CAYMAN ISLANDS LAW BULLETIN

NO.1

MAY, 1990

Cayman Islands Government

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CAYMAN ISLANDS LAW SCHOOL

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The Cayman Islands Law Bulletin is intended to provide an informati and reporting service for attorneys and others who may need to be aware of developments in the law of the Cayman Islands.

The material entered in the Law Bulletin is not intended to be exhaustive or authoritative but should be regarded as an index and a record of material which may be of some use in legal work.

While reasonable care is taken in the preparation of material for publication in the Law Bulletin, neither the Cayman Islands Law Scho nor the Cayman Islands Government accepts responsibility in law for the accuracy of the contents of this issue, nor do the views express necessarily reflect the opinion of the Cayman Islands Government.

Contributions

The Editors would like to express their thanks to the Honourable Mr. Justice Schofield for his contribution to this edition.

An open invitation is extended for the submission of manuscripts on topics of interest to the legal community. If you would like more information please contact the Director of Legal Studies, Cayman Islands Law School, Tower Building, George Town 97999 Ext. 3540.

Edited by the Director of Legal Studies and Law Lecturers, Cayman Islands Law School.

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EDITORIAL NOTE

This is the inaugural edition of the Cayman Islands Law Bulletin which, it is hoped, will be published three times a year - January, May and September.

The Law Bulletin is edited and published by the Cayman Islands Law School. The publication, which was approved by the Legal Advisory Council in October 1989, is intended to have two purposes.

First and foremost, to bridge a gap which exists in the law reporting system in use in the Cayman Islands. The need for a timely and accessible system of law reporting has long been recognised. The matter was put succinctly by Professor Peter Rowe, the first Director of Legal Studies, in a paper entitled "A Proposal for Reporting of Judgments of the Courts of the Cayman Islands" (December, 1983).

"The establishment of an efficient system of law reporting on the Islands would now appear to be imperative. Not only has the volume of criminal cases and commercial litigation increased, generating the need for an awareness of the actual decisions of the courts by legal practitioners but with the establishment of the Law School in 1982 the reporting of decisions would assist in the teaching of Cayman Law to students of the School".

The lack of law reporting was addressed with the publication in 1984 of the Cayman Islands Law Reports by Law Reports International under the editorship of Dr. Alan Milner M.A., LL.M., PH.D, Fellow of Trinity College, Oxford. That series now comprises two bound volumes (1984-85 and 1986-87). A further volume, 1988-89, is expected by the end of the current year.

Despite the presence of this excellent reporting series, it was felt that there was scope for an additional series of reports in the form of a Law Bulletin, produced locally and with a minimum of delay between the date of judgment and the report. Discussions were held with Dr. Milner who wholeheartedly endorsed the concept.

The current edition contains summaries of the majority of judgments of the Grand Court and Court of Appeal delivered in open court during the period January 1, 1989 to December 31, 1989. Certain judgments contained insufficient information to be usefully summarized and were therefore omitted. In future issues, it is hoped to include significant judgments and decisions from the Magistrates' Court and references to issues decided in Chambers.

The case notes are presented as summaries. The purpose of the Law Bulletin is not to achieve a full reporting of the case but rather to provide sufficient information about the case to allow practitioners and students to determine whether the case is of use to them and allow them to locate the full text.

The second purpose of the Law Bulletin is to provide a forum in which judges, legal practitioners, lecturers and law students can express themselves on topics of interest to the legal community. In this

regard, we are fortunate to have received an article by the Hon. Mr. Justice Derek Schofield which is included in this edition. Contributions for future editions would be welcomed on any topic.

We would like to thank the officers of the Judicial Department who compiled and submitted the judgments, thus enabling the summarization process to take place, and the Computer Services Department who provided assistance in the publication and binding process. We would also like to thank fifth year student Myrna Gregson who assisted in proof reading. Any remaining errors are, of course, the responsibility of the editors.

Your comments and suggestions are most welcome.

Richard Finlay
Director of Legal Studies

INDEX TO CASES NOTED

CASE NOTES

SUMMARIES OF JUDGMENTS OF THE GRAND COURT AND COURT OF APPEAL JANUARY 1-DECEMBER 31, 1989

ADMINISTRATIVE LAW

Natural Justice - Right to be represented - Police Disciplinary Proceedings.

Case: Prendergast v. Commissioner of Police and the Attorney General

Court: Grand Court (244/89)

Cor: Schofield, J.

Legislation: Police Law s6(1), s5(1)(4), Police Regulations

Cases Referred to: Enderby Town Football Club Ltd. v. Football Association Ltd. 1977 Ch. 391;
Maynard v. Osmond (1977] Q.B. 240;
Dean v. Weisengrund.[1955] 2.QB 120;
Regina v. Secretary of State for the Home Department ex parte Tarrant (1985] 1 QB 251
Pett v Greyhound Racing Association Ltd (No.2) [1969] 2 All E.R. 221;
University of Ceylon v Fernando [1960] 1 All ER 631

Counsel: Mr. Hill Q.C. and Mr. Hampson for the appellant
Mr. Smellie for the respondent

The applicant, a police officer subject to disciplinary proceedings, applied for a declaration that the Commissioner of Police had discretion to permit him to be represented by counsel and for prohibition against the proceedings being heard without such legal representation.

The application followed from the refusal of the Commissioner to allow the applicant legal representation on the basis that the Police Law and Regulations made thereunder provided for representation by a serving police officer or gazetted officer.

Held: (for the applicant)

(1) The relevant Law and regulations do not preclude the Commissioner from permitting legal representation and he has a discretion to do so.

(2) The decision in Maynard v Osborn (1977) QB 240 may be distinguished on the difference between the underlying U.K. legislation and the Cayman provisions in question.

(3) Such discretion ought to be exercised in favour of the applicant in the present case, having regard to the seriousness of the charge and potential penalty, the likelihood of points of law arising, the capacity of the applicant's fellow officers to fairly and independently represent the accused's case considering the nature of the offence and the size of the police force, the need for reasonable speed in making adjudication and the need for fairness.

(R.F.)

AGENCY

Agreement authorising agent - Verbal agreement for payment of interest.

Case: A.L. Thompson Building Supplies Ltd. v. McLaughlin

Court: Grand Court (1/1988)

Cor: Collett, C.J.

Date: 7th July 1989

Counsel: Mr. N. Levy for the plaintiff
Mr. R. Nelson for the defendant

The plaintiff alleged that at a meeting held at their offices one morning in May 1986 between the plaintiff company's managing director, the defendant and Mr. A, the defendant give an express authority to Mr. A to purchase from the plaintiff whatever he needed to perform building work for the defendant and to charge the prices to her account with the plaintiff. This evidence was confirmed by Mr. A but disputed by the defendant who denied any such agreement.

The plaintiff also claimed interest on accounts due from the defendant and relied on a verbal agreement alleged to have been made with the defendant on the telephone.

Held: (for the plaintiff)

(1) For the defendant to show that Mr. A had acted without authority, she would have to prove a conspiracy between him and the plaintiff which she had failed to do.

(2) To charge interest on outstanding sums, the onus is on the plaintiff to establish the existence of a binding agreement between the parties for the payment of stipulated interest and the burden had not been discharged.

(R.O.)

COMPANIES

Compulsory winding up - Effect of appointment of receiver - Adjournment of petition pending foreign appeal against underlying debt - Effect of bargain entered into by petitioner and third parties.

Case:	In the matter of S Corporation and the Companies Law
Court:	Grand Court (201/1988)
Cor:	Collett, C.J.
Date:	April 13, 1989
Legislation:	s.93 Companies Law
Cases Referred to:	The Peak Hill Goldfield Ltd (1909) 1 K.B. 430 Re Marquis of Angelsey (1903) 2 Ch 727 Ames v Trustees of the Birkenhead Docks (1855)1 Ch 14 Re Sartoris 1892 1 Ch 14 Orri v Moundreas Lexis (1981) Re Maudsley 1900 1 Ch 602 In Re Greenwood 1900 2 A.B. 306 Re Amalgamated Properties of Rhodesia (1917) 2 Ch 115 Re Douglas Briggs Engineering Ltd. (1962) 1 Ch. 19 Re L.E. F. Wools Ltd. (1970) 1 Ch.27
Counsel:	Mr. A. Jones for the Petitioning Creditor Mr. S. Gee and Mr. A. Foster for S Corporation Mr. R. Potts Q.C. and Mr. Hampson Opposing Creditor and a Contributory Mr. N. Clifford for Receiver appointed in 137/1988

After presentation of a winding up petition by the petitioning creditor in relation to S Corporation, the court considered the following issues;

(i) Whether appointment of a receiver was a bar to continued prosecution of the petition by the creditor of underlying debt.

(ii) Whether petition should be adjourned pending appeal against underlying debt obtained in foreign jurisdiction.

(iii) The effect of a bargain, if any, between a petitioning creditor and third parties who are in litigation with him in other proceedings (although they may include an opposing creditor in the winding-up) to defer the exercise by the court of the supervisory jurisdiction vested in it by the Companies Law so as to advance their private interest as litigants in the other proceedings.

Held: (application for winding up allowed)

(1) There is no authority to the effect that a creditor of a local company for an amount sufficient to support a winding-up by petition is not entitled to petition in reliance upon that debt merely because an interim receiver has been or is appointed in respect of it for the purpose of preserving and/or collecting in the debt. To hold otherwise would involve the consequence that, unless a receiver has been specifically clothed with power to present a petition in the name of the creditor, no one would be in a position to petition for a winding-up based upon the existence of that unpaid debt. It is clear that the receiver may not do so in his own name as he is not the creditor. The statutory jurisdiction under the Companies Law would thereby be frustrated.

(2) Upon establishment of the debt and the insolvency of the company, a petitioning creditor is prima facie entitled ex debito justitiae to the winding-up order. The onus is then upon those opposed to the making of the orders to persuade the court that an alternative course such as an adjournment is more appropriate, just and convenient. In the present case the court was not so persuaded on the facts. The hearing of the foreign appeal would not be before two years with a right to further appeal(s).

(3) The court will not hold a petitioning creditor who makes such a bargain to its terms as it is tantamount to the sanctioning of an interference with the judicial exercise of discretionary power.

(B.B.)

COURTS

Consent Order - Variation
(SEE Family Law - Consent Order)

Judgment - Inherent power of court to set aside its own judgment

Case: Francis v. Wood

Court: Cayman Islands Court of Appeal (4/88)

Cor: Zacca, Pres; Georges and Henry, J.J.A.

Date: March 14 1989

Cases Referred to: Hip Foung Hong v. H. Neotia Co. 1918 A.C. 888
Jones Co. v. Beard [1930] All E.R. 483
de Lasala v de Lasala [1979] 2 All E.R. 1446
Meek v Fleming [1961] 3 All E.R. 148
Thynne v. Thynne [1955] 3 All E.R. 129
Lazard Bros & Co. v. Midland Bank Ltd. 1933 A.C. 289

Counsel: Mr. Norman Hill, Q.C. for the appellant
Mr. Pierre Lamontagne, Q.C. for the respondent

Motion for the judgment of the Court of Appeal to be set aside, and a new trial ordered. The grounds upon which the order was sought were that the sketch plan of a collision in a motor accident which was put before a jury in criminal proceedings and, which by an agreement inter parties, was to be put before the Grand Court in subsequent civil proceedings had differed from the plan in fact put before the civil court. The sketch plan put to the civil court had included a point of impact. It was submitted that both the trial court and the Court of Appeal had assumed throughout the civil proceedings that the plan showing the point of impact was the plan which was before the jury in the criminal trial.

Held: (refusing the application)

(1) The Court of Appeal had previously held that the jury's conviction of the appellant was proper even though the plan before them did not include a point of impact. There was evidence other than the sketch plan in the form of oral testimony from eye-witnesses. It would appear that both sketch plans (i.e. the one showing, the other not showing the point of impact) were included in the record which was before the trial judge in the civil case.

(2) The sketch plan was not the only evidence to be considered at the civil trial. There were the certified copies of evidence given by witnesses including persons who were able to give eye-witness account of the accident. The sketch plan was not conclusive and was not evidence which could have necessarily determined the matter in favour of the appellant.

(3) Apart from certain exceptions, none of which applied in this case, the court has no jurisdiction to set aside its own judgment. The appellant should either proceed by way of appeal or by a fresh action on the ground of fraud.

(S.S.)

Judgment of Summary Court - Three elements necessary to comply with 51 & 52 Criminal Procedure Code and requirements of appeal courts- Whether insufficient judgment fatal to convictions - Substantial miscarriage of justice.
(SEE ALSO Theft-Insufficient Judgment)

Case:	Smith v. Regina Ebanks v. Regina
Court:	Grand Court (Summary Court Appeal 47 and 61/88)
Cor:	Collett, C.J. and Schofield, J.
Date:	29th September 1989
Counsel:	Mr. Furniss for the appellant Smith Appellant Ebanks in person
Legislation:	ss. 51 & 52 Criminal Procedure Code ss. 71 & 72 Criminal Procedure Code s.26 Summary Jurisdiction Law ss. 49 & 55 Criminal Procedure Code s. 172 Criminal Procedure Code as amended by Law No. 28 of 1983

Cases referred to: Gonzales and Suarez v. Regina (1984) CILR 10

These appeals were consolidated because they both involved a common issue of public importance which the Grand Court had never dealt with before, namely, what elements must a judgment consist of in order to comply with sections 51 and 52 of the Criminal Procedure Code and what is the effect of a failure to record and pronounce a judgment? In both appeals only a verdict had been recorded. In Smith's case which involved only possession of cocaine the record showed "found guilty on evidence before the Court" and in Ebank's case which involved consumption of ganja, consumption of cocaine and possession of cocaine "guilty of all three."

Held: (appeal dismissed)

(1) The minimum requirements for an adequate judgment to comply with sections 51 and 52 were a record of:

(i) the point or points for determination
(ii) the decision thereon
(iii) the reasons for the decision

These were especially important for the purposes of the appeal courts because appeals were decided from the records and not by way of rehearing unless the Grand Court so directed. The decision of Summerfield C.J. in Gonzalez and Suarez v. Regina was not relevant because there was a manuscript document containing reasons for the decision which led to a judgment.

(2) The judgment here was not sufficient even in a simple case

because ss. 51 and 52 of the Code required a "judgment" which was clearly distinguished from a "verdict" in ss. 71 and 72 of the Code. A judgment could not be made up from the record of the proceedings as a whole, since here it was impossible to identify the points set for determination of the manner thereof.

(3) In both cases the judgment was insufficient. This would be fatal to the convictions unless the court was satisfied that this caused no substantial miscarriage of justice. On the evidence in both cases no court could have reached a different conclusion in respect of the charges. The appeals against conviction must therefore be dismissed.

(G.F.)

CRIMINAL LAW

Assault Occasioning Bodily Harm - Non-insane automatism - Whether defence to assault - Burden of proof - Mitigation.

Case: Regina v. Smith

Court: Grand Court (Ind. 12/89)

Cor: Harre, J.

Date: 9 June 1989

Cases cited: Regina v Tolson (1889) 23 Q.B.D. at p.181
Regina v Majewski [1976] 2 All E.R. p. 147
Tuberveil v. Savage (1669) Mod Rep. 3 at p.4
Bratty v. A.G. of Northern Ireland
Isitt v.Regina (1977)
D.P.P. v. Morgan (1975) 2 All E.R. at p. 364

Counsel: Mr. A. Smellie for the Crown
Mr. Pierre Lamontagne Q.C. and
Mr. G. Ritchie for the defendant

The defendant was charged with assault occasioning actual bodily harm. This arose from his actions following a motor vehicle collision. The victim of the assault was a 72 year old man. It was shown that the defendant struck his victim at least once on each side of the face. The defence was one of automatism. In his evidence, the defendant stated that although he remembered getting out of his vehicle and running down the shoulder of the road towards the other vehicle, his recollection of events leading to the assault was unreal. He did not distinctly see his victim or, for that matter, see him as a person. The victim seemed to be surrounded by an evil aura. In a statement to the police some three days after the incident, the defendant admitted to having been enraged by what the victim had done in causing the accident and had struck him in consequence. He had later realised that there was no need for what he had done as the victim was obviously not trying to leave the scene.

Held: (conviction of assault)

(1) In a crime of basic intent such as assault, proof of the actus reus generally raises a presumption of a corresponding mens rea. It is a prima facie proof of mens rea so as to shift the evidential burden of proof onto the defence. A proper foundation for a defence of lack of mens rea must be laid. It is for the prosecution to negative that defence.

(2) The accused's mental state was something other than automatism and it was certainly not a case of insanity. The prosecution have amply proved the requisite mental element in the assault notwithstanding the evidence brought in rebuttal. There was no doubt that anger was the explanation for the accused's conduct.

(3) In view of the strong mitigating factors, a fine of $250 was imposed.

(B.B.)

Assault Police Officer - Unlawful possession of Firearm - Carrying an Offensive Weapon - Possession with intent to supply ganja - Escape from Lawful Custody - Possession of ganja - Handling Stolen goods.

Case:	Barnett v. Regina
Court:	Grand Court (Summary Court Appeal) (98/89)
Cor:	Schofield, J.
Date:	14th September 1989
Legislation:	s.63 Police Law s.15 Fire Arms Law s.69 Penal Code s.3(1)(m) Misuse of Drugs Law s.230(1) Penal Code
Counsel:	Appellant in Person Ms. Dilbert for the Crown

The appellant was convicted following a plea of not guilty to five separate charges ranging from assaulting the police to possession of ganja. He was also convicted of possession of a firearm and carrying an offensive weapon on his own plea of guilty. He appealed against the conviction to which he had pleaded not guilty and against the sentences on all offences.

The case against the appellant was that around 9a.m. on the 8th February 1989 he had been under observation whilst walking on a track to the beach when two officers challenged him to drop a flare gun which he in fact cocked and pointed at the face of one of the officers. At this the other officer shot the appellant in the left ankle. 14.8 grams of ganja and $200 were found on the appellant along with cigarette papers and some .45 cartridges. After arrest and caution the appellant said "B you know I wasn't going to shoot S". The other witnesses were unable to say whether the appellant made a move to use the gun. The charge of handling stolen goods arose from the arrest of the appellant on the same day: 2 stolen rings (which had been stolen in January, 1989) were found in a bag which the appellant dropped on the track to the beach. The charges of escape from lawful custody and possession of ganja arose from a police inquiry on October 18th, 1988 at the appellant's residence. The appellant was seen dropping a lit cigarette to the ground which turned out to be ganja and broke away from the hold of a police officer when arrested and cautioned. He was not in fact charged until March 7th 1989.

Held: (appeals dismissed)

(1) The appellant had been carrying the flare gun when he knew he was being sought by armed police officers; he gave an unsatisfactory explanation of having it and the evidence of the officers was accepted by the magistrate as truthful.

(2) The amount of the drug in the appellant's possession was sufficient to prove intent to supply.

(3) The circumstances in which the rings were found were sufficient to establish that the appellant was guilty of handling them.

(4) Despite the fact that the cigarette of ganja was found lying at the appellant's feet, the additional evidence that smoke smelling of ganja was coming from his mouth and nostrils and that he had fresh ash on his fingers was sufficient to prove a possession charge. This was supported by the appellant's immediate attempt to escape from lawful custody.

The sentences imposed were as follows:

Case No.	Offence	Sentence
926/89	Unlawful possession of firearm	3 months imprisonment
927/89	Carrying offensive weapon	3 months imprisonment (consecutive)
928/89	Assault on police s.83 Police Law	3 months imprisonment (consecutive)

690/89	Possession of ganja with intent to supply	18 months imprisonment (consecutive)
1013/89	Handling stolen goods	12 months imprisonment (consecutive)
1093/89	Escape from lawful custody	9 months imprisonment (concurrent)
1094/89	Possession of ganja	4 months imprisonment (Concurrent)

The assault on the police involving the use of a firearm was an extremely serious matter and the appellant was fortunate to have received half the maximum sentence and the appellant's subsequent pai and suffering from the ankle injury were therefore not a ground for reduction. The other sentences must also be seen as lenient for the same reason.

(G.F.)

Assault Police officer - Conviction of an offence which does not exis - Interpretation s.63 Police Law.

Case: Smith v Regina

Court: Grand Court (Summary Court Appeal)(189/89)

Cor: Schofield, J.

Date: December 7, 1989

Legislation: S.63 Police Law, s.64 Penal Code

Counsel: Mr. Furniss for the appellant
Ms. Connolly for the crown

The appellant was charged with and convicted of "obstructing police contrary to section 63 of the Police Law".

The section reads:

"Whoever assaults or resists any police officer acting in execution o his duty or aids or incites any person so to assault or resist, or refuses to assist any such officer in the execution of his duty when called upon to do so, or who, by the giving of false information with intent to defeat or delay the ends of justice, wilfully misleads or attempts to mislead any such officer, is guilty of an offence.

Held: (allowing the appeal)

(1) There is no reference in the provision to obstructing a police officer. The marginal note to the section mentions "Penalty for assaulting, obstructing etc. or misleading an officer". Although a marginal note may assist a court in the construction of a law in cases of ambiguity, it cannot control the language used in the particular section of the law.

Section 63 provides for no offence of obstructing a police officer and the appellant was convicted of an offence which does not, therefore, exist.

(2) It may be that the facts fall within the wording of section s. 64(b) of the Penal Code but the appellant was not charged with an offence under that provision.

(B.B.)

Drugs - Failure to provide urine specimen -s.4 Misuse of Drugs Law - Lawful arrest requirement - Reasonable suspicion of offence under Misuse of Drugs Law - Meaning of reasonable suspicion - Suspicion based on information from another police officer

Case: Regina v. McLaughlin and Burke

Court: Grand Court (Summary Court Appeal) (104/88)

Judge: Collett, C.J.

Date: 20th July, 1989

Legislation: s.4 Misuse of Drugs Law (2nd Rev.)

Caseds cited: Shaabin Hussein v. Chang Fook Kam [1969] 3 All E.R.
Copeland v. McPherson (1970) S.L.T. 87
Regina v. Moore (1970) R.T.R. 486
Erskine v. Hollin (1971) R.T.R. 199

Counsel: Miss Dilbert for the appellant
Mr. John Furniss for the respondent

The respondent had been acquitted of failing to provide a urine specimen for laboratory test contrary to s.4(2) of the Misuse of Drugs Law. This appeal raised an important point on principle in relation to the administration of the Misuse of Drugs Law (2nd Revision): namely, could the "reasonable suspicion" of the commission of an offence in s.4(1) of that law be based not on personal observations but on information received from another?

Such "reasonable suspicion" was necessary to establish that the arrest was lawful, which was a requirement for the offence in s.4(2) to be committed. The respondent had been arrested by two police officers following a report from another officer that he had seen the respondent consuming drugs.

