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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
BEFORE THE HON. SIR JOHN SUMMERFIELD C.B.E., Q.C., JP
CHIEF JUSTICE

ON 23rd, 24th, 25th, 26th, 27th, and 30th JANUARY 1984.

CASES NOS.858 - 862 of 1983
APPEAL NO. 37 of 1983.

BETWEEN	RAUL GONZALEZ and FREDDY SUAREZ	APPELLANTS
AND	REGINA	RESPONDENT

Norman Hill Esq. Q.C. (with him Voaden Esq) for 1st appellant
W. K. Chin See Esq. Q.C (with him Levy Esq.) for 2nd Appellant
Time Kendall Esq. Q.C. (with him Scarborough Esq. and Miss Dilbert) for respondent.

JUDGMENT

There would appear to be a perverse law which provides that the more important a case is the more likely it is that things will go wrong in the course of it; and the more likely it is that things will go wrong the more they do. This is an important case, from the point of view of both the public, because of the large quantities of cocaine said to be involved, and, of course, the appellants themselves, because of the heavy sentences passed. And this case exemplifies the operation of that perverse law. My earnest hope is that I will not add to the series of errors.

I must confess to some sympathy for the learned Magistrate. He had before him a battery of top echelon counsel who energetically rained upon him protests and objections, not all of them by any means soundly

based. This is more apparent in the transcript of the proceedings - which is not the official record but which has been brought to attention - than in the Magistrate's notes comprising the official record. I am not suggesting that any counsel did anything other than what he conceived to be his duty but, in the result, I am not surprised that there has been some loss of perspective in several respects. I must also say on behalf of the learned Magistrate that, with more assistance from the prosecution, some of the errors I shall advert to would have been avoided e.g. failure to implead the accused on all charges at the outset and failure to seek the consent of the accused in relation to the category B offences charged.

In these introductory observations it is not out of place to allude to the fact that there appears to have been a great deal of quite unnecessary cross-examination on irrelevant matters. This is apparent from the record of the lengthy cross-examination of the Commissioner of Police, Mr. Stowers, who was, after all, in the context of this case, little more than a link in the chain of handlers of a small packet of white powder on its journey to the analyst. It is difficult to see what bearing most of that cross-examination had on the real issues in the case. The same is true, to a lesser extent, of the cross-examination of several other witnesses. The observation is made, not because of the loss of time incurred but because it would appear that some of that irrelevant cross-examination made its contribution to the lost of perspective in dealing with the real issues

That said, it must be accepted that there is force in the arguments of learned counsel for the appellants that evidence irrelevant to the charges under consideration was admitted e.g. the alleged admission of the first appellant that he had just sold 500 kilogrammes of cocaine two weeks before. That evidence had no bearing on the charges the accused were facing and was, therefore, inadmissible. It is a matter which will have to be considered carefully in relation to this appeal. Equally, however, it would appear that evidence which prima facie was admissible was excluded; but that is of no consequence to the appeal.

With those preliminary observations I turn first to some salient features of the trial and its history.

The first trial, which was aborted, commenced on 20th April 1983 before another Magistrate. There were then six accused persons. The two appellants were charged jointly with possession of cocaine; the first appeallant was charged on a separate charge of possession of cocaine and another charge of offering to sell cocaine; and there were two other charges charging all six accused with conspiracy to import cocaine and conspiracy to export cocaine.

The conspiracy charges were laid under section 293 (f) of the Penal Code and are category B offences under section 5 (1) of the Criminal Procedure Code (the Code) read with Schedule 1 of that Code. Offering to sell cocaine is also a category B offence under section 25 of the Misuse of Drugs Law, read with Part B of the Second Schedule of that Law, if the amount involved weighs 2 ounces or more. No amount was specified in the charge but it transpired, in the second trial, that the amount the prosecution had in mind in relation to this charge was 70 kilogrammes.

There is nothing on the record of the first trial to indicate that the accused had consented to summary trial on the category B offence and it was stated from the Bar in the course of this appeal that no such consent was sought or given. The trial, nevertheless, proceeded as a summary trial as if consent had been given.

Early in the trial the prosecutor sought leave to amend all the charges by substituting for the word "cocaine" the words "cocaine hydrochloride, being a salt of cocaine". He also sought to amend the charge of offering to sell by changing the date on which the offence was alleged to have been committed from 22nd February 1983 to 22nd March 1983. No amendment was made to the charges themselves and there is no note that the learned Magistrate ordered the amendment. Presumably he assented verbally and all concerned treated the charges as having been amended. There is also no note to the effect that the accused had

been called upon to plead to the altered charges.

On the 4th May the prosecution told the Court that it proposed to offer no further evidence against three of the accused and conceded that a prima facie case had not been made out against them. Those three accused were thereupon discharged.

On the 6th May the learned Magistrate disqualified himself from continuing with the trial because of what he expressed to be the likely prejudicial effect on the trial of a statement broadcast by Radio Cayman at the instance of the Commissioner of Police. He stopped the trial and ordered that it be commenced de novo before another Magistrate.

That retrial commenced on 11th July 1983 and resulted in the conviction of the two appellants. The third accused was dismissed on a no case submission. This appeal is against those convictions and the sentences imposed.

At the commencement of the retrial the learned Magistrate impleaded the two appellants and the third accused who was later discharged on two conspiracy charges. The one charged that the three had conspired together and with others unknown to import cocaine hydrochloride. The other charged that the three had conspired together and with others unknown to export cocaine hydrochloride. The charges were substantially the same as the two conspiracy charges at the first trial with the amendments put forward except for the number of accused persons.

