GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS: 25 and 26 OF 1996

BETWEEN**:**

MICHAEL COX
MICHAEL MITCHELL

Appellants

and

THE QUEEN

Respondent

Before: The Hon. Mr. Justice C.M. Dennis Byron — Chief Justice
The Hon. Mr. Justice Albert Redhead — Justice of Appeal
The Hon. Mr. Justice Albert Matthew — Justice of Appeal

Appearances: Mr. B. Radix for No:1 Appellant
Mr. A. Clouden for No: 2 Appellant
Mr. M. Holdip for the Respondent
Mr. T. St. Louis with him.

1997: JULY 7, 8, 9, 10;
September 15.

Criminal Law - Possession of a controlled drug & knowingly handling such with intent to supply - *Drug Abuse (Prevention & Control) Act* sections 6(2), 7(1), 38(1), 39, 42 - What constitutes Criminal 'attempt' - **R v. Eagleton** (1843-1860) All E.R. 363 referred to - The law on joint enterprise - Whether the burden of proof could be held to have shifted - Whether a strict liability offence had been created, given the wording of section 8 of the Constitution - **R v. Oakes** 20 D.L.R. (4th) 200; **R v. Appleby** (1971) 21 D.L.R. (3rd) 325 referred to - Alleged breaches of the *Judge's Rules* - Whether the appellant's statement was voluntary and therefore admissible, notwithstanding breaches of the Judge's Rules - **The State v. Colin Joseph de France** (1978) 26 WIR 179 considered - *The Wednesbury principle* - Whether the admission of the appellants' statement was unfair or prejudicial to a fair trial - Discrepancies between the out-of-court statements and the appellants' unsworn statements in court - Meaning of 'knowingly concerned' as contained in the statute - Whether the chain of custody or possession was sufficiently and clearly marked to permit the lawful admission of the controlled drug into evidence. Appeals dismissed.

J U D G M E N T

Redhead J

Both appellants were tried and convicted by a jury on 19th December, 1996 on a four count indictment in the October Assizes held in St. Georges, Grenada.

The first count of the indictment charged the number 1 appellant and one Clarke John who was acquitted with the offence of knowingly handled a controlled drug which was intended for supply to another, contrary to Section 7(1) of the Drug Abuse (Prevention and Control) Act 1972.

The second count charged the number two appellant alone with knowingly handled a controlled drug which was intended for supply to another, contrary to Section 7(1) of the Drug Abuse and (Prevention Control) Act 1972.

The third count charged the second named appellant with possession of controlled drug contrary to Section 6(2) of the Drug Abuse (Prevention and Control) Act, 1992.

The fourth count charged both appellants with attempt to export a controlled drug contrary to Section 38(1) of the Drug Abuse (Prevention and Control) Act, 1972.

The first named appellant was convicted on first and four counts of the indictment and was sentenced to 5 years and 7 years respectively to run concurrently.

The second named appellant was convicted on the second, third and fourth counts of the indictment and was sentenced to 5 years, 5 and 7 years respectively to run concurrently. The appellants appeal to this Court against their convictions.

The facts on which the Prosecution relied are as follows: Leroy Walker, a trucker for about nine (9) years, on 28th September, 1994, as a result of a telephone conversion with the second named appellant whom he had known for about seven years went to a house in Springs and collected five card board boxes. The card board boxes which were all taped and sealed were delivered to Walker by the first named appellant.

Walker testified before the jury:-

> "At the house in springs Hill, I met a couple of guys including accused Clark John and the Rastaman, accused Cox, I spoke to the accused John. I asked him if Zato lives there. I waited outside for about ten minutes and John returned and said to me, "he is coming." I waited for another 10 minutes, then Zato, the Rasta, accused Cox came and called me inside of the house. He said to me while I was outside, there are the boxes you have to collect. I saw a couple of boxes and I went away with five of them. . ."

The boxes were carried and loaded unto Walker's truck. Walker then asked the number one appellant if he had seen the number two appellant. The first-named appellant then said he would call the second named appellant. Walker further testified that the number one appellant told him:-

> "Senator [Michael Mitchell] said to meet him at L.I.A.T. baggage shed."

The second-named appellant then gave Walker $340.00 and told him "hand this to Senator," the second named appellant.

Walker drove the van to the L.I.A.T baggage shed on the carnage where he met The second-named appellant. The boxes were off loaded and weighed on the L.I.A.T scales then loaded back unto the van.

The second-named appellant then told Walker that they had to go to the agents. Walker drove the vehicle to the agents, Amerijet. On their way to the agents the second-named appellant asked Walker "if the guys" had given him any money. Walker answered in the affirmative and gave him the $340.00 which the first-named appellant had given him to give to him.

Walker testified that the second named appellant then said that :-

> "This money is not enough because the weight of the boxes are heavy."

From Customs, Walker then drove the second-named appellant and the boxes to the airport as directed by the second-named appellant, Walker having driven the van "through the big gate to the back," the boxes were then unloaded from the van, Walker then drove the van away leaving second named appellant at the airport.

Leroy Flavigny on 28th September, 1994 was Supervisor of Customs in charge at Point Salines International Airport. On that day he made a routine check at the back of the Customs area. he testified before the jury that he noticed workmen off loading fruits from trucks. The fruits were to be shipped on that day on the Amerijet to Miami, U.S.A.