Held: (appeal allowed)

(1) Reasonable suspicion for the purposes of s.4(1) could be based hearsay evidence. Unlike the evidence necessary to prove the commission of an offence, suspicion of an offence could be based on matters which could not be put into evidence at all. The information need only come from a reliable source which was believed (Shaabin Bi Hussein v. Chang Took Kann, Erskine v. Hollin, Copeland v. McPherson Regina v. Moore) The magistrate therefore erred in law by holding that because the information was second hand, the suspicion based on it could not be reasonable.

(2) The learned magistrate might still have concluded from other circumstances that the suspicion was not reasonable. The point on appeal however was whether a reasonable suspicion could be based on second hand information and the appeal must therefore be allowed.

(3) Because of the lapse of time and minor nature of the charge no order for a retrial was made.

(G.F.)

Drugs - Importation of cocaine and possession of cocaine with intent to supply contrary to Misuse of Drugs Law - Presumption of knowledge in s. 7(1)(b) Misuse of Drugs Law

Case:	Wilson v. Regina
Court:	Grand Court (Summary Court Appeal) (124/88)
Cor:	Schofield, J. and Harre, J.
Date:	2nd June 1989
Legislation:	s.3(1)(a) Misuse of Drugs Law s.7(1)(b)
Cases Cited:	Victoria Weeks v. Regina (Court of Appeal Crim App. #26/87)
Counsel:	Mr. Hampson for the appellant Mr. Sibbles for the Crown

The appellant was convicted of the two offences of importation of cocaine and possession of cocaine with intent to supply. On 14th Jun 1988, the appellant was found to have 3 pairs of trousers in his luggage the waist bands of which were stuffed with 138.7 grams of cocaine. The appellant shouted a number of times "I can't believe ? did this to me" but also identified the substance as cocaine. His story was that he was carrying the trousers for ? who had paid his ticket from his home in Kingston, Jamaica and had failed to give him the necessary US$200 for entry when he did not turn up so that he had to borrow US$100 from a fellow traveller. The facts placed a burden on the appellant of disproving knowledge on the balance of probabilities because of the presumption in s.7(1)(b) Misuse of Drugs Law. The magistrate weighed the following points:

(1) The appellant's failure to be put on notice by the incongruous conduct attributed to P,

(2) his apparent determination to travel to Cayman despite lack of money and P's not turning up,

(3) his willingness to deceive the Immigration Authorities in Cayman in order to gain entry,

(4) his immediate identification of the substance as cocaine.

Held: (appeal dismissed)

(1) The point which weighed most heavily against the appellant was that P made no arrangements for the disposal of the valuable cargo when he did not turn up. Unlike the Weeks case the magistrate's conclusion here was based on his unfavourable impression of the appellant as a witness and not just on the improbability of his explanation.

(2) The magistrate was entitled to conclude that the appellant had not satisfied him on the balance of probabilities that he had no knowledge of the cocaine.

(G.F.)

Drugs - Possession of controlled drug - Whether constructive possession where a person indentifies package at customs and lifts it for inspection, the package having arrived unbidden and without prior arrangement.

Case: Regina v. Gibson

Court: Cayman Islands Court of Appeal (30/88)

Cor: Zacca, Pres.; Kerr J.A., Henry J.A.

Date: 19 April 1989

Legislation: Misuse of Drugs Law

Cases Cited: Regina v. Cavendash (1961) 45 Cr. App.R. 374
Regina v. Cyrus Livingston (1952) 6 J.L.R. 95
DPP v Brooks (1974) A.C. 863
Haw Tua v. Public Prosecutor (1982) A.C. p. 151
DPP v. Ping Lin (1975) 3 All E.R. 175

Counsel: Mr. F.M. G. Phipps Q.C. and
Mr. Keith Collins for the appellant
Mr. Anthony Smellie for the Crown

The appellant was convicted in a Summary Court of being in possession of cocaine with intent to supply contrary to section 3.1(m) of the Misuse of Drugs Law. He was sentenced to 7 years imprisonment and a fine of $1000 or 18 months in default. The conviction and sentence were affirmed by the Grand Court.

The appellant went to the airport to enquire about a package, which alleged to contain a car cover, that had arrived for him from Miami a flight. He identified and claimed a box at the customs office. Upon inspection and search, it was found by a customs officer to contain a concealed package of cocaine. The appellant informed customs officers that the box was destined for his (the appellant's) mother and that his sister had sent it to him through someone called W. At the trial, the prosecution called evidence to show that it was in fact the appellant himself who had sent the box ahead from Miami courier. The alleged pretext for so sending it was that as a stand-b passenger the appellant's flight out of Miami was uncertain. He had, in fact, hoped that the box would clear customs before his own arrival in Cayman. In the event it did not. The appellant denied th Miami connection with the box. His defence was that it came unbidden and without prior arrangement.

Held: (appeal dismissed)

(1) There is a difference between two cases;

(a) where goods are claimed by a travelling passenger at a conveyor belt or carousel by removing and appropriating them. In such case possession of the goods has been taken or retaken, as the case may be from the airline carrier in whose custody they have been, despite the restriction which circumscribes the right of the passenger to remove them out of the area pending eventual clearance, and;

(b) where a person attends for the purpose of clearing goods that cam without his prior arrangement or request.

In the first, there is the antecedent possession and the uninterrupte possessory title. In the latter, in the absence of prior arrangement mere identification of the package to be cleared and the casual or incidental lifting it for customs inspection would not place the person in de facto possession, custody or control and out of the custody or control of the customs.

(2) In the instant case the appellant's Miami connection with the bo was a contested issue. The appellant positively alleged that the box came unbidden and without prior arrangement. This was a pivotal poin in the case and demanded a determination by the learned magistrate. His omission so to do cannot be cured. Accordingly, on this ground, the appeal was allowed. However, in view of the learned magistrate's omission as aforesaid and the gravity of the offence, the conviction was quashed and a new trial ordered in the interests of justice.

(S.S.)

Drugs - Possession of cocaine - Proof required of possession - s. 7(1)(b) Misuse of Drugs Law (Revised)

Case: Ebanks v Regina

Court: Grand Court (Summary Court Appeal) (2868-70/88)

Cor: Harte, J.

Cases referred to: Dilbert v. Regina (S.C.A. 72/88)
Tremlett v Richard Fawcett
(Unreported decision, U.K. Divisional Court, Queen's Bench Division

Legislation: s 7(1)(b) Misuse of Drugs Law (Revision)

The appellant was found to have possession of 6 rocks of substance wrapped in cigarette paper. The evidence of the Crown was that the arresting officer had placed the 6 rocks in a clear plastic exhibit bag which was sealed, tested and that he received certificates showing the rocks to contain cocaine. The appellant appealed his conviction on the basis that the evidence did not establish beyond a reasonable doubt that he had in his possession a controlled drug, in particular, that the sample analyzed was that which had been taken from him.

Held: (appeal dismissed)

(1) The Crown had established possession of a controlled drug beyond a reasonable doubt and could therefore rely on the certificate - s.7(1)(b) Misuse of Drugs Law (Revised).

(2) The failure of the arresting officer to testify as to the labelling of the exhibit bag did not constitute a reasonable doubt where he identified the bag and its contents in his evidence and that he recovered during the incident in question. The existence of this evidence distinguished this case from Dilbert v. Regina where a reasonable doubt existed as to whether the contents analyzed were the same as those recovered from the accused.

(R.F.)

Drugs - Possession of cocaine with intent to supply - Explanation by the accused -Identification of exhibit - Evidence of inference of possession with intent to supply

Case: Clarke v. Regina

Court: Grand Court (Summary Court Appeal) (150/88).

Cor: Collett, C.J.

Date: 3rd March 1989

Legislation: Misuse of Drugs Law (Revised) 1985

Cases cited: Dilbert v Regina S.C.A. 72/88

Counsel: Mr. J. Furniss for the appellant
Miss L. Dilbert for the Crown

The appellant was convicted of one offence of possession of cocaine with intent to supply contrary to s.3 (1) (m) of the Misuse of Drugs Law (Revised) and was sentenced to two years imprisonment.

During the course of a search of the appellant's house two police officers found a plastic bag containing 8 packages of gold foil containing powder which resembled cocaine. Subsequently, a police officer testified that he took the package to the Central Police Station, heat sealed the exhibit in the Appellant's presence, locked it away and then sent it to the U.S.A. for analysis. The same packet was received back together with a certificate which certified that the contents were 0.638 grams of cocaine. Counsel for the appellant submitted that the police officer did not testify what he wrote on the label which identified the drug exhibit. Consequently, the facts of the case came within Dilbert v. Regina S.C.A. 72/88.

The appellant had explained in his defence that he had found a light on in the house when he had returned from work and a plywood board displaced, which he had nailed back. He surmised someone had broken in and left the packages. Counsel for the appellant submitted that he had given an explanation of the presence of the cocaine consistent with his innocence.

Finally, counsel for the appellant submitted that there was not sufficient evidence produced by the prosecution to warrant the learned magistrate in drawing an inference that the Appellant's possession of the cocaine was with intent to supply. The officers had observed three people separately come to the door of the building and found in the room occupied by the Appellant $175 (C.I.) and $91 (U.S.) in notes.

Held: (appeal dismissed)

(1) In Dilbert v Regina there had been a gap in the chain of identification as the sample was not returned after examination and not exhibited at the trial and the officer had not testified what he wrote on the label. In the present case, the sample had been returned to the RCIP after examination together with the certificate of the analyst and had been produced in evidence.

(2) There were sufficient grounds for the learned magistrate to reject the explanation offered by the appellant as the officer saw a lot of cobwebs in the place which an intruder would have disturbed and the appellant was unable to give a satisfactory explanation why he told the examining officers "I don't know cocaine" before anything had been said to him concerning the contents of the foil.

(3) With regard to the conviction with intent to supply, the package were wrapped in the usual way in which that drug is sold on the streets at $25 a package. The presence of considerable cash found in the appellant's possession rebuts any suggestion he had been a purchaser of the drug rather than seller and the appellant had not suggested that he had any other source of funds other than savings from earnings.

(R.O.)

Drugs - Possession of Cocaine with intent to supply contrary to s.3(1)(m) Misuse of Drugs Law

Case:	Hendricks v. Regina
Court:	Grand Court (Summary Court Appeal) (30/89)
Cor:	Schofield and Harre, JJ.
Date:	2nd June 1989
Legislation:	S.3(1)(m) Misuse of Drugs Law
Counsel:	Appellant in person Mr. Sibbles for the Crown

The appellant's notice of appeal related only to sentence but the court reviewed the conviction also. The case against him was that he was observed by two police constables on Coventry Road off Walkers Road, sitting on an abandoned motor cycle with one Beaver Smith. He was seen to lower his right hand behind the motor cycle and a search revealed a quantity of cocaine in a match box lying where the appellant had dropped his hand. He gave three conflicting explanations;

(1) neither he nor Smith knew of the drug,

(2) Smith had been selling the drug and hid it,

(3) an individual unknown to him had placed the matchbox there.

Held: (appeal against conviction dismissed, appeal against sentence allowed)

(1) The appellant's movements, the fact that the drugs were found on his side and his conflicting explanations were sufficient to support the possession conviction.

(2) The appellant's youth and previous good record sentence rendered a sentence of 5 years excessive. Sentence reduced to 2 years.

(G.F.)

Drugs - Possession of Cocaine with intent to supply and resisting a lawful search contrary to s 3(1) (m) and s 5(1) Misuse of Drugs Law - 3 years - Appeals against conviction and sentence

Case:	King v. Regina
Court:	Grand Court (Summary Court Appeal) (3670-72/88)
Cor:	Schofield, J.
Date:	29th March, 1989
Legislation:	ss.3(1) (m) and 5(1) Misuse of Drugs Law
Counsel:	Mr. Furniss for the appellant Ms. Dilbert for the Crown

The appellant was seen by three constables holding a paper bag at the door of her house. Their attention was attracted to her when she asked why the police were questioning a man who had just left her house. They followed her into the house and drugs were found in the bag although the appellant had said there was only $159 in it. She claimed she had put money in the bag after picking it up from the floor and had no knowledge of he drugs. The bag had to be forced from her.

Held: (appeal against conviction and sentence dismissed)

(1) The appellant's knowledge of the drugs could only be proved by inference but the only reasonable inference from her behaviour and unconvincing explanation was that she knew what was in the bag.

(2) Despite her age and ill-health the 3 year sentence imposed was appropriate.

(G.F.)

Drugs - Possession with intent to supply cocaine contrary to s.3(1) (m) Misuse of Drugs Law - Appeal against conviction - Police Acting on information received - Highly prejudicial evidence - Unsafe conviction

Case:	Plummer v. Regina
Court:	Grand Court (Summary Court Appeal) (25/89)
Cor:	Schofield, J. and Harre, J.
Date:	12th June 1989
Legislation:	s.3(1)(m) Misuse of Drugs Law
Counsel:	Mr. Hampson for the appellant Mr. Sibblies for the Crown

The appellant was convicted of possession of cocaine with intent to supply. On 24th October 1988, acting on a tip-off, the police went to his residence and observed him walking to a rabbit hutch and placing something on top of it. 1.067 grams of cocaine base were found under a motor cycle helmet on top of the rabbit hutch. The appellant was arrested and said "I was only trying a thing. Can you give me a chance?" The police had been acting on a report that the appellant was dealing in drugs.

Held: (appeal allowed)

(1) Since the magistrate based his decision on the fact that such a report had been received by the police, which was inadmissible hearsay evidence of a highly prejudicial nature, he had misdirected himself in law and the conviction was therefore unsafe and must be quashed.

(2) Conviction quashed; sentence of 5 years imprisonment set aside.

(G.F.)

Drugs - Possession of cocaine with intent to supply - Possession of Cocaine.

Case: Robinson v. Regina

Court: Cayman Islands Court of Appeal (46/88)

Cor: Zacca, Pres; Georges, J.A.; Henry, J.A.

Date: April 19, 1989

Counsel: Mr. Furniss for the appellant
Mr. Sheehan for the respondent

Appeal against conviction of being in possession of cocaine and of being in possession of cocaine with intent to supply. The evidence against the appellant consisted of circumstantial evidence. The appellant elected not to give evidence relying on the submission that on the evidence lead, an irresistible inference could not be drawn that she was in possession of the substance recovered by the police from her premises. The evidence consisted of the testimony of three police officers who kept under observation for about half hour part of the premises which she occupied. The appellant was seen to walk to a spot between an outside toilet and a fence on three separate occasions, dig for a substance and then return to the house within five minutes with her fist clenched. The officers thereupon approached the appellant and informed her of their observations and then accompanied her to the spot. One of the officers dug in the area and recovered a plastic bag and bottle containing a substance which proved on subsequent analysis to be cocaine. There were no finger prints of the appellant on either the bottle or the other object recovered by the police. A urine sample supplied by her was negative for drugs. There was no evidence of dirt on her fingers, even though she was questioned shortly after the alleged digging in the sandy area where the items were recovered.

Held: (dismissing the appeal)

(1) Although the arguments about the absence of the appellant's fingerprints on the items recovered by the police and the absence of dirt on her hands were not without merit, the magistrate was entitled to accept the testimony of the police officers in preference to the denial by appellant.

(2) The magistrate was entitled to conclude that the appellant's presence in the area in question on three occasions in the preceding half hour was not mere coincidence and that it supported the inference that she had knowledge that the objects were in the area.

(B.B.)

Drugs - Possession of cocaine -Possession of cocaine with intent to supply - Evidence relating to other criminal offences - Expert evidence to interpret a document inference of intent to supply - Excessive sentence.

Case: Stewart v. Regina

Court: Grand Court (Summary Court Appeal) (156/88)

Cor: Collett, C.J. and Harre, J.

Date: 26th April 1989

Legislation: Misuse of Drugs Law (Revised) 1985
Criminal Procedure Code 1975

Cases cited: Ratten v. Queen [1971] 3 All ER 801
Makin v Attorney General for New South Wales (1894) AC 57
R v Sims (1946) 1 KB 531
Harris v D.P.P. (1952) AC 694
Noor Mohammed v The King (1949) AC 182
R. v Whittaker and Watler SCA No.13 of 1984

Counsel: Mr. D. Ritch for the appellant
Mr. A. Kerrins for the Crown

The appellant was convicted of one charge of possession of cocaine and one charge of possession of cocaine with intent to supply contrary to s.3(1) of the Misuse of Drugs Law. He was sentenced on each charge to four years imprisonment and a confiscation order was made in respect of $12,340(CI) and $300(US) and he was recommended for deportation.

Held: (appeal allowed in part)

1. A piece of paper found in the appellant's trouser pocket when first searched after his arrest was admissible as evidence of a tally of previous drug sales as it could legitimately lead to the inference that the appellant was in the business of selling cocaine. (Ratten v. Queen distinguished, Makin v. Attorney General for New South Wales, R v Sims and Harris v. D.P.P. applied).

2. That it is competent for the opinion testimony of an expert to be given to interpret such a document.

3. That it was correct for the magistrate to draw an inference adverse to the appellant as to the issue of intent to supply with regard to the amount of cocaine together with the document found in the trouser pocket.

4. That a sentence of 4 years imprisonment for intent to supply was not manifestly excessive or wrong in principle and the amount of the cocaine and its purity are, inter alia, factors to be taken into account. The 4 year sentence to be served concurrently for simple possession is excessive and is for the same possession as has drawn the concurrent 4 years on the more serious charge. This offends the maxim that no one should be punished twice for the same criminal act. The conviction for simple possession is quashed.

(R.O.)

Drugs - Possession of Ganja with intent to supply - Evidence - Hearsay - Whether adverse inference can be drawn from silence of the accused in the face of accusation - Whether intent to supply can be presumed from possession of controlled drug.

Case: Hurlston v. Regina

Court: Grand Court (Summary Court Appeal) (155/89)

Cor: Schofield, J.

Date: December 15,1989

Legislation: s 3(1)(m), s7 Misuse of Drugs Law(Revised)

Cases Referred to: Hull v. R [1971] All ER 324

Counsel: Appellant in person
Ms. Connolly for the respondent

Appeal against conviction by Summary Court on a charge of possession with intent to supply ganja contrary to section 3(1) (m) of the Misuse of Drugs Law (Revised)

Held: (allowing the appeal)

(1) The learned magistrate ought to have expressly excluded from his mind as hearsay and inadmissible evidence that a report was made against the appellant to the police station alleging that he was offering drugs for sale.

(2) No adverse inference could be drawn against the appellant from his silence in the face of the police officer informing him of the report to the police station.

(3) There is no presumption of intent to supply from possession of a

controlled drug. It is for the prosecution to prove strictly to the required standard that the appellant had the drug with intent to supply it.

(B.B.)

Drugs - Possession of ganja with intent to supply contrary to s.3(1)(m) Misuse of Drugs Law - Appeals against conviction and sentence - Circumstantial evidence and inconsistent explanations - Inference of future intent

Case:	Rivers v. Regina
Court:	Grand Court (Summary Court Appeal) (107/89)
Cor:	Schofield, J. and Harre, J.
Date:	6th October 1989
Legislation:	s.3(1)(m) Misuse of Drugs Law (Revised)
Counsel:	Mr. Hampson for the appellant Mr. Sheehan for the Crown

The appellant was convicted of possession of ganja with intent to supply contrary to s.3(1)(m) Misuse of Drugs Law. The appellant was observed by two police officers smoking an object like a cigarette and putting a small packet by a tree. When approached, the appellant smelt of ganja and a packet of cigarette papers was found in the hole in the block he had been sitting on. A bag containing compressed vegetable matter was found by the tree and the appellant was found to have CI$1785.69 and US$89 in his pocket. During interview he snatched the bag and poured away about a quarter of it before being caught about half a mile from the police station. He pleaded guilty to destroying evidence and escape from lawful custody, as well as consumption of ganja. The vegetable matter was analysed and found to be 25 grams of ganja. He gave inconsistent explanation for the large quantity of cash in his possession.

Held: (appeal dismissed)

(1) The appellant's possession of 25 grams of ganja combined with the possession of the money and his implausible explanations lead to the irresistible conclusion that he was guilty as charged.

(2) The money in his possession established not only that he had been selling the drugs but also in this case gave rise to an irresistible inference of his future intent to supply the drug.

(G.F.)

Drugs - Resisting search contrary to ss 5(1) and 12 Misuse of Drugs Law - Possession of cocaine with intent to supply contrary to s.3(1)(m) - Appeal against conviction.

Case: Rankine v. Regina

Court: Grand Court (Summary Court Appeal)(53/89;61/89)

Cor: Schofield, J.

Date: 23rd June 1989

Legislation: ss 5(1) and 12 Misuse of Drugs Law
s.3(1)(1) and 3(1)(m) Misuse of Drugs Law
s.220 (1)(b) Penal Code

Counsel: Appellant in person
Ms. Dilbert for the Crown

The appellant was convicted of resisting a search contrary to ss 5(1) and 12 of the Misuse of Drugs Law and of possession with intent to supply cocaine contrary to s.3(1) (m). He had pleaded guilty to the offence of consuming ganja contrary to s.3(1)(1) of the Misuse of Drugs Law and to the offence of burglary contrary to s.220(1)(b) of the Penal Code in respect of which conviction he appealed against sentence only. The appellant was observed by police and seen to throw an object to the ground. The object was a matchbox which contained 4 packets of cocaine. The appellant ran off but was caught by the police. He denied both possession of the match box and running off. His story was that he had been given the match box when he asked a passing cyclist for a light and on seeing its contents panicked and threw it to the ground.

Held: (appeal allowed in part)

(1) The appellant's story about the matchbox was incredible but because the small amount of cocaine and money in the defendant's possession there could be no inference of intent to supply; a simple possession charge was appropriate. A conviction for possession was substituted and the sentence reduced from 2 years to 12 months.

(2) The act of running off did amount to resistance although not of the most serious kind. The sentence was accordingly reduced from three months to fourteen days.

(G.F.)

Extradition - Judicial review - Certiorari

Case: Bodden v. The United States Government

Court: Grand Court (344/88)

Cor: Collett, C.J.

Date: January 19, 1989

Legislation: Extradition Act 1870
Habeus Corpus Act 1679

Cases Referred to: Rees v Sec. of State for the Home Department (1986) 2 All E.R. 321
A-G for Hong Kong v. Kwok-A-Sing (1912) 3 K.B. 427
R v Sec. of State or Home Affairs ex parte Budd (1942) 2 K.B. 14
Wall v R (No.2) 1927) C.L.R. 266
Searches Case (1588) 1 Leon 70
Ex parte Duvernay (1875) 19 L.C.J. 248

Counsel: Mr. Alberga Q.C. and Charles Quinn for the applicant
Mr. Smellie for the respondents

In an application for certiorari directed to the acting magistrate an the United States government in extradition proceedings, two issues were presented for consideration;

(i) Whether the Governor can legally issue a second order to proceed with extradition proceedings under section 7 of the Extradition Act 1870 once proceedings initiated by an earlier order of his pursuant to a request from the foreign government concerned have run their course and been terminated, unless a further request has been received from the government.