It might be convenient to make one point at this stage. Key witnesses for the prosecution were two agents from the United States Drug Enforcement Agency. It was no part of the case for the prosecution, and it was so stated from the Bar, that the conspiracy to export included either or both of those agents. Apart from anything else they were not persons unknown. Further, the agents, as agents provocateurs, had no intention whatever of exporting the controlled drug and so no "agreement"

constituting a conspiracy which included them could come into being. It would, of course, be quite wrong to charge anyone with conspiracy based on an agreement brought about by the agents provocateurs.

The appellants and the third accused pleaded not guilty to the two conspiracy charges. Their consent to these two charges being tried summarily was neither sought not given. The question of consent was not adverted to at all. It may be that the learned trial Magistrate thought that the necessary consents had been given at the earlier trial and that those consents continued to operate. No objection or query was raised by the defence and the trial proceeded as if there were no irregularity and the trial Magistrate were properly seized of the matter.

No doubt during the overnight adjournment the learned Magistrate realised that he had not impleaded the appellants on all the charges due for retrial. At the commencement of the proceedings on 12th July he announced that he proposed to implead the appellants on further charges. The first witness, Zuiderant, had by then completed his examination in chief. Objection was taken by counsel for both appellants but, after argument, the learned Magistrate decided to implead them. There were three further charges all of which affected the first appellant. Only one affected the second appellant. The charges were put. On the advice of counsel both appellants declined to plead and pleas of not guilty were entered in relation to the three charges.

The first additional charge charged the first appellant with unlawful possession of cocaine hydrochloride on 17th February 1983. No indication of the amount involved was given at the time but it later transpired that this charge related to 3 grammes of cocaine hydrochloride.

The second additional charge charged the first appellant with unlawfully offering to sell cocaine hydrochloride on 22nd March 1983. The amount involved was not set out in the charge but the amount the prosecution proposed to prove in relation to this charge was 70 kilogrammes.

The third additional charge charged both appellants with unlawful possession of cocaine bydrochloride on 22nd March 1983. The amount involved was not disclosed but later in the trial the prosecution announced that this charge related to 31 kilogrammes of the controlled drug.

The three additional charges were substantially the same as the corresponding charges in the earlier trial with the amendments put forward. They were not, however, the same charges.

Freshly made out charges had been laid for the retrial and they had been signed by a different Justice of the Peace. This was also the case with the two conspiracy charges to which the three accused pleaded not guilty at the commencement of the retrial. Following the plea to the latter three substituted charges the prosecution informed the court that all the charges laid for the retrial were identical to the earlier charges as amended in court and that the Crown would not be proceeding with the earlier charges which were then formally withdrawn.

That act by the Crown is not without significance. In the first place, if there had been consent to the earlier category B charges being tried summarily that consent would not attach to the substituted charges. Further, the original plea to the earlier charges would not apply to the substituted charges. It could not, therefore, be argued that the accused had been impleaded on all the charges which affected them, pursuant to section 62 (1) of the Criminal Procedure Code, and that those pleas were valid for the retrial so that, in effect, the trial Magistrate on the retrial was merely proceeding to try the case pursuant to section [illegible] of the Code following the earlier plea of not guilty entered at the first trial. The substituted charges precluded such an argument and, to be fair, it should be pointed out that no such argument was put forward. I merely advert to it, to demolish it, as the point had crossed my mind.

The position at the retrial was, therefore, that the accused had to be impleaded on all the substituted charges as they affected each of the

three accused. That was done in the sequence set out above. Further the necessary consents should have been sought if the charges for the category B offences were to be heard summarily. That was not done. No such consents were given. One thing is certain; there was no consent, express or implied, to the trial of the charge of offering to sell cocaine hydrochloride laid against the first appellant. There was strenuous objection to the trial Magistrate hearing that charge albeit that the objection was not based on section 5 of the Criminal Procedure Code.

The trial proceeded along its obstacle course of many objections, some of which had merit. After the fourth witness had given evidence the defence called upon the prosecution to disclose the quantity of cocaine h...ochloride to which the two possession charges related. The prosecution undertook to give the weights. It is a matter of surprise that the weights were not given then and there, or, indeed, in the opening, as the prosecution must have been aware of the weight of the drug related to each possession charge. On the following day the weights were given - [illegible] grammes on the charge which related to 17th February on which the first appellant was charged and 31 kilogrammes on the charge which related to 22nd March on which both appellants were charged.

There were no case submissions at the close of the prosecution case which resulted in the complete acquittal of one of the accused. The two appellants gave unsworn statements from the dock and called no evidence. Their defence was a complete denial of the charges. The first appellant was convicted on all charges. The second appellant was acquitted on the charge of conspiracy to import but convicted on the charge of conspiracy to export and the charge of unlawful possession on 22nd March ([illegible]1 kilogrammes). Heavy sentences were imposed.

When convicting the two appellants the learned Magistrate read from a manuscript document in his own handwriting. As he read from that document he amplified and supplemented passages extemporarily. What he read out and verbally amplified and supplemented was taken down by an official reporter employed by the Crown. That reporter was a high grade

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court reporter employed by a firm of official court reporters in Florida. The transcript was made available to counsel for the appellants, and by agreement, has been added to the record of these proceedings.

