

32/82

IN THE PRIVY COUNCIL

No.36 of 1981

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- AND -

HERBERT STEWART Respondent

AND BETWEEN :

HERBERT STEWART Appellant

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.
Hale Court
Lincoln's Inn
London WC2A 3UL

Solicitors for the Appellant and
for the Respondent in the Cross-
Appeal

PHILIP CONWAY THOMAS & CO.
61 Catherine Place,
LONDON
SW1E 6HB

Solicitors for the Respondent
and for the Appellant in the
Cross-Appeal

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :-

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- AND -

HERBERT STEWART Respondent

AND BETWEEN :-

HERBERT STEWART Appellant

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

RECORD OF PROCEEDINGSINDEX OF REFERENCE

| No. | Description of Document. | Date | Page |
|-----|--------------------------|------|------|
|-----|--------------------------|------|------|

IN THE RESIDENT MAGISTRATES
COURT

| | | | |
|----|-------------|--------------------|---|
| 1. | Indictment | 9th October 1979 | 1 |
| 2. | Proceedings | 17th December 1979 | 3 |

PROSECUTION EVIDENCE

| | | | |
|-----|-------------------------|--------------------|----|
| 3. | Vilma Blair | 17th December 1979 | 3 |
| 4. | Randolph Shirley | 17th December 1979 | 8 |
| 5. | Dean Bennett | 17th December 1979 | 10 |
| 6. | Christopher Barnaby | 17th December 1979 | 11 |
| 7. | Calmeta Thompson | 17th December 1979 | 12 |
| 8. | Dean Bennett (recalled) | 17th December 1979 | 17 |
| 9. | Joshua Roberts | 17th December 1979 | 18 |
| 10. | Randolph Shirley | 17th December 1979 | 19 |

| No. | Description of Document | Date | Page |
|-------------------------------|--|--------------------|------|
| <u>DEFENDANT'S EVIDENCE</u> | | | |
| 11. | Herbert Stewart | 17th December 1979 | 21 |
| 12. | Wilbert Reid | 17th December 1979 | 24 |
| 13. | Clerk's Certificate | Undated | 25 |
| 14. | Grounds of Appeal | Undated | 25 |
| <u>IN THE COURT OF APPEAL</u> | | | |
| 15. | Additional Grounds of Appeal | 24th March 1980 | 27 |
| 16. | Judgment | 13th March 1981 | 28 |
| 17. | Conditional Order for leave to Appeal | 4th May 1981 | 38 |
| 18. | Order Granting Final Leave to Appeal to Her Majesty in Council | 13th August 1981 | 39 |
| <u>IN THE PRIVY COUNCIL</u> | | | |
| 19. | Order granting Special Leave to Cross-Appeal to Her Majesty in Council | 24th November 1981 | 39 |

EXHIBIT

| Exhibit No. | Description of Document | Date | Page |
|-------------|------------------------------|---------------|------|
| 1. | Statement of Herbert Stewart | 18th May 1979 | 41 |

DOCUMENT TRANSMITTED TO PRIVY COUNCIL BUT NOT REPRODUCED

JUDGEMENT OF KERR. J.A.
REGINA V. SHOBBA MIRCHANDI
GHANCHAYAN TOLANI

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :-

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- AND -

HERBERT STEWART Respondent

AND BETWEEN :-

HERBERT STEWART Appellant

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

RECORD OF PROCEEDINGS

NO.1
Indictment

IN THE RESIDENT
MAGISTRATES COURT

No.1
Indictment 9th
October 1979

In the Residents Magistrates Court
The Queen vs. Herbert Stewart
In the Resident Magistrate's Court for the parish of
Saint James Holden at Montego Bay on the 9th day of October

IT IS HEREBY CHARGED on behalf of Our Sovereign Lady the
Queen:-

Herbert Stewart is charged with the following offence:-

STATEMENT OF OFFENCE - FIRST COUNT

Conspiracy to contravene section 24, contrary to paragraph
1(1) of Part 11 of the Fifth Schedule of the Exchange
Control Act.

PARTICULARS OF OFFENCE

Herbert Stewart, between the 16th and the 18th of May, 1979,
being a person in the Island, conspired with other persons
unknown to export foreign currency amounting to US (notes)

In the Resident ~~Magistrates Court~~ §13,176.00, US (Travellers cheques) §1,410.00, US (money order) §1,570.00, Canadian notes §67,00, (money order) §241.00

No.1
Indictment 9th
October 1979
(Continued)

Herbert Stewart is further charged with the following offence:-

STATEMENT OF OFFENCE - SECOND COUNT

Contravention of section (1) and paragraph 1(1) of Part 11 of the Fifth Schedule of the Exchange Control Act.

PARTICULARS OF OFFENCE

10

Except with the permission of the Minister, Herbert Stewart during the month of May, 1979 being a person in the Island who is entitled to sell foreign currency and not being an authorised dealer such foreign currency amounting to US (notes) §13,176.00 US (Travellers cheques) §1,410.00 (money order) §1,570.00, Canadian (notes §67.00 Canadian (money order) §241.00.

Plea: Not Guilty

Sgd. C.A. Brown
Clerk of the Courts,
St. James

20

Before the Honourable
Mr. Kipling Douglas

In the Resident
Magistrate's Court for
the parish of Saint
James

WITNESSES:

Arraigned: 9.10.79

Holden at Montego Bay
on the 9th day of
October 1979

Plea: Not Guilty
to each count

Tried: Oct. 9, 29 & 30th
December 17th

THE QUEEN

30

v.

Verdict: Guilty on both
Count.

HERBERT STEWART

Sentence: Count 1 Fined
§30,000 or six months
imp. at Hard Labour
Count 11 Fine §30,000 or
6 months at Hard Labour,
sentence of imprisonment
to run consecutively in
default of payment of fine,
Foreign Currency to be
forfeited.

For - Conspiracy to
contravene
(Count 1)
Contravention
of section
(Count 2)

WITNESSES
FOR
DEFENCE:

40

(Verbal Notice of Appeal
Bail in the sum of
\$50,000 with one or two
sureties.

In the Resident
Magistrates Court

Sgd. K. Douglas
Resident Magistrate,
Saint James
17th December , 1979

No.1
Indictment 9th
October 1979
(Contd.)

10

NO. 2

No.2
Proceedings 17th
December 1979

Proceedings

IN THE RESIDENT MAGISTRATE'S COURT FOR THE PARISH OF SAINT
JAMES HOLDEN AT MONTEGO BAY ON THE 17TH DAY OF DECEMBER,
1979 BEFORE HIS HONOUR MR. K. DOUGLAS RESIDENT MAGISTRATE
FOR THE SAID PARISH.

ON APPEAL

INFORMATION NUMBER 3055/79)

20

REGINA)
VERSUS) FOR: CONSPIRACY TO EXPORT FOREIGN CURRENCY
STEWART, HERBERT) CONTRAVENTION

Mr. Karl Vancork for Accused
Mr. Wilcott for Crown

Order for Indictment

Plea: Not Guilty

Prosecution Evidence

In the Resident
Magistrates Court

No. 3

Prosecution
Evidence
No.3
Vilma Blair
Examination

30

Vilma Blair

VILMA BLAIR (Sworn)

Woman Acting Corporal attached to the Financial
Investigating Unit, 40 Duke Street Kingston.
Mr. Cork objects to witness giving evidence as her name does
not appear on the back of indictment as required by Rule 1
Sub Section 5 of the Schedule to the Indictment Act.
Having seen no names on back of Indictment now that the
case has commenced this amounts to the fact that the Crown
intends to call no witness and should be treated as such.

40

Objection overruled.

Witness proceeds.

On Friday 18th May 1979 I was at the Donald Sangster's International Airport, Saint James. I was not alone, I was accompanied by Woman Acting Corporal Thompson and Constable Shirley. I was sitting in the vicinity of the Security Check point - Outgoing Immigration. I noticed that passengers were being processed for Eastern Airline Flight 970 to Miami which I heard announced on the Intercom. (Mr. Cork objects) to evidence on the grounds that its hearsay as witness is not competent to give evidence to a statement she heard over an intercom.