(ii) Whether a decision of the Grand Court that a writ of habeas corpus should go to the release of the applicant unconditionally from custody upon his commitment by the senior magistrate to await extradition to the United States of America is an absolute bar to any further proceedings to secure his extradition on identical charges.

Held: (application dismissed)

(1) The senior magistrate no doubt became functus officio once he ha made his order committing the applicant to prison to await extradition to the foreign country but there is no reason to hol that the Governor, not having been rendered functus officio by his issue of the first order to proceed, ever became so as a result of the making of that order of the magistrate or indeed a a result of the subsequent order of the Grand Court which quashe it.

(2) The court would assume that the same procedural error which led to the quashing of the applicant's commitment on 22 July 1988 would not be repeated. The judgment of this court delivered on that date discloses the nature of that error and also shows that there was no determination of the merits of the extradition application or of the sufficiency of the evidence to support the charge for which extradition is sought.

(3) The conclusion is that in fresh habeas corpus proceedings, such as might follow if the acting magistrate were to find it proper to commit the Appellant after hearing the evidence provided by the United States Government, the same question as to the validity of the grounds of his detention would not arise as arose for this courts determination in the earlier habeas corpus proceedings.

(4) It follows therefore that no good grounds were disclosed for issue of an order of certiorari in this case.

(B.B.)

Gambling - Order for forfeiture of monies after conviction for using home as common gaming and for selling lottery tickets - s.4 Gambling Law - Burden on prosecution prove monies subject to order were proceeds of sale.

Case: Aguilar v. Regina

Court: Grand Court (Summary Court Appeal) (87/89)

Judge: Collett, C.J.

Date: 8th November 1989

Legislation: s.4 Gambling Law
s.11(2) Gambling Law
s.182(1) Criminal Procedure Code

Counsel: Mr. Furniss for the appellant
Mr. Sheehan for the Crown

The appeal related to a sum of $5,200 which had been ordered to be forfeited. The appellant had alleged in his police statement that this money was money he had brought from his native Honduras to buy boat parts. Both he and his wife pleaded guilty to using their home as a common gambling house and selling lottery tickets contrary to s.4 of the Gambling Law and had admitted that two other sums were the proceeds of the sale of lottery tickets.

Held: (appeal allowed)

(1) Because of the guilty pleas, this explanation in relation to the $5,200 was never put before the magistrate and the outline of the facts supplied by the prosecuting officer suggested that the Appellant and his wife had given a false explanation that the $5,200 was part payment for the sale of a home. Therefore, the forfeiture order in respect of this sum could not stand.

(2) The burden was on the prosecution to establish that the $5,200 had been derived from the sale of lottery tickets. This issue had not been tried by the court.

(G.F.)

Manslaughter - Self Defence - Whether force used to repel attack excessive.

Case: Gordon v. Regina

Court: Cayman Islands Court of Appeal (24/87)

Cor: Zacca, Pres; Georges and Henry, J.J.A.

Date: August 7, 1989

Cases Referred to: Beckford v. R. [1987] 3 All E.R. 426

Counsel: Mr. Collins for the appellant
Mr. Smellie for the respondent

Appellant was convicted of manslaughter by a judge sitting alone upon her election pursuant to section 121A of the Criminal Procedure Code. The deceased made sexual advances to the appellant in her bedroom on the night in question. The deceased, a man of 72, was described as "a small man". There was evidence that the deceased was "hardly ever sober" and that "when drunk he was a violent man". The appellant alleged in her evidence that when she rejected his advances, the deceased kicked and boxed her, grabbed a machete and came after her. She ran to the adjoining room and he followed raising the machete as if he wanted to strike at her. She remembered that there was a knife on a table and as he came towards her with the machete she grabbed his hand and stabbed him in the chest. The machete fell and, in the ensuing struggle, he caught the appellant round the neck. She did not have the chance to get away. She "kept juking him with the knife" trying to get him to let go her neck until she felt the deceased's hand release from around her neck.

Held: (appeal allowed)

(1) Once the learned trial judge accepted that the deceased started the fight armed with a machete and concluded that "the truth of the matter was probably not far removed at all from her account" it is difficult to see how he could refer to the subsequent struggle as the appellant "persisting in her attack".

(2) There was insufficient evidence to refute her testimony indicating her apprehension or to justify the conclusion of the learned trial judge that the appellant did not think she was in danger of bodily injury from the deceased. If she did believe she was in danger of bodily injury, she would have been justified in using in self defence such means as were at her disposal and which were reasonable in the circumstances. She found a knife in hand when the deceased attacked her. Its use to repel an attack with a machete would have been reasonable in the circumstances.

(B.B.)

Motor Vehicles - Careless Driving - Appeal against conviction - Burde and Standard of proof - Verdict unsafe and unsatisfactory - Judgment unsatisfactory and unsubstantiated

Case: Terry v. Regina

Court: Grand Court (Summary Court Appeal) (3033/88)

Judge: Collett, C.J. and Harre, J.

Date: 17th April 1989

Counsel: Mr. Hampson for the appellant
Ms. Conolly for the Crown

The appellant had been convicted of careless driving in the Summary Court. The case against him was that he had struck and injured a pedal cyclist from the rear. His story, supported by his wife and a domestic servant (who were passengers) was that the cyclist had fallen into the side of the van while attempting to overtake it and that he had admitted that the accident was his fault, asked that the police not be called, and that the cause of the accident was a tyre blow out. The complainant denied all this and had told a police officer that the appellant had agreed to pay the bill and bring back the bicycle. The grounds of appeal were that:

(1) the magistrate had misdirected himself on the burden and standard of proof;

(2) the verdict was inconsisent with the evidence before the court and so was unsafe and unsatisfactory rendering a miscarriage of justice;

(3) the conclusions in the judgment were unsatisfactory and were unable to be substantiated.

Held: (appeal dismissed)

(1) There was no misdirection because on a full review of all the evidence the court came to the firm conclusion that the prosecution version of the events was the truth. The words of the record that "in all the circumstances the court saw no reason to discard the Crown's evidence or be doubtful of it" could not be interpreted as a direction that it was for the defendant to disprove the Crown's evidence.

(2) The magistrate's findings of fact based on the demeanour of the witnesses which here was that they were not reliable was not to be interfered with unless for a reason apparent in the fact of the record he did not take proper advantage of his opportunity to assess their evidence. Despite the sharp conflict on the evidence the magistrate was entitled to conclude that the cycle had been hit from behind.

(3) The magistrate did not err in the conclusion he reached on the evidence and his decision was therefore neither unsafe nor unsatisfactory. The appeal against conviction was therefore dismissed.

(G.F.)

Motor Vehicles - Dangerous driving contrary to s.65 Traffic Law, Law 16 1973 - Appeal against conviction.

Case: Nicolletta v. Regina

Court: Grand Court (Summary Court Appeal) (197/89)

Cor: Schofield, J.

Date: 21st December, 1989

Legislation: s.65 Traffic Law

Counsel: Mr. Furniss for appellant
Ms. Conolly for the Crown

The appellant was convicted of dangerous driving contrary to s.65 Traffic Law 16/1973. A police officer testified that he was in a police vehicle on Airport Road and observed the appellant executing an overtaking maneuver at over twice the speed limit in the face of oncoming traffic which was forced off the road. When stopped at the airport terminal the appellant said "you have a problem I have a plan to catch". He came out of the terminal again however, and was warned by the officer that he would be prosecuted for dangerous driving. The appellant testified that he was travelling to the airport to tell the agent he would not be taking the Jamaica flight and was travelling within the speed limits; he had lied about catching the plane because he did not want to argue with the police.

Held: (appeal dismissed)

(1) Despite the conflict between the evidence of the officer and the driver of the car overtaken, the fact that the police officer tried to get a statement from that driver supported his evidence as not being concocted and his evidence was accepted by the magistrate as truthful beyond a reasonable doubt rather than fabrication out of malice.

(2) The conviction should therefore stand.

(G.F.)

Motor Vehicles - Driving a motor vehicle without due care and attention contrary to s.66 Traffic Law - Appeal against conviction - Whether evidence consistent with exercise of due care and attention.

Case: Burgess v. Regina

Court: Grand Court (Summary Court Appeal) (39/88)

Judge: Collett, C.J.

Date: 11th October, 1989

Legislation: s.66 Traffic Law

Cases Cited: Brandon v. Osbourne (1924) 1 KB 548

Counsel: Mr. Parkinson for the appellant
Ms. Brooks for the Crown

The appeal was against a conviction for driving a motor vehicle without due care and attention contrary to s.66 of the Traffic Law. The appellant had driven into a parked car knocking it to the other side of the road where it knocked down a bystander. He alleged that he was dazzled by the lights of a car coming directly at him from the wrong side of the road. The witnesses had said that the parked car only had parking lights on and the appellant himself in a statement made to police had said that the car was parked and then made no mention of headlights.

Held: (appeal dismissed)

(1) Regardless of the degree of blame on the part of the driver of the parked car, it need only be shown beyond reasonable doubt that the appellant had failed to exercise due care and attention. That was the only verdict reasonably open on the evidence.

(2) The defence in Brandon v. Osbourne of having taken evasive action was not available because the actions of the driver of the parked car had not put the appellant in immediate danger.

(G.F.)

Motor Vehicles - Driving without due care and attention - Conflicting evidence - Absence of finding

Case: Samuels v. Regina

Court: Grand Court (Summary Court Appeal) (129/88)

Cor: Collett, C.J.

Legislation: Traffic Law

Date: 3rd January 1989

Counsel: Mr. John Furniss for the appellant
Ms. Connolly for the Crown

The appellant had been convicted of driving without due care and attention contrary to s.66 of the Traffic Law and was fined $160.00 and his licence was endorsed.

The charge arose out of an accident which happened on Sunday 9th August 1987. The appellant was driving his car along a main road when he collided with the rear of a motorcycle ridden by the complainant which was turning right on to a minor road which formed a junction with the main road at that point.

The complainant gave evidence that he had put on the indicator lights to signal an intention to turn right and had slowed down to allow two oncoming cars to go past before making his turn. As he made the turn

he was "licked off his cycle from behind."

After the accident the appellant stopped his car and went over to th complainant. Both testified that they had a conversation about signals. Both agreed that the complainant asked the appellant how h failed to see his signal. The complainant swore that he received th answer that the appellant hadn't seen him. The appellant swore that the complainant hadn't given any indication of a turn and how, if th indicator had been flashing, it was not still flashing after the accident. An independent witness confirmed the complainant's account

The learned magistrate did not make any findings on the issue but found the appellant guilty on the basis that, by attempting to overtake at an intersection he did not exercise due care and attention.

Held: (appeal allowed)

(1) The proposition that a motor car driver on a main road approaching a road junction with a minor road is never entitled to overtake a motorcyclist riding in front of him is too broad.

(2) The learned magistrate should have recorded a finding on the evidence whether or not the complainant had signalled. Appeal allowed, conviction quashed and the Appellant's fine is remitted.

(R.O.)

Motor Vehicles - Driving whilst intoxicated contrary to s.61(b) Traffic Law - Appeal against conviction and sentence - Proper operation of Intoxilyser

Case:	McDermott v. Regina
Court:	Grand Court (Summary of Appeal)
Cor:	Schofield, J.
Date:	9th March, 1989
Legislation:	s.6(1)(b) and s.62(4) Traffic Law s.25 Penal Code
Counsel:	Mr. Hampson for the appellant Ms. Brooks for the Crown

The appellant was involved in a collision with another vehicle on 27t September 1987; she appeared drunk and was found to have 140 milligrams of alcohol in 100 milliliters of blood after a breath test was administered by the intoxilyser machine. The defendant was given a copy of the certificate, the original being produced as an exhibit. The machine was calibrated on 1st September 1987. This certificate was also produced as an exhibit. The grounds of appeal were: (a) that the magistrate failed to satisfy himself that the check list referred to for calibrating the machine had been followed; (2) the Crown had not established that the operation manual had been followed.

Held: (appeal against conviction dimissed, appeal against sentence allowed)

(1) With regard to the grounds of appeal:

(a) The evidence was that the check-list was complied with in preparing the machine.

(b) It was not necessary to show that every individual step in the manual had been observed. The evidence showed that the officer knew how to use the machine properly and did in fact do so. The monthly calibration of the machine was proven and sufficient. The appellant's hysteria would not affect the reading.

(2) The disqualification was mandatory and the fine of $160 appropriate but the period of imprisonment in default of payment was in excess of that provided by s.25 Penal Code. Appeal against sentence allowed to the extent of reducing three months imprisonment in default of payment to 14 days.

(G.F.)

Motor Vehicles - Driving whilst intoxicated - Amendment of particulars of charge whether sufficient amendment - Whether evidence or arrest - Whether sufficient evidence of intoxication.

Case: Regina v. Watler

Court: Grand Court (Summary Court Appeal) (135/89)

Cor: Harre, J.

Date: November 24, 1989

Legislation: s.61(a)(b) Traffic Law

Cases Referred to: Cooper v Rowland 1977 RTR 291
Richard v. West 1980 RTR 215

Counsel: Mr. S. McField for the appellant
Mr. R. Sheenan for the Crown

The appellant was convicted of driving whilst intoxicated contrary to section 61(a) of the Traffic Law but as the particulars of the offence supported an offence under section 61(b) of the Law rather than the offence charged, the particulars were amended at the trial so as to justify the charge under section 61(a).

Questions arose at the trial as to whether the appellant had been arrested by a policeman in uniform as required by section 62(1) of the Traffic Law and, if so, whether the arrest was lawful; also whether without an analyst's certificate showing a blood alcohol level in excess of the prescribed limit, the evidence of what happened before the purported arrest was sufficient for the appellant to be brought before the court.

Held: (dismissing the appeal)

(1) The particulars of the offence were amended before any evidence had been heard at the trial.

(2) If a constable omits to state that he was in uniform, a court is entitled to assume that he was in uniform when he has stated that he was on duty as a motor patrol officer. Therefore, the court below was entitled to take judicial notice that a member of the police traffic department who was on duty must be in uniform.

(3) The arrest of the appellant was lawful. The police constable had reasonable grounds to believe that the appellant had committed an offence under section 61 of the Traffic Law. The circumstances were such that the appellant must have known the nature of the alleged offence for which he was detained. While it was true that he was released from hospital (where he had been taken upon his arrest) without arrangements having been made as to bail, this anomalous but humane practice of not restraining suspected road traffic offenders in hospital did not indicate that the appellant had not been arrested on the occasion in question.

(4) The Crown chose rightly not to rely on the certificate of blood analysis as there was no evidence of the provenance of the sample. However the learned magistrate, having accepted the evidence of the Crown of what transpired before the appellant's arrest and subsequent removal from the scene, found on those facts, standing alone, that he was guilty. The fact that he expressed himself in that way shows that he was addressing his mind to determining guilt without reference to the laboratory certificate. The appellant's conviction on that basis was safe and sound.

(B.B.)

Murder - Definition in s.168 Penal Code - Malice Aforethought - Intention to cause death or do grievous bodily harm defined in s.171 Penal Code - Circumstantial evidence - Trial by judge alone under s.12A Penal Code - Inference of guilt from circumstantial evidence

Case: Regina v. Ebanks

Court: Grand Court (Ind. 39/89)

Judge: Collett, C.J.

Date: 25th August, 1989

Legislation: s.168 Penal code
s.171 Penal Code
s.121A Criminal Procedure Code

Counsel: Mr. Smellie for the Crown
Mrs. P. Levers and Mr. G. Hampson for the defendant

The defendant was charged with a single count of murder contrary to s.168 of the Penal Code which provides "whoever of malice aforethought express or implied causes the death of another person by an unlawful act or omission is guilty of murder." s.171 further provides that malice aforethought shall be deemed established by proof, inter alia, of an intention to cause death or to do grievous bodily harm to a person. The defendant pleaded not guilty to this count and elected to be tried by judge alone in accordance with s.121A of the Criminal Procedure Code.

The particulars of the offence were that on 12th December 1982 or 13th December 1982 at West Bay, Grand Cayman he murdered Y. The Crown's case was that Y died as a result of two gunshot wounds inflicted by the defendant by the use of a .22 calibre gun at close range and that an intent to kill was to be inferred from the circumstances.

Held: (conviction entered)

(1) The crown had to prove beyond any reasonable doubt:

(a) that the victim's death occurred within a year and a day of some unlawful act which caused it;

(b) that this unlawful act or omission was perpetrated by the defendant;

(c) that it was accompanied on his part by an actual intention to kill or do grievous bodily harm to her or to another person;

(d) that the act or omission was perpetrated in West Bay on 12th and 13th September 1982.

(2) The evidence against the defendant was partly circumstantial; such evidence was not inferior to direct evidence of a fact in issue but required careful examination. An inference adverse to the defendant could only be drawn from circumstantial evidence if such an inference was the only logical one which could be drawn from it. There must also be no other co-existing circumstances which would weaken or destroy that inference.

(3) It was legitimate to infer from the forensic evidence that:

(a) the deceased was standing in her bathroom facing the window when she was shot in the right forehead with a .22 bullet fired through th screen of that window from outside by an assailant wielding a gun of that calibre a few inches from that screen;

(b) that the louvers of the window had been removed beforehand (sinc none were broken);

(c) that minutes, or possibly hours later, the victim was shot in th back of the neck, at point blank range while lying unconscious in the bathroom by an assailant using the same .22 calibre gun. The Chief Justice could therefore feel sure that the cause of death was an unlawful act perpetrated by the wielder of this gun and that there was an express intention to kill, so that the offence of murder had been committed.

(4) The crucial issue which remained was whether the perpetrator of the offence was the defendant. The evidence showed:

(a) that the defendant had of his own accord confessed to a credible witness on the following morning that he had shot the deceased to death;

(b) that the defendant arranged to acquire a firearm before the killing, had test fired a firearm of a description which could have caused the fatal wounds; had sought to acquire and probably acquired ammunition of the calibre which caused three wounds shortly beforehand; had admitted afterwards having hid a gun which had been used in a murder. Moreover, the details of the reports confession tallied closely with the circumstances of the shooting as disclosed by subsequent police investigations and forensic examination. The defendant was also found in possession of utensils which were apparently taken from the deceased's store on the night of the murder and he gave at least two false accounts of how he came by them. No evidence pointed to any other culprit. Despite the fact that there was no finger-print evidence against the defendant, that the gun had not been found and that the defendant made no attempt to conceal the clothing or deny that it was his, there was no finger-print evidence pointing to anyone else. There was nevertheless nothing surprising about a gun not being found in the circumstances of a guilty criminal person trying to bluff his way out of trouble by bold rather than furtive behaviour.

(5) The Chief Justice was therefore satisfied beyond any doubt that the defendant deliberately and with malice aforethought shot the victim to death at the stated place and time and was therefore guilty of murder.

(G.F.)

Obtaining property by deception contrary to s.223(1) Penal Code - Appeals against conviction and sentence.

Case:	McLaughlin v. Regina
Court:	Grand Court (Summary Court Appeal) (45/89)
Cor:	Schofield, J.
Date:	16th June, 1989
Legislation:	s.223(1) Penal Code
Counsel:	Appellant in person Ms. Dilbert for the Crown

The appellant was convicted on two counts of obtaining property by deception contrary to s.223(1) of the Penal Code. On 24th October 1988 he had been in custody with P at Georgetown Police Station. The appellant persuaded P to write a note to P's wife requesting her to give the appellant $300 to enable him to pay a police officer who would get him out of custody. On 24th October Mrs. P paid the appellant $300 in the presence of a witness to pay a police officer. A further $150 was paid later the same day. The appellant was arrested on 2nd November following a report from Mrs. P. The appellant admitted receiving $450 for carrying two notes to Mrs. P but said they related to information as to where P had hidden cocaine and money. He alleged that a note giving directions to the money and drugs was shown to him and when they were found it was from this stash that he was paid. Only the note concerning the $300 to be paid to the appellant was produced.

Held: (appeal against conviction dismissed)

(1) Despite some discrepancies, the evidence of Mrs. P and her two witnesses was to be preferred to the appellant's version.

(2) Although he had an appalling record for similar offences, the sentence imposed would be excessive in consecutive operation to those he was already serving.

(3) Appeal against sentence allowed to extent of reducing imprisonment from 2 years to 12 months.

(G.F.)

Official Corruption - Conspiracy - Uncorroborated evidence of accomplices

Case:	Regina v. Myers and Minzett
Court:	Grand Court (Summary Court Appeal)
Cor:	Collett, C.J.
Date:	14th April 1989
Legislation:	Penal Code (1975)
Cases referred to:	D.P.P. v. Kilbourne (1973) 57 CAR 381
Counsel:	Mr. Keith Collins for the appellant Ms. Brooks for the Crown

The appellant was convicted on three counts of official corruption contrary to s.78 (a) of the Penal Code and one count of conspiracy to defraud contrary to the common law. The co-defendant had been convicted and sentenced separately.

The appellant was employed as a vehicle inspector and driving test examiner and conceived a scheme whereby, in return for payment he would procure for selected members of the public the issue of Cayman Islands drivers licences to which they were not entitled without such persons having to undergo the prescribed drivers test. Four witnesses who had obtained licences in this way testified against the appellant

Held: (appeal dismised)

(1) In general, one accomplice should not be taken as corroborating the evidence of another but this is not a rule of universal application.(D.P.P. v Kilbourne)

(2) The four witnesses spoke of different incidents providing a measure of mutual corroboration of each other's testimony.

(R.O.)

Procedure - Deficiencies in Record of Proceedings in Summary Court - Failure to take pleas or reach verdict in Certified Record - Requirement to take plea and record admissions under ss. 62(1) and 63 Criminal Procedure Code - Formal arraignment and trial

Case:	Bush v. Regina
Court:	Grand Court (Summary Court Appeal)
Cor:	Schofield, J.
Date:	9th January 1989
Cases referred to:	Jerry De Witt v. Regina CICA 11/84
Counsel:	Mr. Quinn for the appellant

The appellant faced five charges in respect of which there were a number of deficiencies. The five charges were:

5083/87	Consumption of Cocaine
5084/87	Possession of Ganja
451/87	Consumption of Cocaine
452/87	Consumption of Ganja
453/87	Escaping Lawful Custody

After conviction, he appealed.