He said he continued to the area of the weighing scale, which is used to weigh the boxes before they are placed on the pallets to be shipped out, continuing he said:-

> "As I arrived close to the scale, I noticed five carton boxes of fruits properly taped and labelled with the Amerijet shipping label on it. The boxes were addressed to Allen Import and Export. There were numbers on them which I do not recall, but they were marked ship to Miami. I decided to do a routine examination on those boxes. I proceeded to L.I.A.T. office at the airport in the check in area, where the agent of Amerijet usually did his customs documents. I spoke with him i.e. Mr. Cadet who handed me a copy of the shipping entry pertaining to five boxes. . . we [Flavingny and his officer] proceeded to the back of the Customs area where the boxes were and place one of the cartons on the conveyor belt, so that an examination could be done in the Customs department, together with my officers. I opened the carton and used a small knife to cut open the tape used to seal the carton. I opened up the box on top of it, on the inside, were green oranges which I removed and about 3/4 way the carton I noticed a package properly wrapped with brown masking tape. I used the same knife and make a slit in the said package. It contained dry planting material which resembled marijuana."

Flavingny said further on oath that he then made a telephone call to the police. Sgt. Bowen and other police officers arrived and they made a thorough check of that carton as well as the other four cartons. All the other boxes contained fruits at the top and

dry plant material which resembled marijuana. There were nineteen (19) packages in all weighing about 1501/4 lbs in the five boxes.

There was also a deposition of Steven Cadet who did not give evidence before the jury but whose deposition was taken before the magistrate was read to the jury. In his deposition, Cadet said that on the 27th September, 1994 the second named appellant called him on the telephone and told him that he wanted to ship five hundred pounds (500) of fruits and vegetables to Miami, and asked him [Cadet] for the rate. Cadet said that he told him that the rate was 30 cents U.S per pound.

Cadet in his deposition said that the following morning at 8:45 a.m. the number two appellant called him and told him that he had weighed the fruits using L.I.A.T scales and that the weight was 540 lbs. Cadet said that the second-named appellant arrived at his office about ten minutes after he had spoken to him. He said that on the second-named appellant's arrival he had begun processing the air way bill from information given to him by the second-named appellant over the telephone. The air way bill contained such information as name of person exporting the stuff and name of consignor.

Continuing, Cadet said on Oath :-

> "He signed the documents I was sitting right there looking. There was a specific area on the document designated for signature. He signed in that area. I signed the document also, after I signed I told him what the charges were. He paid me $340.00. . . There was a difference of $161.82. he agreed to pay this at the airport when I got there."

Documentary exhibits were shown to Cadet. He identified them as the documents which he had processed on the second-named appellant's instructions. He identified a signature on the documents and then said:-

> "I see where Senator signed, it looks like Gilbert."

Cadet said on Oath that he gave the second-named appellant five air way bill stickers and asked him to insert the information on the air way bill i.e. the number which coincides with the shipment.

Finally Cadet said:-

> " I went to the back of Customs at about 11:00 a.m. to 11:15 a.m. the Wednesday, September 28th, 1994. I went to the cargo area. I saw five boxes. I looked for the stickers which I had given to him, they were attached. I was able to determine that the stickers which were on the boxes related to the cargo, the subject matter of the airway bill which I had prepared because they carried the same number as the airway bill. No other cargo would carry that number."

The second named appellant gave a statement to the police. The statement was in the form of questions and answers. Basically what this appellant said was that on Wednesday 28th September, 1994 he was on the St. Georges pier when a gentleman approached him and requested that he performed Custom brokerage service for him and he, the appellant volunteered. He made up an Export shipping document bearing the name, Roger Fruit Enterprise, St. Andrews, Grenada.

The second named appellant further said that the gentleman gave him an invoice which contained all the information on it.

The second-named appellant said that he made out the shipping bills for mangoes, plums, avocado and golden apples. When this appellant was asked if he saw the boxes in which mangoes, avocado, plums and golden apples were, he said that he got a ride to the airport in a van and he saw the same boxes in that van but it was not the same gentleman he made out the shipping bill for who gave him the ride to the airport.

Finally the second-named appellant said that he was not sure that he would be able to identify the gentleman who requested his service to make up the shipping bill because the same day he came across a number of people requesting his services and that he was sure that he, the second named appellant had nothing to do with the boxes.

The first named appellant also gave a statement to the police in the form of a questions and answers. This appellant denied ever being in springs on 28th September, 1994. He denied ever delivering any of the boxes to Campbell. He denied seeing any van in Springs on 28th September, 1994. He denied telling Campbell that senator said to meet him at L.I.A.T. The first-named appellant also denied speaking to the second-named appellant on the telephone on 28th September, 1994. In fact he denied any knowledge of the boxes, of Campbell and of any dealings with any boxes.

I have outlined the facts of this matter in some detail having regard to the

submissions made by Learned Counsel for the appellants.

On behalf of the first and second named appellants, seven and twelve grounds of appeal were filed respectively. Some of the grounds filed on behalf of the second named appellant coincide with those filed on behalf of the first named appellant and arguments advanced on some of those grounds in favour of the first named appellant were adopted by Learned Counsel for the second named appellant.