10

Objection overruled. At about 2.30 that afternoon Corporal Thompson spoke to me. He gave me certain information as a result of what he told me along with Constable Shirley we started to look out for Sergeant Stewart and a lady. At about 3:30 I saw Sergeant Stewart he was with a lady. The Sergeant was dressed in uniform. He walked towards the outgoing section of immigration. He was about ten yards from me. Sergeant Stewart had the lady's travel documents with him plus a brown paper bag. He handed the travel documents to an immigration Officer. (Mr. Cork objects to this evidence on ground that the witness is giving evidence about a certain document or paper as she cannot give oral evidence of a written document). Also she can give evidence that the Sergeant had paper in hand but can't say whose they are or what they are) Court rules that although witness is not in a position to say whose documents she can say what they were.

20

Evidence continues

30

Sergeant Stewart kept the brown paper bag. The lady handed her hand luggages to the ladies at the security check who checked them and she walked through the frisker machine.

The immigration officer processed the documents and handed them back to Sergeant Stewart. The lady came around picked up her things. Sergeant Stewart walked outside the Checking area and handed her the travel documents but kept the brown paper bag. They then walked off in the direction of the bar in the intransit lounge. Corporal Thompson then spoke to me again and I walked through the Number 1 boarding gate on to the Tarmac. I left Corporal Thompson inside she eventually came out on tarmac and gave me certain information I then saw Sergeant Stewart and the lady walking towards us with Constable Shirley behind them. Sergeant Stewart had the brown paper bag and in the other hand he had a brown paper parcel in the shape of a bottle. We were facing the airplane. Sergeant Stewart and the lady were coming towards us. As they came towards us I called to Sergeant Stewart. I said "Stewie" They were then very near to me about three yards away. He did not answer. Myself Acting Corporal Thoppson and Constable Shirley rushed up to

40

50

Stewart and the lady, encircled them. I asked Stewart what he had in the brown paper bag. He handed the lady the paper parcel that resembled a bottle but kept the bag. He held on to the bag and said a fi me bag, a fi me bag a not the woman bag. (Mr. Cork objects on ground that this evidence is not admissible without any ground work being made) objection overruled.

In the Resident
Magistrates Court
Prosecution
Evidence
No. 3
Vilma Blair (Contd)

Evidence continues

10 I insisted on him to show me the contents of the bag. He said "Come let we go up a office. There was a crowd of workers on the Tarmac as Sergeant Stewart had become a little hostile. I, Acting Corporal Thompson, Constable Shirley walked back to the Terminal Building. Sergeant Stewart who was in the middle still had the brown paper bag with him. We went up some stairs and stopped at the top. There I asked Sergeant Stewart for the bag again. He gave it to me I opened this brown paper bag in front of Acting Corporal Thompson, Sergeant Shirley.

20 Mr. Cork request permission to ask a few questions by way of voir dire. Permission not granted) Mr. Cork now objects to this evidence being admitted on the ground that under the English Legal System what we have adapted a person is entitled to a certain amount of privy unless you are given special statutory Authority to do so. I concede that under the Exchange Control Act the law gives certain persons permission to breach principle. Quote section 4 paragraph 3 of the 5th Schedule on Exchange Control Law. The evidence as to the contents of the bag cannot be given because its the Exchange Control Act as not similar to the Unlawful Possession Law. Both of which are bastards of the English Legal Principle and both of which are phrased alike and both of which required in the wording of the statute the same type may be of evidence and because these two laws infringe on the right of a citizen the Ratio decendi law applicable to Unlawful Possession of Property Law is the same in relation to the Exchange Control Act.

30
40
50 The Unlawful Possession of Property Law permits two people the Constable and an authorised person only to breach the rights of a particular person namely a suspected person, a kin to the Unlawful Possession of Property Law the Exchange Control Law Breaches the right of a citizen in same fashion as the Unlawful Possession of Property Law in that it gives an Immigration Officer or Custom Officer the rights to breach it in relation of a traveller. It therefore follows that since this witness is neither an immigration officer nor customs officer and since the accused was not a traveller then the evidence of the contents of a bag which the accused said was his cannot be admissible in this case nor can it be admissible in any offence under the Exchange Control Law.

Mr. Wilcott replies

In the Resident Objection overruled
Magistrates Court

Witness Continues

Prosecution
Evidence
No. 3
Vilma Blair
(Contd)

In the bag I saw a brown leather bag and on one side of bag I saw Mr. Travel Kit. (Mr. Cork objects) I opened the brown leather travel bag. I saw several wads of U.S. Currency also saw a small piece of paper with the description of the money and how it was made up. At this stage Woman Acting Corporal Thompson cautioned Sergeant Stewart. We then counted the money in Sergeant Stewart's presence and arrived at a total of sixteen thousand four hundred and sixty four dollars U.S. Sergeant Stewart said me never know say a so much money but unco can't kill me fe that. Mr. Cork objects on ground that no ground work has been made.

10

Overruled.

Witness continues

"A the woman money, is a friend ask me to give her. We asked Sergeant Stewart to accompany us to the Financial Investigating Office in Montego Bay. He refused but said he would come on there later on. He did not come. Sergeant Roberts, myself, Acting Corporal Thompson and Constable Shirley went in search of him, we found him on a Street in front of Sam Sharp's Square. He was in a van accompanied by another person, he was the driver. He came back to the Financial Investigating Office with us. There it was counted again in his presence. We took the money to Sergeant Roberts and Barnett. Sergeant Barnett cautioned him and put certain questions to him. These questions and answers were recorded. Corporal Thompson was the officer in charge.

20

30

Cross-
Examination

Cross-Examined by Mr. Cork.

We find Sergeant Stewart at Sam Sharpe Square at about 6:30-6:45 p.m. Sergeant Roberts spoke to him. They spoke for a matter of minutes. We accompanied Sergeant Stewart to Albion where Sergeant Stewart dropped off person. Albion is about a mile and a half away. From there we went to the Financial Investigating Unit Office at Montego Beach Hotel. This is about $2\frac{1}{2}$ miles from Albion. This was now about 7:30 to 7:45 p.m. When I first saw Sergeant Stewart I was sitting by security. It might be possible that we got to the Montego Beach Hotel before 6:45. I wasn't wearing a watch. He was not arrested then. When I first saw Sergeant Stewart he was in the company of the lady. I didn't see when they meet. I did not know the lady before. I knew Sergeant Stewart very well. I have never been out with him. I was not to have gone out with him a week before that to party in Lamb's River.

40

He did not offer me a drive to Lamb's River. I heard about a party. When I saw Sergeant Stewart I was sitting

50

10 behind the frisker machine facing immigration and Security. In the Resident
The Security check point is after you pass through Magistrates Court
Immigration just a little behind it. Woman Acting
Corporation Thompson was then in the Intransit lounge area Prosecution
not too far from the Security checking area, about six Evidence
yards from me. I was sitting by the bar. Constable No.3
Shirley was sitting by the bar. Mr. Stewart and lady were Vilma Blair
coming towards outgoing Immigration when I first saw him. (Contd.)
Sergeant Stewart is a Sergeant attached to Immigration,
Montego Bay. Financial Investigating Unit has no office
at Montego Bay. We do not share the Immigration Office, if
we have anything to do we go there. I am acquainted with
everyone there. Sergeant Stewart gave the documents to
Constable Bennett. He checked the papers and gave them back
to Mr. Stewart. Sergeant Stewart then walked on the
outside of Security. I sit quite close to the Frisking
Machine. I have been working at the Montego Airport for the
past two years. I sometimes work more than eight hours a
day. I sometimes sit for fifteen minutes at the Frisker
20 machine. I first noticed the second parcel when they came
toward me on the tarmac. The lady had her handbag in her
hand. I did not attempt to detain the lady. I agree it is
possible that the plane was due to depart at 3:25. I can't
remember if it was an hour late for departure. I can't
remember how long Eastern Airline was on the ground. I
agree the lady with Sergeant Stewart was the last passenger
to be cleared by Eastern Airline. She was the last person
who went on the plane. I wouldn't say she was the last
person to be cleared. It is possible that somebody was
30 cleared after her.