Held: (appeal allowed)

(1) There was no record of a plea being tendered in 5083/87 but it appeared that a "not guilty" plea was entered because a verdict of "not guilty" was recorded.

(2) In 451/87, there was no plea recorded or verdict indicated. In 453/87 there is no record. Because of the 2 year delay these charges should be withdrawn.

(3) In 5084/87 and 452/87 there was no record of a plea and it seemed no trial was conducted in either case. Although there was some indication of a guilty plea in 5084/87, both convictions should be quashed because there was no compliance with ss 62(1) and 63 Criminal Procedure Code, s.62(1) of which states:

> "If both parties appear, the court shall proceed to hear the case and the substance of the charge or complaint shall be read to the court and he shall be asked whether he admits or denies it".

(G.F.)

Rape - Evidence - Whether scream by complainant of rape capable of corroborating her evidence negativing defence of consent.

Case:	Shannon v. Regina
Court:	Cayman Islands Court of Appeal (48/88)
Cor:	Zacca, Pres; Georges, J.A.; Henry, J.A.
Date:	August 7, 1989
Counel:	Appellant in person Mr. Sheenan for the Crown

Appeal against conviction for rape upon the ground that there was no evidence upon which the jury could convict. The identity of the accused person and the fact of sexual intercourse were not in dispute. The only issue was consent. There were two conflicting stories of a relationship between the complainant and the appellant.
Held: (dismissing the appeal)

(1) As there were conflicting stories of a relationship, this was essentially a case for determination by a jury. The judge left it quite fairly to the jury. There is no room for saying that the complainant's story is so clearly improbable that the jury ought to have had their doubts about it, so that on appeal there could be sai to exist a lurking doubt.

(2) The appellant had given a version of events in which he had stated that the complainant had screamed but only after the act of sexual intercourse when he had disclosed that he was married and deeply attached to his family.

(3) Could the evidence of the scream corroborate a complainant's sto when it could also be said to be consistent with the version given b an accused person? A scream by the complainant could certainly be corroborative of evidence of lack of consent. The account given by the appellant would, of course, offer an explanation of that scream which could have led the jury to conclude that the scream was not indicative of the absence of consent, but merely anger at having been deceived. This question of interpretation was one for the jury, but the judge was correct in leaving the matter to the jury as potentiall corroborative.

(B.B.)

Theft contrary to ss. 212 and 218 Penal Code - Appeal against conviction and sentence - Intoxication by cocaine - Effect on Crimina intent - Whether intention to permanently deprive.

Case: Clarke v. Regina

Court: Grand Court (Summary Court Appeal) (174/89)

Cor: Schofield, J.

Date: 21st December 1989

Legislation: ss 212 and 218 Penal Code

The appellant was convicted of theft contrary to ss 212 and 218 Penal Code. The assistant in a jewellry store testified that the appellant inquired about the purchase of a gold chain and pendant but said he would need $300 from his aunt, saying she worked just across the street. He made off on his bike taking the chain and pendant saying he would bring it back. He was stopped by the police a half an hour later and handed them over but hurried off when asked to go to the station. When arrested that afternoon he alleged he was on his way back having got the money to pay but no money was found on him. He testified that the story about the aunt was a lie and that he had bee taking cocaine that day.

Held: (appeal against conviction dismissed, appeal against sentence allowed)

(1) The appellant's two possible defences, that he was so intoxicated by cocaine that he could not form the necessary criminal intent and that he did not intend to permanently deprive the owner of the property both failed. The evidence of his actions and clear recall showed he fully appreciated the nature and quality of his actions and his own testimony showed at the time he took the goods he had the necessary intent and intended to use them to buy cocaine. He was therefore properly convicted of theft.

(2) The sentence was excessive and should be reduced by half. Appeal against sentence therefore allowed to extent of reducing sentence from 18 months to 9 months imprisonment.

(G.F.)

Theft contrary to ss 212 and 218 Penal Code - Appeals against conviction and sentence - Identification evidence.

Case:	Connor v. Regina
Court:	Grand Court (Summary Court Appeal) (118/89)
Cor:	Schofield, J.
Date:	7th Sept. 1989
Legislation:	ss 212 and 218 Penal Code
Counsel:	Appellant in person Ms. Connolly for the Crown

The appellant appealed against two convictions for theft contrary to ss 212 and 218 of the Penal Code. In relation to the first offence, the appellant was seen putting a chain valued at $85 into his pocket by a shop assistant. When challenged by the assistant he denied taking it. He was chased by another assistant and eventually arrested by him but no chain was found on him. He gave no explanation to the police for running off. The first assistant had identified the appellant clearly as the man who took the chain. In relation to the second offence, the appellant was seen taking a blender, value $80, without paying for it. An assistant who observed the appellant in broad daylight over a considerable time period and who also knew him identified him.

Held: (appeal dismissed)

(1) In each case the identification evidence was strong and both convictions were safe and sound.

(2) Sentences of 6 months on each count to be served consecutively and $85 compensation confirmed under s.33 Penal Code.

(G.F.)

Theft contrary to s 212 and 218 Penal Code - Insufficient judgment - Three Elements for adequate judgment in addition to complying with s. 51 and 52 Criminal Procedure Code and requirements of Appeal Courts Failure to identify and determine upon vital issue - Accomplice Evidence - Corroboration - Substantial miscarriage of justice.

Case: Byrd v. Regina

Court: Grand Court (Summary Court Appeal) (118/88)

Cor: Schofield, J. and Harre, J.

Date: 14th September 1989

Legislation: ss 51 and 52 Criminal Procedure Code
s.172 Criminal Procedure Code

Cases Referred to: Smith and Ebanks v. Regina SCA 47 and 61 of 1988

The appellant was convicted of theft contrary to ss 212 and 218 Penal Code. The case against him was that he supplied automobile parts which had been stolen from D to an automobile painter who had inquire about those parts 2 days earlier. The painter, a Mr. R, paid $100 bu said he did not realise they were stolen. A police officer recovered the part from the painter and despite the denial by the appellant tha he knew of the painter or the parts, the magistrate recorded his reasons for finding him guilty of theft as follows:

"I accept evidence of R Guilty of Theft"

Held: (appeal allowed)

(1) The three elements which a sufficient judgment in the summary court must include were;

(i) the point for determination
(ii) the decision thereon
(iii) the reasons for the decision

These were required in addition to compliance with ss 51 and 52 of th Criminal Procedure Code. The judgment here was therefore not adequate.

(2) The magistrate failed to consider whether Mr. R was an accomplic as a possible handler of the stolen goods. Simply to state that he accepted the evidence of Mr. R was insufficient to demonstrate this. He had to state whether he felt corroboration of this accomplice evidence was necessary or whether he could rely on the uncorroborated evidence of an accomplice. The judgment was therefore defective in failing to determine upon that vital issue.

(3) The court was therefore unable to say that no substantial miscarriage of justice could have resulted (applying the test in s.17 Criminal Procedure Code) because the court had no way of knowing whether the magistrate considered the question whether Faulkner was ar accomplice.

(G.F.)

Assault Police Officer - Consuming Ganja - Possession of Ganja - 3 months imprisonment for assault - Sentence for possession varied to achieve consistentcy with sentence for consumption.

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (177/89)

Cor: Schofield, J.

Legislation: s 204(b) Penal Code
s3(1) (k) and (i) Misuse of Drugs Law

Counsel: Appellant in person
Ms. Dilbert for the Crown

The appellant, a 17 year old male, assaulted a police officer in the course of an arrest for possession and consumption of ganja. The amount discovered in his possession was 7.1 grams. He was sentenced to 3 months on the assault, 6 months suspended for two years on the consumption and 6 months concurrent with the assault sentence on the possession. He appealed the sentences.

Held: (appeal allowed)

(1) The proper approach in dealing with all 3 charges which arose from a single incident is to adopt a uniform approach. There was no justification for dealing with the two drug offences in different ways ie one by an immediate term of imprisonment and one by a suspended term.

(2) To achieve consistency in so far as possible, the appeal was allowed in relation to the sentence for possession and the period for imprisonment suspended for two years.

(R.F.)

Burglary and assault - Sentences to run consecutively - Complainant wished to withdraw case - Sentences should run concurrently

Case: Powery v. Regina

Court: Grand Court (Summary Court Appeal) (104 and 114/89)

Cor: Schofield, J.

Date: 4th August 1989

Counsel: Mr. Hampson for the appellant
Ms. Connolly for the Crown

On 4th May 1989 the appellant had been convicted of breaking into a house and stealing items having a total value of approximately $785.

The appellant had seven previous convictions. The appellant had received a partly suspended sentence in January 1989 and at the time of his conviction was serving a sentence of eight months imprisonmen The appellant was sentenced to eighteen months imprisonment, nine months of which was suspended.

On 8th June 1989, the appellant was convicted of assaulting his wife occasioning her actual bodily harm. Although the injuries were mino the circumstances of the assault were serious. It was not brought before the magistrate that the complainant wished to withdraw the charge and had sworn an affidavit to that effect and to the effect that she considered the appellant was unlikely to repeat his violenc against her. The complainant was also experiencing difficulties in holding the family together while her husband was in prison.

Held: (sentence varied)

(1) The sentence for the burglary offence cannot be said to be manifestly excessive in the light of the appellant's previous convictions.

(2) The complainant's view of the assault while not binding on the court, is relevant to sentence and it is in the public interest that the appellant be rehabilitated back into his family and society as a whole. Such rehabilitation may be rendered more difficult by an extra period of imprisonment. The sentence of si months imprisonment should be upheld but run concurrently with th sentence imposed for burglary.

(R.O.)

Burglary - Breach of Probation - 24 months, 6 suspended, varied to 18 months immediate - 6 months consecutive on breach of probation.

Case: Ovuq v. Regina

Court: Grand Court (Summary Court Appeal) (99/89)

Cor: Schofield, J.

Counsel: Mr. Furniss for the appellant
Mr. Sheehan for the Crown

The appellant, 19 years of age, pleaded guilty to burglary (jewelry and was sentenced to 2 years imprisonment, 6 months of which were suspended. The value of items stolen was $3000.00 and they were not recovered. The appellant appealed from sentence.

In addition, the court considered sentence in relation to 6 previous offences committed during the period June to September 1988. The appellant had been convicted and sentenced by the Summary Court on these offences as follows:

SC 2226/88 Burglary 50 hours community service
2227/88 Burglary 6 months, suspended 2 years
3195/88 Burglary 6 months, suspended 2 years
3196/88 Burglary 9 months
3310/88 Burglary 18 months 6 months suspended for 2 years (consecutive) to 3196/88

These sentences had been substituted by the Grand Court for a two year Probation Order (SCA 131/88) on the basis that the appellant was addicted to drugs and to allow him to attend a rehabilitation centre in Minnesota, U.S.A.

Two days after the probation order was substituted, the first mentioned jewelry burglary occurred. The appellant was not, however, charged or convicted until after he completed the aforementioned rehabilitation programme.

Held: (appeal allowed)

(1) In relation to the burglary (jewelry) the circumstances of the case including the fact of the previous existing probation order, rendered a partly suspended sentence inappropriate. However, the fact the offence was committed prior to the appellant having had the benefit of rehabilitation is relevant. Sentence varied by removing the part suspended and varying the period to 18 months.

(2) In relation to the 6 previous offences, without deciding whether the court had the power to pass sentence in excess of that originally chosen by the Summary Court, it would be inappropriate in these circumstances to do so. The appellant was sentenced as follows:

2226/88 - community service equal to that served
2227/88 -as above
3193/88 -1 day
3195/88 -1 day
3196/88 -6 months
3310/89 -6 months

All prison terms were consecutive with each other and concurrent to the burglary (jewelry) sentence.

(R.F.)

Drugs - Consumption of cocaine - 12 months, six months suspended varied to allow immediate release

Case: Jefferson v. Regina

Court: Grand Court (Summary Court Appeal) (15/89)

Cor: Schofield, J.

Legislation: S.3(1)(1) Misuse of Drugs Law (Revised)

Counsel: Mr. Hampson for the appellant
Mrs. Escalante for the Crown

The appellant had several previous convictions under the Misuse of Drugs Law all related to consumption offences. On a conviction of consumption of cocaine he was sentenced to 12 months imprisonment, 6 of which were suspended. Following the date of conviction, the appellant's wife required major surgery and was incapable of caring for the children of the family. Appeal was from sentence.

Held: (appeal allowed)

(1) Since this was not an offence involving supply of drugs and because the appellant has no history of supplying, the appeal was allowed in the peculiar circumstances to allow for immediate release.

(R.F.)

Drugs - Consumption and possession of cocaine - Ability to pay fine - Imprisonment in default

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (131/89)

Cor: Schofield, J and Harre, J.

Date: 14th September 1989

Legislation: s. 25 Penal Code
s. 12(4) Misuse of Drugs Law (Revised)

Cases Cited: Bush v. Regina (1985) CILR 62

Counsel: Ms. L. Dilbert for the Crown
Appellant in person

The appellant pleaded guilty to offences of consumption and possession of cocaine and was sentenced to suspended terms of imprisonment and fines. On the consumption charge, he was fined $1,000 with 6 months imprisonment in default of payment. On the possession charge, he was fined $2,000 with 6 months imprisonment in default. Unfortunately the Appellant has subsequently received a term of imprisonment for another offence which he is still serving. He is consequently unable to pay the fines.

Held: (appeal allowed)

(1) The principles applicable to the imposition of fines following convictions under the Misuse of Drugs Law were expressed by Summerfield CJ in Bush v. Regina. Section 12(4) requires that both imprisonment and a fine be imposed on conviction. But a balance must be struck between the sentence of imprisonment and the fine. "Before imposing a fine, especially a heavy one, with imprisonment in default, the court should be satisfied of the ability of the convicted person to pay it. It may often be necessary to tailor the fine to the ability of the convicted person to pay it....To slap down a heavy fine regardless of the accused person's ability to pay can often result in injustice. It may simply operate as an automatic sentence of imprisonment...It is clearly objectionable that a convicted person should have to suffer imprisonment simply because he is poor".

(2) Where the court is satisfied of the convicted person's ability to pay the fine there is every reason why the fine should be coupled with a term of imprisonment in default as a deterrent against non-payment. This may well be an important factor where the fine is a heavy one. (per Summerfield CJ in Bush v Regina)

(3) The period of 6 months imprisonment in default of the fine of $1,000 for consumption exceeds the maximum of 4 months permitted by section 25 of the Penal Code.

(4) In the present appeal there is nothing on the record to give any indication of the appellant's ability to pay these substantial fines. There is, indeed some evidence of inability, in that he was in custody throughout the time for payment which he was given. There appears to have been no inquiry as to means and the prosecution volunteered no information as to resources or life-style. The appellant's own representation is that he was never in a position to pay and there is nothing to rebut this. The fines should be scaled down, as should the periods of imprisonment in default of payment.

(5) The appeal is therefore allowed to the extent of reducing the fine of $1000 to $200 and the fine of $2,000 to $400, with 1 month and 2 months imprisonment respectively in default of payment. The appellant has 3 months in which to pay after his release from prison.

(P.H.)

Drugs - Consumption of ganja - Excessive fine

Case: Bodden v. Regina

Court: Grand Court (Summary Court Appeal) (21/87)

Cor: Harre, J.

Dates: March 16, 1989

Legislation: S 3(1)(1) Misuse of Drugs Law (Revised)

Cases referred to: Bush v. Regina (1986) C.I.R.L. 62

Counsel: Appellant in person
Ms. Conolly for the Crown

The appellant was convicted on 3 February 1988 of consumption of ganja contrary to section 3(1) of the Misuse of Drug Law. He was sentenced to 9 months imprisonment (suspended for 2 years) and a fine of $2000 or 6 months imprisonment in default. He was given 2 months to pay the fine. Thus he should have been committed in April 1988.

On 16th August 1988 he was convicted of consumption and possession of cocaine. He was fined $600 or 6 months imprisonment in default in each case. The suspended sentence of February 1988 was activated. He appealed against these sentences which included the activation of the suspended sentence. The appeal was heard by Schofield J. on 15th December 1988 but the issue of the fine imposed at the same time as the suspended sentence on 3 February 1988 was not addressed.

The present appeal concerns that fine of $2000 or 6 months imprisonment in default. The ground of appeal is that the fine was excessive for the consumption of ganja.

Held: (appeal allowed)

(1) As the matter was not addressed in the previous appeal the court has jurisdiction to deal separately with the appeal against the fine or imprisonment in default.

(2) Before imposing a fine (especially a heavy one) with imprisonment in default, the court should be satisfied of the ability of the convicted person to pay it. To slap down a heavy fine regardless of the accused person's ability to pay may simply operate as an automatic sentence for imprisonment or an extension of a substantive term imposed because of inability to pay. It is objectionable that a convicted person should have to suffer imprisonment or undergo longer term of imprisonment simply because he is poor.

(3) No doubt the learned magistrate took into account the accused's previous convictions related to ganja in imposing the fine. The record of the Summary Court does not include the matters which the learned magistrate took into account in arriving at the sentence. Accordingly the fine of $2000 and sentence of imprisonment in default is set aside.

(B.B)

Drugs - Possession and consumption of cocaine - Consumption of ganja - 12 months on possession varied by suspending same for 2 years.

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (52/89)

Cor: Schofield, J.

Cases referred to: Green v. Regina S.C.A. 130/88

Counsel: Mr. Hampson for the appellant

Ms. Dilbert for the Crown

The appellant, who had a previous conviction for handling stolen property, was given a suspended prison sentence for the consumption offence and an immediate prison sentence of 12 months for possession.

Held: (sentence varied)

(1) It is wrong in principle to mix suspended and immediate prison sentences as was done here.(John Sheldon Green v. Regina)

(2) It is usual to award a suspended sentence to a first offence of possession of cocaine. The sentence for possession is accordingly varied by suspending the entire 12 month period of imprisonment.

(R.F.)

Drugs - Possession of Cocaine - Consumption of cocaine - Escaping Lawful custody - 3 years reduced to 18 months, concurrent with 12 months and 3 months

Case:	Ebanks v. Regina
Court:	Grand Court (Summary Court Appeal) (2868-70/88)
Cor:	Harre, J.
Cases referred to:	Dilbert v Regina (S.C.A. 72/88) Tremlett v Richard Fawcett (unreported, U.K. Divisional Court, Q.B. division)
Legislation:	s.7(1)(b) Misuse of Drugs law (Revised)
Counsel:	Appellant in person Ms. J Conolly for the Crown

The appellant was found in possession of .488 grams, 88% cocaine base. His record included 3 drug related convictions, none for supplying any drug. He appealed against a sentence of 3 years for simple possession, 12 months concurrent for consumption, 3 months concurrent for escaping lawful custody as being excessive.

Held: (appeal allowed)

(1) The appellant's sentence was markedly out of line with sentences passed in similar cases.

(2) A sentence of 3 years is in line with those passed for possession of greater quantities with an intent to supply. The evidence here was the cocaine was for personal use and not supply.

(3) The sentence was manifestly excessive and reduced to 18 months, concurrent with sentences for consumption and escaping lawful custody.

(R.F.)

Drugs - Possession of cocaine - 3 years imprisonment - Deportation

Case: Creighton v. Regina

Court: Grand Court (Summary Court Appeal) (126/88)

Cor: Schofield, J.

Date: 15th December 1989

Legislation: s. 3(1)(a) Misuse of Drugs Law (Revised)

Counsel: Miss Brooks for the Crown
Appellant in person

The appellant was found in possession of 67.6 grams of 80% cocaine hydrochloride. She said that she had been asked to pass the substanc on to a man called "Danny", and that she had been threatened that her four year old son would be harmed. She is a 37 year old etymologist working with the Ministry of Agriculture in Jamaica. She had arrived in Cayman on vacation five days before her arrest. As well as her son, she has a seventy year old mother to maintain.

On her plea of "guilty" before the Summary Court to a charge of possession of cocaine with intent to supply contrary to section 3(1)(a) of the Misuse of Drugs Law (Revised), she was sentenced to three years imprisonment and recommended for deportation after her release. Appeal from sentence.

Held: (appeal dismissed)

(1) Undoubtedly this appellant is an intelligent and talented person. The sentence is having a traumatic effect on her family. Nevertheless this court must balance all that against the seriousness of the offence and its duty to protect the public of Cayman against the drug trader. The appeal was accordingly dismissed.

(P.H.)

Drugs - Possession of cocaine with intent to supply

Case: Regina v. Anderson

Court: Grand Court (Summary of Appeal) (90/89)

Cor: Schofield, J.

Date: 18th July 1989

Legislation: s.3(1) Misuse of Drugs Law (Revised)

Counsel: Ms. Dilbert for the Crown
Appellant in person

The appellant was convicted of possession of cocaine with intent to supply contrary to section 3(1) of the Misuse of Drugs Law. He pleaded "guilty" before the Summary Court. He admits that he had possession of 12.8 grams of cocaine hydrochloride. He said that he had been given the cocaine two days previously. He threw it in the dustbin but had been persuaded that it was stupid to throw the drug away, and that he should sell it. He is 28 years old. He has a steady relationship with a girlfriend in Jamaica and has two children by her. He is a first offender.

In sentencing the appellant to four years imprisonment, the learned magistrate noted that the appellant had only been in Cayman two days before his arrest. He did not accept that the appellant wanted to throw the drug away and that he was persuaded into selling it. This was the appellant's third visit to the Cayman Islands in a relatively short period of time despite the fact that he is a poor man.

Held: (appeal allowed)

(1) The sentence is out of step with previous sentences handed down by these courts for similar offences.

(2) Sentence reduced from four years to three years.

(F.H.)

Drugs - Possession of Cocaine with intent to supply contrary to s.3(1)(m) Misuse of Drugs Law - 5 years reduced to 2 years

Case:	Hendricks v. Regina
Court:	Grand Court (Summary Court Appeal) (30/89)
Cor:	Schofield and Harre, JJ.
Date:	2nd June 1989
Legislation:	S.3(1)(m) Misuse of Drugs Law (Revised)
Counsel:	Appellant in person Mr. Sibblies for the Crown

The appellant's notice of appeal related only to sentence but the court reviewed the conviction also. The case against him was that he was observed by two police constables sitting on an abandoned motor cycle with one S. He was seen to lower his right hand behind the motor cycle and a search revealed a quantity of cocaine in a match box lying where the appellant had dropped his hand. He gave three conflicting explanations;

(1) neither he nor S knew of the drug,

(2) S had been selling the drug and hid it,

(3) an individual unknown to him had placed the matchbox there.

Held: (appeal against conviction dismissed, appeal against sentence allowed)

(1) The appellant's movements, the fact that the drugs were found on his side and his conflicting explanations were sufficient to support the possession conviction.

