3rd March 1983

3.3.83

IN THE GRAND COURT OF THE CAYMAN ISLANDS

BEFORE THE HON. SIR JOHN SUMMERFIELD C.B.E. Q.C.

CRIMINAL CASE NO.1884/82 ON APPEAL

BETWEEN	BRENT HYDES AND ASHTON EBANKS	APPELLANTS
AND	HON. ATTORNEY GENERAL	RESPONDENT

Mr. David Ritch for appellant
Mr. T. Scarborough for respondent

JUDGMENT

This is an appeal against conviction for the offence of unlawful possession of a controlled drug, namely, cocaine. It is, perhaps, as well to stress that the controlled drug specified in the charge is cocaine.

By agreement it was decided that ground 1 (c) would be argued and determined in isolation, without prejudice to reliance being placed on the other grounds later, if need be, because if ground 1 (c) was determined in the appellants' favour the appeal would have to be allowed. Ground 1 (c) reads:

> "(c) there was no prima facie case to answer on a charge of possession of cocaine as the substance produced by the prosecution was "Cocaine hydrochloride" and this latter substance was not proven to be a prohibited drug as defined in the law.".

The substance the appellants were alleged to have had in their possession was analysed and found to be cocaine hydrochloride. This was proved at the trial by a certificate of a qualified chemist appointed by the Governor in that behalf pursuant to section 6(2) of the Misuse of Drugs Law 1973. That section reads:

> "(2) A certificate under the hand of the C.M.O. or of a qualified chemist or a qualified medical laboratory technician appointed by the Governor in that behalf either specifically or generally shall be a prima facie evidence of whether or not

> any given substance, therein identified and referred to, is a controlled drug specified in such certificate....".

That certificate was tendered in evidence without objection. It may be noted that such a certificate may be tendered in evidence as prima facie evidence of "whether or not" any given substance, therein identified and referred to, is a controlled drug.

The relevant part of the certificate reads:

Exhibit No.	Received	Found	Reserve
452	0.088g	Cocaine Hydrochloride 54%	0.020 g

It does not state whether or not the substance referred to is a controlled drug. There was no other evidence on that issue.

The defence rested on a no case to answer submission, which was overruled, and called no evidence. The specific point now raised was not raised in that submission but is nevertheless inherent in such submission which amounts to a submission that the Crown has not established a prima facie case. The learned Magistrate proceeded to convict and to sentence the appellants.

A controlled drug is defined as a drug listed in the First Schedule. Paragraph 1 of the First Schedule lists, among other drugs, cocaine. Paragraphs 2, 3, 4 and 5 read:

> "2. Any stereoisomeric form of a substance for the time being specified in paragraph 1 above not being dextromethorphan or dextrorphan.
> 3. Any ester or ether of a substance for the time being specified in paragraph 1 or 2 above.
> 4. Any salt of a substance for the time being specified in any of paragraphs 1 to 3 above.
> 5. Any preparation or other product containing a substance or product for the time being specified in any of paragraphs 1 to 4 above.".

It is elementary, of course, that the onus of establishing that the offending substance is a controlled drug is on the Prosecution and to do so beyond all reasonable doubt.

On this appeal reliance was placed on paragraphs 4 and 5 of the First Schedule. It was urged that this Court should take judicial notice of the fact that cocaine hydrochloride was either a salt of cocaine or a preparation or other product containing cocaine.

Pausing for a moment at this stage, I should remark that where two or more substances are combined to form a different substance, e.g. a salt, I do not think that the resulting product can be "a preparation or other product" containing either or any of the original substances, as such. If that were intended by paragraph 5 then paragraph 4 would be unnecessary. In my view, paragraph 5 is intended to cover preparation or products containing substances in their original chemical structure, albeit in a different form e.g., to take examples outside the specialised field of controlled drugs, sugar in tea, coffee and milk and the like.

As to judicial notice I can draw on my general knowledge of elementary chemistry to know that sodium and chlorine, both deadly poisons, can be combined to constitute a harmless, indeed beneficial, substance, namely sodium chloride or common salt. But, at the risk of revealing my ignorance in this field, my general knowledge in relation to those substances ends there. The resultant product is obviously completely different from the substances which combined to form the compound. I cannot say if the resulting salt is a salt of sodium or a salt of chlorine or of neither. My general knowledge of chemistry does not extend to that level.

An elaborate argument was built up by reference to definitions in the Shorter Oxford English Dictionary and the British Pharmacopoeia. But even if I were to accept the references to the British Pharmacopoeia I would still not be satisfied that cocaine hydrochloride falls within paragraph 4 or 5 of the first Schedule.

Which brings me to an important point. Without making any definitive pronouncement on the point, the British Pharmacopoeia may have been admissible <u>as evidence</u> <u>at the trial</u>. I doubt if it would have made much difference in this particular case. But it was not and this appeal is not the correct forum for the admission of any such evidence. No application was made to adduce additional evidence and, in any event, fresh evidence of that nature would not be permitted where its purpose is to rescue the prosecution case from an oversight. It is certainly not new evidence either. I admitted the references in the British

Pharmacopoeia de bene esse. I now reject them.

A distinction has to be drawn between receiving evidence and taking judicial notice of a fact when the subject of judicial notice is a matter of common knowledge with regard to which no inquiry is made by the judge – Cross on Evidence 4th Ed. p 139, "Judicial notice and the reception of evidence".

In taking judicial notice the judge is acting on his own knowledge and that is a completely different procedure from the reception of evidence. Not only must the fact be within the judge's own knowledge but a basic essential is that the fact judicially noticed should be of a class that is so generally known as to give rise to the presumption that all persons are aware of it – Cross, ibid, p 142. These two essentials are not necessarily always present. A judge may well not know which record is the current Top of the Pops while most of the remainder of the community may have the knowledge at their fingertips. Conversely, a judge may have acquired an extensive knowledge of chess openings which is not shared by the general public. An example where the essentials converge is the recent visit of Her Majesty. A judge would certainly be entitled to take judicial notice of that happy event. I think I can safely say that the vast majority of persons are not aware of the contents of the British Pharmacopoeia (or even of its existence) or the chemistry of the controlled drugs specified in the first Schedule. Otherwise, it would be unnecessary to have the evidence of an expert to identify them. I am certainly amongst that majority of persons. I could not be sure in my own mind that cocaine hydrochloride falls within any of the categories specified in the First Schedule. All one can say from general knowledge is that it would appear to be a compound resulting from the combination of hydrochloric acid with cocaine. What the resultant compound constitute is beyond the range of general knowledge.

The matter does not end there. That the substance identified is a controlled drug had to be proved at the trial. It is clear that the learned trial Magistrate did not advert his mind to the fact that the substance identified was different from the one specified in the charge

i.e. a controlled drug specified in paragraph 1 of the First Schedule. One cannot speculate on whether or not he would have found beyond reasonable doubt, on the material before him, that it was a controlled drug had he done so. No doubt the charge would also have had to have been amended to meet the situation.

If in fact cocaine hydrochloride is a controlled drug within any of the categories specified in the First Schedule it is unfortunate that this case should turn on the failure to identify its nature under any of those categories. It would have been simple enough for the qualified chemist to have made that identification in his certificate. As it is, the appeal must succeed on the ground that the Prosecution failed to establish that the substance concerned was a controlled drug.

The appeal is allowed; the conviction in each case is quashed and the sentences are set aside.

SIR JOHN SUMMERFIELD.

3 March 1983.