I cannot say how long after the others she boarded the
plane. I went out on Tarmac first. Woman Acting Corporal
Thompson next. Then Sergeant Stewart and the lady and then
Constable Shirley. Question: Does Sergeant Stewart know
that you are an Financial Investigating Unit Agent.

Crown Counsel object.

Court overrules question.

40 Evidence continues: I have been with Financial Investigating
Unit for two years, and have been working alternately at the
Norman Manley Airport and Donald Sangster Airport. During
that time Sergeant Stewart has been an Immigration Officer
at the Sangster Airport. Shirley has been there about a
year and Thompson just over a year. All of us shared the
immigration office. Sergeant Stewart knows the type of
work I was doing. I can't remember who was in the van with
Sergeant Stewart. I know it was a man. I know Corporal
Hibbert, it is possible that he was the man, it could have
been someone else. I think the person was in uniform.
I think it was Immigration uniform. I cannot remember what
50 I said to the woman. I spoke to her as a result of taking
her passport. After I spoke to her I gave her back her
passport. I don't remember if any of the other officers

In the Resident spoke to the lady. Acting Corporal Thompson could also
Magistrates have spoke to her. We walked off the Tarmac before the
Court plane left. I do not know what time the plane left.

Prosecution
Evidence

No.3
Vilma Blair
(Contd.)

We counted the money in an open office at the top of the steps. When he told me it was the woman it was later on. He had maintained that the bag was his. He was in uniform. When he said that I was not too sure that he was telling the truth. I now say I did not believe him. The woman was already on the plane. He was hostile. He said later on that it was the woman's money. I then believed him. Those statements were made by Sergeant Stewart. I was in the room when Sergeant Stewart gave the caution statement. I was not listening to the statement. I was not listening to the statement all the while it was taken. I think I was writing my statement. I can't remember then hearing Sergeant Stewart saying that the money was his. I can't remember Sergeant Stewart saying that it was a friend who gave him the money to give her. I did not read Crown Counsels file in the morning. I did hand the file to Crown Counsel since morning, it was on the desk. I took it off the desk that I sat at and put in on the desk that he sat at. I did not look in there.

10

20

In the Resident
Magistrates Court

NO. 4

Randolph Shirley

Prosecution
Evidence

RANDOLPH SHIRLEY (Sworn)

No.4
Randolph Shirley
Examination

I am a Constable attached to the Financial Investigating Unit of National Security, 40 Duke Street, Kingston. I was on duty 18th May 1979 at Donald Sangster International Airport. I was not alone I was with Acting Corporal Thompson and Acting Corporal Blair. Acting Corporation Thompson spoke to me at about 2:20 p.m. She gave me certain information and as a result I started to watch for Sergeant Stewart of Immigration, Montego Bay and a lady whom I later learned to be Dulcie Mc Lain. I eventually saw Sergeant Stewart, he was with the lady Dulcie Mc Lain. He was in uniform. They were coming towards the Immigration desk. The Security check point is behind. Sergeant Stewart was carrying a brown paper bag. When he got to Immigration Desk he kept the paper bag and handed some documents to the Immigration Officer. The Immigration Officer processed the documents and gave them back to Sergeant Stewart. At this time Miss Mc Lain had left the desk and gone to Security check point. After she left the Security check point she went into the intransit lounge. After she had reached there Sergeant Stewart walked over to her taking the brown paper bag and her travel documents. He handed Dulcie Mc Lain the travel documents but kept the brown paper bag. At this point I began surveillance.

30

40

50

They went to the bar where they had drinks. I took up

position immediately in front of the bar. While they were there I saw Sergeant Stewart put the brown paper bag into Dulcie Mc Lain's travelling bag. At this point Corporal Blair was travelling towards the Airport Tarmac followed by Acting Corporal Thompson. Sergeant Stewart looked in their direction and removed the brown paper bag from Dulcie McLain's travelling bag. Passengers were boarding Eastern Airline No.970 destined for Miami.

In the Resident
Magistrates Court

Prosecution
Evidence
No.4
Randolph Shirley
Examination
(Contd.)

10 (Mr. Cork objects)

Overruled.

At 3:55 p.m. Sergeant Stewart and Dulcie McLain left the bar. Sergeant Stewart carrying a brown paper bag and a brown parcel. They headed towards the aircraft, I followed closely behind. Acting Corporal Blair called to Stewart as they were about to board the aircraft. He did not reply. Acting Corporal Blair, Acting Corporal Thompson and myself rushed up to them and accosted them. Acting Corporal Thompson identified herself and member of the party to Dulcie
20 Mc Lain as police officers and members of the Financial Investigating Unit. Acting Corporal Thompson told Dulcie Mc Lain that he had been.

Objection

(Objection upheld)

Evidence continues:-

Acting Corporal Blair after Sergeant Stewart had handed the parcel to Dulcie Mc Lain asked Sergeant Stewart what he had in the brown paper parcel. He refused became hostile and said a fi me bag a fi me bag, a no fi the woman bag unco
30 can't do that man. Acting Corporal Thompson cautioned Sergeant Stewart and he replied come mek we go up a office. As a result of his action Dulcie Mc Lain boarded. Objection (Objection upheld). McLain boarded the aircraft. Acting Corporal Thompson, Acting Corporal Blair, Sergeant Stewart and myself left towards the terminal building. On our way Sergeant Stewart said to us "A little money in a the bag the woman ask me to held her out I don't know how much in there" While we were going up the steps inside the
40 terminal building, Acting Corporal Blair took the brown paper bag from Sergeant Stewart opened it and in it I saw a brown leather bag marked Mr. Travel Kit. She opened it and in it I saw several wads of U.S. currency, Canadian notes, U.S. travellers cheques U.S. and Canadian money Orders. When the bag was opened Sergeant Stewart said me never know say is so much money but no kill me fi that a the woman money, is a friend ask me to give her. Acting Corporal Thompson asked Sergeant Stewart the name of the friend he made no reply. The money was counted in an unoccupied office at the airport. Totalled sixteen thousand four hundred and sixty four
50 dollars. Acting Corporal Thompson told Sergeant Stewart

In the Resident Magistrates Court
No.44
Randolph Shirley Examination
(Contd.)

that he had breached the Exchange Control Act and that he should accompany us to the Financial Investigating Unit Office in Montego Bay. He refused but said he would come later. Acting Corporal Thompson took possession of the bag and money. At the office that is Financial Investigating Unit a report was made to Sergeant Roberts and we went in search of Sergeant Stewart. We found him at Sam Sharpe's Square on a road that runs in a southern direction. He came back to the office with us. There the money was counted in the presence of Sergeant Stewart, Sergeant Roberts, Sergeant Barnsby Acting Corporal Thompson, Acting Corporal Blair, myself and other police officers. It amounted to \$16,464.00. I heard Sergeant Stewart cautioned by Sergeant Barnaby who I then heard put a number of questions to Sergeant Stewart who read and signed them.

10

No.5
Dean Bennett Examination

NO. 5

Dean Bennett

DEAN BENNETT Sworn:-

Constable attached to Immigration Department, Sangster International Airport. On 18th May, 1979, I was on duty between hours of 8:00 a.m. and 4:00 p.m. at the outgoing section of the airport. I was processing passengers for Eastern Airline flight 970 I saw Sergeant Stewart sometime in the afternoon somewhere in the vicinity of the bookstore. He passed by where I was working. I recall by my Immigration number processing a passenger (Mr. Cork objects on ground that witness has admitted that he is not giving his evidence from memory but from some other source, it is there inadmissible. Objection overruled). In processing the passenger McLean a Jamaica Immigration card was handed to me. This is the card. Cork objects to admission of card in evidence on ground that Dulcie McLean is not a party to the proceedings. Objection overruled. Exhibit 1 Immigration card.