The first ground of appeal filed and argued on behalf of the first named appellant is that the Learned Trial Judge wrongly allowed the count of attempting to export a controlled drug contrary to Section 38(1) to go to the jury at the close of the case for the Prosecution on a submission of no case to answer by the defence.

Learned Counsel for the first named appellant referred to a number of authorities including:-

R v GEDDES (1976) CRIMINAL LAW REPORTS 894

R v EAGLETON (1843-1860) ALL E.R. 363

R v GULLIFER (1990) 1 W.L.R. 1063

The locus clossicus on the subject of attempt is EAGLETON where at page 369 Parke B. said:-

> "The mere intention to commit a misdemeanor is not criminal, some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it but acts immediately connected with it are. . ."

And as Lord Diplock said in **D.P.P. v STONEHOUSE (1972) 2 ALL E.R. 909 at 917**

> "In other words the offender must have crossed the Rubicon and burnt his boats."

To put it simply, the accused, in my view, would have gone so far towards the commission of the full offence that there could be no turning back, that is, he would have gone on to commit the full offence but for the interruption . No further steps would have been necessary on the part of the accused for the commission of the crime.

Learned Counsel, Mr. Clouden argues that the only evidence against his client, if Walker's evidence is to believed, is that his client pointed out the five boxes to Walker. He contends that there is no evidence to show that his client knew what was in the boxes.

The evidence is that the first named appellant sent Walker to the second named appellant to the L.I.A.T baggage shed. According to Walker, the first-named appellant said

to him.

> "Senator said to meet him at L.I.A.T baggage shed."

Walker met the second named appellant at the L.I.A.T. shed, the boxes were weighed. Walker gave the second named appellant $340.00 given to him by the first-named appellant which he used to pay the freight for the boxes.

The sealed boxes as delivered by the first-named appellant to Walker ended up in the same manner at the Customs in the weighing area waiting to be placed on the Amerijet Aircraft.

There is no doubt, from the evidence that the second-named appellant had done everything which he could have done and which was necessary for the exportation of the boxes when they were intercepted by Leroy Flavingny in the weighing area of the Amerijet just before they were placed on the pallets to be shipped out.

In my view, there was ample evidence from which the jury could have found that both appellants were acting in consort that they were concerned in a joint enterprise to export a controlled drug to Miami.

> "Where two persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise..."
>
> **(R v ANDERSON & MORRIS (1966) 1Q.B. 110)**

The second named appellant having done everything which was necessary for the exportation of the drug. There was no further step which was necessary for him to have taken to export the drug. The acts of the second named appellant in that regard are the acts of the first named appellant.

The Learned Trial Judge rightly told the jury at page 42 of the record:-

> "In the case of Mitchell, if you find that he did all that he admittedly did, and you find further that the boxes which he delivered to Amerijet contained a controlled drug. . ."

And at page 43 he said:-

> ". . . if you find that there was a common design between these parties to export these packages then, the act of Cox is the act of Mitchell and the act of Mitchell is the act of Cox."

Mr. Radix, Learned Counsel for the second named appellant adopted the arguments and submissions made by Mr. Clouden in relation to this count on behalf of his client.

In my view, there is an abundance of evidence as outlined above from which the jury could have found, and must have found that both appellants were acting in consort to export a controlled drug and therefore were both guilty of the offence of attempt to export the drug.

The submission on the first ground therefore fails.

The second ground of appeal argued on behalf of the first named appellant was that the reverse onus clause as contained in Section 42 of the Drug Abuse (Prevention and Control) Act 7 of 1992 and in particular Section 42(1) (d) thereof is unconstitutional because it is inconsistent with the guarantee of the presumption of innocence in Section 8(2)(a) of the Constitution of Grenada and is not saved by virtue of Section 8(11)(a).

As I have stated above the first named appellant was charged and convicted under the following Sections of the Drug Abuse (Prevention and Control Act. 1972- Sections6(2) 7(1) and 38(1).

The second named appellant was charged and convicted under Sections 7(1) and 38(1) of the same Act.

Section 6(1) reads as follows:-

Subject to any regulations made under Section 12 it shall not be lawful for a person to have a controlled drug in his possession.

Section 6(2) Subject to Section 39, it is an offence for a person to have a controlled drug in his possession in contravention of Subsection(1)

Section 7(1) A person commits an offence if he knowingly handles a controlled drug which is intended whether by him or some other person for supply in contravention of Section 5(1).

Section 38(1) is in the following terms:-

> "Notwithstanding anything in any other law contained, a person who attempts to commit an offence under this Act . . . is guilty of an offence."

Section 39(1)

This Section applies to offences under any of the following provisions of this Act. That is to say Sections. . . 6(2) (etc.). . ."

(2) Subject to (Subsection 3) in any proceedings for an offence to which this Section applies it shall be a defence for the accused to prove that he neither knew of nor suspected, nor had reason to suspect the existence of some fact alleged by the Prosecution which is necessary for the Prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies, it is necessary, if the accused is to be convicted of the offence charged for the Prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the Prosecution alleged it to have been and it is proved that the substance or product in question was the controlled drug the accused-

(a) Shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected, nor had reason to suspect that the substance or product in question was the particular controlled drug alleged but-

(b) Shall be acquitted thereof:-

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product was a controlled drug or

(ii) if he proves that he believed that the substance or product in question to be a controlled drug, or a controlled drug of a description, given that if it had in fact been the controlled drug or a controlled drug of the description he would not have been committing any offence to which this section applies.