(2) The appellant's youth and previous good record sentence rendered a sentence of 5 years excessive. Sentence reduced to 2 years.

(G.F.)

Drugs - Posession of cocaine with intent to supply (2 counts) - 4 1/2 years and $2000 fine on first, 5 1/2 years concurrent on 2nd - Fine reduced on appeal.

Case:	McLean v. Regina
Court:	Grand Court (Summary Court Appeal) (30/89) (869-871/ 1988)
Cor:	Harre, J.
Cases Referred to:	Bush v. R. (1986) CILR 62
Legislation:	s13 Misuse of Drugs (Amendment) Law, 1986
Counsel:	Appellant in person Ms. J. Conolly for the Crown

The appellant, a 20 year old male, was found in possession of 45 packets of cocaine comprising 5.307 grams on March 4 1988 and 29 packets of cocaine comprising 2.360 grams on August 26, 1988. He pleaded guilty to both charges. He had 4 previous convictions including one each for consumption and possession of cocaine. He appealed the sentence as excessive.

Held: (appeal allowed in part)

(1) The sentence was not wrong in principle or manifestly excessive despite the mitigating factors of the appellant's age.

(2) s13 Misuse of Drugs (Amendment) Law requires certain sentences including possession of cocaine with intent to supply to include a term of imprisonment and a fine.

(3) A fine so imposed should be tailored to the offender's means so as to strike a balance between the period of imprisonment and the fine (Bush v. Regina). A fine of $2000.00 in this case represents an incentive to a young man to return to the drug trade and was reduced to $500.00. The sentence on the second count was varied to include a fine of $500.

(R.F.)

Drugs - Possession of cocaine with intent to supply - Remaining on Islands without authorisation - Giving a false name - 3 1/2 years and fines of $200 and $300 upheld.

Case: Moorie v. Regina

Court: Grand Court (Summary Court Appeal) (116/89)

Cor: Schofield, J.

Date: December 15, 1989

Legislation: s 3(1)(m) Misuse of Drugs Law (Revised), s 56(1)(c), s74(1)(a)

Counsel: Appellant in person
Miss Brooks for the Crown

The appellant, a Jamaican mother of 4 children, pleaded guilty to all charges. The amount of cocaine in her possession was 38.5 grams. She appealed sentence.

Held: (appeal allowed in part)

(1) While the court has sympathy for the appellant and the hardship imprisonment will cause her dependent children, the seriousness of the offence and the court's duty to protect the public's interest justify the sentence.

(2) The fines for overstaying and giving a false name were also appropriate but the periods of imprisonment in default exceed those prescribed by s25 Penal Code and are reduced to $200 or 1 month (from 3 months) and $500 or 2 months (from 3 months).

(R.F.)

Drugs - Possession of cocaine with intent to supply - Possession of ganja - Consumption of ganja - Theft - 5 years reduced to 3 1/2 on possession of cocaine with intent to supply.

Case: Myles v. Regina

Court: Grand Court (Summary Court Appeal) (89/89)

Cor: Schofield, J.

Date: July 18, 1989

Legislation: s 3(1)(m), 3 (1)(k), s3(1)(e) Misuse of Drugs Law; s 212 and 218, Penal Code

On search of the appellant's person and home 60 cocaine rocks totalling 10.169 grams were found together with ganja weighing 9 grams and one hundred and seventy five recorded video tapes, the property of V. The appellant also tested positive on a urine test for ganja. The appellant, who was a 37 year old woman, was sentenced to five years for possession with intent to supply 6 months concurrent for possession of ganja, 3 months concurrent for consumption and 6 months consecutive for theft. Appeal was from sentence only.

Held: (appeal allowed in part)

(1) The consecutive approach to sentence for theft was appropriate.

(2) The courts have been adopting an upward trend in sentencing suppliers and the court found no sympathy for this appellant. However, in light of previous sentences for like offences in the court the sentence of 5 years was excessive and reduced to 3 1/2 years.

(R.F.)

Drugs - Possession of cocaine - Possession of cocaine with intent to supply - Evidence relating to other criminal offences - Expert evidence to interpret a document inference of intent to supply - Excessive sentence.

Case: Stewart v. Regina

Court: Grand Court (Summary Court Appeal) (156/88)

Cor: Collett, C.J. and Harre, J.

Date: 26th April 1989

Legislation: Misuse of Drugs Law 1985
Criminal Procedure Code 1975

Cases cited: Patten v. Queen [1971] 3 All ER 801
Makin v Attorney General for New South Wales (1894) AC 57
R v Sims (1946) 1 KB 531
Harris v D.P.P. (1952) AC 694
Noor Monammed v The King (1949) AC 182
R. v Whittaker and Watler SCA No.13 of 1984

Counsel: Mr. David Ritch for the appellant
Mr. Anthony Kerrins for the Crown

The appellant was convicted of one charge of possession of cocaine and one charge of possession of cocaine with intent to supply contrary to s.3(1) of the Misuse of Drugs Law. He was sentenced on each charge to four years imprisonment and a confiscation order was made in respect of $12,840(CI) and $300(US) and he was recommended for deportation.

Held: (appeal allowed in part)

1. A piece of paper found in the appellant's trouser pocket when first searched after his arrest was admissible as evidence of a tally of previous drug sales as it could legitimately lead to the inference that the appellant was in the business of selling cocaine and likely to intend to supply a substantial quantity he had cached as soon as a customer could be found.(Ratten v. Queen, Makin v. Attorney General for New South Wales , R v Sims ,, Harris v. D.P.P.)

2. That it is competent for the opinion testimony of an expert to be given to interpret such a document.

3. That it was correct for the magistrate to draw an inference adverse to the appellant as to the issue of intent to supply with regard to the amount of cocaine together with the document found in the trouser pocket.

4. That a sentence of 4 years imprisonment for intent to supply was not manifestly excessive or wrong in principle and the amount of the cocaine and its purity are, inter alia, factors to be taken into account. The 4 year sentence to be served concurrently for simple possession is excessive and is for the same possession as has drawn the concurrent four years on the more serious charge. This offends the maxim that no one should be punished twice for the same criminal act. The conviction for simple possession is quashed

(R.O.)

Drugs - Possession of ganja - Consuming cocaine - Default of payment

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (150/89)

Cor: Schofield, J.

Date: 29th September 1989

Legislation: Penal Code

Counsel: Appellant in person
Mr. Sheehan for the Crown

Held: (appeal dismissed)

(1) Having regard to the previous convictions of the Appellant, fines of $500 for possession of ganja and $1,000 for consuming cocaine are not excessive or inappropriate.

(2) The sentences of 4 months and 6 months imprisonment in default o payment of the fines exceed the maxima prescribed by section 25 of th Penal Code. Having regard to the Appellant's circumstances, it was not necessary to impose the maximum prescribed. The periods were reduced to 6 weeks and 3 months, to operate consecutively in the even of the fines remaining unpaid.

(P.H.)

Fine - Ability to pay - Imprisonment in default - Extension of time

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (130/89)

Cor: Schofield, J and Harre, J.

Date: 6th October 1989

Legislation: Penal Code

Cases cited: Bush v. Regina (1986) CILR 62

Counsel: Mr. G. Hampson for the appellant
Mr. R. Sheehan for the Crown

The Appellant was convicted of five traffic offences and received a total fine of $800 with a total of seven months imprisonment in default of payment. This included a fine on one charge of $200 or 3 months imprisonment. He was given 2 months to pay the fines. Unfortunately, he was taken into custody where he has been ever since, on other matters before the two month period that was allowed for payment expired. He is consequently unable to pay the fines within the period.

Held: (appeal allowed)

(1) The fine should be tailored to his ability to pay if injustice is not to result. (per Sir John Summerfield CJ in Bush v Regina)

(2) The appellant was in employment in the construction industry at the time the fines were imposed. The fines do not therefore offend against the above expression of principle.

(3) The Appellant needs reasonable time to pay the fines. The sentence should be varied to allow him four months after his release from prison to get back on his feet in employment and acquire funds.

(4) The sentence of 3 months imprisonment in default of payment of the fine of $200 exceeds the maximum set out in section 25 of the Penal Code. It will therefore be reduced to 30 days.

(P.H.)

Motor Vehicles - Death by Dangerous Driving - 18 months

Case: McCoy v. Regina

Court: Cayman Islands Court of Appeal (45/89)

Cor: Zacca, President; Georges, J.A.; Kerr, J.A.

Date: November 30, 1989

Cases Referred to: R v. Boswell 1984 3 All ER 353
Rivers v. Regina C.I.C.A. #6/88

Counsel: Mr. Hill Q.C. and Mr. Hampson for the appellant
Ms. Dilbert for the Crown

The appellant, a firemen, was returning from his place of work in the early morning hours after working a double shift when he struck and killed the deceased who was walking on the side of the road. The appellant's evidence was that he had fallen asleep at the wheel and while admitting he had hit something, he thought it was a tree. He had earlier taken a diet pill and had been drinking alcohol. He did not stop following the collision or report the accident. He plead guilty and was sentenced to 18 months. He appealed on the basis that the trial judge had failed to give due weight to the mitigating factors, in particular, that the deceased had been his second cousin and that his death would forever be reason for remorse.

Held: (appeal dismised)

(1) The sentence of 18 months adequately reflected the mitigating factors of the case.

(2) A custodial sentence was inevitable based on the existence of two aggravating factors, namely, the consumption of alcohol by the appellant and his failure to stop at the time of the accident and report it.

(R.F.)

Motor Vehicles - Disqualification from driving - Whether period appropriate in circumstances.

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (55/88)

Cor: Harre, J.

Date: June 13, 1989

Cases referred to: Ramgeet and Forbes v Regina
(S.C.A. 94-5/89)

Counsel: Mr. P. Polack for the appellant
Ms. Dilbert for the Crown

Appeal against sentence including disqualification from driving for 3 months. The appellant is a painter and a family man whose livelihood depends on the use of a motor venicle in the course of his employment. Apart from one offence of failing to comply with a traffic sign, he had a clean driving record.

Held: (allowing his appeal to the extent of lifting the disqualification).

(1) A court must take into account the circumstances of an offender before imposing disqualification. An order which may involve relatively minor inconvenience for one offender may be catastrophic to another.

(2) The appellant falls into the latter category. Had the magistrate had all the facts before him he might well have come to a different conclusion.

(B.B.)

Motor Vehicles - Driving Away a vehicle without owner's consent -3 months.

Case: Logan v. Regina

Court: Grand Court (Summary Court Appeal) (97/89)

Cor: Schofield, J and Harre, J.

Date: June 2 1989

Legislation: s75 (1) Traffic Law

Counsel: Mr. Furniss for the appellant
Mr. Sibblies for the Crown

The appellant had previous convictions for speeding and driving without insurance in 1987. At the same time as he was sentenced for the offence under appeal, he pleaded guilty to driving without a licence, driving without insurance and careless driving in respect of the same vehicle and to dangerous driving without a licence and driving without insurance arising from an earlier incident. The appellant held a valid Jamaican driving licence but no local licence.

He appealed the sentence of 3 months as excessive based on his contention that the car had been rented by his brother's girlfriend who would have granted him permission to drive it if she had been in a position to do so. i.e if he had a valid driving licence.

Held: (appeal dismissed)

(1) The appellant's record established a penchant for traffic violations which warranted a sharp deterrent sentence.

(R.F.)

Motor Vehicles - Permitting the use of a motor vehicle without insurance contrary to s.3(2) Motor Vehicles Insurance (Third Party Risks) Law 1964 - Appeals against conviction and sentence - Magistrate's finding as to credibility of witnesses not to be questioned - Lying to court not a valid reason for increasing sentence.

Case:	Fish v. Regina
Court:	Grand Court (Summary Court Appeal) (14/89)
Cor:	Harre, J.
Date:	12th June, 1989
Legislation:	s 3(2) Motor Vehicles (Third Party Risks) Law 1964 s.12 Bank of Jamaica Law 1960 s.8 Decimal Currency and Legal Tender Law 7 of 1969 Currency Law 1971 (Law 19) Currency Law 1974 (Law 1)
Counsel:	Ms. Bodden for the appellant Mr. Sibblies for the Crown

The appellant was convicted of permitting the use of a motor vehicle without insurance contrary to s.3(2) of the Motor Vehicles Insurance (Third Party Risks) Law 1964 when his wife's car was involved in an accident. The appellant had given two conflicting stories to the police: (1) that he had lent the car to the uninsured driver to collect his wages; (2) that the car had been taken without permission. The latter story was confirmed by an employee of the appellant but was disbelieved by the magistrate. The fine of $150 was the maximum converting the £50 maximum under the 1964 Law to Cayman Dollars. The magistrate had also imposed 15 months disqualification because the defendant had lied to the court.

Held: (appeal allowed in part)

(1) The conviction should stand but a reduction in sentence was appropriate. The magistrate's assessment of the credibility of the witnesses must stand and he had correctly applied the burden and standard of proof.

(2) Conduct during the proceedings was not a basis for increasing sentence. The minimum of 12 months disqualification was appropriate.

(3) Appeal against sentence allowed to extent of reducing fine from $150 to $75 and period of disqualification from 15 to 12 months.

(G.F.)

Motor Vehicles - Driving whilst disqualified - Driving without insurance - Period and timing of disqualification - Amount of fine

Case: Powell v. Regina

Court: Grand Court (Summary Court Appeal) (113/89)

Cor: Schofield, J.

Date: 15th September 1989

Legislation: Traffic Law (Revised) 1986
Motor Vehicles insurance (Third Party Risks) Law 1964

Cases cited: Fish v. Regina SCA #14/1989

Counsel: Ms. Dilbert for the Crown
Appellant in person

The appellant was convicted of driving whilst disqualified and of driving without insurance. He was sentenced to 3 weeks imprisonment together with a 2 year period of disqualification on the first count and to a fine of $150 or 1 month imprisonment and a period of disqualification for 12 months on the second count. He appealed from sentence.

Held: (appeal allowed in part)

(1) On the first count, the learned magistrate was obliged by section 69(1) of the Traffic Law to sentence the appellant to a term of imprisonment with hard labour. Under s.69(1) the learned magistrate had no discretion but to impose a further two years disqualification to run from the expiration of the existing period.

(2) On the second count, the maximum fine for an offence under section 3 Motor Vehicle Insurance (Third Party Risks) Law is $100. (Fish v Regina). Accordingly the fine in count 2 is reduced to $100. The period of disqualification was legal and appropriate.

(R.O.)

Motor Vehicles - Speeding - Effect of previous convictions s71(3) Traffic Law - $300 fine and 18 months disqualification

Case: O'Connor v. Regina

Court: Grand Court (Summary Court Appeal) (96/89)

Cor: Schofield, J and Harre, J.

Legislation: s.71(3) Traffic Law

Cases referred to: Solomon v Regina SCA 11/89

Counsel: Mr. Hampson for the appellant
Ms. Dilbert for the Crown

The appellant was convicted of speeding and disqualified from driving. The effect of the disqualification would seriously impede his career which involved use of a motor vehicle. He had three previous convictions for speeding, two for careless driving and one for leaving the scene of an accident.

Appeal was from sentence and based on the contention that, pursuant to s71(3) Traffic Law, previous convictions recorded more than 3 years before the current offence ought not to be taken into account in determining sentence.

Held: (appeal dismissed)

(1) s71(3) Traffic Law does not have the effect contended for as to render such earlier convictions "spent".

(2) The sentence in Solomon v. Regina was based on the peculiar facts of that case and has no relevance here.

(R.F.)

Motor Vehicle - Speeding - s.16 Traffic Law - Disqualification -s70 Traffic law -12 month disqualification reduced to 3 months.

Case : Ramgeet v. Regina
Forbes v. Regina

Court: Grand Court (Summary Court Appeal) (94 & 95/89)

Cor: Schofield, J and Harre, J.

Date: June 12/89

Legislation: Traffic Law

Counsel: Mr. Furniss for the appellants
Mr. Sibbles for the Crown

The first appellant exceeded a 40 m.p.h. limit by 13 m.p.h. on Red Bay Road at its junction with South Sound Road at 12.45 a.m. The second appellant exceeded a 40 m.p.h. by 15 m.p.h. at 1.24 a.m. Both appellants pleaded guilty and were disqualified for a period of 12 months. They appealed and the appeals were consolidated.

Held: (appeal allowed in part)

(1) The question is whether it is proper to impose orders of disqualification for the offence of speeding simpliciter where there is no evidence of driving at a speed dangerous to the public which calls for a mandatory disqualification of three years.

(2) The power of a magistrate to order disqualification and as to the period is unfettered save that it must be exercised judicially. In exercising such discretion the magistrate should take into account:

a) the seriousness of the offence - the actual speed and the amount by which it exceeds the limit are relevant but not determinative of the question of seriousness. The nature of the road and whether there is a high volume of vehicular and pedestrian traffic must also be considered.

(b) the circumstances of the offender which must include the previous driving record, impact on livelihood and degree of inconvenience.

(3) In the case of both appellants, a consideration of the factors warranted a period of disqualification. In the case of the 1st appellant who had a previous conviction but who would suffer hardship as a result of the disqualification 12 months was warranted. In the case of the 2nd appellant, a first offender who was unemployed, a disqualification of 12 months was disproportionate to the seriousness of the offence and was reduced to 3 months.

(R.F.)

Motor Vehicles - Speeding - Disqualification - Previous offences

Care: Terry v. Regina

Court: Grand Court (Summary Court Appeal) (32/89)

Cor: Schofield, J.

Date: 19th October 1989

Legislation: Traffic Law
Rehabilitation of Offenders Law 1985

Counsel: Mr. Furniss for the appellant
Ms. Connolly for the Crown

The appellant was convicted of speeding contrary to s.63 (1) (a) of the Traffic Law and was sentenced to pay a fine of $220 and disqualified from holding or obtaining a driving licence for four months. He appealed against the disqualification order only.

The appellant had several previous convictions including one for failing to comply with a traffic sign and one for careless driving. Counsel for the appellant urged that these convictions be ignored in keeping with the spirit of Rehabilitation of Offenders Law. The appellant had a more recent conviction for careless driving.

Held: (appeal dismisised)

1. With regard to the older convictions the court is not obliged to ignore them and takes them into account but they do not weigh as heavily as more recent convictions.

2. Given all the circumstances there was no reason to interfere with the period of disqualification.

(R.O.)

Remaining in the Cayman Islands without authorisation - Using an irregular passport - Making a false statement - Time between arrest and appearance before the magistrate

Case: Smith v. Regina

Court: Grand Court (Summary Court Appeal)

Cor: Schofield, J.

Date: 25th January 1989

Legislation: Caymanian Protection Law 1984
Police Law 1976

Counsel: Mr. Furniss for the appellant
Ms. Escalante for the Crown

The appellant was convicted of three offences against the Caymanian Protection Law, remaining in the Cayman Islands without authorisation contrary to s.56(1) and making a false statement contrary to s.74(1)(a). He was sentenced to a three hundred dollar fine or 1 month imprisonment in default of payment on the first count, a five hundred dollar fine or 1 month imprisonment in default of payment on the second count and an immediate sentence of three months imprisonment on the third count.

Held: (appeal dismissed)

1. The sentences imposed were legal and appropriate.

(R.O.)

Theft - ss. 212 and 218, Penal Code - Bank Employee - 9 months of which 4 were suspended.

Case: Rankine v. Regina

Court: Grand Court (Summary Court Appeal) (79/89)

Cor: Schofield, J.

Dates: June 2, 1989

Legislation: Penal Code, s212 and 218

Counsel: Mr. Furniss for the appellant
Mr. Sibblies for the Crown

The appellant, a 23 year old mother of 3 children, was convicted on her own plea of guilty to an offence of theft and was sentenced to 9 months imprisonment, four of which were suspended. The theft occurre while she was employed as a teller. Over a period of one week, the appellant in six transactions stole a total of CI$4900 and US$2400. She attempted to conceal the theft by detroying documents.

Held: (appeal dismissed)

(1) The period of imprisonment was not manifestly excessive having regard to the seriousness of the offence. The court must mark its disapproval of conduct amounting to breach of trust by imposing a rea form of imprisonment.

(2) The type of offence is one which the appellant is unlikely to commit again and a partial suspension of imprisonment was therefore justified.

(R.F.)

Theft - Money repaid - Young offender - Suspended sentence.

Case: Briceno v. Regina

Court: Grand Court (Summary Court Appeal) (72/89)

Cor: Schofield, J and Harre, J.

Date: 2nd June 1989

Legislation: Penal Code

Counsel: Mr. Furniss for the appellant
Mr. Sibblies for the Crown

The appellant who was 17 years old at the time of the offence, was employed by a bank from 9th March 1987. From 4th September to 21st September 1987 she sold drafts to customers and kept the cash on them totalling $4,460.76. She has now repaid the whole of that sum. Her mother was extremely ill at the time of the offence and has since died. It was in paying her mother's medical bills that the appellant found herself in financial difficulties.

The appellant pleaded "guilty" to five charges of theft, contrary to sections 212 and 218 of the Penal Code. She was sentenced by the learned senior magistrate to a total of 9 months imprisonment and a further 9 months which was suspended for 2 years.

Held: (appeal allowed)

(1) Whilst a real term of imprisonment, possibly with part of that suspended, is usually appropriate for this type of offence, in the circumstances of this offence and in particular the youth of the offender, the learned magistrate should have imposed fully suspended sentence.

(P.H.)

Theft - Burglary- s7 Penal Code -18 months of which 6 were suspended varied to 12 months suspended

Case:	Dixon v. Regina
Court:	Grand Court (Summary Court Appeal) (155/88 and 4/89)
Cor:	Harre, J.
Legislation:	s.7 Penal Code
Counsel:	Appellant in person Ms. J. Conolly for the Crown

The appellant, a 21 year old male, was convicted on his plea of guilty to theft of 120 pounds of lobster meat valued at $1320, two offences of burglary and one of theft (stealing cash of $350.00 from a parked car). On the first theft he was sentenced to 18 months imprisonment, with 6 months suspended for 18 months and ordered to pay compensation of $400.00. On the other 3 offences he was sentenced to 2 years, 9 months and 12 months concurrently. He appealed on the ground the sentence was excessive in each case.

Held: (appeal allowed in part)

(1) Notwithstanding the appellant's lamentable record, the sentence for theft of the lobster meat was varied to 12 of the 18 months suspended in recognition of his participation in a rehabilitation group within prison.

(2) The concurrent sentences for the 3 remaining convictions were no unlawful or manifestly excessive and within the maximum imposed by s7 Criminal Procedure Code.

(R.F.)