20

30

Cross-Examination

Cross-examined
XX Mr. Cork

The normal departure time of the Eastern Airline flight 970 is 3:25 p.m. I processed the person after the normal departure time. My signature does not appear on the exhibit nor was it written up by me, nor was I present when it was written up.

40

Re-examination

Re-examined
Re xx

The Jamaican Immigration card is not usually signed by an Immigration officer. They are stamped.

Christopher Barnaby

CHRISTOPHER BARNABY (Sworn)

Prosecution
Evidence
No.6
Christopher
Barnaby
Examination

10

Sergeant of Police attached to the Financial Investigating Unit, Ministry of National Security. On Friday 18th May at about 4:30 p.m. I was at the office of the Financial Investigating Unit, Montego Bay. Corporal Thompson also of the F.I.U. made a report to me at that time and showed me a brown paper bag with a quantity of foreign currency; I gave certain instructions to her. She left with Sergeant Roberts also of the Financial Investigating Unit, Acting Corporal Blair and Constable Shirley all of the Financial Investigating Unit. They returned at about 6:30 p.m. with Mr. Stewart of the Immigration Department, Montego Bay. I cautioned Mr. Stewart and told him that Acting Corporal Thompson reported to me that he was seen going towards an Eastern Airline at the Sangster International Airport with a brown paper bag which contained foreign currency. He said mek me tell you Barnaby I know that money was in the bag but I didn't know that it was so much money. The money belong to the girl she was going to a friend of mine name Mr. Brice. Try help me, nobody knows that I have the money, we are all police. I told Mr. Stewart that I intend to put a number of questions to him which will be recorded, He said it is okay but I shouldn't write what he had told me. I asked Mr. Stewart twenty one questions which were recorded.

20

30

The questions asked and the answers given were read over by the accused who signed to its correctness. On Saturday 19th May I executed a warrant on Stewart at the Montego Bay Police Station. I cautioned him he made no statement. I did in no way persuade him to make this statement. I did not make any promise or promises to him in respect of the statement which I made. He read the statement and made corrections then signed it. I have the original of the statement here. Crown applies for statement to be read into the record.

40

Mr. Cork objects on ground that rule 3A of the Judges rules -section 30. Objection overruled. Statement read into record. Exhibit 2. On 19th May I executed the warrants on Mr. Stewart. This is the warrant Exhibit 3.

Cross-Examined
XX Mr. Cork

Cross-
examination

50

Acting Corporal Thompson made the report at about 4:30. I sent four out to get Sergeant Stewart. They were Sergeant Roberts, Acting Corporal Thompson, Acting Corporal Blair, and Constable Shirley. It is possible that Acting Corporal Brooks may have gone with them. They all returned together. It is as a result of a report made to me by

In the Resident Acting Corporal Thompson that I sent to get Sergeant
Magistrates Court Stewart. I did not have a warrant. Up to the time when
I asked the questions I had no warrant. It was after I
had cautioned him that he said Let me tell you Barnaby
I did know that the money was in the bag and that I
didn't know that it was so much money. I cautioned him in
following term You are not obliged to say anything but
whatever you say will be taken down in writing. I did
take down what he said about the bag in writing, it is in
my notebook. The statement in Exhibit 2 was signed by
Sergeant Stewart and witnessed by one of the people
present.

Prosecution
Evidence
No.6
Christopher
Barnaby
Examination
(Contd.)

10

The statement written in my diary was not signed by
Sergeant Stewart and was not witnessed by anyone. He did
say it. It could have been written in the statement. The
diary is in my briefcase.

Question: Can I see it

Answer: No

Mr. Cork applies to court to be shown the diary.

Application withdrawn - Mr. Cork says he withdrawn
application in effort to save time. The purpose for which
I sent for Sergeant Stewart was to question him as I
believed that a criminal offence had been committed. I
sent for him to question him - possibly charge him. I
did question him and I did execute a warrant, I did not
apply for it. I got the warrant from Acting Corporal
Thompson. Acting Corporal Thompson gave me the foreign
currency. She told me that the foreign currency was taken
from Sergeant Stewart. I am not certain by whom whether
it was her or Blair.

20

30

In the Resident
Magistrates
Court

No.7

Calmeta Thompson

Prosecution
Evidence
No.7
Calmeta
Thompson
Examination

CALMETA THOMPSON Sworn

Acting Corporal of Police attached to Financial
Investigating Unit, Montego Bay. Mr. Cork applies for
and is granted permission to recall Sergeant Barnaby to
put one question.

Answer: It is a fact that thats what I said, what
Sergeant Stewart said and I did not record is true.

40

On Friday 18th May 1979 I was on duty at the Donald
Sangster International Airport when at about 2:15 p.m. I
went to the Immigration office where I saw a lady sitting
in the office, sitting with Sergeant Herbert Stewart.
I overheard a conversation between this lady and someone

to whom she was speaking on the phone. I then left the office and went to the outgoing immigration section where I saw Acting Corporal Blair and Constable Shirley and told them of the conversation I had overheard. At about 2:30 p.m. I saw Sergeant Stewart in the company of this lady. Both came to the outgoing immigration desk. I observed that Sergeant Stewart was carrying a brown paper bag along with some travel documents. He handed the travel documents to the Immigration officer. After the travel documents were processed the lady went through the normal security formalities leaving Sergeant Stewart with the brown paper bag and the travel documents. She then went in the intransit lounge where Sergeant Stewart walked over to her and handed her the travel documents.

In the Resident
Magistrates
Court

Prosecution
Evidence
No.7
Calmeta
Thompson
Examination

At this stage Acting Corporal Blair, Constable Shirley and I started surveillance. Constable Shirley took up position at the boarding gate, Acting Corporal Blair was sitting by the security check point and I remained in the intransit area. Mr. Stewart and the lady went to the bar where they had drinks. I saw Sergeant Stewart put the paper bag into a travelling bag which was on the counter of the bar. Having seen this I went and informed Acting Corporal Blair, Acting Corporal Blair then went on Airport Tarmac. I was following behind her slowly and there I saw Sergeant Stewart look in our direction and remove the brown paper bag from the lady's travel bag. I then went on the airport tarmac and told Acting Corporal Blair what I saw Sergeant Stewart do. Passengers were boarding Eastern Airlines flight 970 destined for Miami. At about 3:55 p.m. I saw Sergeant Stewart, the lady walking towards the Eastern Aircraft along with Constable Shirley following behind.

Acting Corporal Blair called to Sergeant Stewart he did not answer. They were about to go on the aircraft when acting Corporal Blair, Constable Shirley and I rushed up to them, I identified myself and members of the party as police officers of the Financial Investigating Unit. I asked the lady her name which she gave as Dulcie McLean. I told her I had been observing her movements. Acting Corporal Blair asked Sergeant Stewart what were the contents of the brown paper bag and tried to take it from him. He refused to hand over the bag and became hostile and said a fi me bag a fi me bag a no the woman bag unoo can't do that man. I then cautioned Mr. Stewart and he said come mek we go in a office. Acting Corporal Blair, Constable Shirley and I walked with Sergeant Stewart towards the terminal building. On our way towards the building he said a little money in a the bag, me don't know how much in there, is a friend ask me to give her. Acting Corporal Blair then took the brown from Mr. Stewart opened it and saw a brown leather bag marked Mr. Travel Kit. This Acting Corporal Blair opened also and I saw several wads of U.S. currency notes, Canadian currency notes, U.S. and Canadian money orders. When Sergeant Stewart saw this amount of money he said "Me never know say is so much

In the Resident
Magistrates
Court

Prosecution
Evidence
No.7
Calmata
Thompson
Examination

money but unoo no kill me fi that, a the woman money, is a friend give me to give her. I asked him the name of the friend but he did not reply. The sum of the money was counted in an unoccupied office at the airport which totalled \$16,464.00. This was the brown leather bag containing the money which was taken from Sergeant Stewart. This is the money. Money and bag tendered together Exhibit 4.