Section 42

So far as is material to this appeal states:-

"42(1) Without prejudice to any other provisions of this Act-"

(a) -

" (b) where it is proved that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such a person was in possession of such a drug."

(c) -

(d) "where it is proved that a person handled within the meaning of Section 7

anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such drug was contained in such thing."

The Grenada Constitution Section8(2) provides as follows:-

"Section 8(2) Every person who is charged with a criminal offence -

(a) Shall be presumed to be innocent until he is proved or pleaded guilty.

> "Section 8(11) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of-
> (a) Subsection 2(a) of this Section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."

Learned Counsel, Mr. Clouden argues on behalf of the first named appellant that a law such as Section 42(1) of the Drug Abuse (Prevention and Control) Act which places the burden on an accused person, of proving facts which the Prosecution ought to prove in order to secure a conviction, the presumption of innocence becomes redundant.

Under Section 42(II)(b) the Prosecution must first prove that the accused person had in his possession something containing a controlled drug. A rebuttable presumption which shifts or evidential burden that rests on the accused to show that he did not know that thing which he possessed contained a controlled drug.

Similarly under Section 42(I)(d) the Prosecution must first of all prove within the meaning of Section 7 that an accused person handled something in which a controlled drug was contained, having so proved then, an evidential burden shifts to the accused to disprove that he did not know what was in the thing was a controlled drug.

Mr. Clouden in support of his submission that Section 42 of the Act is unconstitutional being inconsistent with Section 8(2)(a) of the Constitution placed a lot of emphasis on:

REGINA v OAKES 20 D.L.R. (4th) 200

Oakes was charged with possession of a narcotic for the purpose of trafficking contrary to Section 4(2) of the Narcotic Control Act R.S.C. 1970. As required by Section 8 of that Act, the Trial Judge conducted the trial in two parts and found that the accused was in possession of the narcotic. Section 8 of the Act provides that where the accused is found in possession, he must establish that he did not have the narcotic for the purpose of trafficking.

At page 202 Dickson C.J. said:-

> "At a minimum, this test [the proportionality test] requires that Section 8 be internally rational, there must be a rational connection between the basic fact of possession and the presumed fact of possession with a purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics Section 8 cannot meet this test since possession of a small quantity of narcotics. In the result Section 8 is over inclusive and could lead to results in certain cases which would defy both rationality and fairness. Accordingly Section 8 of the narcotic Control Act is of no force and effect."

Section 11(d) of the Canadian Charter of Rights and Freedoms says:

> "Any person charged with an offence has the right.
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Section 2(f) The Canadian Bill of Rights which says in effect that every law of Canada shall unless it is expressly declared by an Act of Parliament shall operate as not to abrogate, abridge, or infringe or authorize the abrogation, abridgement or infringement of or constructed so as to deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law.

Notwithstanding the above guaranteed provisions, the Supreme Court of Canada held:-

R v APPLEBY (1971) 21 D.L.R. (3d) 325

> "That a reverse onus provision, which goes no further than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under Section 2(f). It would, of course, be clearly incompatible with Section 2(f) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no further than to require an accused to prove an essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. . ."

Mr. Clouden makes this rather interesting assertion in ground 2 when he argues that the reverse onus clause as contained in Section 42(1)(d) of the Drug Abuse and Control Act is unconstitutional because it is inconsistent with the guarantee of the presumption of innocence in Section 8(2)(a) of the Constitution and is not saved by virtue of Section 8 11(a).

Section 8 11(a) of the Grenada Constitution reads as follows:-

S 11 Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of:-

> "(a) Subsection 2(a) of this Section to the extent that the law in question imposes upon any person charged with a Criminal offence, the burden of proving particular facts."

The Constitution is the supreme law of the land, the whole Constitution. Mr. Clouden's assertion seems to relegate Section 8 11(a) to a lower status than that of 8(2)(a) when he says it is not saved by Section 8 11(a) of the Constitution. In my view, no provision of the Constitution has greater force, prominence or preeminence than another provision.

Section 8 11(a) gives Parliament the authority to legislate as it did under Section 42, to require an accused person to offer proof on a balance of probabilities of essential facts which are rationally open to the accused to prove or disprove as the case may be. This could not in my view, violate the presumption of innocence under Section 8(2)(a) of the Constitution.

There does not appear to be a similar provision in Canadian Charter or the Canadian Bill of Rights as that of Section 8 11(a) of the Grenada Constitution, yet Laskin C.J. in Appleby said "that a reverse onus provision which goes no further than to offer proof on a balance of probabilities does not necessarily violate the presumption of innocence under S.2(f). . ."

Although Appleby was distinguished in OAKES, it is my view, that OAKES must be looked at in relation to its peculiar facts which gave rise to the reasoning , that is, there could be no rational connection between possession of a small quantity of eight - one gram of cannabis resin in the form of has his oil and the inference of that possession for the purpose of trafficking. And therefore Section 8 of the Narcotic Act which provides that where the accused is found in possession of such a quantity - he must establish that he did not have the narcotic for the purpose of trafficking was over inclusive and could lead to results in certain cases which would defy both rationality and fairness. Section 8 was therefore null and void.