Theft - Concurrent sentence - Magistrate should announce total period of incarceration

Case: Ebanks v. Regina

Court: Grand Court (Summary Court Appeal) (59/89)

Cor: Schofield, J and Harre,J.

Date: 6th October 1989

Counsel: Mr. G. Hampson for the appellant
Mr. R. Sheehan for the Crown

The appellant was convicted on three counts of obtaining property by deception. He was sentenced to 6 months imprisonment on each count, two of which were to be concurrent, one to be consecutive. Counsel or both sides recalled the learned magistrate pronouncing in court that all three sentences would be concurrent.

Held: (appeal allowed in part)

(1) It would have been proper sentencing policy to make all three terms concurrent in view of the fact that the offences were repetitive in nature. Each offence involved passing a stolen and valueless cheque for $100 and obtaining property in return. In view of these factors and the ambiguity which existed in the minds of both counsel, the terms in this case should have been concurrent.

(2) In cases where several terms of imprisonment are imposed, the magistrate should announce clearly in court, and include in the record, the overall effect of the sentence in terms of actual period of incarceration which the convicted person faces. It is clearly unjust for him or his counsel to be left in any doubt in this regard.

(P.H.)

Using Irregular passport - 6 months reduced to 4 months

Case: Graham v. Regina

Court: Grand Court (Summary Court Appeal) (82/89)

Judge: Schofield, J

Legislation: s74(1)(c) Caymanian Protection Board

Counsel: Appellant in person
Mr. Sheehan for the Crown

The appellant, a first offender, was sentenced to 6 months imprisonment on a charge of using an irregular passport. He was also sentenced to 2 months consecutive on a conviction of making a false statement and fined $200 on a conviction of overstaying. Appeal was from sentence.

Held: (appeal allowed in part)

(1) The sentences for overstaying and making a false statement were proper.

(2) 6 months was the maximum sentence under s74(1)(c) Caymanian Protection Law and was not justified where the appellant is a first offender.

(R.F.)

DAMAGES

Conversion - Calculation of Damages
(SEE Torts-Conversion)

Duty to mitigate loss - Motor accident caused by the negligence of the defendant - Unavailability of parts.

Case: McLaughlin v. Forbes and Forbes

Court: Grand Court (Summary Court Appeal) (1/87)

Cor: Schofield, J.

Date: 27th October 1989

Cases cited: Garnac Grain Co. v. Faure and Fairclough [1968] A.C.1130

Counsel: Mr. K. Collins for the appellant
Mr. T. Shea for the respondent

The appellant claimed damages from the respondents, in respect of a motor vehicle accident which occurred as a result of the negligence of the respondent. Liability was accepted and the only issue in dispute was the quantum of damages. The appellant claimed that the vehicle was off the road for 52 days awaiting parts to be delivered from overseas and the repairs to be effected. He claimed $25 per day as the cost of hiring a vehicle from a friend. The respondents alleged that the appellant should have mitigated his loss by ensuring an earlier dispatch of the parts required and an earlier repair of the vehicle.

The learned magistrate considered 52 days to be an inordinately long period and cut the appellant's claim to 21 days loss of use as the appellant was under a duty to mitigate his loss.

Held: (appeal allowed)

(1) The onus was on the respondents to show that the loss could have been mitigated.(Garnac Grain Co. v. Faure and Fairclough) The respondents called no evidence that the parts could have been available at a date earlier than their dispatch. There is no basis upon which to make a finding that the parts could have been available within 21 days.

(2) The learned magistrate should have allowed 52 days loss of use.

(R.O.)

Exemplary Damages
(SEE Torts-Conversion)

FAMILY LAW

Affiliation - Defendant ceased to reside in the Islands - Meaning of "return"

Case:	Baker v. Lawrence
Court:	Grand Court (Summary Court Appeal) (2/89)
Cor:	Schofield, J.
Date:	27th October 1989
Legislation:	Affiliation Law 1973
Cases:	Regina v. Fermanagh Justices [1987] 2 All ER 563 Regina v. Evans (1986) 1 Q.B. 228
Counsel:	Mr. Bannon for the appellant Mr. Furniss for the respondent

The respondent gave birth to an illegitimate child in 1987. She alleges that the appellant is the father of that child. She made a complaint to the Summary Court on 9th March 1989 under the Affiliation Law 1973. The appellant alleged before the magistrate that the complaint was brought outside the time limit prescribed by section 3(1) of the Affiliation Law. It was conceded that the time limits in sections 3(1)(a) and (b) had expired, but the respondent contended that she was still within the period in Section 3(1)(c). That section reads as follows:

"3(1) Any single woman who is with child or who is delivered of a child may -

(c) at any time within the twelve months next after the return to the Islands of the man alleged to be the father of such child upon proof that he ceased to reside in the Islands within the twelve months next after the birth of the child,...

make a complaint on oath or affirmation, before a Justice of the Peace alleging same man to be the father of the child."

The appellant holds a permanent residency of the Cayman Islands where he owns a condominium. He visits the Islands occasionally for a week to 10 days at a time. After the birth of the child, the respondent next saw the appellant in September 1987. He was staying on the Islands for about a week. They spent some time together.

She next saw him in February 1988 when they had dinner together and then went to her parents house. The next morning the appellant left the Islands. He did not return to the Island until March. They next met in late August, or early September, when again they had dinner and then went back to her house. She said the appellant told her he was going to move back in February 1989. The appellant moved back into his condominium in February 1989 and the complaint was laid in the following month.

The magistrate found the appellant did not return to the Islands until 9th February 1989 and that the complaint was consequently laid within the limitation period. The appellant appealed.

Held: (appeal allowed)

(1) Counsel for the respondent contended that a complaint may be made within 12 months of any of several or many subsequent returns, because the word "next" does not precede "return" in section 3(1)(c). To uphold that submission would be to defeat the operation of a limitation period in the case of an alleged putative father who leaves the Islands within twelve months of the birth of the child. There would be some merit to the argument if the section referred to "a return" to the Islands, but it refers to "the return" and the only sensible construction is that the complaint must be made within twelve months of the alleged father's first return to the Islands if he has ceased to reside here within twelve months from the child's birth.

(2) The words "residence" and "place of abode" are flexible, and must be construed according to the object and intent of the particular legislation where they may be found." (per Gibson J. in R.v. Fermanagh Justices [1987] 2 All ER 563 extracted from Stroud's Judicial Dictionary, Fourth Edition, vol.4, p.2359). The same must apply to the verb "to reside": The object and intent of section 3(1)(c) is to bring within the Court's jurisdiction a putative father who physically absents himself from the Islands, and consequently from process under the Affiliation Law, within the twelve month period following the birth of the child but who subsequently returns. Therefore a person who physically quits the Islands, other than for a short stay away on, say, holiday or business, ceases to reside here for the purposes of the Affiliation Law. If physically absent the

fact that he has residency status or keeps property here does not, mean he resides here for the purpose of this Law. It is a question c physical presence.

(3) The appellant ceased to reside in the Islands within the twelve months next after the birth of the child. It matters not that he may well have left the Islands before the birth. (See: R v. Evans [1896] 1 QB 228.)

(4) A return to the Islands means a termination of the cessation of residence. Again the object and intent of the statute must be looked at in construing the word "return". It cannot mean a permanent retur otherwise the putative father who returns to these Islands from time to time on, say business, can excuse himself from our jurisdiction. On the other hand a return for just one day need not be a return for our purposes, otherwise circumstances may arise where a putative father, by surreptitious means, could avoid the Court's jurisdiction. "Return" in this context means a return which involves a stay long enough to enable the process of the Affiliation Law to be put into operation, and what is a "return" under section 3(1)(c) of the Affiliation Law must depend on the facts of each particular case.

(5) It would have been possible for the respondent to serve a summons on the appellant on any one of his visits to the Islands. The respondent obviously had some contact with the appellant on these visits and it would not have been too difficult to serve the summons on him.

(6) For the purpose of section 3(1)(c) that the appellant returned to the Islands in September 1987 that is on his first return during which it was possible for the complainant to commence proceedings against him.

(P.H.)

Consent order - Variation - Lump sum - Change of circumstances - Clean break - Court's discretion

Case: Range v. Range

Court: The Cayman Islands Court of Appeal (2/89)

Cor: Zacca J. (Pres.), Kerr and Henry, J.J.A.

Date: 21st September 1989

Legislation: Matrimonial Causes Law

Cases: Dinch v Dinch [1987] 1 All ER 818
de Lasala v. de Lasala [1979] 2 All ER 1145

Counsel: Mr. Norman Hill QC for the appellant
Mr. Keith Collins for the respondent

A consent order was made in the Grand Court containing, inter alia, the following terms:

> "2.That the former matrimonial home ... be sold by public auction or private treaty to be agreed between the parties beforehand, subject to the rights of the ... as mortgagee over the said property and the net proceeds therefrom to be transferred to the petitioner absolutely in full and final settlement of any ancillary financial provision currently before this court.
>
> 4. That in compliance with 2 above, the petitioner do forego and dispense with any claim for periodical payments of maintenance or other such financial provision from the Respondent."

Unfortunately, the property was sold for a sum that was slightly less than the amount due to the mortgagee and the wife who had expected to receive $100,000 from the sale of the property, received nothing. She applied for a variation of the consent order and such further or other relief as the court deemed fit. On 23rd December 1989, the learned Judge of the Grand Court granted the variation. The husband appealed.

Held: (appeal allowed)

(1) Section 21 of the Matrimonial Causes Law provides for the making of ancillary orders and section 23 provides that either spouse may make application for variation of any order made under section 21, and the court, after hearing the parties, may make such variation. No clean break principle can be said therefore to be established by the legislature and the Grand Court has jurisdiction to vary all ancillary orders.

(2) In our views that jurisdiction ought to be sparingly exercised where the order itself appears to contemplate finality and is made by consent of the parties.

In Dinch v Dinch , Lord Oliver at p.827, after referring to the following dictum of Lord Herschell L.C. in Re South America and Mexican Co. ex p Bank of England [1895] 1 Ch. 37 at 40 -

> "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

and to Brown v Kirrage (1980) 11 Fam Law 141 in which Brandon L.J. regarded the dismissal of a wife's claim for ancillary relief as a matter of such seriousness that the court ought to be extremely cautious about implying a dismissal where none is actually expressed in the order concluded:-

> "One has, as it seemed to me, simply to look at the order and any admissible material available for its construction, and determine what the court intended, or, in the case of the consent order, what the parties intended to effect by the order. If the conclusion is that what was intended was a final and conclusive once for all financial settlement, either

overall or in relation to a particular property, then it must follow that that precludes any further claim to relief in relation to that property."

(3) Once the financial arrangements have been made the subject of an order of the court, their legal effect is derived from the court orde and not from the agreement by the parties. In Thwaite v Thwaite, Ormrod LJ observed:

> "The effect of eliminating the contractual basis of these consent orders should simplify the problems. If their legal effect is derived from the court order it must follow, we thin. that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders".

(4) The fact that no payment was or could be made under the consent order is not a change in circumstances which entitles the wife to apply for a variation. The order was unhappily drafted and on its wording it was always a possibility that the unfortunate situation could arise since the sale was subject to the rights of the mortgagee.

(5) It is in all cases the imperative professional duty of those vested with the task of advising the parties to these unfortunate disputes to consider with due care the impact which any terms that they agree on behalf of their clients have and are intended to have on any outstanding application for ancillary relief and to ensure that such appropriate provision is inserted into any consent order made as to leave no room for any future doubt or misunderstanding or saddle the parties with the wasteful burden of wholly unnecessary costs.

(P.H.)

Divorce - Irretrievable breakdown - Behaviour - Subjective test - Relevance of potential loss of security for non-Caymanian Respondent - Condonation no defence - Effect of cohabitation - Policy of legislation to end "limping" marriages.

Case: Myers v. Myers

Court: Grand Court (D70/86)

Cor: Collett, C.J.

Date: 3rd January 1989

Legislation: Matrimonial Causes Law (1976) as amended

Cases referred to: Bradley v Bradley [1973] 3 All ER 750 (CA)

Counsel: Mr. J. Jenkins for the petitioner
Mr. S. McField for the respondent

This has been a relatively short and stormy marriage. The parties were married in 1984. The husband is 26 years older than the wife and has

been married previously. Until the summer of 1986 the parties' relationship was quite amicable. In July 1986 the wife began a series of unprovoked assaults on the husband as they were retiring for bed at night by striking him about the head and body. On 18th August 1986, the wife entered a room where the husband was sleeping and struck him a heavy blow on the head. She also caused wilful damage to the matrimonial home and to property within the home. The wife, in her Answer makes claims of unreasonable behaviour on the part of the husband, including allegations of unkindness to her mother and the children and an assault on her with an ice-tray.

The husband filed a Petition for divorce on 22nd September 1986 based on the fact that the wife had behaved in such a way that he cannot reasonably be expected to live with her, pursuant to section 10(1)(b) of the Matrimonial Causes Law (the Law). The parties ceased cohabitation on 16th November 1986. The wife alleges that the marriage has not broken down irretrievably.

Held: (petition allowed)

(1) The test for deciding whether or not it is unreasonable to expect the husband to live with the wife is a subjective one: (see Rayden on Divorce 14th ed. pp 234-235)

(2) Unless the ground in section 10(1)(b) of the Law is proved, a decree of divorce cannot be granted.

(3) It has not gone unnoticed by the Court that whereas the husband has no reasonable motive for lying, she is a Jamaican national married to a person possessing Caymanian Status and as such stands to lose both residential and job security if this marriage is dissolved.

(4) There is no basis on which the allegations of unkindness to the respondent's mother or to the children, or the alleged assault on the wife with the ice-tray could be relied upon as precluding him from reliance upon section 10(1)(b)

(5) The repeal of the Divorce Law (Cap.41) swept away condonation as a defence in divorce proceedings altogether.

(6) The fact that the parties had continued to co-habit after the occurrence of acts of alleged unreasonable behaviour did not of itself preclude reliance upon those acts as showing that it was unreasonable to expect the party to whom they were directed to co-habit any longer (Bradley v Bradley). Of course, such cohabitation over a long period may lead the court to conclude in all the circumstances of a particular case that it is not unreasonable to expect cohabitation to continue.

(7) In the present case the cohabiting was shorter, and the relationship continued to sour after 1986.

(8) The marriage has broken down irretrievably. The parties have already been apart now for nearly two years. Their life styles and temperaments are clearly incompatible and the likelihood of any resumption of cohabitation must realistically be assessed as

nil. This is a limping marriage indeed, and it is the policy o the legislation to enable it to be ended.

(P.H.)

Nullity of marriage - Effect of decree - Legitimacy - Child of the marriage - Ancillary relief in favour of children - Custody

Case: Re M

Court: Grand Court (D65/89)

Cor: Collett, C.J.

Date: 18th August 1989

Legislation: Marriage Law
Matrimonial Causes Law

Counsel: D. Murray for the applicant
Respondent not present or represented

At the time the parties went through a ceremony of marriage, the applicant was 15 years and 3 months old. After the ceremony, the applicant gave birth to a child of whom the respondent is the father. The applicant seeks a decree of nullity.

Held:

(1) A marriage soleminized in the Cayman Islands between persons either of whom was at the time under the age of 16 years is void by virtue of section 3(2) of the Marriage Law.

(2) At common law, a child born to the parties to such a marriage is considered illegitimate and it is unfortunate that the legislature here has taken no such action as has been taken in the United Kingdom to ameliorate that rule of common law here in favour of the child.

(3) Section 21 of the Matrimonial Causes Law does not in terms remove decrees of nullity ab initio of any marriage from the enabling provisions which otherwise empower the court to make orders concerning the custody, care and control of "children of the marriage" or for periodic payments to be made in favour of such a child.

(4) The proper construction of "child of the marriage" for the court to adopt in the absence of any reliable guide is the one that would be most beneficial to the child concerned, namely that the expression includes a child of the "marriage" which is the subject matter of these proceedings even if it is declared to have been void ab initio and thus in law never to have existed.

(5) The court has jurisdiction to make ancillary relief orders under section 21 even although section 12(5) does not require the postponement of the decree pending settlement of all ancillary matters as it does in regard to other decrees.

LAND LAW

Priority of Interests - Real property - Registered Land Law - Unregistered interest vs. subsequent registered interest taken with knowledge of prior interest.

Case: Myles and Winton v. Prospect Properties Ltd. and Woolf

Court: Court of Appeal (12/89)

Cor: Zacca, (Pres); Kerr, J.A.; Henry, J.A.

Legislation: Registered Land Law (Revised) 1976

Counsel: Mr. Hill Q.C. and Ms. Bridges for the appellant
Mr. Shea for the respondent

The original action resulted from a priority dispute between the holders of unregistered interests in land which arose prior in time to registered interests in land and the existence of which was known to a subsequent charge holder.

The plaintiffs/respondents, Myles and Winton had purchased certain real property from Prospect Properties under agreements for sale in 1981 and 1982. Both of them paid the purchase price in full over a period of time by installments in accordance with the agreement. Neither of them lodged a caution with the Registrar of Lands, the effect of which would have been to forbid registration of further dispositions.

Subsequent to the agreement being entered, but prior to their completion by payment, Prospect Properties granted charges over the land to the defendant/appellant, Woolf, who registered the same in the encumbrance section of the Land Register. Woolf, at the time of taking and registering the charges, had full knowledge of the existence of the plaintiff's claims.

Upon performance of their obligations under the agreements for sale, the respondents called on Prospect Properties for title and upon Woolf to discharge the charges which he refused to do.

Schofield J. in a judgment dated March 30, 1989 (Causes 160-161/1985) held for the respondents and ordered specific performance of sale of land and incidental relief.

Held: (appeal dismissed)

(1) In determining whether the prior unregistered interests took priority to the registered charges, the Registered Land Law (Revised) governs the matter and provides for priority to registered interests.

(2) The failure of the respondents to lodge cautions rendered their

interests subject to the interests of the holder of registered charges for which valuable consideration had been given even though there was proof of notice of the prior interests when registration of the later charges took place.

(3) On the facts, the Court of Appeal agreed with the trial judge, however, that there was an absence of valuable consideration passing between the appellant and Prospect Properties and that his right to maintain priority was therefore lost.

(R.F.)

Right of Way - Land adjudication process - Grant-user

Case: Wilson v. Bodden and Wright

Court: Grand Court (195/83)

Cor: Collett, C.J.

Date: 29th September 1989

Legislation: Land Adjudication Law 1971
Registration (Land) Law (Cap 150)

Cases cited: Robinson v Bailey [1948] 2 ALL ER 791
Todrick v Western National Omnibus Company [1934] Ch 190
Jelbert v Davis and another [1968] 1 All ER 1182

Counsel: Mr. Norman Hill Q.C. for the plaintiff.
Mr. P. Lamontagne Q.C. for the defendants.

By a deed of gift dated 22nd August 1969 made between the plaintiff's brother JW acting as administrator of the estate of RW of the first part and the plaintiff of the second part, the land comprised in Registration Section George Town Central Block 13E Parcel 88 became vested in the plaintiff.

The parcel to the east of Parcel 88, George Town Central, Block 13E Parcel 42 was transferred on sale from the estate of RW to the first defendant on 2nd February 1977 and on 30th January 1977 was transferred into the joint names of the first and second defendant.

The deed of gift dated 22nd August 1969 had a plan annexed thereto which stopped short of conveying a strip of land approximately 20 feet wide extending the full length of the northern boundary, labelled on the plan "proposed road".

The plaintiff submitted the deed together with the annexed plan in support of her application under the Land Adjudication Law 1971 and an absolute title was declared in respect of parcel 88 including the 20 foot strip but subject to an easement described as 'a vehicular right of way'.

Held:

(1) That if the same evidence had been before the adjudicator as was before the court, the 20 foot strip would have been included as part of parcel 42 and not parcel 88. Nevertheless, the court is bound by the adjudication process.

(2) For the purposes of determining the width of the right of way and its permitted user, the date of the grant is to be taken as the adjudication process itself.

(3) As the date of grant of the easement is to be taken from the adjudication process and not the Deed of Gift dated 22nd August 1969, the 20 foot measurement cannot be sacrosanct. The land was undeveloped at the date of grant and the minimum width of a vehicular right of way is normally assumed to be 12 feet. Accordingly, the width of the right of way credited by the adjudication process is 12 feet.

(4) As the genesis of the easement is more like a grant than aprescription, the dicta of Lord Greene, M.R., in Robinson v. Bailey applies: "Where there is an express grant of a right of way....the unrestricted use of which the grantee of the right of way is entitled the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant".

(5) Accordingly the present and future use of the right of way is not limited to the defendants and members of their immediate families but it includes their residential and/or commercial tenants and members of their immediate families and their employees with vehicles of a size and width commensurate to the width and surface of the roadway. No restriction can be placed as to the nature of the surface which the defendants may cause to be placed on the right of way at their own expense.

(R.O.)

TORTS

Conversion - Assessment of damages
(SEE ALSO Damages-Exemplary Damages)

Case: L.B. Leasinggesellschaft m.b.h v. Cayman Austrian Concrete Co. Ltd , International Technical Service and Marketing Ltd, HH, EB and MB

Court: Grand Court (143/88)

Cor: Collett, C.J.

Date: July 5, 1989

Cases referred to: Livingstone v Raywards Coal Company (1880) 5 App. 25
Strand Electric and Engineering Co. Ltd. v Brisford Entertainments Ltd [1952] 2 Q.B. 246

Counsel: Mr. R. Alberga, Q.C. instructed by Mr. Alan Turner of W.S. Walker & Co. for plaintiff

Mr. P. Broadhurst instructed by K. Collins & Co. for 1st and 3rd defendants

Mr. P. Lamontagne Q.C. for 5th defendant

The plaintiff, an Austrian financial institution, purported to enter into six contracts of lease hire in respect of various items of plant and equipment designed for making concrete in December of 1986. The lessee under the purported agreements was R.A.H. Hamilton Corporation and the leases were signed purportedly on behalf of Hamilton by a Mr. C who, as it turned out, was falsely held out to the plaintiff as the authorised agent of Hamilton. The intention of the contracts was to finance a venture in Grand Cayman. Cayman Austrian Concrete Company Ltd (C.A.C.) was to be incorporated in the Cayman Islands, sub-lease the plant and equipment and operate it. C.A.C. was to be owned as to 60% of its shares by International Technical Services and Marketing Ltd. (ITSM) and as to the other 40% by an Austrian Company. The terms of the contract allowed for a grace period of 9 months running from the date of take over of the plant and equipment in Grand Cayman by C.A.C. in December 1986 and thereafter monthly rentals at a stipulated rate were to be paid to the plaintiff until the conclusion of the 54 month term of hire at which time there was a right of purchase granted to the lessee.