Mr. Cork objects to exhibit going in through this witness, because on witnesses own evidence she is not the person who can tender this money.

10

Objection overruled.

Mr. Cork applies that the witnesses who have given evidence so far to be asked to leave the Court as his investigations reveal that the unoccupied office where the money was counted in the presence of Sergeant Stewart does not exist. I propose to make an application to Court for each witness to show the unoccupied room in which the money was counted. That in an effort to save time instead of making the application while each witness is giving his evidence I propose to make one application after all the witnesses have given evidence. Because of this it could not be in the interest of justice for the witnesses who have already given evidence, who I propose to later call to identify this non existed building to be present while this witness and constable Shirley are being cross examined as to the location of the non existent office or building.

20

Court overrules application Witness recalled to continue

Evidence continues

30

After I took the money from Mr. Stewart I told him that he had breached the Exchange Control Act. I asked him to accompany me to the Financial Investigating Unit Office at Gloucester Avenue, Montego Bay. He did not come with me. I then got in touch with Sergeant Barnaby and Roberts. I made a report to Mr. Barnaby. I then went to look for Sergeant Stewart. Acting Sergeant Roberts, Acting Corporal Blair, Constable Shirley and I. We found him on Market Street. He was driving a vehicle. He stopped on Market Street and come out. Sergeant Roberts spoke to him and he accompanied the party back to the F.I.U. office. At the office Sergeant Baranaby asked him a number of questions which were written down. I did not take part in question and answers.

40

On 19th May I obtained a warrant for the arrest of Sergeant Stewart. This is the warrant Exhibit 3. Sergeant Barnaby, Sergeant Robert and I then went to the Montego Bay Police Station. I made an attempt in the office of Superintendent Anderson to read the warrant to Sergeant Stewart. I was stopped by Mr. Anderson. I eventually gave

50

the warrant to Sergeant Barnaby. I was at the station when he read the warrant to Sergeant Stewart. I heard him caution Sergeant Stewart who made no statement after being cautioned.

In the Resident
Magistrates
Court

Cross-Examined

Prosecution
Evidence
No. 7
Calmeta
Thompson
Examination

XX Mr. Cork

10 When I saw Sergeant Stewart at Market Street he was not alone, another Immigration officer Mr. Hibbert was with him. I cannot recall if Hibbert was in uniform. I have known Mr. Hibbert about a year and six months. I have been stationed at Montego Bay Airport a year and six months. I went to the airport and saw Miss Blair there, She has been there longer than I. As far as I know she also knows Immigration Officer Hibbert. She was with me at Market Street. After we accosted Sergeant Stewart at Market Street he drove to Mr. Hibbert's home and dropped him off. I saw
20 when Corporal Hibbert came out the van. All this time Acting Corporal Blair was with me. I don't think if she could see all that I saw. Acting Corporal Blair took the brown paper bag from Sergeant Stewart. This was on a step leading from the Tarmac going upstairs to incoming Immigration. It is a curve step. This was above the curve. It was about a quarter the distance from the Tarmac to the Immigration Office. If a witness in this case were to say that I took the money from Sergeant Stewart he wouldn't be telling the truth. When Corporal Blair took the bag from
30 Mr. Stewart she took it to F.I.U. office, she left Mr. Stewart at the airport. I accompanied her. The money was counted at the F.I.U. office when Mr. Stewart arrived there. This was on Gloucester Avenue.

 When she took the money we went straight to the Police Station, then to Gloucester Road. There we counted the money in his presence. The money was counted by Sergeant Barnaby, Sergeant Roberts, Acting Corporal Blair and I. It was counted at the airport also in his presence. This was in an unoccupied office upstairs the airport building be-
40 side the passage leading to the Incoming Immigration office. Acting Corporal Blair, Constable Shirley and I counted the money there. The office is after you complete the steps coming along the passage. The passage leads straight to Immigration. The passage is about 2 chains long. The office is on the right of the passage way going towards Immigration. It is no longer an unoccupied office. It is no longer an office as intransit passengers walk through there to come downstairs. We used a small table to count it on. At that time the Financial Investigating Unit and
50 Immigration shared the same office. In these offices there are proper facilities to search and under normal circumstances we search people in the Immigration office. When we interrogate people at the airport we do it in the Immigration Office. That day for some unknown reason we chose to use the unoccupied office instead of the Immigration office.

In the Resident
Magistrates
Court

Prosecution
Evidence
No.7
Calmeta
Thompson
Examination

When Sergeant Stewart was accosted he was on the Tarmac going towards Eastern Airline plane. He was about two steps away from the plane's steps. He was about two yards from it. All three of us rushed up to him as we had called to him and he didn't answer. I identified myself to him. He knew that I was a Financial Investigating Unit Officer, for the past 18 months. I spoke to the lady, Acting Corporal Blair spoke to him. We were facing him, We did not converge and encircle them. I did not know what time the plane departed. I did not make any attempt to detain the lady who Mr. Stewart was accompanying. When Mr. Barnaby reads the warrant to Sergeant Stewart, Superintendent Anderson, Sergeant Roberts and I were present. I was there when I accosted Sergeant Stewart he had two parcels in his hand. The lady had a black travelling bag and something else I can't record. I have seen women board planes without handbag. As he was accosted he gave one to the lady. I did not look at it. The lady went off. Mr. Cork applies for Mr. Bennett to be excused from the Court. Mr. Bennett excused.

10

When I first saw Mr. Stewart he had travel documents in his hand. He gave them to Constable Bennett who left the Court a while ago. He was coming from the entrance and gave them to M r. Bennett who cleared them and gave them back to him. It is not true that the lady cleared herself through Immigration. I did see them standing at the bar drinking. I did not see the lady leave the bar she stayed there until she went out. The second parcel that Mr. Stewart had looked like a bottle. The In Bond store is after you clear Immigration. He left the lady at the bar and went and collected it at the liquor shop. Sergeant Barnaby was in charge of the Financial Investigating Unit at the Sangster Airport. I did not know him before he was attached to Financial Investigating Unit. After Sergeant Stewart was accosted at Market Street he was accompanied into Sergeant Barnaby's office by a party of us. We all went in together. Sergeant Stewart sat down and we all sat down.

20

30

Then Sergeant Barnaby proceeded to ask Mr. Stewart questions. He questioned him before. He wrote down the caution on a sheet of foolscap paper and made Mr. Stewart sign it. This was the first thing that happened. I heard Mr. Stewart talking to him before he was cautioned, he was saying a lot of things pertaining to the money. I cannot recall what was being said. I heard Mr. Stewart was sitting. Mr. Barnaby wasn't doing anything. The first time he write down anything was when he wrote down the caution.

40

Then Mr. Stewart signed it. I didn't see Mr. Stewart sign it as I was not paying much attention. There was conversation before the caution was administered. I started working that day at about 8:30. I had no special time to leave. I had no special place to work. I can't

50

recall who was sitting behind Immigration. I cannot say how or when the lady arrived at the airport. When I first saw her she was in the Immigration office. Mr. Stewart at that time knew that I was a Financial Investigating Unit agent. When she was taking on plane he didn't say anything to her. He gave her back her travel documents after she had cleared security. The room in which we counted the money did exist. (Mr. Cork applies to Court to have the witness show him the unoccupied office at the airport where she counted the money also that notwithstanding the fact that Acting Corporal Blair is present in Court that she also be recalled to show as the unoccupied office in which she counted the money as from my investigations and instructions no such room exists or existed and that this exercise be done now and by the witnesses separately and each one called to show the Court where this building is. This application of the location of this room by Acting Corporal Thompson differs from that of Acting Corporal Blair. My investigations reveal that neither of the location described by both witnesses exists or ever existed. My application is that the Court visits the locus in quo and with both witnesses travelling separately). Court refuses application.