It is my view, that OAKES has very little or no application to the instant appeal. To begin with the drugs in question are 1501/4 lbs. of marijuana and therefore the reasoning in OAKES cannot be applied to the reasoning in this appeal. Most importantly Section 8 11(a) of the Constitution of Grenada, in my view, gives legislative approval to Section 42 of the Drug Abuse (Prevention and Control) Act. Such a statutory exception was recognised over 60 years ago in:-

WOOLMINGTON v DIRECTOR OF PUBLIC PROSECUTIONS (1935) A.C. 462 When Lord Vicount Sankey L.C. said at pages 481-2:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of Prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

Ground 2 of the Appeal is therefore dismissed.

The third Ground of the appeal argued on behalf of the first named appellant was that the trial judge was wrong on a question of Law when he admitted the police interview with the appellant notwithstanding, that the Learned Trial Judge had expunged or edited the interview thus excluding highly prejudicial parts. The interview was procured in contravention of the Judge's rules and in the circumstances designed to trap, cross-examine and get before the Court incriminating facts in the interview prejudicial to a fair trial of the appellant. The appellant thereby did not receive the substance of a fair trial.

Grounds 2 and 3 of the second named appellant, grounds of appeal raise the same issue.

The record shows that on the 13th October Sgt. Mason who was investigating the offences in connection with the appellants, met Michael The first-named appellant at the C.I.D. and told him that he, Mason, needed to question him in relation to five cardboard boxes found at Point Salines International Airport containing about 150 1/4 lbs. of dried plant material resembling marijuana. The first-named appellant was at the C.I.D. from about 2:00 p.m.

On a voir dire held to consider the admissibility of the statement given by both appellants, the Learned Trial Judge gave written reasons for his decision to admit the statements in evidence. The Judge found that there were breaches of the Judge's rules in respect of the interrogation of both appellants.

In reference to the interrogation of the first-named appellant, the Learned Trial Judge said, that he had been at the C.I.D. for about six hours before questioning commenced, according to Mason, 'but mason does not know whether he had anything to eat or drink.'

The Learned Trial Judge also found Mason to be untruthful when he said that he did not have evidence in his possession that the first-named appellant was in any way implicated in the matter under investigation.

The Learned Trial Judge ended by saying:-

> "Mason's evidence under cross-examination showed him to be evasive and not entirely frank with the Court. Notwithstanding all of the above, I believe that Cox's answers were voluntary and despite the breaches of the Judge's Rules committed in the process of that interview, I will admit the interview."

In relation to the interrogation of the second named appellant Sgt. Mason and a party of officers went to the home of the second named appellant on 30th September, 1994. They carried out a search, being armed with a search warrant.

On the conclusion of the search this appellant was told that a written statement was needed from him as to what he did in relation to some documents. The appellant, an ex police officer, was told that he was needed at the C.I.D.

The second named appellant requested to travel to the C.I.D. in his own vehicle. Mason agreed but sent one of the armed police officers with him, "to ensure that he came to the police station."

On arrival at the police station at about 8;15 a.m. this appellant was placed in the charged room behind a desk. At 8:45 a.m. Mason began questioning The second-named appellant who said he will not give any statement until his Lawyer was present. Mason provided him with a telephone and after making some calls, the appellant answered questions.

The Learned Trial Judge in his written reasons said inter alia:-

> "Mitchell had no breakfast before leaving home, and there is no evidence that he was provided with refreshment before or during the questioning. No break was taken during that period of questioning. No caution was administered at any stage. Accused read the questions and answers, agreed that it was true and correct and signed it."

The Learned Trial Judge found that the second-named appellant was not free to leave the police station and that he was unquestionably under police restraint. The Learned Trial judge found, without a doubt in his mind that, if not before the commencement of the questioning, at any rate during the course of the questioning, Sgt. Mason had evidence which would afford reasonable grounds for suspecting that the second-named appellant had committed an offence and that he should have cautioned him either before commencing the questioning or at any rate in the course of questioning him, as required by rule 2 of the Judge's Rules.

The Learned Judge said that he was not satisfied that reasonable arrangements were made on that occasion for refreshment for the second-named appellant as required by Direction 3 of the Administrative Directions Appendix B to the Judge's Rules. Undoubtedly the second-named appellant was under restraint and he knew it.

The Learned Judge concluded:-

> "However, he does not strike me as a man of faint heart, who would be easily intimidated. There is no indication that he was ever, on that morning, other than firmly in control of himself. I do not think that he allowed the circumstances to operate to sap his resolve or result in unfairness to him. I am satisfied that the statement given by accused Mitchell on 30th September, 1994 between 8:45 and 14:05 was voluntary and notwithstanding the breaches of the Judge's Rules and what may well be the unlawful detention of Mitchell during that period, the statement is admissible. I do not think that the surrounding circumstances are such as would move me to exercise the discretion to exclude this statement, and I will admit this statement."