Although the reporter was of a high calibre one has only to read the transcript to become convinced that it is not an accurate record of what the learned Magistrate read out and added extemporaneously. Whether this was due to the speed at which the Magistrate was speaking or unfamiliarity with what a person from Florida might think of as a "foreign" accent, or both, is a matter for conjecture. But it is obviously seriously inaccurate in parts. Some of it is gibberish. Chunks of the manuscript document appear to have been omitted. When one reads the typescript of the manuscript document one is conscious of a balanced text carefully thought out on many important factors to be taken into account. The transcript is a complete distortion of that balance. Two examples will illustrate the view I have formed. This is a passage from the manuscript document:

> The evidence to support all the charges was adduced over a period of some 16 trial days and came from the mouth of some 14 witnesses.
>
> The defendants exercised their right to make statements from the dock. And now in reviewing as briefly as possible the salient points of the case I cannot over emphasize the fact that it is the duty of the Crown to prove the accused men guilty beyond reasonble doubt. This duty never shifts. Bearing this in mind, it is clear that even should I reject the defence I must turn to the case for the prosecution and examine it to see if they have discharged the burden of proof.".

That is a sound direction on the burden of proof and on the approach a trial Magistrate to the evidence. It is inconceivable that the learned Magistrate would have departed from that direction while reading it. This how it comes out in the transcript:

> "Now, what's the evidence supporting all these charges? This evidence was adduced over a period of some sixty days and came from the mouth of some fourteen witnesses. The defendants exercised their right to make their statements.
>
> And now, reviewing as briefly as possible the salient points of this case, I cannot but over emphaise the fact that it is the duty of the Crown, in this case the prosecution, to prove the accused men guilty beyond reasonable doubt. This burden shifts bearing in mind it is clear that we should reject that, if I should reject the Defence, I must then turn to the case of the prosecution and examine it to see if they have

discharged this burden.".

That completely distorts the original and turns it into an incorrect direction. If that had been said by the learned Magistrate then one would expect counsel for both appellants to seize on the misdirection and make it a ground of appeal. That was not done. However, other observations made by the learned Magistrate in the course of giving judgment were made grounds of appeal in the notice filed within 6 days of the Magistrate's decision.

Quite clearly the learned Magistrate had the correct approach but the reporter misheard him or could not keep up with him.

Another passage is equally revealing. The manuscript document has this:

> "I find that the chain from Zuiderant to Cotterell though meandering slightly is a solid unbroken one.
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> Much has been said about the evidence of the agent Pulley and indeed as witnesses go he had much to be desired. But this court, as all courts can reject the entire testimoney of any witness, accept an entire testimony or accept part and reject part of the evidence of any witness. For this reason this court paid special attention to the evidence of John Pulley. No one can deny that he arrived in George Town on 9th February the day after he said he first became involved in this case and two days after the meeting of Zuiderant and Gonzalez. No one denies that he came here with agent Delgado. That day he met with both Commissioner Stowers and Supt. Dalziel. Again, it is not denied that he met with Hugo on 10th and again on 11th February and again on morning of 12th before returning to Miami. This testimoney we can accept. He said he spoke to Hugo from Miami on several occasions by phone, but this has not been verified. On the 18th February after speaking to Supt. Dalziel he later met him at the Miami Airport and took from him the film container in which was the silver foil and white powder. This fact has not seriously been challenged, and indeed I have already dealt with this aspect of the case. His sealing it and finally delivering it to Cotterell has been challenged. The markings on the envelope, for example, there are one or two discrepancies such as whether his initials or full name was signed but this did in no way discredit his evidence sufficiently to cause me to disbelieve that he sealed and signed the evidence envelope.".

That has been transcribed as follows:

> "I find that the chain from Zuiderant to Cottroll, though meandering slightly as — such has been said of agent Pulley, indeed as witnesses go, he had much to be desired. For this Court, as all Courts can do, they can reject the entire testimony of the witness,accept the entire testimony or accept part and reject part of the evidence of of any witness.
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> For this reason this Court paid special attention to the

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evidence of John Pulley. The day after he said he first became involved in this case and, in fact, two days after the meeting of Zuiderant with Gonzalez, no-one denies that he came here with agent Delgado. That day he met with both Commissioner Stowers and Superintendent Dalziel. Again, it is not denied that he made a tour again on the 11th February and again on the morning of the 12th before returning to Miami. This testimony we can accept. He said he spoke to Pulley in Miami on several occasions by phone, but this has not been verified.

On the 18th February after speaking to Superintendent Dalziel he later met him at the Miami airport and took from him the container in which was the silver foil and white powder. This fact has not been seriously challenged and, indeed, this aspect of the case. His sealing it and finally delivering it to Cottroll has been challenged. The markings on the envelope, for example, there are one or two discrepancies there such as whether he had written his initials or he had written his full name. I hold that goes very far to discredit this witness, evidence of this witness.

A completely different picture results.

There are a number of other examples but it is unnecessary to labour the point. It is quite clear that one can place very little reliance on the transcript of the judgment. One also wonders how much reliance can be placed on other parts of the transcript which was referred to in support of certain grounds of appeal. However, no objection was taken to references to these earlier passages in the transcript. The point is that the transcript of the judgment is valueless.

In this context it is logical to deal with one of the additional grounds of appeal, namely:

> "That the learned Magistrate erred in law in not complying with the provisions of sections 51 and 52 of the Criminal Procedure Code in that the judgment delivered in open Court does not form part of the record of appeal. That the reasons for decision which appear in the record do not comply with the said provisions in that they are substantially different from the decision delivered in open court."