In the Resident
Magistrates
Court

Prosecution
Evidence
No.7
Calmata
Thompson
Examination

Re-Examined
re XX

Re-Examination

As far as I know this year the airport has undergone extensive repair. That section was under repairs at that time. It is now used as place where Intransit passengers walk to go downstairs.

No. 8

Dean Bennett

No.8
Dean Bennett
Cross-Examination

DEAN BENNETT (recalled) on request of Defence (Sworn)

I was on duty on 18th May 1979 at the Donald Sangster International Airport. I processed exhibit 1. I did so from the passport and travel documents. Dulcie McLean gave me the passport and travel documents. When I process a passenger there are certain things I have to do such as comparing photographs etc. I have never processed a passenger in his or her absence because it is not supposed to be done. Sergeant Stewart didn't hand me on 18th May any documents to be processed on behalf of Dulcie McLean. Sergeant Stewart has never given me any papers to process on behalf of any passenger.

Re-examined
re xx by permission

Re-Examination

When Dulcie McLean gave me the documents to be processed Sergeant Stewart was by the outgoing section. I

No.10

with Mr. Wilcott. He did ask me about my leg. I was
Randolph Shirley inside immigration when I first saw him. He came straight
Cross-Examination to the Immigration coming from the direction of the air-
line offices. He had in his hand a brown paper bag and
travel documents. He handed them to the Immigration Officer.
Constable Bennett was the Immigration Officer. He
processed the documents and handed them back to Sergeant
Stewart who left the desk and met Miss McLean in the
Intransit Lounge. She went far from the bar when he
joined her. She was about $\frac{3}{4}$ chain from the bar. They then 10
went to the bar. When they were at the bar I saw Acting
Corporal Blair walking towards the tarmac. Acting Corporal
Thompson followed closely behind. I took up position
directly in front of the bar. Sergeant Stewart and the
woman had drinks. Sergeant Stewart left the bar and went
over to the liquor store and picked up a brown paper parcel.
He was in uniform. I don't know if the place where he
picked up the liquor was on the In Bond store. I have
been in F.I.U. one year. I have been a policeman for six
years coming to Montego Bay Airport since last December. 20
I saw Miss McLean with one bag, a travelling bag about
two and half feet long. I can't remember the height. When
they left the bar they were accosted as they were about to
board the aircraft, about two yards from the step. All
three of us went in front of them. Acting Corporal Thompson
identified herself to Dulcie McLean. She went on the
plane after Sergeant Stewart behaved in a certain way.
She was permitted to board the plane and leave Jamaica.

I can't recall what time the flight took off. We went 30
towards the terminal building. Sergeant Stewart mentioned
something while we were going up the steps. The brown
paper bag was opened by Acting Corporal Blair. I did not
tell the court that the bag was opened by Acting Corporal
Thompson. We went to an unoccupied office, if you are
going towards the incoming Immigration you will find that
that office on the right. There was a workbench in there.
I left for the Financial Investigating Unit office. I was
one of the people who went to collect Sergeant Stewart
that evening. I also went with him to Sergeant Barnaby's 40
office. Sergeant Stewart was cautioned by Sergeant
Barnaby. Then he was asked a number of questions which
were written down on a foolscap paper Exhibit 2. What he
said was written down on paper like Exhibit 2.

C A S E

Mr. Cork submits that there is no case to answer.

Court rules Case to answer

Herbert Stewart

HERBERT STEWART Sworn

Defendant's
Evidence
No.11
Herbert Stewart
Examination

10 Sergeant of Police attached to Sangster Airport and
also Immigration Officer for Island of Jamaica. On 18th
May 1979 I was acting as Inspector attached to the same
Donald Sangster Airport. An Eastern Airline flight normally
departs on Fridays at 3:25 p.m. That day I received a
telephone call from Mr. Wilbert Reid, Traffic Examiner
requesting certain information as whether or not the Eastern
Flight had left. This was about 3:30 p.m. I made enquiries
and as a result I told him that the plane would be delayed.
He said that a lady would be coming to board the flight and
she was late and if I could assist her when she comes to get
on the flight. Mr. Reid and the lady arrived at about 3:35
p.m. I had seen her one time before. Mr. Reid took her down
to Eastern Airline office. I waited outside. They returned
20 and both of us went through the Immigration entrance I had
nothing in my hand at that time. Mr. Reid turned back at
the entrance and the lady went to Immigration and I went to
the bar in the Intransit lounge. I waited at the bar for
the lady.

30 When she came the flight was boarding. I offered her a
drink, she said she wanted some rum to take with her. She
left and went to the In Bond store leaving all her luggage
beside me at the counter. When she returned I asked her if
she wanted something to drink, she said yes. She ordered a
coke, I was drinking a beer. She never finished the coke by
this time nearly all the passengers were boarding the plane.
She had four parcels and the rum making five. She had a
travelling bag a hand bag, a ticket folder, a brown paper
bag. and the rum. She asked me to assist her as I took up
two of the packages and she went towards the boarding gate
accompanied by me. She handed her ticket to the Clerk and
I followed her. We went through the gate towards the plane
and I saw Miss Blair walking towards the flight also. She
40 said Stewie what you have in your package. I said to her
I am not showing you what's in my package. I did not know
what was in the bag. I still continued walking towards the
flight with the young lady. Then she came in front of me
and accosted me. The lady was still walking towards the
flight. I still had the bottle of rum. Miss Blair said I
want to see your package. The lady was now going up the
steps. Then I saw Miss Thompson of the Financial
Investigating Unit and Shirley beside me. Miss Blair still
asked me to show her what I had in package. I was
embarrassed as I thought she was joking in the first
50 instance. I said let us go to the Immigration office. On
our way I saw Miss Blair, Miss Thompson and Shirley coming
towards me, going up the steps. Miss Blair still insist
for me to show her what's in the parcel. When I reach on
top of steps on immigration floor she took the parcel from

In the Resident
Magistrates
Court

checked the currency form for Dulcie McLean. I cannot recall if Sergeant Stewart spoke to me at that time.

No.8
Dean Bennett
Cross-Examina-
tion

Question: As far as you know Immigration officers is it not a practice that immigration officers who have their friends going through to bring the documents to be processed?

Answer: They may accompany passengers to the desk but they don't take their documents and help them by processing them.

In the Resident
Magistrates
Court

No. 9

10

Joshua Roberts

Prosecution
Evidence

JOSHUA ROBERTS Sworn

No.7
Joshua Roberts
Examination

Detective Sergeant of Police attached to the F.I.U. Ministry of National Security, Kingston. On 18th May 1979 at about 4:30 p.m. I was at the Financial Investigating Unit office in Montego Bay along with Sergeant Barnaby, Corporal Thompson made a report to Sergeant Barnaby in my presence. She had a brown paper bag I examined it. In it I saw a brown leatherette bag marked Mr. Travel Kit.

20

Mr. Cork objects

Objection overruled

This is the bag. I came down into the town of Montego Bay with Acting Corporal Thompson, Blair and Constable Shirley. We went to the roundabout, then to the high level road back along that road when I saw Sergeant Stewart driving in a pick up. I return to the town of Montego Bay where I saw the pick-up parked. I spoke to Sergeant Stewart. He first went to Albion and then to the Financial Investigating Unit office, Montego Bay. I made a report to Sergeant Barnaby on my return to office. Sergeant Barnaby cautioned Sergeant Stewart told him of the report he got and Sergeant Stewart replied, "Let me tell you Barnaby I know money was in the bag but I didn't know it was so much money. The money belongs to the girl, she was going to Mr. Brice who is a friend of mine, try help me, nobody don't know that I have it, we are all police, Sergeant Barnaby told Sergeant Stewart that he intended to ask him some questions. Sergeant Stewart said Okay.