When C.A.C. attempted to import the plant and equipment to Grand Cayman, it experienced financial problems over the clearance of the equipment from the docks involving payment of freight and customs duties. Money for this purpose was eventually supplied by the 5th defendant, MB. A legal debt was thereby created in favour of MB from C.A.C. in the amount of approximately $93,000.

HH became involved with C.A.C. in early 1987 as share holder and

Director. In June 1987 he was appointed Managing Director. In March of 1987, HH, on behalf of C.A.C., signed a purported lease of all the plant and equipment from ITSM. His evidence was that when he signed the lease he was ignorant of the plaintiff's interest as owner of the equipment.

In June of 1987, MB began to press for the repayment of the $93,000 she had extended to C.A.C. This lead to an agreement between C.A.C. and MB whereby registration papers for a portion of the equipment, namely four trucks with concrete mixers, would be handed to MB for use as collateral should she wish to borrow funds to the value of what she was owed and the debt be liquidated at an agreed monthly period. In September of 1987 the four trucks with mixers were re-registered under the Traffic Law into the name of MB. At the same time, HH as director of C.A.C. confirmed MB's right to hold the ownership papers to the trucks in question as a pledge for the loan in question. Notwithstanding the transfer of registration the trucks with mixers remained, like the other equipment, on site and in the possession of C.A.C. and used by it in the course of its business.

As a result of information received by the plaintiff as to the invalidity of its lease with R.A.H. Hamilton, it caused its representative to attend to the Cayman Islands in October of 1988. At that time, HH conceded the correctness of the plaintiff's claim to title to all the plant and equipment and agreed there should be a new lease of the equipment from the plaintiff to C.A.C. which would formally acknowledge the plaintiff's ownership and regularise the legal position. This arrangement was put into effect. However, due to its financial position C.A.C. was unable to make payments under the new lease and it was formally terminated by the plaintiff in December 1988.

In December of 1988, the plaintiff appointed an agent with authority to take charge of the equipment in Grand Cayman and physical possession was retaken by the end of December. Thereafter, the plaintiff attempted to dispose of the plant and equipment. In January it received an offer of 1.9 US$ from an English Company. That sale was lost as a result of communication to the prospective purchaser of the existence of third party claims, namely MB's claims to the four trucks with mixers. The court found the loss of the bargain was the direct and natural consequence of the pledge of the vehicles and re-registration in favour of MB.

Subsequently, a company called Ferryman Investments expressed an interest in purchasing the trucks with mixers. It was under the impression that they could be purchased for $120,000. In March of 1988, Ferryman Investments offered to purchase the trucks from MB for that price. She refused the offer and advised Ferryman Investments that the actual price was $175,000 and moreover insisted that the sale must go through at that figure within a number of days or else she would export the trucks to Florida where she alleged there was a prospective purchaser prepared to pay $200,000. These assertive tactics were successful and on March 14th 1988 Ferryman paid MB her price of $175,000. A few days later, Ferryman Investments leased or purported to lease the same four trucks with mixers to another local company, Cayman Allied Concrete Limited, which had been newly formed and was 100% beneficially owned by HH.

The remainder of the plant and equipment was eventually transmitted t Cayman Allied Concrete Limited.

In June of 1988 proceedings were commenced and an interim injunction was granted to prevent the use or disposition of plant and equipment by the defendants. The plant and equipment was eventually delivered to the plaintiff's possession on January 10th 1989.

In January 1989,a consent order of the court was made whereby Ferryma Investments paid $150,000 as agreed damages to the plaintiffs and the claims against that company and against Cayman Allied Concrete Ltd. were dismissed. The action also claimed damages for conversion against the defendants;

(1) against the second defendant ITSM for alleged conversion of all equipment on 10th March 1987, the date of its purported lease to C.A.C.

(2) against HH and MB jointly and severally, for alleged conversion of the four trucks with mixers in September of 1987 by re-registratio into MB name.

(3) a claim for exemplary damages against MB in respect of the sum o $175,000 received by her from Ferryman Investments for the four truck with mixers arising from the sale of March 1988.

Held: (action allowed)

(1) Conversion as a part of the common law of the Cayman Islands is an act or completed series of acts of wilful interference without lawful justification with any chattel in a manner inconsistent with the right of the person entitled and an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with it. Knowledge of identity of the true owner is not essential.

(2) In relation to the action of ITSM in March of 1987, this amounted to a dealing with the equipment in a manner inconsistent with the right of the plaintiff and liability for the tort of conversion was established.

(3) The plaintiff was entitled to compensation from ITSM for the value of the use of the equipment during the whole of the period it purported to lease that equipment to C.A.C. as damages for conversion.

(4) In relation to the events of September 1987, namely re-registration of the four trucks with mixers into MB's name, such acts or series of acts constitute wilful interference without lawful justification since no one has a right to pledge the property of a third party to answer for a debt of his own to his creditor. While it was true that no actual change in possession of the vehicles took place in December of 1987 and that the registration itself had no effect of transferring title to the vehicles, the effect of the Traffic Law was such that MB was alone empowered to determine whether or not they should continue to be licensed for use on the roads of the Cayman Islands and to control any further transfer of the registration which might be sought. An intention to deny the rights of the true owner of these vehicles could therefore be readily inferred to MB and to HH who must have known that C.A.C. had not paid for the trucks.

The fact that neither of them knew at the time that it was the plaintiff who was the true owner was not relevant.

(5) Difficulty in assessing damages for this act of conversion arose because the defendants did not cause any alteration in the position or use of the vehicles which remained with C.A.C. Therefore no additional injury or damage was suffered by the plaintiff at that time as a result of the actions of HH and MB. However, that situation altered in February of 1988, when the English Company broke off negotiations for the purchase of the equipment with the plaintiff. The court held that that was a direct and natural consequence of HH and MB's earlier actions. The assessment of damages was made difficult because the entire purchase price of $1.9 million for all plant and equipment was not broken down and it was impossible to determine the value of the bargain lost in respect of the four vehicles. The only measure of damage which could be deduced upon the evidence to be referrable to the actions of HH and MB in September of 1987, and January 1988 was the loss of the rental during the period February to March 1988, a period of forty-one days.

(6) The actions of MB in selling the four trucks and mixers to Ferryman Investments constituted a further act of tortious conversion. The conclusion of the sale was the clearest possible act of wilful interference with the ownership of the plaintiff and it took place at a time when MB had a full knowledge of the plaintiff's interest. Compensatory damages in respect of this particular act of conversion have already been paid by Ferryman and to that extent MB's liability was exonerated.

(7) The court then considered whether this was a proper case for the award of exemplary damages as against MB. The only justification for a claim of exemplary damages which could be properly advanced was the second common law category based on the speech of Lord Devlin in Rookes v Barnard which relates to the situation where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff. These words described the conduct of MB in March 1988 in regard to the four vehicles. The measure of exemplary damages did not, however, extend to the entire $175,000 paid to MB for the trucks. It is the gratuitous pursuit of profit that is offensive to the law, not the mere misguided pursuit of the plaintiff's property by MB in order to recoup herself for the monies lent to C.A.C.. The quantum of exemplary damages is a matter for the court's discretion where the case for such an award has been made out. Damages were awarded on the basis of crediting the amount of the loan by MB to C.A.C. from the purchase price and further crediting the US dollar equivalent of the damages assessed against HH and MB for the conversion of September 1987, in order to avoid duplication of damages as against MB.

(R.F.)

TRUSTS

Rectification - Children's settlement - Intention of settlor to include step-daughter as beneficiary - Standard of proof - Exercise of discretion in granting remedy

Case: BB v. Integritas Trust Management Ltd. and GB(a minor) and CB(a minor)

Court: Grand Court (252/89)

Cor: Schofield J.

Date: 20th October 1989

Cases Cited: James Jeremy Bond and Others v. Integritas Trust Management and Others (Causes 40,41,58,59,66 and 67 of 1988)
Re Butlins Settlement Trust [1976] 2 All ER 483
Tucker v Bennett (1887) 38 Ch.D.1
Shelbourne (Countess Danger) v. Guchiguin (Earl) (1784) 1 Bro CC 338
Fowler v Fowler (1859) 4 De G & J. 250
Jocelyne v Nissen [1970] 1 All E.R. 1213
Bonnole v. Henderson [1895] 1 Ch 742 F.E.
Rose Ltd. v. Wm. H.Pim Ltd. [1953] 2 All E.R. 739
Hanley v Pearson [1870] 13 Ch. D. 545
Whiteside v. Whiteside [1950] Ch. 65

Counsel: Mr. Lamontagne Q.C. and Mr. Quinn for the plaintiff
Mr. Turner for the first defendant
Mr. Alberga Q.C. and Mr. Shea for the second and third defendant

The plaintiff/settlor made two settlements in favour of his children on 29th October 1987 with the first defendant, Integritas Trust Management (Cayman) Limited. The second and third defendants were the only existing children of the settlor and are fourteen and twelve years old respectively. The settlor's wife had a child by a previous marriage, one KD, aged 22 whom the settlor mentioned he intended to be a beneficiary and principal beneficiary under the two settlements and so instructed his solicitors. The definitions in the settlements did not, however, as they stood include KD and so rectification was sought to insert a new sub-clause to include her as a principal beneficiary.

The evidence showed that the settlor had always regarded KD as his own child and had made clear his intention to his solicitors of making her a beneficiary and principal beneficiary. This intention had also been made clear to the trust officer of a trust company which was consulted. His practice of treating KD in just the same way as his other two natural daughters was further supported by a note he had made concerning the making of a will where he described her as his daughter. It appeared that on first signing the trust settlement documents he failed to check the wording carefully and realise its legal significance. On notice of the error the settlor immediately

tried to have it corrected by his solicitors and took an earlier action to have this done.

Held:

(1) The Grand Court had jurisdiction to grant the remedy of rectification in respect of a voluntary settlement to give effect to the true intention of the settlor.(James Jeremy Bond and Others v. Integritas Trust Management and Others)

In particular the settlement could be rectified "notwithstanding that the mistake arose, not in omitting, or using words intended, or not intended, to be included, but in ascribing the wrong interpretation to the words to be used".(Re Butlins Settlement Trust)

(2) Here the mistake was that of the settlor alone and not the trustees; there was no other party with whom he bargained, so that he need prove only that the settlements did not express his true intention.

(3) Strong and convincing evidence is required to prove the settlor's intention. (Tucker v. Bennett, Shelbourne v. Guchiquin, Fowler v Fowler, Jocelyne v Nissen.) Notes made prior to or at the time of the settlement were probably of more probative value than ex post facto statements or affidavits but both were admissible evidence which must be weighed. (Bonhole v. Henderson, Rose Ltd. v. Wm. H. Pim Ltd., Hanley v. Pearson) On the facts such "convincing proof" was made out by the totality of the evidence.

(4) Even where the settlor's intention was established to the satisfaction of the court, the question remained whether this was a suitable case for the exercise of the discretion in favour of the settlor. This involved considering the following matters:-

(a) The court would more readily grant rectification where this was in the interest of the beneficiaries e.g. to validate a settlement which could otherwise be void as offending the rule against perpetuities. (James Jeremy Bond & Others v. Integritas Trust Management and Others.) Here, however, a grant would clearly be to the detriment of the named beneficiaries and should be jealously guarded (Whiteside v. Whiteside.)

(b) The court in Whiteside also decided that where the error can be attributed to the fault or carelessness of the person seeking rectification this weighed heavily against granting the remedy. There, however, the settlor had amended the correctly worded drafts in such a way as to avoid his stated intention which was quite different from the instant case of failing to read documents carefully and detect an error.

(c) The remedy of rectification should not be granted where the desired result could conveniently be achieved by other means. (Snell, Principles of Equity, James Jeremy Bond v. Integritas Trust Management)

(5) In respect of the accumulation and maintenance settlement a deed of appointment would not put KD in the same position as if she had

been included in the original settlement. Nor would an action in negligence against the settlor's solicitors prove a convenient alternative remedy. In respect of the life interest settlement, however, a deed of appointment would achieve the desired intention of the settlor if the trustees agreed to make such a deed in accordance with clause 3(2). Pending their decision, rectification would be granted in respect of the accumulation and maintenance settlement, but the application would be adjourned in respect of the life interest settlement.

(G.F.)

ARTICLES, CASE COMMENTS AND REVIEWS

HUMAN RIGHTS: THE VALUE OF COMMUNICATION

The Hon. Mr. Justice Derek Schofield, Puisne Judge, Cayman Islands

PREFACE

The kind of human rights abuses alluded to in this article have not been encountered in the Cayman Islands. They do exist in many parts of the world and the writer had first-hand experience of a deteriorating human rights situation in his last jurisdiction, where police and security forces were over-zealous in crushing what they perceived to be threats to the security of the State. In certain parts of the world it seems to be a feature of life that unpopular regimes use oppression to control opposition. Hand in hand with this oppression comes a desire to manipulate the courts so that the fundamental safeguards, often written into the Constitutions and legislation, are not enforced against the State by the courts. The purpose of this article is to discuss how agencies such as the Commonwealth Secretariat can support the courts which seek to protect the citizen against State oppression.

I would add that in my experience this oppression by the State is not something which occurs overnight. It is a slowly-developing cancer which often starts by a simple bending of the rules relating to suspects being held for slightly longer than the statutes permit or extracting confession statements from suspects by threats or by means of actual violence.

Once the courts start to relax their enforcement of the rules designed for the protection of the citizen this leads to further abuses and a steady spread of the cancer of oppression. It is vitally important for the courts to be alert to any possible breaches of the rules and to strictly enforce the rules lest the cancer develop.

I have directed this article particularily to magistrates but much of what I have to say is relevant to judges.

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The "Bangalore Principles",[1] which summarise the discussions of senior Commonwealth judges and lawyers attending a Colloquium held in Bangalore, India, in February, 1988, are welcomed by all those who are interested in the furtherance of human rights. Particularly pleasing was the paragraph which prescribed better dissemination of information of human rights materials and meetings for exchange of relevant information and experience. In this article I seek to emphasize how an implementation of that particular paragraph could assist magistrates in the field.

[1] See C.J.J. Volume 7 No.4 December 1988 pp.21,22

In his paper to the Colloquium[2] the Hon. Justice Kirby, President of the New South Wales Court of Appeal, said:

> One of the most notable legal phenomena of the period since the Second World War has been the ratification of large numbers of international human rights conventions. In Europe, the European Convention on the Protection of Human Rights and Fundamental Freedoms has built up an established jurisdiction both in the European Court of Human Rights and in the Commission in Strasbourg. Similar regional human rights treaties have been adopted in the Americas and in Africa. Under the auspices of the United Nations, a number of international treaties have been opened for signature....

One can also point to initiative in the field of human rights taken by members of the Commonwealth and in particular to the setting up, in January 1985, of the Human Rights Unit of the Commonwealth Secretariat. Although the mandate of the Human Rights Unit does not involve any investigative or enforcement roles, the creation of the unit was a significant acknowledgment by the Heads of Government of Commonwealth countries of the importance which they attach to human rights.

Unfortunately, it often seems easier to espouse human rights than to give complete respect to them. As pointed out by His Excellency R.R. McMurty,[3] the High Commissioner for Canada in Britain, there is urgent need to consider the appointment of an Advisory Committee on Human Rights so as to strengthen the international profile of the Commonwealth. He said:

> This is particularly important in the context of the struggle against apartheid in South Africa. While the initiatives taken by the commonwealth have had a significant influence internationally, we do know there is some criticism about the Commonwealth's perceived reluctance to examine its own house. It is suggested that there is a real element of hypocrisy to our continuous denunciation of the evil regime in South Africa when there are alleged human rights abuses within some of our member countries which are not being addressed by the collective will of the Commonwealth."

Undoubtedly the Commonwealth has a role to play in advancing human

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[2] "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms".

[3] See C.J.J. Vol. 7 No. 3 June 1988 pp.3-5

rights and is perceived by some at least to have a potentially greate role than it now plays.

The external pressure, or persuasive forces, exerted by international bodies undoubtedly have their effect on individual governments. They also give support to bodies and individuals within a country, who are fighting for improvements of human rights. Internally the vociferous fight for human rights is properly carried out by politicians an activists and, whilst magistrates may be immersed in human rights issues by virtue of the cases which come before them, they must avoid being seen to enter the political arena. Magistrates, and any association of them, may make their voices heard, but they must be restrained voices. A too visible public pursuit of human rights issues by magistrates may be seen to detract from their judicial role.

The greater contribution to the cause of human rights that a magistrate can make is to ensure that there is a fair trial of every issue before him. As stated by your Journal:[4]

> "Political actions tend to receive the greatest attention in the struggle for human rights, such as pickets and protest demonstrations, but the history of the 40 years since the Declaration of Human Rights was made, provide many examples of the duty courts of law have in protecting the individual. A court may be the first place in which it is learned, for example, that defendants have been held for excessive and unjustifiable periods in prison before they have been brought to trial, or perhaps that lawyers prepared to defend opponents of government have been victimised. Intimidation of any kind within the court system or unacceptable prison conditions are further examples which constitute a challenge to the rule of law.

A failure to condemn abuses of human rights in matters which come before the magistrate is an encouragement by him to those who practise those abuses. The following are a few of the particular instances where the courts can act as a check on possible, or potential, human rights abuses by investigators and prosecutors:

(1) Strict adherence to the time limits set for bringing accused persons before the Court and an insistence that those who exceed the prescribed time limits are called upon to answer for it;

(2) Strict adherence to rules relating to the grant of bail;

(3) An insistence that any allegation of police brutality is investigated and that facilities are made for

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[4] See Editorial C.J.J. Vol.7 No.3 June 1988

independent medical examination of an accused person alleging such treatment;

(4) The ensurance of a speedy trial of accused persons whilst permitting proper access to legal representation;

(5) Closest adherence to the rules relating to the admission in evidence of alleged confessions made by accused persons whilst in police custody.

It need hardly be said that magistrates should always adopt a balanced approach to sentence and should not be carried away by a prosecutor's perception of the seriousness of an offence.

Although to some it may seem to pursue the idea of a fair trial in some jurisdictions there may well be forces at work making its pursuit extremely difficult. All member states of the Commonwealth include the protection of human rights in their legal systems but there may be individual laws within any given legal system which infringe on what a particular magistrate considers to be human rights norms. Whilst it is always open to a magistrate to draw to the attention of the law-making body that particular provisions are offensive, and to seek to alleviate the oppressive effect of them within his lawful capacity, there is a limit to how far he can go without appearing to enter the political arena. A magistrate who is on a crusade may appear to lose his judicial impartiality and at the end of the day it is for the politicians to amend any laws which operate oppressively.

A particularly dangerous force against a magistrate's proper exercise of his judicial functions is a strike at his independence. "The independence of the judiciary is a critical component of the right to a fair trial".[5] The General Assembly of the United Nations has invited Governments to take account of the basic principles on the independence of the judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan, Italy, in 1985. Despite this we have had recent examples within the Commonwealth of actions which strike against judicial independence. In one country there has been a change in the Constitution eliminating safeguards against arbitrary dismissal of judges and in another country the removal from office of the Lord President and two other Judges of the Supreme Court.[6] This latter has been criticized in a resolution of the International Commission of Jurists. If the higher judiciary is in danger of arbitrary or wrongful removal from office, what security have the judges of the lower courts?

An atmosphere of insecurity within a judiciary permeates to all levels and it takes a robust constitution on the part of a magistrate to ignore it. I have participated in training courses for magistrates in which one recurring question from, and obviously a real concern of,

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[5] Professor Rosalyn Higgins "Human Rights: some question of integrity." The Modern Law Review January 1988 Vol. 52 p.1

[6] This latter example was exhaustively covered by Dr. Andrew Harding in "The Malaysian Judiciary Crisis of 1988" C.J.J. Vol. 8 No.1 June 1988 pp. 3-9

the participants was how to react if a senior member of the administration attempts to influence a decision. What came across very forcefully to me in those courses was that the magistrates apprehended a threat to their independence, knew that they should resist that threat but needed confirmation of their views and, in som cases, guidance on how to cope with the threat. Even the obvious answers of committal for contempt of the offending officer or reporting the matter to the Chief Justice only hold good if the appea. courts and the Chief Justice are themselves independent of pressure.

If magistrates are part of a strong and independent judiciary they car readily withstand any attempt by members of the administration, or anyone else for that matter, to influence them in the performance of their duties. If the judicial system lends itself to interference, magistrates may not be receiving proper guidance on how to combat improper influence. Furthermore magistrates often operate in small townships where it is difficult for them to keep themselves aloof from members of the administration. It is not too difficult to see how they can come to feel isolated from their own kind and perhaps lose confidence in their own standards.

A system of government which relies on abuse of human rights to maintain control has a vested interest in having a tame judiciary. For a magistrate who works within a system to stand up to pressure and to discharge his duties impartially, may take a great deal of courage. Some magistrates are personally better equipped to withstand pressure; some magistrates have more to lose than others. All magistrates who work under such pressure would feel easier if they received support from their own colleagues. When pressure is on, any support is morale-boosting. A judiciary, and individual members of it, would also feel stronger if they had access to the support of right-thinking members of their own profession in other parts of the world and were aware of the efforts of others in relation to the independent exercise of judicial functions and in relation to curbing abuses of human rights. They would also benefit from personal exchanges of information and experiences.

The Colloquium which resulted in the 'Bangalore Principles' may have had in mind the dissemination and exchange of information on human rights questions on a higher jurisprudential plane than I speak of and no one can gainsay the value of that. There is also need for education, better dissemination of information and exchange of relevant experience on a basic level to encourage those, such as magistrates, who are in the vanguard of the fight against breaches of fundamental human rights.

EDITOR'S NOTE

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BANKS AND THE PROCEEDS OF INSIDER DEALING
A COMMENT ON NANUS ASIA CO. INC. v. STANDARD CHARTERED BANK

Richard Finlay, LL.M (Cantab.); Barrister and Solicitor

"....on settlement date, wire the funds to this account in the Cayman Islands." Gordon Gekko's attorney to Bud Fox, aspiring broker and insider dealer; Wall Street, 1987.

INTRODUCTION

Despite the economic and philosophical arguments which received attention in the mid 1970's, it is now generally accepted that insider dealing is activity which should be discouraged, to the point that it is widely subject to criminal prohibition.[7] It is unlikely, given the public outrage at the insider dealing cases which received publicity in the U.S. and the U.K. in 1986 and 1987, that the practice has many advocates today. Rather, regulators, legislators and courts alike seem to share the view that the deterrence of insider dealing is necessary to protect investor confidence and therefore the efficiency of the market.[8]

The argument goes like this. In an environment where information is a most valuable commodity, the possession of material non-public information is a distinct advantage. If an investor perceives himself to be at a disadvantage due to the use of inside information or if he is unhappy about being in a market where some of the players have a substantial informational advantage over him, he may withdraw from the market. The market's effectiveness is thereby impaired, both in relation to the reputation of the company whose securities are subject to the trading and the cost of raising capital generally.[9]

No one is sure of the incidence of insider dealing. As one author put it, "(e)vidence of the prevalence of insider dealing is necessarily

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[7] For a summary of the debate for and against, see Rider and Ffrench, The Regulation of Insider Trading, (Macmillan) 1979. It is now a crime, to some extent, in many jurisdictions including the United Kingdom, Canada and the United States.

