.

I am satisfied having read the judge's reasons for the exercise of his discretion against the exclusion of the depositions that he took all the precautions referred to Scott's case before he admitted the depositions. I can therefore find no ground upon which it would have been right to exercise the discretion to exclude the admission of those depositions in evidence. I also find the appropriate warnings given to the jury by the judge as to the treatment of the depositions of Colon to be amply adequate to ensure fairness to the appellants.

In *Henriques and Carr v The Queen* PC No.61 of 1988 at p.6 the Lords of the Privy Council had this to say on the issue of the warning:

" When a judge allows deposition evidence to be admitted he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they take this into consideration when evaluating the reliability of his evidence. Furthermore as Lord Griffiths said in *Scott v The Queen* (1989) A.C. 1242 at page 1259 'in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination'."

As mentioned earlier I do not see any conflict with the depositions of Colon and any other evidence in the case.

The learned trial judge gave these warnings to the jury:-

" Now I believe two depositions were read to you in this case, that of Inspector Glasgow and that of Justine Colon

And I should tell you how you treat that. There was an objection to Colon's deposition being read to you and I overruled the objection. If the Judge in any particular case exercises his discretion and admit the deposition, then it may well be that an obligation is cast upon the trial judge in his summing-up to draw to the attention of the jury that evidence has come to them in a form where they have not had an opportunity of seeing the witness or seeing the witness give his evidence, hearing what he has to say, of observing his demeanour in the witness box and have themselves exercise the right if they choose to ask the witness questions and further, hearing the witness cross-examined by the accused or his counsel if he desires. In other words, the jury should be directed to view such evidence with caution, because these were opportunities not open to the defence. It is necessary that you bear all this aspect in mind when you come to consider the evidence that has been put before you by the reading of the depositions.

Mr. Foreman and Members of the Jury when the adjournment was taken I was at the point where I was going to deal with the deposition of Justino Rivera Colon. I have told you certain things about his evidence earlier and I will just remind you of some of it. There are two important factors. One is that the deposition is being read and therefore you have not had the opportunity of seeing him give evidence from the witness box and to see his demeanour and to see him being cross-examined and to ask him any questions you wished to. So you will have to bear all of this in mind when you come to consider the evidence in this deposition."

The second ground of appeal argued by Dr. Barnett has two limbs: Learned Counsel submitted that the learned trial judge in identifying evidence capable of amounting to corroboration of accomplices' testimony did two things wrong. Firstly, instead of directing the jury that such evidence was capable of amounting to corroboration he told them that such evidence was corroboration. Secondly, he identified evidence as being capable of being corroborative when such was not the case.

In dealing with this issue as with most issues where the summing up of a trial judge is being challenged, a Court of Appeal will have to look at the summing up as a whole.

As regards the first objection, the learned trial judge in commencing his directions to the jury on the issue of corroboration, accurately directed them on that issue and then used these words:

"Now there are some bits of evidence from which you can find evidence which is capable of amounting to corroboration of what Colon and Cataquet (the two accomplice witnesses) said..."

The judge then pointed out some ten bits of evidence in relation to each of these accomplices which he thought were corroborative of their testimony. In doing so, except for three occasions, he quite correctly directed the jury that those bits of evidence were capable of amounting to corroboration and that it was for the jury to say whether in fact that evidence was corroborative of the accomplices' testimony. As regards the three instances, he purported to usurp the functions of the jury when he told them that those bits of evidence were corroborative.

These three lapses of the trial judge are found to be sandwiched between his initial correct direction to the jury and several subsequent accurate directions, when he dealt specifically with the other bits of evidence and then at least on two other occasions when he repeated the proper direction, as he was concluding his directions on corroboration.

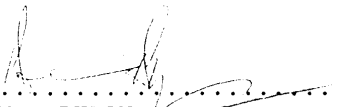
Looking at the summing up as a whole, I do not feel any injustice was done to the accused by these three "slips" made by the trial judge. Having seen the proper and careful directions given by the judge at the beginning of the summing up, and immediately prior and immediately after he dealt with the issue, I am of the view that the distinction between the two phrases "is corroboration" and "is capable of amounting to corroboration" would have been lost on the jury with the latter direction being firmly impressed on their minds having regard to the number of times it was repeated to them. I do not find merit on this limb of this ground of appeal.

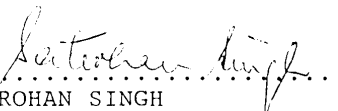
As regards the second limb of this ground of appeal, both Mrs. Robinson and Dr. Barnett agree that the trial judge made errors in telling the jury what evidence was capable of amounting to corroboration when such evidence was looked at in isolation. They also both agree however, that cumulatively, these bits of evidence were capable of amounting to corroboration. I also agree. I

further agree with Dr. Barnett that the trial judge did not use the cumulative approach and with Mrs. Robinson that there is other evidence which is capable of amounting to corroboration and which were not put to the jury by the judge.

Of these findings I cannot see that any injustice was done to the appellants as a result of this lapse of the trial judge.

With regard to the remaining submissions of counsel for the defence, I agree with Byron J.A's conclusion therein and would therefore dismiss the appeal.


.....
C.M.D. BYRON
Justice of Appeal


.....
SATROHAN SINGH
Justice of Appeal (Ag.)


.....
V.F. FLOISSAC
Chief Justice

I concur.