Mr. Clouden referred to the following authorities:-

THE STATE v COLIN JOSEPH de FRANCE (1978) 26 W.I.R. 179

R v PRIEST (1847) 2 COX 378

R v SANG (1979) 2 ALL E.R. 1222

R v GAVIN and ORS (1885) 15 COX 656

R v IBHARIM (1914-18) ALL E.R. 874

In de France the appellant was taken into custody at about 6:00 p.m. on 8th January. He was informed and cautioned of the death of his Stepfather whose death was being investigated and of whose murder he was suspected. He refused to make a statement, he was placed in a cell without any sanitary facility. On 9th January at about 10:00 a.m. Sgt. Wilson who was investigating the offence caused the appellant to be brought out from the cell to him. Sgt. Wilson then read two statements in the appellant's

presence made by two self confessed confederates, Nanu and Rampersaud, implicating the appellant in the murder. After those statements were read the appellant was cautioned and he elected to make a signed statement that was free from threats and inducements. The appellant was for a continuous period of 22 hours locked up in a bare cell without food or drink or sanitary facility before he gave the statement.

At the trial of the appellant for the murder of Abdool Yussuf, his stepfather, the defence objected to the admissibility of the statement in evidence on the ground that it was an involuntary confession.

The Trial Judge heard evidence on the voir dire and ruled that the statement was free and voluntary and admissible. The statement was the only material evidence against the appellant. The appellant was convicted of the murder.

On appeal to the Guyana Court of Appeal it was held by a majority (1) that a Court of Criminal Appeal should exercise a jurisdiction to set aside a conviction for serious breaches of the Judge's Rules, although they are not rules of law or for a failure to exercise a discretion in relation to breaches in fit cases. Not to do so would be to exercise insufficient control over the admission of evidence resulting from improper police questioning and to fetter unjustifiably the exercise of the statutory jurisdiction of the Court to set aside a conviction if in finding that "on any ground" a miscarriage of justice has resulted.

The Trial Judge's ruling that the statement was free and voluntary, was not challenged but what was argued before the Court of Appeal was that having regard to the fact that the appellant at first refused to give a statement. He was then confined in a cell for 22 hours without any sanitary facilities. He had no food or drink for that period. There were substantial breaches of the Judge's Rules, requiring the Judge to investigate the question whether he should exercise his exclusionary jurisdiction which he never did. Secondly the circumstances leading up to the making of confession including the said breaches made it obligatory to consider whether or not it should be excluded as obtained unfairly, although voluntary and wrongly, this was never done.

Haynes C. at page 189 referring to Lawrence J.'S Judgment in

R v VOSIN (1918) 1 C.A.R. 89 at 96 said:

> **"It may be and often is a ground for the judge in his discretion to exclude the evidence but he should do so only if he thinks that the statement was not a voluntary one in the sense above mentioned or was an unguarded answer made in the circumstances that made it**

> **unreliable or unfair for some reason to be allowed in evidence against the prisoner. . ."**

The Learned Chancellor opinoned that it was permissible under the Judge's Rules for the police, without reading the statements, to have questioned the appellant on information in the statement after he was duly cautioned. Then Haynes C. said:-

> **"If of course, questions are put intended to break down the answers of the accused to questions put by the police to which they had received unfavourable replies that would be cross-examination. . .But on the evidence that the Trial Judge must have accepted at the voir dire, none of that happened here. For these reasons applying the vosin principle. I find myself unable to say that the Trial Judge should have excluded the appellants confession. I do not even find in the circumstances any likelihood that he would have done so if he had exercised his discretion judicially. And so the appellant had failed to prove that on this ground a miscarriage of justice resulted."**

The Court then considered the condition in the cell, long period without food prior to his signing the confession and concluded that there was no evidence on the voir dire to support an inference that these conditions were intended to cause the appellant to crack under the strain, and that inspite of these things he felt normal and refused to talk and it was only because Sgt. Wilson produced a gun and threatened to shoot him that he signed the confession.

Haynes C. at page 195 said:-

> "In these circumstances it is possible to hold that the Trial Judge for these reasons should or might reasonably have excluded on the ground of unfairness. On the facts here, and applying the principles laid down in the authorities first cited, if he had done so, it would have not been a judicial exercise of his discretion."

The Guyana Court of Appeal rejected the arguments that the Learned Trial Judge ought not to have admitted the statement on the grounds of unfairness or that by admitting it was likely to lead to a miscarriage of justice. However, the Court of Appeal took the view that the Judge having admitted the statement mainly on the evidence of Cpl. Wilson in the voir dire when he said that he was not keen to get a statement from the appellant. When on cross-examination before the jury he said it was necessary to get a statement from the appellant.

The defence argued that having regard to this evidence and the condition under which the appellant was kept prior to signing of the statement the Learned Trial Judge ought to have revisited the question of voluntariness of the statement. This he did not do.

The Learned Chancellor agreed and said at page 197:-

> "I think the new evidence was of sufficient weight to require the Trial Judge to review the earlier ruling to admit the confession."

The Court then came to the conclusion that the Trial Judge having failed to reconsider the matter that the appellant had lost a chance of acquittal which was open to him, that a miscarriage of justice resulted and that the conviction cannot stand. I have quoted extensively from the above cases because Mr. Clouden placed great emphasis on this authority.

I now turn to examine the instant appeal. As a starting point neither of the appellants gave evidence on the voir dire. The Learned Trial Judge having heard the evidence on the voir dire gave comprehensive and cogent reasons why he admitted the statements in evidence. The Learned Trial judge having exercised his discretion and ruled the statements admissible, there was nothing, as in de France to caused the Learned Trial judge to reconsider his ruling and exercise his exclusionary jurisdiction to exclude the statements.