Non compliance with sections 51 and 52 of the Code is a point which, o far as I am aware, has never been taken before. It has been the normal ractice for the trial Magistrate to give his verdict, perhaps supported y verbal reasons, and leave the matter there unless there is an appeal. f there is an appeal he supplies written reasons for his decision which orms part of the record of appeal. This practice stems from the time en the Grand Court tried offences summarily and the appeal then went to e Jamaica Court of Appeal. The practice is written into the

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Grand Court Law. It is a practice which is recognised in several Caribbean countries, including Jamaica. Clearly sections 51 and 52 enacted in 1975 altered the law in this regard but the practice seems to have continued. Indeed,cases in which this practice has been followed have gone on second appeal to the Court of Appeal without attracting comment. It was because of this practice that the learned Magistrate gave instructions that the manuscript document from which he read in court should not be typed so as to form part of the record. He had in mind that written reasons for his decision would be supplied in the usual way. Those reasons were in due course supplied and form part of the record. They are a distilled version of the original manuscript document.

The point regarding sections 51 and 52 of the Code is well taken and reveals a defective practice.

When it became apparent that the learned Magistrate had read from a document while giving judgment I took steps to retrieve the manuscript document and made copies of it available. By agreement the original and a typed version of that document is now part of the record as it should have been from the beginning.

It must be conceded that there is no statutory authority for the reasons for decision prepared in the past as part of the record of appeal in appeals from a court of summary jurisdiction. As an administrative measure it might have been helpful to an appellate court in determining how the trial Magistrate reached his conclusion but statutory authority for the practice was absent.

As it is, I do not have to decide whether recording only he verdict of a trial Magistrate, as was the practice in the past, mounts to a judgment for the purpose of section 51. In this case here was clearly a judgment which met the requirements of section 51. at was the manuscript document read out with extemporary additions.

The reasons for decision can be disregarded. It is unfortunate that there were extemporary additions and, as there were, it is unfortunate that there is no reliable record of those additons. However, the substance of the judgment is in the manuscript document and the substance can be examined to determine the reasoning of the trial Magistrate. I propose to give no further consideration to the transcript.

One further point should be made about the judgment. It deals in considerable detail with a number of matters quite extraneous to the real issues. In doing so the learned Magistrate has allowed himself to conjecture in realms in which conjecture was unnecessary. Such conjecture invites criticism. In the end it will have to be determined whether these meanderings undermine some of his major findings. No doubt he felt obliged to follow through points raised in the extensive cross-examination and in argument. In the heat of the fray this is understandable. But in reality, on a cool appraisal, this was a simple case which required findings one way or another on a short range of issues. The detailed examination of certain side issues has clouded the real ones.

There is a further defect in that the judgment read out was not signed or dated as required by section 52(1) of the Code. That is formal defect which does not go to the merits of the case in any way. Relying on section 176 of the Code this court can disregard non-compliance with that formality.

To lead up to one of the main points for decision I will return o the non-disclosure of the quantities of controlled drug and its effect relation to three of the charges by reason of Part B of the Second hedule of the Misuse of Drugs Law.

In the case of hard drugs the quantity involved in any offence eged can have important consequences in relation to both punishment jurisdiction. For the offence of buying, consuming or possessing etc.

of a hard drug weighing less than 2 ounces the minimum penalty is imprisonment for one year together with a fine of $1000 and the maximum is imprisonment for 7 years together with a fine of $10,000. For the same offence involving a quantity of 2 ounces or more the minimum penalty is 3 years with a $10,000 fine and the maximum is imprisonment for 15 years with a fine without limit. Whether the quantity is under 2 ounces or is 2 ounces or more affects the gravity of the offence by law; not merely in the discretionary assessment of sentence. One form of the offence is more serious than the other by law. The position is analogous to simple assault and aggravated assault. It is, therefore, important that the charge should specify whether the amount alleged is under or over 2 ounces (or exactly 2 ounces, if that is the case).

That was not done in this case. However, in the course of the hearing the quantities relied on by the prosecution were disclosed and no objection was taken to the charges on the basis of any defect therein. Section 175 of the code, therefore, applies.

Although the question does not arise in this case it may be helpful to observe that it is the quantity of the drug itself that matters, without regard to any adulterant with which it is mixed. For example, if a case concerned a mixture of cocaine and some adulterant, weighing in all 4 ounces, the percentage of purity being 45%, then the charge should recite less than 2 ounces. There would be less than 2 ounces of pure cocaine in the mixture.

In case of "soft" drugs the position is exactly the same under section 12 of the Misuse of Drugs Law save that the "weight factor" determining the gravity of the offence by law is "less than one pound" as against "one pound or more".

When it comes to selling, dealing in or distributing a hard drug (and related offences as set out in Part B of the Second Schedule)

the 2 ounce threshold affects not only the maximum and minimum sentence but impinges also on jurisdiction by reason of section 25 of the Misuse of Drugs Law. Where the quantity is less than 2 ounces the offence is a category C offence for the purpose of section 5 of the Code. Where it is 2 ounces or more the offence is a cagetory B offence. Perhaps it should be made clear that these offences involving less than 2 ounces and carrying the heavy penalties they do are not category C offences by virtue of Schedule 1 of the Code. They are category C offences by virtue of section 12 of the Misuse of Drugs Law which expressly makes them triable summarily. It is, therefore, important that the charge should specify whether the amount alleged is under or over 2 ounces (or exactly 2 ounces, if that is the case).