[8] Financial Services in the United Kingdom, Cmnd 9432, para 3.1.; Attorney-General's Reference (No.1 of 1988), 1989 2 All ER 1; The Conduct of Business Rules, Financial Services Act (UK), 1986; Companies Securities (Insider Dealing) Act (UK), 1985.

[9] This is the current rationale of regulation, at least in the U.K., despite the absence of empirical evidence that insider dealing affects public confidence in the market; Rider, Chaikan, Abrams, Guide to the Financial Services Act 1986, (CCH) p.97, Hannigan, infra note 10, p.13 at footnote 58. There does however seem to be some correlation between investor confidence and the incidence of insider trading. For example, consider the recent performance of the London Financial Markets on the heels of the rumour that Transport Secretary Cecil Parkinson had engaged in insider trading. (The Times, November 3, 1989, "Parkinson denies Dealing Rumours".)

difficult to obtain, it not being the type of activity which lends itself to a Gallup Poll".[10] However, even if the number of transactions is small, there is evidence that the amount involved is anything but. For example, in the Boesky case, one of the headline making cases referred to above, the estimates of the profit made by Mr. Boesky through insider dealing ranged from U.S. fifty million to U.S. two hundred Million.[11] In the recent case of Nanus Asia Co. Inc. v. Standard Chartered Bank, to be discussed shortly, the amount in issue was just under 20 million U.S.[12] It is perhaps not surprising that this money may tend to gravitate towards banking institutions carrying on business in jurisdictions which combine strict banking secrecy laws and the absence of taxation. The Cayman Islands,[13] among other off-shore financial centres, qualify under both heads.

The issue to be addressed in this article is the position of a bank which receives the profits of insider dealing in light of general principles of law and equity and the recent decision in Nanus Asia Co. Inc. v. Standard Chartered Bank, a decision of the High Court of Hong Kong. Such a bank may find itself forced to weigh its contractual obligations to its customer (as depositor) with its equitable obligations to the "victims" of the customer (as insider dealer).[14]

CIVIL LIABILITY FOR INSIDER DEALING-THE BANK AS CONSTRUCTIVE TRUSTEE

In addition to attracting criminal penalties, insider dealing may also, in the appropriate circumstances, result in civil liability. It is in the context of this potential civil liability of the insider that the bank's position will be considered.

It may be useful to begin by outlining the general principles of law and equity which are relevant to the liability of a bank receiving the gains of insider dealing. The vehicle by which liability may arrive on the bank's door step is the constructive trust-a trust arising independently of the intentions of any of the parties by operation of law resulting from the conduct of the trustee.[15]

It is a well established principle that a person who knowingly receives or deals in trust property with actual, constructive or imputed knowledge that it is trust property transferred in breach of trust may be constituted a constructive trustee and therefore have imposed on him the strict fiduciary duties of such office.[16]

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[10] Hannigan, The Regulation of Insider Dealing, (Kluwer) 1988, p 18.
[11] "S.E.C. Under Fire over Boesky", The Independent, 25 November, 1986.
[12] Unreported decision of the Hong Kong High Court, September 22, 1988; See also Ellinger, 1989 JBL p.257 and "A safe haven for fraud?", 1989 10 Co. Lawyer p.1.
[13] For a discussion of the Cayman Islands and their bank secrecy laws, see Donalds, Bank Secrecy in the Cayman Islands, (19860 10 WILJ 114.
[14] One of the arguments against the regulation of insider dealing is that it is a victimless crime. Hannigan, supra note 10, at p 8.
[15] Barnes v. Addy (1347) L.R. 9 Ch. App. 244; Oakley, Constructive Trusts (Sweet and Maxwell) 1987, p.1
[16] Rider, Insider Trading(Jordans) 1988, p.84.
Selangor United Rubber Estate Ltd v. Craddock(No.3) [1968] 2 All ER 1073 Belmont Finance v Williams Furniture Ltd. [1980] 1 All ER 393

The application of the principle in the context of this discussion assumes that the insider is in a trust or fiduciary relationship to the company in whose shares the information is held (or to others holding the shares), that inside information is property and that the bank becomes constructive trustee for the company (or others) when it knowingly receives the proceeds of the transaction (or obtains such knowledge while it is in possession of such funds). In such a case, the bank will be liable to the beneficiary of the trust or the person to whom the fiduciary duty is owed for the amount involved, even though it may no longer be in the bank's hands.

There are, therefore, three elements which must exist before the principle operates;

(a) a trust or fiduciary relationship and a breach thereof;

(b) the existence of property which is capable by its very nature of being trust property;[17]

(c) requisite knowledge (or participation) on the part of the constructive trustee.

THE DECISION IN NANUS ASIA CO. INC. v. STANDARD CHARTERED BANK

The decision which is subject to comment in this article is that of Deputy High Court Judge Cruden of the High Court of Hong Kong. However, some background is necessary before we get to the facts of that case.

The principal culprit is a Mr. Fred Lee who was, by his own admission, involved in insider trading activities in the United States. As a result of those activities, he received profits in the amount of approximately 20 million dollars which he deposited in the Standard Chartered Bank in New York. The United States Securities and Exchange Commission became interested in Mr. Lee at which point he directed the Standard Chartered Bank to transfer the proceeds of his account to a branch of that bank in Hong Kong.

The Securities and Exchange Commission (SEC) obtained an order in New York District Court that the Standard Chartered Bank pay to it those funds. The order was made pursuant to the Insider Trading Sanctions Act 1984 which allows for confiscation powers in addition to the imposition of criminal penalties for insider trading. The bank, in compliance with the order, paid the money to the SEC.

The case of immediate interest resulted from an action by Mr. Lee, on behalf of the corporation controlled by him in Hong Kong, against the Standard Chartered Bank in Hong Kong, when it failed to pay, on his

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[17] This element is the subject of some controversy. There are cases which have imposed a constructive trust in the absence of a property element. It has been suggested these are examples, not of the use of the constructive trust as a remedial device where no recourse is available in contract or tort, but as examples of equity imposing a different remedy - a personal liability to account in some manner as a trustee. Oakley, supra note 15 at pp 1-4 and 85-89.

instructions, the balance of his account to his Hong Kong solicitors.

The bank, finding itself between a rock and a very hard place, argued that it was justified in resisting the demand for payment on two grounds. It relied initially on the presence of the New York order. The bank was unsuccessful on this point on the basis that the order i: question was domestic to the United States and had no extra-territorial effect in Hong Kong. However, the Hong Kong court did accede to the bank's suggestion that it was excused from complyinc with the demand since by doing so, it would incur liability as constructive trustee to the victims of Mr. Lee's insider trading activities.

It must be pointed out that at no time while in possession of inside information did Mr. Lee hold what would commonly be thought of as a fiduciary position. He was not a director of the company in whose shares he traded, nor did he act as a broker, representative, manager, agent or professional adviser to any of the shareholders affected in the transaction. He was what is known as a "tippee" trader-he traded on information passed by a person who had obtained that information by virtue of his connection to the company whose shares were traded.

While the result has a certain air of moral propriety about it, its legal foundation must be questioned. If one examines the case against the elements of liability relating to banks as constructive trustees, the following comments may be made;

(a) Trust or fiduciary relationship.

While it is true that corporate directors and senior officers owe fiduciary duties to the company, and a broker or agent owes the same to a client dealing in shares, no such duties are owed by a shareholder to the company whose shares he owns, or to other shareholders in that same company.[18]

Where the insider is a director, senior officer or professional adviser, use by him of the inside information obtained in that position results in personal liability to the beneficiary of the duty. This is a consequence of the rule that a fiduciary must not profit from his position. That principle was expressed in Boardman v. Phipps as follows;[19]

" No person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in a fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity

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[18] Regal (Hastings) Ltd. v Gulliver [1942] 1 All ER 378; Selangor United Rubber Estate Ltd. V Craddock, supra, (directors); Canadian Aero Service Ltd. v O'Malley (1974) 40 DLR (3rd) 371, (senior officers);
Underhill and Hayton, Law of Trusts and Trustees (1987) (14 ed), p.914 (professional advisers); Percival v. Wright 1902 2 Ch 421, (shareholders vis-a-vis the company and each other).

[19] (1967) 2 A.C. 46, per Hudson L.J. at p.51.

and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground, save that he made the profits with the knowledge and consent of the other person."

The duty, and therefore the personal liability flowing from it, is dependent upon the existence of a fiduciary relationship. As indicated earlier, in the absence of unusual circumstances or a special relationship, shareholders owe no duty to a company or to each other in relation to the use of insider information.[20] Such use may result in their criminal liability but not in civil liability to others.

Mr. Lee was neither a director nor professional adviser nor senior officer of the company in whose shares he dealt. As such, he was not subject to fiduciary duties or prevented from profiting thereby. How then, did the court come to the conclusion that he was bound by equitable obligations?

The decision of Cruden, D.J. on this point was based on the provisions of the U.S. Insider Trading Sanctions Act. He accepted that the provisions of such legislation, being confiscatory in nature, imposed a trust notwithstanding that such relationship could not be established under general principles of trust law.

While it may be that the traditional confines of trust law deny effective civil remedies in cases of insider trading, any extension of those remedies (for example, to shareholders vis-a-vis the company or each other) should surely be done at the instance of legislators.. The imposition of a constructive trust in the manner in which it was utilized in this case goes well beyond the generally accepted limits of the use of such trust.[21]

Further, it has been noted that the use of U.S. domestic legislation to create a trust in Hong Kong is inconsistent with the refusal by the Hong Kong Court to give effect to the order of the New York Court as justifying non-payment. How is it possible that the order is denied extra-territorial effect but the legislation on which it is based is allowed to create a trust relationship where none existed in Hong Kong (or English) law?[22]

(b) Information as property.

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[20] Footnote 18 supra. For a discussion of the circumstances where particular facts may give rise to such duties between shareholders inter se or to the company see Rider, Partnership Law and its Impact on Domestic Companies, 1979 CLJ 148; Clemens v. Clemens Bros [1976] 2 All ER 268.

[21] There have been suggestions that civil remedies be used to combat insider dealing in the U.K., including a statutory right vested in a securities issuer to take action against insiders; Rider, Chakin, Abrams, supra note 9, p.121.

[22] Supra note 12 per Ellinger.

When dealing with property which has been disposed of in breach of trust, it is necessary to distinguish between the possibility of following the property into the hands of the third party and the imposition of a constructive trust on the third party.

The liability of a fiduciary under the "no profit" rule is personal in nature. The liability of the third party (the person whom it is sought to make a constructive trustee) depends on whether that which he has received has a proprietary element to it. If no property element is passed by the fiduciary to the third party, the third party does not become a trustee. He is liable to return any property received provided he still has it and subject to the equitable tracing rules.[23] If property is passed however, the third party receiving it may be personally liable as constructive trustee whether or not he still has the property assuming the requisite knowledge or participation is also present. This liability is significantly wider than the tracing rules.

The issue becomes whether inside information is property to the extent that it can attract the application of the general principle explained above.

As indicated earlier, in Nanus, Mr. Lee was a "tippee" trader and, therefore, liable himself as constructive trustee (setting aside the question of the existence of a fiduciary relationship) only if the inside information he received had the necessary proprietary element. It follows that if inside information is not property, the Standard Chartered Bank could not be the constructive trustee of the proceeds of the use by Mr. Lee of the information.

Is information which is confidential to some degree or another property? In Oxford v. Moss,[24] the U.K. Queens Bench Division decided confidential information was not property for the purposes of the Theft Act 1968. That view, which has been subject to criticism,[25] nonetheless appears now to be consistent throughout the Commonwealth. Recently, the Supreme Court of Canada in R. v. Stewart unanimously reversed a decision of the Ontario Court of Appeal which had held misappropriation of confidential information could be a basis of a charge under the general statutory provision of the Canadian Criminal Code.[26]

Of course, the question as to whether confidential information can be property for the purposes of criminal proceedings does not resolve the issue in relation to civil liability. In Boardman v. Phipps[27], confidential information regarding the fact that the company's shares were undervalued

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[23] Oakley, supra note 15, p.103.
[24] (1978) 68 Cr.App. R. 183
[25] Rider, supra note 16, p.51.
[26] See Hammond, Theft of Information, 1988 104 LQR 529.
[27] Supra note 19.

on an asset valuation basis was considered to be property by the trial judge, two judges in the Court of Appeal and two in the House of Lords. The others did not share this view.

This issue did not, however, seem to trouble the Hong Kong Court. It may be that in reaching his decision, the trial judge had in mind the view recently expressed by an author as follows:

> "...when the debate is weighed alongside such factors as the growing volume of law protecting information under the obligation of confidence...and the nature of the pernicious practice of insider dealing which parliament is attempting to stamp out, it seems probable that even if information does not easily fit into traditional notions of property, the judiciary may be content to so treat it, if that is necessary to prevent an insider dealer from retaining his ill-gotten gains".[28]

(c) Knowledge or participation by the constructive trustee.

This requirement was not in issue in the Nanus case since the defendant bank readily admitted it had knowledge of the trust claim while the money was still in its hands.

It should be noted, however, that in cases where this requirement is in issue, the test is a strict one which will be of some comfort to the bank. The most recent judicial pronouncement is that found in Lipkin Gorman v. Karpnale Ltd.[29] That case involved the liability of a bank as constructive trustee by participation in breach of trust by a partner to his law firm and clarified earlier pronouncements on this issue.[30] While the judgments of the Court of Appeal are not consistent, the view has been expressed that "...the decision as a whole suggests that a bank would not be held liable as constructive trustee except where it had express or Nelsonian knowledge (wilfully blind) or if there were some most extraordinary circumstances that ought to have put it on inquiry."[31]

CONCLUSION

Securities regulators world wide will no doubt applaud the decision in Nanus as adding a new and powerful weapon to aid in the fight against the use of inside information. Whether lawyers and bankers will share that sentiment seems unlikely.

If the case is followed in Commonwealth jurisdictions, including those like Cayman, bankers and their lawyers will have to treat with great caution requests for transfer or withdrawal of funds by suspected

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[28] Hannigan, supra note 10, p.110.
[29] [1989] 1 WLR 1987 modified by the Court of Appeal, October 13, 1988 (unreported).
[30] For discussion of the confusion caused by these, see Vroegop, Constructive Trusteeship and the Bank, 1988 JBL 437.
[31] New Cases on the Bank as a Constructive Trustee, 1988 JBL p.255.

insiders. While it is true the degree of knowledge required is strict, there is no doubt that it extends to actual knowledge acquired while the funds are on deposit. While it might be initially thought that this is unlikely to occur except rarely, a couple of facts should be kept in mind.

The first is that the SEC, as illustrated by cases like Nanus, is very active when it comes to detecting and enforcing criminal and civil sanctions against this type of activity and is certainly not intimidated by national boundaries.

The second is that securities regulation is increasingly becoming a matter of international cooperation. This is evidenced by such developments as the various Memorandums of Understanding entered into by a number of countries including the United States, the United Kingdom, Canada and Japan which allow for the exchange of information and for reciprocal investigation.

Of particular interest to the Cayman Islands is the Mutual Legal Assistance Treaty, recently ratified by the U.S. The domestic legislation giving effect to the treaty extends to requests for information relating to insider dealing.[32] A bank receiving such a request should think of the result in Nanus before releasing funds to its client.

EDITOR'S NOTE

This comment will also appear in the Caribbean Law and Business Journal published by the Caribbean Law Institute.

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[32] s.3 and Article 19(g) of the Schedule, The Mutual Legal Assistance (United States of America) Law, 1986, (Law 16 of 1986), Cayman Islands.

REVIEWS

A GUIDE TO THE LABOUR LAW 1987 by JOHN RITSON

Richard Owen, LL.B., Solicitor

The Labour Law 1987 (Law 30 of 1987) which came into effect on 1st March 1988, with a six month grace period to enable employers to comply with its provisions thereafter, is the most important single piece of employment legislation to have been enacted in the Cayman Islands.

As the law imposes many duties on employers and also some on employees, Mr. Ritson's guide to the Law which is intended for employers, employees and practitioners is a welcome addition to the growing collection of Caymanian legal literature. With such different classes of people in mind, Mr. Ritson obviously had a difficult balance to strike but has handled this problem skillfully. Employers are likely to find his appendix of forms and precedents useful as it reprints, with the permission of the Director of Labour, various specimen forms recommended by the Trade and Labour Office. In addition, Mr. Ritson has included his own forms so that there are examples of every type of form an employer requires to comply with the Law. Mr. Ritson has also added a specimen disciplinary procedure which although not required in the Written Statement of Conditions of Employment is obviously an advisable inclusion.

The Law is based on the Anguillan Labour Law and is intended to be staightforward and intelligible to a layman with the need for legal interpretation to be kept a minimum. There are similarities to English employment legislation and Mr. Ritson uses English case law to interpret the sections which of necessity are drafted in general language.

It is beyond the scope of Mr. Ritson's brief to examine the next steps forward for employment legislation in the Cayman Islands. It will be interesting to see if the Law proves to be a seminal piece of legislation and whether employees' rights will be extended further in the future. Certain matters do come out of the book which merit serious attention and Mr. Ritson identifies certain possible areas of difficulty which could be tightened up. For example, the entitlement to severance pay provided by s.35 is conditional on the employer as opposed to the employee terminating the employment. This would appear to prevent the concept of constructive dismissal from operating, whereby an employee can justify terminating his employment in reaction to his employer's behaviour and still claim that it is an unfair dismissal. Unless the phrase "termination by the employer" is interpreted as including constructive dismissal, there will be a major loophole in the Law, with employers being able to force out employees by making their lives intolerable and avoiding liability for severance pay. There is also no right of reinstatement for an unfairly dismissed employee irrespective of how outrageous his reason for dismissal may have been.

Mr. Ritson has interesting observations to make on the discrimination provisions. These only relate to direct discrimination and remain silent on the matter of indirect discrimination, where a requirement or condition could be imposed which is easier for one set of people t: comply with than another set. For example, unnecessary age limits where candidates for a post had to be between the ages of seventeen and a half and twenty-eight have been held to be indirect discrimination in England as fewer women would be available for employment during those years due to their production or raising of children.

The book was written prior to the Labour (Amendment) Law 1989 which has answered some of the difficulties that Mr. Ritson envisaged. For example, there is now a definition of managerial and professional employees which makes the provisions relating to public holiday pay and overtime pay easier to understand. Apart from this, the most notable features of the Amendment Law are that managerial employees are also excluded from the provisions relating to gratuities. Overtime pay can be excluded for non-managerial employees provided both parties agree and such agreement is approved and registered with the Director of Labour. This had not been possible before the passing of the Amendment Law. The employer and employee can now agree the level of overtime pay, whereas it had been previously set by statute at the rate of one and a half times the employee's basic hourly rate. Again such agreement needs to be approved by and registered with the Director of Labour.

In addition to a "standard working week", s. 23 has been amended so that there is now a "standard working day," which shall not exceed nine hours. The number of members of an appeal tribunal has been increased from two to four with a quorum of three and the Governor now has the power to appoint a deputy Chairman. There is a right of appeal from a refusal of the Director to register an agreement relating to overtime pay.

A Guide to the Labour Law by John Ritson is published by J. Ritson, Weston House, Bishops' Wood, Brewood, Stafford, U.K. and is available from Hobbies and Books. Price $25.

LAW SCHOOL REPORT

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The Cayman Islands Law School was founded in 1982 following the repor and recommendations of Professor Paul Fairest of Hull University. Originally housed in the Court House, it has expanded from five students and a staff of one to twenty-five students, a Director, four Law Lecturers and an Executive Officer and is located in modern facilities in the Tower Building, George Town.

Students study concurrently for the University of Liverpool LL.B. and the Attorney-at-Law qualification over a five year period while serving under articles of clerkship to members of the Legal Profession.

Recent developments at the Law School include the following:

(a) The Law School Patron, The Right Honourable Lord Templeman, M.B.E., was present in Cayman in October to preside over the third graduation ceremony which saw three students receive degrees. During his visit, Lord Templeman also delivered lectures to the students as well as a public lecture.

(b) In November, the Law School announced the introduction of a new programme, the Diploma in Legal Studies. This course is intended for students who wish to obtain a qualification in law but who may not be able to undertake the study necessary for the five year Attorney-at-Law or the four year Degree course. The diploma will be offered as a two year course in law with an alternative three year mode of study. It is envisaged that it will be of interest to people whose work involves law and legal applications both in the public and private sectors. It is intended that the diploma will assist Caymanians in seeking promotion in their work and career advancement.

(c) November also saw a visit by Professor Paul Fairest of Hull University, consultant to the Legal Advisory Council. Professor Fairest delivered a number of lectures to the students and commented favourably on the standard of legal education offered at the Law School. He has also undertaken to deliver a report regarding certain fundamental changes to the Law School which were discussed with the Director of Legal Studies during his visit. It is expected that this report will be submitted to the Legal Advisory Council for their consideration in May 1990.

(d) In December, an addition to the course curriculum of the Attorney-at-Law Course was announced. Lectures on "Professional Practice and Ethics" have since been conducted by Law School staff and by the Hon. Mr. Justice Derek Schofield. The programme culminated in a panel discussion in March which included Mr. David Bird and Mr. Ramon Alberga, Q.C. All participants expressed the view that the subject matter was a valuable addition to legal education in Cayman.

(e) A booklet entitled "Guidelines for the Education and Training of Justices in the Juvenile Court" authored by Law Lecturer Piers Hill was published and distributed in March 1990. The booklet is designed to assist Justices of the Peace and others involved in the Juvenile Court system.

(f) Two case comments/articles authored by Law School staff members have been accepted for publication. "Banks and the Proceeds of Insider Dealing: A comment on Nanus Asia Co. Inc. v. Standard Chartered Bank" and "The Scope of Application of the Hague-Visby Rules" both authored by Richard Finlay, Director of Legal Studies, will appear in Caribbean Law and Business early in 1990. Mr. Finlay has also been named Country Correspondent for the Cayman Islands to that publication.

Requests for information about the Law School or its programs should be addressed to the Director of Legal Studies, 4th Floor, Tower Building, George Town, Telephone 97999 Ext. 3540