30

40

No force or threat or any inducement was ever used by Sergeant Barnaby to get Sergeant Stewart to make statement. As far as I know Sergeant Stewart read over the questions and answers and signed them. I was present on the following day when Sergeant Barnaby arrested Sergeant Stewart with his warrant. It was read to him. He was cautioned he made no statement.

Cross-Examined
XX Mr. Cork

In the Resident
Magistrates Court

10 I am attached to the Financial Investigating Unit. I
went for Sergeant Stewart. I accompanied him into the
office. I carried Sergeant Stewart to Sergeant Barnaby to
investigate the report. He was the senior Sergeant there.
I don't know if Sergeant Barnaby was attached to the
Immigration Department. We also have a Sergeant Stewart in
the Financial Investigating Unit he also was attached to
the Immigration. I know Mr. Dunstan Weatherly he is a
Customs officer attached to the F.I.U. There is also a
20 mr. Dunstan Anderson a Customs Officer attached to the F.I.U.
I know Mr. Ransford Daley a Customs Officer attached to
the F.I.U. I would agree that the F.I.U. has its complement
of Customs Officers and Immigration Officers. I took
Sergeant Stewart to Sergeant Barnaby's office, for the
purpose of interrogating him. Sergeant Barnaby was supposed
to deliver the interrogatories. There was no such plan
before I went out. Sergeant Barnaby told Stewart you are
not obliged to say anything unless you wish to do so, but
whatever you say will be taken down in writing and may be
given in evidence. I don't know if all that Sergeant
Stewart said was taken down in writing. I remember
verbatim especially what was said.

Prosecution
Evidence
No.7
Joshua Roberts
Examination

30 The first question Barnaby asked him was his name. He
said Herbert Stewart. It was on 18th May 1979 five months
ago. I don't recall the second question. I think he asked
him his occupation. I don't remember the fourth or fifth
question. I don't recall the sixth seventh, eighth or ninth,
tenth, eleventh, 12th, 13th, 14th, 15th 16th, 17th 18th 19th
20th 21st. I remember it was twenty one questions. I
didn't write down what Mr. Stewart said before the questions.
I have seen the question and answer statement since Stewart
signed it. I will agree that Sergeant Stewart signed
Exhibit 2 as his statement. he signed the caution above
exhibit 2.

The statement about knowing money was in the bag was
never signed to or witnessed by anybody. This was not a
plot to give evidence against the accused.

40 No.10

Randolph Shirley

No.10
Randolph Shirley
Cross-Examination

RANDOLPH SHIRLEY now arrives in Court for Cross-examination

Cross-Examined
XX Mr. Cork

When I first saw Stewart I was by the Immigration
outgoing desk. I last gave evidence in this case on 9th of
this month. I have not since morning discussed this case

In the Resident
Magistrates
Court

Defendant's
Evidence
No. 11
Herbert Stewart
Examination

me she opened the mouth of the bag and look inside and she said, "But is money, I said is the lady's package. I drew it to her attention that the plane was still on the ground. She went towards the intransit lounge downstairs. I asked her where she going because the lady is on the flight and its her package. She said Stewie, is alright man I will see you. The next time I saw her was after six that evening. She did not come or show me any money that evening. It is not true that they counted the money in an unoccupied room at the airport. There is no such room.

10

I never asked them to give me a chance or made any statement other than what I have told you. After I left work I went to a place at Barrett Town accompanied by Corporal Hibbert. On my return coming off top road I saw an F.I.U. car coming towards me. After parking I saw the vehicle turn around so I drove and stop at Market Street, and Charles Square to buy a star. I saw the F.I.U. car stop in front of my vehicle. I saw Sergeant Roberts come out and he spoke to me. He asked me to accompany him to the F.I.U. office because of certain information he received. I went to the Financial Investigating Unit office where I saw Sergeant Barnaby. I did not say anything to him about knowing money was in it but I didn't know it was so much, whatever I said to him he wrote down. I had no intention of leaving the island that day. I was Acting as Inspector of Immigration. Neither Corporal Blair, Thompson or Shirley Immigration Officers nor were any of them Customs officers. I did not know the contents of the bag. I was merely assisting the lady to carry the parcels from the bar to the plane. I knew Blair, Thompson and Shirley to be officers of the Financial Investigating Unit.

20

30

Cross-
Examination

Cross-Examined
XX Mr. Wilcott

When Corporal Blair took the parcel from me she opened it and said its money. I did not ask her to show me the money. I said to her that the owner of the bag was on the flight. I was surprise but I did not ask her to let me see it. I did not ask her to count the money there. I never said to Corporal Blair Lord me pension now. I have been in the police force twenty one years. I was stationed in Saint Mary. I was operating as an Immigration officer there. I was transferred from Saint Mary to Montego Bay in 1976. I am Sergeant of Police. I do know a man called Brice. I knew him when he was in Anotto Bay. I have known him for 5-7 years. I do not know where he lives now. For the past 7 years I have not seen him. He was not in Court here with me on 9th October. I haven't seen Birce for five years. I have seen Dulcie McLean one time before 18th May. From her passport she is a Telephone Operator. She told me she worked in Kingston. I don't know where she lives. Prior to 18th May the last time I saw her was a year ago. I saw her at the Airport on 18th May at about 3:30 p.m. On 18th May I saw Corporal

40

50

Thompson in my office more than one time. Dulcie McLean was not in my office at anytime. I would not regard Brice as a friend of mine. I don't know if he and McLean are friends now. On 18th May I heard that she was Brice's girlfriend. The statement on Exhibit 2 is true. I told Mr. Barnaby that I heard that she was friendly with a Mr. Brice who now lives in the United States. I only looked through Exhibit 2 and signed it. I knew that they were friendly years ago. I supervise the processing of documents of people leaving the island. It is my duty to see that the Immigration laws of people leaving the country are strictly observed. Immigration does not check hand luggage. As an Immigration Officer its my duty to see that immigration rules are observed. I agree that no Immigration Officer should use his official position to breach the rules. If an Immigration Officer were to allow a parcel of money to go through without it being checked that would be a breach of the rule. On 18th May I did not accompany one Dulcie McLean through the check point. I have had heated arguments with Miss Blair and Miss Thompson all the time before 18th May.

In the Resident
Magistrates Court

Defendant's
Evidence
No.11
Herbert Stewart
Examination

These arguments could have contributed to this. I knew Sergeant Roberts and Barnaby. They are telling lies on me. All of them are lying against me. I am speaking the truth. I did not go to Immigration Officer with Miss McLean. Constable Bennett works under my supervision. He is telling the truth. When he said I did not give him any documents. The police officers who said they saw me do so are lying. I had a drink with Miss McLean in the intransit lounge. I had no bag in my hand then. When Miss McLean went into the lounge people were boarding the flight. I did offer her a drink I put passengers on the flight all the time. I did not know that there was a Financial Investigating Unit Officer behind me. I had two bags in my hand. They both belonged to Miss McLean. I did not give her any of the bags. Miss Blair took one bag from me I still had the other one. The one Miss Blair took had money the other rum. Miss Blair was in front of me she said Stewie, I answered her. The Officers are lying. I did answer her. Miss Blair was the only person who spoke to me. Nobody tried to take the bag from me. Miss Blair did not ask me to give her the bag. I did not tell her "A fi me bag, a fi me bag. They are lying. I said to them Sir lets go to the Immigration Office. I did not say a little money in a the bag, the woman ask me to help her. The answer to question 10 in the statement is true. It is not inconsistent with what I have just said. I thought she was joking. The answer to question 12 is correct. They did not count any money before me. I did not know that there was money in that bag. I was not escorting the lady out. I do not know that some of the things in exhibit are initialled by Brice. I drove my van to F.I.U. Headquarters. Sergeant Barnaby spoke to me. He cautioned me. I wasn't speaking to him before he took down statement in writing. Sergeant Roberts and Sergeant Barnaby are lying on me regarding what I am supposed to have said. Miss McLean did not come out my

In the Resident office. I did not know that Shirley was following me. I
Magistrates did not know that there was the vast amount of money in
Court the bag. I did not know that there was money in bag.