That was not done in the offering to sell charge laid against the first appellant. No objection was taken to this defect and so section 175 of the Code applies. However, the prosecution had in mind 70 kilogrammes of cocaine hydrochloride in relation to this charge. That appears from the opening address. It is also apparent from the evidence led. The charge should, therefore, have specified "over 2 ounces".

It follows that this offering to sell charge was charging a category B offence from its inception. It cannot be argued, in my view, that, because no quantity was specified it was on the face of it a category C offence that was being charged. The prosecution cannot rely on its own omission in that way. It does not follow that because no quantity was specified that it would, prima facie, be less than 2 ounces. The jurisdiction of the Magistrate is conferred by statute and not otherwise. He does not have automatic jurisdiction to try an offence unless it is a category C offence or some statute expressly confers jurisdiction. The offence of offering to sell cocaine hydrochloride is not a category C offence unless the quantity involved is less than 2 ounces. Unless the charge expresses

the quantity as being less than 2 ounces then on the face of it the offence charged is not a category C offence within the automatic jurisdiction of the Magistrate. Jurisdiction over a category B offence is only conferred by consent.

The reality of the situation is that this charge charged a category B offence.

During the course of argument I asked whether the consent necessary to cloak the Magistrate with jurisdiction under section 5 of the Code could be accorded by conduct, without an express verbal consent being given. I had in mind the history of this case. Substantially the same charges were partly tried in the earlier trial. At the retrial the accused freely entered not guilty pleas to the two conspiracy charges. Lack of consent was not signified in any way and the trial proceeded in relation to those two category B offences charged without demur. Could the learned Magistrate properly assume that consent had been given? Indeed, it was argued by learned counsel for the respondent (relying on the definition of "consent" in the Shorter Oxford Dictionary) that acquiescence amounted to consent. Unfortunately, there is nothing to suggest that the learned Magistrate adverted to the question of consent at all.

In Brangwynne v Evans 1962 1 All E.R. the principle of law is reiterated that a defendant in a Magistrates' court can only be called on to answer one charge at a time unless he consents, either expressly or impliedly, to informations being heard together. Implied consent, therefore, is sufficient to permit more than one information being heard together. However, that case merely sets out the position regarding the trial of more than one information under Common Law. It is of no assistance in construing a statute which provides that consent must be given to cloak a Magistrate with jurisdiction to try a particular offence.

Section 5 (1) of the Code provides:

"For the purpose of determining the mode of trial

before a court, offences shall be classified into three categories as follows:

Category A – offences triable upon indictment and not otherwise;

Category B – offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one) may be tried summarily; and

Category C – offences triable summarily and not otherwise.".

It is perfectly clear from that that unless the prosecution and the person/s charged give their consent to a category B offence being tried summarily the Magistrate has no jurisdiction to try it summarily. He must proceed by way of preliminary enquiry. In my ew that consent must be express. Mere acquiescence is not enough. Acquiescence would obviously not be sufficeint where an accused person is not represented. I do not see how it can be any different if he is represented. The consent must come from both the prosecutor and the accused person/s. Without the consent of both the Magistrate has no jurisdiction to try a category B offence. Those consents must be obtained before the accused is impleaded.

Furthermore, those consents should be recorded so that it is plain from the record that the Magistrate had jurisdiction. That is emphasised in many of the cases cited.

The necessity for strict compliance with a provision such ıs section 5 (1) is emphasised in many cases that were cited, R v onica Stewart 1971 17 W.I.R. 381, R. v. Cockshott 1898 1 QBD 582 and tephani v John 1947 2 All E.R. 615 being among them.

It is immaterial that counsel for the defence stood by and llowed the irregularity in the proceedings to occur. The principles et out in R. v. Neal 1949 2 All E.R. 438, Belcon v.R. 1963 5 W.I.R. 6 (at p. 532) and Hamilton v. R. 1963 5 W.I.R. 361 cannot apply here. ilure to take objection cannot cure the absence of jurisdiction.

Whether I am right or wrong in saying that consent must

express and that mere acquiescence is not sufficient does not really matter in this particular case. There was clearly no consent to the offering to sell charge being tried by the Magistrate. There was active opposition to its being so tried. Admittedly the opposition was not in the exercise of any election under section 5(1) of the Code, but opposition there was and on no view of what transpired when the learned Magistrate decided to implead the appellant on that charge could it be said that the first defendant consented to it being tried by the Magistrate. It does not matter whether the learned Magistrate tried three charges or one charge, in respect of which he had no jurisdiction, together with charges in respect of which he did have jurisdiction. The effect, whatever it may be, must be the same.

And it is that effect which must now be examined.

Quite clearly the trial, in so far as it related to the three charges in respect of which the learned Magistrate had no jurisdiction, is a nullity. The verdicts on those charges, namely, the two conspiracy charges and the charge of offering to sell, are a nullity.

Accordingly, those verdicts must be quashed and the sentences for them set aside. It is so ordered. In consequence it becomes unnecessary to consider the grounds of appeal directed specifically to these charges

I will not order a retrial on those charges for two reasons.

The first is that I doubt whether it is appropriate when ieclaring a trial and verdict to be a nulity to order a retrial. upport for that view can be found in R. v. Donlad White 1976 24 W.I.R. 54. The effect of the order is that there has been no trial on those hree charges. The prosecution may proceed with them or not as they ee fit.