I am of the view, that is of major significance that what was before the Learned Trial Judge were statements from the appellants which were mainly exculpatory and not incrimatory as in de France. Notwithstanding that the statements were objected to, the Trial Judge at that point in time could not have known what the defence was.

The Learned Trial Judge considered all the relevant considerations. he found that Mason an ex-police officer, a man of the world, apparently a man of some reputation and quite self possessed. The Judge came to the conclusion that there was no indication that he was ever on that morning, other than firmly in control of himself. He did not think that the second-named appellant allowed the circumstances to operate to sap his resolve or t o result in unfairness. The Learned Trial Judge held that although there were breaches of the Judge's Rules that the statement of this appellant was free and voluntary.

Similarly with the first-named appellant's statement the Learned Trial Judge found that his detention was from 2:00 p.m. and the statement, questioning began at about 6:01 p.m. Implicitly, the Judge, in his ruling, found there was no oppression p 28 (1) (See **PRAGER (1972) 1 ALL E.R. (114)** Although the Learned Trial Judge found that there were breaches of the Judges rules he held that the statement was free and voluntary.

In my opinion the Learned Trial Judge had exercised his discretion in line with the Wednesbury principle. See **(ASSOCIATED PICTURE HOUSE LTD. v WEDNESBURY CORPORATION (1948) 1 K.B. 223)** Lord Greene M.R. at page 224 said:-

> "A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may totally be said and often is said to be acting unreasonably. . . "

The Learned Trial Judge having considered all the relevant questions and exercised his discretion judicially, this Court will not interfere in that regard.

However, what has to be considered here is whether the admission of the statements of both appellants were unfair or prejudicial to a fair trial in any way. If it was, then, of course the statements ought not to be admitted and the convictions would be set aside, notwithstanding that there was in my view, cogent evidence on which the jury could have convicted the appellants.

As a starting point it must be borne in mind that statements as a whole in no way implicated the appellants in the crime which was under investigation. They both denied any knowledge of the offence. Their statements were mere denials. Their statements were exculpatory statements.

Although the statements were challenged at that point in time the Judge could not have known what the defence of the appellants would have been and for the Judge at that time to have used his exclusionary discretion to omit the exculpatory statements might very well have worked against the interest of the appellants.

It is true, as it turned out, that when the appellants made their unsworn statements from the dock it had by then became clear that their statements to the police were tissues of lies.

However, it is my view, that the Trial Judge must make his decision and exercise his discretion to admit or not to admit the impugned statement at that point in time of the trial when the application is made to exclude it. He cannot anticipate what the defence would be or which one of the options the accuse would exercise or for that matter if he exercise his option to make a statement what he would say.

In my opinion there could have been nothing unfair to either appellants or prejudicial to their fair trial in admitting their statements in evidence. The third ground of appeal therefore fails.

Grounds 4 and 5 are subsumed under ground 6 according to Learned Counsel. I now turn to ground 6, which is to the effect that Learned Trial Judge erred when he invited the jury that is was open to them to find a joint enterprise. I have dealt with the issue sufficiently under ground one.

I now turn to the ground seven, the additional Ground of appeal of the first named appellant, that is to say, that the Learned Trial Judge erred in law, when he advised the appellant that in light of the mandatory presumptions as contained in Section 42 of The Abuse (Prevention and Control) Act chapter 3 he was obliged to take one of three courses open to him. This approach taken by the Learned Trial Judge was a marked departure from settled law and practice and indeed had the effect of forcing the accused to make a statement in contravention of his fundamental and constitutional right to remain silent, and his right to protection of law.

The record shows that the second-named appellant having being put upon his election, elected to make an unsworn statement. He began by saying "My name is Michael Mitchell." At that point Learned Counsel, Mr. Radix rose and suggested that in view of the special provisions of the law in relation to the onus of proof applying in these matters additional advice should be given to the accused. Counsel for The first-named appellant and for the Crown agreed.

As I understand the record it is quite clear in my view, that when the Learned Trial Judge gave additional direction to the appellants that having regard to Section 42 of the Act they ought to say something if they were to rebut the presumption, this was done on the representation of Counsel for the appellants. If this is so, can they now raise this as a ground of appeal? I think not.

It is my view that even if the Judge having put the appellants on their election then

advised them that they should say something if they are to rebut the onus which was placed on them in light of Section 42 of the Act, could not vitiate the election which he gave them. From a practical point of view it is worthwhile to note that both appellants made an unsworn statement as opposed to a sworn testimony which shows in my view, that they exercised a choice.

Moreover, it appears from the record that even before the Learned Trial Judge gave the additional direction that the number one appellant had exercised his choice in making an unsworn statement from the dock which he went on to do after the additional warning was given. So far all practical purpose the additional warning had no effect on this appellant. This ground of appeal also fails.

I turn to ground 5 the final ground advanced on behalf of the first named appellant, that is the Learned Trial Judge failed to give proper direction or at all on the essential ingredient of the offence as contained in Section 7(vi) of the Drug Abuse (Prevention and Control Act) Act No: 7 OF 1992 i.e. "knowingly concerned" involved not just knowledge of the handling but also a controlled drug."

Furthermore the Learned Trial Judge failed to explain the apparent contradiction between Section 7(1)(2)(a)(b) and Section 42(1)(d) of the said Act.