The second reason is that, in my view, the evidence adduced at the trial does not justify a verdict of guilty on any of those charges. It is rightly conceded that there is no evidence to justify the conviction on the charge of conspiracy to import. I have read the record several times and cannot see how the evidence supports either the charge of conspiracy to export or the charge of offering to sell.

In view of the order I have made it is unnecessary to go into the evidence in any detail to substantiate the view taken. It might have been different if the charges laid had been based on dealing in or attempting to deal in or supplying the offending drug. But that was not the case.

Had the case been shorn of these excrescences it would have been a straightforward one with few issues. On the first (3 grammes) possession charge the issues would be: did the first appellant hand Zuiderant a small package which contained a white powder; was that white powder cocaine hydrochloride (the chain of handling being properly established); did the first appellant know it was that drug he was handing over? On the second (31 Kilogrammes) possession charge the issues would be: did the incident described by the D.E.A. agents when they took two samples occur as they said it did; were those samples cocaine hydrochloride (the handling being properly established); did the two appellants know it was that drug?

There remain those two charges for unlawful possession. There is no doubt that the learned Magistrate had jurisdiction to try those two charges. But what is the effect of having tried them with charges in respect of which he had no jurisdiction?

There are only two possibilities.

One is that the whole trial was a nullity. The nullity tainted the whole trial and rendered the whole proceedings null and void. Everything must be set aside. That is the view urged on me

by learned counsel for the appellants.

The other is that those aspects which are a nullity are severable from those aspects which are valid.

The law sometimes frowns on the curate's egg approach but it is not the case that an irregularity in a trial, even a major one, necessarily vitiates the whole trial as an examination of the authorities will show.

It is well established that if an accused person is tried simultaneously on two indictments the trial is a nullity - R v. Oliver 1942 2 All E.R. 494. In such a case there can be no severance. It is impossible to say that the trial, as it related to one indictment, was a nullity but not so in relation to the other. Both indictments are on the same footing. Neither is bad in itself. It is the simultaneous trial of both that is wrong. In this case, of course, the simultaneous hearing of more than one complaint is expressly permitted by section 13 (6) of the Code. So the simultaneous trial cannot, of itself, be said to cause the whole to be a nullity. Say, for example, a complaint charging a category C offence, such as simple assault, is heard with another complaint with a charge so badly worded that it does not disclose an offence known to law, the trial would not be a nullity. The Magistrate would simply dismiss the case against the accused on the charge which disclosed no offence.

In Harding v. Ramjattan 1959 1 W.I.R. 434 two accused were charged indictably on one information with different, but related, offences one of which was triable summarily with consent, the other not. Both consented to summary trial. It was held that the trial was a nullity.

That case is not binding on this court, but is obviously strongly persuasive. However, there are important differences from this case. In the first place both accused were charged with different offences on one information, i.e. the same information charged one offence which, on consent being given, became triable summarily together with another,

against a different person, which could only be tried on indictment.
One can see how the information itself would be bad in the circumstances,
rendering the trial a nullity. One cannot sever parts of an informa-
tion. That defect would render the whole trial void. It was the
joint trial of two accused on the defective information which rendered
the trial a nullity. Here, of course, there were the equivalent of
five separate informations. If one was bad it would not taint the
others.

A case closer to this one which supports the view that there
can be severance is Emmanuel v. Cox 1967 10 W.I.R. 560. In that case
the two accused were tried together with their consent. There were
three separate charge sheets in respect of each accused, each charging
one offence. The only charge against each which was common to both
was for assaulting a police officer in the execution of his duty. Under
the law of Saint Lucia the other four charges involving separate
defendants could not be properly tried together. The charge common
to both could. The convictions on the charges which the Magistrate
could not try together were set aside. The conviction on the one
that was within his jurisdiction to try together was dismissed.

In principle there is no real distinction between that
case and this one. So much of the trial as was within the jurisdiction
of the Magistrate was held to be valid. So much of it as was
outside his jurisdiction was rejected as null and void. Although that
s not how it was expressed in the judgment that was the effect of
e decision. With respect that seems to be a sound and acceptable
proach which does not allow technicalities to defeat the merits and
stice of a case.

When one analyses the position under our law the approach
mmanuel v. Cox appears to be appropriate.

The proviso to subsection (3) of section 13 of the Code
les that the chargeslaid in this case shall be deemed to be

complaints. There were five separate charges each dealing with one matter. By virtue of that proviso they became five separate complaints. Subsection (6) of that section provides:

> "Every complaint shall be for one matter only, but the complainant may lay one or more complaints against the same person at the same time and the court hearing any one of such complaints may deal with one or more of the complaints together or separately as the interests of justice appear to require.".

The five complaints were heard together, albeit that three were impleaded shortly after the trial on two had begun - an aspect which will be dealt with. Each separate complaint had to be considered separately, as a distinct entity, in relation to the evidence led and a separate verdict reached on each. There is nothing repugnant to common sense or any rule of law or to one's sense of justice in holding that so much of the trial as related to the two complaints charging unlawful possession, which were within the Magistrate's competence, was valid and so much of it as related to the complaints containing the other three charges, which were not within the Magistrate's competence, was a nullity. There was just no trial on the charges in those three complaints. In consequence the verdicts on them were null and void. If there had been an acquittal on one or both of the possession charges it could not be right, on an appeal against conviction on the other charges, to hold that the whole trial had been a nullity, thus leaving it open for a retrial to be launched on all of the charges, including those on which there had been an acquittal on the basis that the acquittal was a nullity.

In any trial where two or more complaints are heard together, some of the evidence will relate to one, some will relate to another and some will relate to two or more. Where the evidence relates to a charge within the Magistrate's competence, it can be considered in relation to that charge. Where it relates to a charge not within the Magistrate's competence, it has no effect in relation to that charge. That charge is not, in reality, being tried.

Looked at another way, it is clear that the learned Magistrate had no jurisdiction to even implead the accused on the charges charging

> addition of a charge, as the court thinks necessary to meet the circumstances of the case:
>
> Provided that where a charge is altered, added or substituted as aforesaid, the court shall thereupon call upon the accused person to plead to the altered new charge:
>
> Provided further that in such case the accused person shall be entitled, if he so wishes, to have the witnesses (or any of them) recalled to give evidence afresh or to be further cross-examined by the defence, and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such cross-examination.

It has to appear to the court that "the charge (presently before the court) is defective, either in substance of in form". There was nothing defective in the substance or form of the two conspiracy charges on which the three accused had been impleaded. The learned Magistrate did not advert to any defect. Although he had no jurisdiction to try them without consent the charges were not in themselves defective. In the circumstances as they appeared at the time section 70 was not applicable.

It is unnecessary for me to consider what constitutes a defect in a charge or the circumstances in which section 70 may be invoked. As it turns out there was in fact no trial until the appellants were impleaded the possession charges. That is when the trial commenced. Everything that happened before then was a nullity. Even impleading the three accused on the conspiracy charges was a nullity.

The trial could only commence when the appellants were impleaded

on charges within the jurisdiction of the learned Magistrate. It was at that point in time that he proceeded to try the case pursuant to section 64 of the Code. He was not in the course of a trial when the appellants were impleaded on the charges which were within his power to try summarily.

One important consequence flows from this finding. The whole of Zuiderant's evidence in chief is excluded from the trial proper. One cannot take the view that the trial only commenced when the appellants were impleaded on charges which the Magistrate had jurisdiction to try summarily and at the same time treat as evidence in that trial evidence given before the trial so commenced i.e. given in proceedings which were a nullity.

This has come about because of an incorrect appreciation of the situation at the time and an incorrect approach to section 70. Had it been realised that the proceedings up to the time when the appellants were impleaded on the two possession charges were a nullity, no doubt Zuiderant would have been taken through his evidence-in-chief again. As it was the trial proper commenced with the cross-examination of Zuiderant.

The evidence in chief was vital to the first charge of unlawful ssession (3 grammes). It was the only evidence of who gave Zuiderant small package with the white powder in it, the circumstances in ch it was given to him and who he handed it to after receiving it. ve examined the cross-examination in detail to see if that evidence epeated in it. It is not. I have also taken account of the alleged sion to Pulley in regard to this aspect to see if that cures the . In my view it does not. It was obviously Zuiderant's evidence ef that the learned Magistrate relied on in reaching his conclusion s charge and it is not for this court to scrape around to see if s any other which might replace it.

It follows that the appeal against the conviction on this charge

must succeed for want of sufficient evidence to support it. Accordingly, the conviction on this charge is quashed and the sentence is set aside.

In consequence it becomes unnecessary to consider the grounds of appeal directed specifically to this charge.

There remains the charge of unlawful possession (31 kilogrammes) on 22nd March against both appellants. As mentioned earlier that should have been a simple case.

The evidence is that Pulley, a D.E.A. agent, had made contact with the first appellant and had had conversations with him relating to his (Pulley's) intention to purchase cocaine from him. Those conversations are relevant to the question of knowledge, although there is also ample other evidence on that aspect.

On 22nd March, in the afternoon, the first appellant took Pulley and another D.E.A. agent operating with him, Delgado, to the first appellant's cement plant. There they entered an office. While they were there the second appellant entered the office and the first appellant introduced him as his Chemist. Pulley spoke to the second appellant in Spanish. Both appellants speak Spanish. The second appellant acknowledged that he was the chemist. Pulley asked him: "How is the coke." The second appellant said: "Pure".

All four then went to a car parked in the vicinity. The first appellant opened the trunk and took out a suitcase. They all then went to a bedroom, the first appellant carrying the suitcase. The first appellant placed it on a bed and opened it up. There were 31 oval packages in two layers in it, all about the same size. Delgado told the first appellant that he wanted to take random samples from two of the packages. He was told to go ahead. He picked one package at random from each layer and he and Pulley took a sample from each package. They then returned the packages. There was a conversation

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about the package feeling as if they weighed more than a kilo and the second appellant said he always packed more than a kilo to allow for spill. The packages were returned to the suitcase and the second appellant carried them out of the room.

Those samples were sent to an analyst. They were identified as cocaine hydrochloride, 90% pure.

The learned Magistrate found that the chain of handling the samples from the D.E.A. agents to the analyst was unbroken and satisfactory and there was evidence to justify that finding.

On 23rd March there was a police raid on the first appellant's premises. However the suitcase with the 31 packages was not found. Those packages were never recovered despite a widespread search.