At page 36 of the record the Learned Trial Judge directed the jury as follows:-

> "The law is that a person handles a controlled drug if he is in any way concerned in carrying, removing harbouring, keeping or concealing the controlled drug or anything containing the controlled drug or if he deals in any manner with the controlled drug. Now this does not mean a mere touching."

The Learned Judge then outlined some of the facts and went on to say:-

> "I direct you in law, these acts, if proved would amount to handling , but whether they are proved or not is a matter for you. . .
> It is the law of Grenada that when it is proved that a person handled anything containing a controlled drug, it shall be presumed, until the contrary is proved, that the person knew that the drug was contained in the thing which he handled. So that if you are satisfied, so that you feel sure , that Cox and Mitchell handled those boxes, and you feel sure on the evidence. . .you are bound to conclude, subject to what i will tell you in a moment, as a matter of law, that Cox and Mitchell, knew in each case that he was handling was a controlled drug."

The Learned Trial Judge then went on to explain to the jury the burden of proof which the appellants must discharge if they are to be acquitted of the offence.

At page 37 of the record he said:-

> "The onus of proof, which was up to that point on the Prosecution, will have shifted in the circumstances just outlined, on that issue of knowledge to the accused. However, whereas the onus on the Prosecution was to prove beyond reasonable doubt, so that you feel sure of the fact which the Prosecution has to prove the burden of proof on the accused is less than that on the Prosecution. That burden may be discharged by evidence satisfying you members of the jury, of the possibility that Cox and in his turn Mitchell did not know what he was handling."

I am of the view, that the Learned Trial Judge gave full and accurate direction of the law which involved an explanation of Section7(1) and Section 42(1)(d) of the Drug (Abuse Prevention and control Act) there is therefore no merit in this ground of appeal.

I now turn to consider some of the grounds of appeal of the second named appellant, which are separate from those advanced by both appellants under ground 12 the second named appellant allege that the Learned Trial Judge wrongly admitted into evidence the controlled drug said to be found in the boxes when the chain of custody or possession thereof was broken by virtue of the delivery of the same to Cadet as the same was never weighed in the presence of the appellant and the Learned Trial Judge failed to give any full or adequate directions thereon to the jury.

At pages 31 and 32 of the record the Learned Trial Judge told the jury:-

> ". . . On 30th September P.C. Jude Francis in the presence of Sergeant Mason and Sergeant Bowen weighed the packages individually and the weights were recorded. At the time and at various times before and after that, when the packages were handled various identifying numbers and dates were written on the packages. . .
> A very crucial element of this case is the determination whether the boxes produced in this Court, said to have contained 19 packages containing marijuana, certified by Dr. Guido Marcelle as such, are the same boxes allegedly delivered by the accused Cox to Walker, weighed and processed by accused Mitchell, intercepted at the airport- customs area by Flavingny and taken to the S.S.U headquarters for investigation and safe keeping.
> If you do not believe that they are, or if you do not feel sure on that account, then you must acquit. I t is only if you feel sure that these are the boxes and that they have not been substituted or their contents interfered with in any manner that has not been satisfactorily disclosed to you, that you need consider the other elements in the case."

In the above passage the Learned Trial Judge traces the movements of the boxes as outlined in the evidence led by the Prosecution and then told the jury it was a question for them whether the boxes produced in Court are the same boxes allegedly delivered by the appellant Mitchell.

I am of the opinion that what was crucial, was not so much the weight of the boxes, but the identification of the boxes. In this regard Cadet in his deposition said that he was able to identify the five boxes in Court as those delivered to him by the second-named appellant. He said that he was able to identify the boxes by the Airway Bill stickers that were on the boxes. Moreover, the evidence is that the boxes were sealed with tapes when handed over to Cadet by the second-named appellant. They were found in the very condition by Flavingny where they were placed in the Customs area of the airport.

It is my view that the Judge had correctly identified the issues and had given proper and adequate directions to the jury. It cannot in my judgment be said that the chain of custody had been broken. This ground of appeal also fails.

I now turn to the final ground of appeal advanced on behalf of the second named appellant under ground 9 the appellant alleges that the Learned Trial Judge wrongly admitted into evidence the deposition of Stephen Cadet as it was unfair to do so, having regard to the fact that his evidence may have required corroboration in material particular. The reception of the evidence of this witness presented grave prejudice to the appellant, according to learned Counsel.

By Section 198 of the Criminal Procedure Code the Judge had a discretion to admit the deposition of Stephen Cadet if certain conditions were fulfilled. The Learned Trial Judge having taken evidence on Oath then satisfied himself the conditions were met and exercised his discretion to admit the deposition in evidence. In my opinion the Learned Trial Judge properly exercised his discretion to admit the deposition. In fact there is no suggestion or challenge that he did so improperly.

Having regard to the evidence as a whole, in my view, it cannot be said that Cadet was an accomplice and therefore his evidence needed to be corroborated. The Learned Trial Judge must have looked at the evidence and would have determined that Cadet was not an accomplice and whether there is evidence capable in law of being corroborative, is a question of law for the Judge. There is therefore no merit in this ground of appeal.

The appeals of both appellants are therefore dismissed and the sentences imposed by the Learned Trial Judge are confirmed.

.....
Albert J. Redhead
Justice of Appeal

I Concur.

.....
C.M. Dennis Byron
Chief Justice (Ag.)

I Concur.

.....
Albert Matthew
Justice of Appeal (Ag.)