It is quite clear from the conversation which the first appellant and the second appellant, particularly the former, had with the D. E. A. agents that they were holding out that all the packages in the suitcase contained cocaine, each containing at least one kilogramme of the drug. It was apparent from the negotiations that substantial quantity of drug was intended in the proposed deal. Two he packages were chosen at random and the sample from each was found o be cocaine hydrochloride, 90% pure. The only reasonable inference that the suitcase contained 31 kilogrammes of that drug. From the rcumstances narrated the only reasonable inference is that the two pellants had joint possession of the drug in the suitcase.

If that evidence is accepted then it amounts to an overwhelming e against the two appellants on this charge of unlawful possession.

There was no evidence , in the sense of sworn testimony tested cross-examination, in rebuttal of the essential features of the ecution evidence. Both appellants gave unsworn statements from the denying the charges or any connection with a controlled drug giving a totally different complexion to the encounters during which

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the offences were alleged to have been committed. Apart from a determined attempt to undermine the credibility of certain key witnesses in cross-examination,one of the main planks of the defence was an attack on the chain of handlers of the samples from the time they were taken until they were analysed, with a view to breaking that chain. As it was the learned Magistrate took the view that there was no break in the chain. The evidence before him justified that finding and his acceptance of the fact that the samples were cocaine hydrochloride.

One consequence of the purported trial of three category B offences with the trial of the two possession offences was that a eat deal of evidence unrelated to the latter was adduced. That evidence was aimed at establishing the three category B offences, but, in my view, failed to do so even if those offences were properly triable summarily. It is complained that this additional evidence amounts to misreception of evidence on a large scale which had a ighly prejudicial effect and vitiated the trial on that account alone.

Misreception of evidence in a trial before a professional, perienced Magistrate is of less consequence than it is in a trial fore a jury. It is not always possible to say what effect the sreception of evidence may have had on the verdict of a jury. The y does not give reasons for its decision. It does not find specific ts and apply the law to them. Therein lies the difference. The istrate does give reasons and he makes specific findings of fact. this case the findings of fact related to this charge are very clear and atic.

Furthermore, the defence's apparent acquiescence in the piracy charges being tried summarily contributed to the procedural which led to this extraneous evidence being adduced. It would have open to the defence to take the point under section 5 of the Code pleas were entered so that it could be established whether the ry B offences would be tried summarily or on indictment. Even

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with regard to the charge of offering to sell, although objection was taken to impleading the first appellant on it, no objection was raised under section 5 of the Code and section 25 of the misuse of Drugs Law. The defence could have had that charge put firmly outside the jurisdiction of the Magistrate by making reference to those sections and making it clear that consent was withheld; thereby precluding the hearing of that charge in the trial on jurisdictional grounds. That was not done. The objection was based on the construction of section 70 of the Code. The learned Magistrate's jurisdiction to try any of the category B offences was never put in issue. The defence cannot stand by in the face of a procedural irregularity going to jurisdiction, contributing thereto by its apparent acquiescence therein and then complain about the consequential misreception of evidence. To allow that would be to allow manipulation of legal process to defeat its purpose. It was within the power of the defence to have prevented what is now complained about.

Mention was made earlier of the learned Magistrate's elaborate handling of several side issues which had little or no bearing on the true issues in this case. That may have been unnecessary. He may have felt it necessary to pass his comments on those matters. But having examined the judgment carefully I do not see how those comments can affect his findings on the vital issues as they related to this charge. He made those findings in firm and unequivocal terms. He addressed his mind, more than once, to the burden of proof in impeccable terms. He explained his approach to the evidence in correct terms.

While accepting that there was also misreception of evidence other than that referred to above I am satisfied that, in the end, the substance of the case on this charge turned on whether or not the learned Magistrate accepted the D. E. A. agents as truthful witnesses and believed their version of what happened at the cement plant on 22nd March. He addressed his mind specifically to that matter and made a finding adverse to the appellants. He also addressed his mind to the handling of the samples until they were in the hands of the analyst and made a firm finding on that. The conversations at the relevant times show clearly that the two

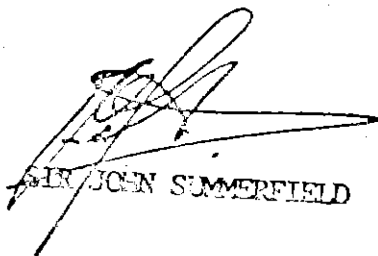
appellants had knowledge of the contents of the 31 packages in the suitcase. In the light of the express findings supported by evidence in what can only be described as an overwhelming case against the appellants the extrenuous matters are unimportant.

This rather long judgment has pointed up a number of untidy and unsatisfactory features. I have considered carefully whether those features justify intervention. I am satisfied that they do not. This court is not concerned with the cosmetics of a case. In terms of section 176 it is concerned with the merits. On the earned Magistrate's clear findings there can be no doubt of the uilt of the two appellants and none of these untidy and unsatisfact- features should interfere with the verdict. There has been no scarriage of justice - certainly not so far as the appellants are ncerned except in so far as they may have escaped adverse verdicts some of the other charges which have been set aside because of the regularities dealt with herein.

I find no merit in any other ground directed at the conviction this charge.

Although the sentences are severe, they are not manifestly ssive so as to justify intervention. The appellants are first nders but the drug involved is a hard drug in an exceptionally quantity for that type of drug. The courts have an obligation ss deterrent sentences in this type of case.

In relation to both appellants the appeal against conviction entence on the charge of unlawful possession of cocaine hydrochloride logrammes) on 22nd March 1983 is dismissed.



SIR JOHN SUMMERFIELD

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