Defendant's
Evidence
No.11
Herbert Stewart
Examination

Defendants
Evidence
No.12
Wilbert Reid
Examination

No.12

Wilbert Reid

10

ON 17TH DECEMBER, 1979

WILBERT REID Sworn

Inspector of Motor Vehicle attached to Island Traffic. I was stationed in Montego Bay on 18th May I know him to be Acting Inspector i/c Immigration, Donald Sangster International Airport. I knew Miss Dulcie McLean. She came to my home at about 3:30 she came off a mini bus. I had a conversation with her formed the impression that she should have departed on Eastern Airline flight which should have gone 5 minutes ago. She asked me to assist her and I made a telephone call to Sergeant Stewart. As a result of call to Sergeant Stewart I realized that Miss McLean could still catch the plane. My office is a little over two miles from Airport. I met Sergeant Stewart by Security. The lady had five parcels in all and her handbag. I took three of the parcels in all and her handbag. I took three of the parcels out of the car, she took two and we went to Eastern Airlines and checked in one, it was a reasonable size bag. The four left were small. I then accompanied her to the entrance where she would go to Immigration. I carried her bags for her and left her there. I reached there about twenty to four and left there at about ten to four. I can't remember who carried Exhibit 4.

20

30

Cross-
Examination

Cross-Examined
XX Mr. Wilcott

On the 18th May I was in Saint James. I knew Mr. Stewart. I knew Mr. Stewart while he was in Saint Mary. I saw Miss McLean came off bus at 3:30. She told me she was going on Eastern Airline. I took her to Airport at ten to four. She had not been processed up to time I left by Immigration. If an incidence occurs while she was being processed I would know about it.

40

C A S E

No.13

In the Resident
Magistrates Court

Clerk's Certificate

No.13
Clerk's
Certificate

IN THE RESIDENT MAGISTRATE'S COURT

FOR THE PARISH OF SAINT JAMES

HOLDEN AT MONTEGO BAY.

ON APPEAL

10 INFORMATION NUMBER 3055/79)
REGINA
VERSUS
STEWART, HERBERT

FOR: CONSPIRACY TO EXPORT
FOREIGN CURRENCY
CONTRAVENTION

CLERK'S CERTIFICATE

20 I John W. Hutchinson, Deputy Clerk of the Courts for
the parish of Saint James, do hereby certify that the
foregoing is a true copy of the Notes of Evidence taken by
His Honour Mr. K. Douglas Resident Magistrate for the said
parish, and that they contain 33 pages in the matter of
Regina vs. Herbert Stewart for Breach of the Exchange
Control Act.

(sgd.) J. Hutchinson
Dep Clerk of the Courts
Saint James

No.14

In the Resident
Magistrates
Court

GROUND'S OF APPEAL

No.14
Grounds of Appeal
Undated

30 IN THE RESIDENT MAGISTRATES COURT

FOR THE PARISH OF SAINT JAMES

HOLDEN AT MONTEGO BAY

ON APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL

REGINA

vs

HERBERT STEWART

In the Resident
Magistrates Court

No.14

Grounds of Appeal
Undated

TAKE NOTICE that at the hearing of this Appeal the Defendant/Appellant shall reply inter alia upon the following grounds of Appeal.

1. That the verdict was unreasonable having regards to the evidence.
2. That the Crown failed to satisfy the burden of proof required in Criminal cases.
3. That the verdicts on the counts in the indictments were inconsistent having regard to the evidence. 10
4. That the Crown failed to adduce any or any sufficient evidence to prove the ingredients necessary to be proved in the offence of conspiracy.
5. That the Crown failed to adduce any or any sufficient evidence to support an offence under Section 4(1) of the Exchange Control Law.
6. That the Crown failed to prove that the contents of the parcel alleged to be taken from the Appellant contained "specified currency" as defined in Section 4(1) of the Exchange Control Law. 20
7. That the Crown failed to prove that the contents of the parcel alleged to be taken from the Appellant contained "foreign currency".
8. That the Crown failed to establish that the Appellant had any opportunity to offer for sale and failed to offer for sale the contents of the parcel alleged to be taken from him.
9. That the Crown failed to prove that either of the 2 counts in the indictment attracted a penalty in excess of the normal Jurisdiction granted to a Resident Magistrate under the Judicature (R.M.) Law. 30
10. That the Crown failed to establish the value of the alleged foreign currency alleged to have been taken from the Appellant.
11. That the Learned Resident Magistrate erred in admitting and relying on the interrogatories administered by the Police.

That the Appellant shall crave leave to adduce and argue supplemental grounds of appeal upon receipt of the Notes of Evidence. 40

WHEREFORE the Appellant prays that this Honourable Court:-

- (a) shall allow his appeal.

(b) that the verdict of the Resident Magistrate be set aside and his conviction squashed or alternatively a new trial ordered.

In the Resident Magistrates Court

(c) such further and other relief as may be just

No.14
Grounds of Appeal
Undated

(sgd) Karl Von Cork
SETTLED

(sgd.) Karl Von Cork
ATTORNEY-AT-LAW FOR AND ON
BEHALF OF THE APPELLANT

10

FILED by KARL VON CORK of No.40 Duke Street, Kingston,
Attorney-at-Law for the Defendant/Appellant.

No.15

In the Court of
Appeal

ADDITIONAL GROUNDS OF APPEAL

IN THE COURT OF APPEAL

No.15
Additional Grounds
of Appeal
24th March 1980

CRIMINAL APPEAL NO. 23/80 R.M.C.A.

20

HERBERT STEWART)
VS) BREACH OF THE EXCHANGE CONTROL ACT
THE QUEEN)

TAKE NOTICE that the Appellant Herbert Stewart will seek leave to argue the following additional Grounds of Appeal.

GROUND 1. There was no evidence of an agreement between the Appellant and McLean or any other person to support Count 1 which charged a Conspiracy, especially since the prosecution had established nothing which could amount to an overt act on the part of McLean referable to any agreement.

30

GROUND 2. It was not permissible in Law for the prosecution to allege the conspiracy in Count 1 and for the Court to convict the Appellant of such a conspiracy which was to Breach the Exchange Control Act, rather than a conspiracy to Breach the Customs Act.

40

GROUND 3. There was no evidence in support of an allegation in Count 2 that the Appellant was

In the Court of
Appeal

No.15

Additional GROUND 4.
Grounds of Appeal
24th March 1980

a person "entitled to sell foreign currency"
as distinct from a bailee of foreign
currency.

The Appellant should not have been charged,
tried and convicted for two offences which
amount to one activity. In this case the
allegation in Count 2 was merely incidental
to the substantive offence in Count 1 or any
allegation alternatively thereto.

10

WHEREFORE THE APPELLANT prays that the Appeal be
allowed and the sentences set aside.

Dated this 24th day of March, 1980

(sgd.) Herbert Stewart

FILED by FRANK PHIPPS Q.C. Attorney-at-Law of No.20½ Duke
Street, Kingston for and on behalf of the Appellant
Herbert Stewart.

In the Court of
Appeal

No.16
Judgment

NO. 16

JUDGMENT

20

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 23/80

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT (AG.)
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAREY, J.A. (AG.)

REGINA

VS.

HERBERT STEWART

30

Mr. F.M.G. Phipps, Q.C. and Mr. K. Von Cork for the appellant.

Mr. Henderson Downer, Deputy Director of Public
Prosecutions and Miss Z. Holness for the Prosecution.

July 28 and 29, 1980; March 13, 1981.

KERR, J.A.

The appellant was a Sergeant of Police and at the

material time an Immigration Officer at the Sangster International Airport, Montego Bay in the parish of St. James. On Friday May 18, 1979, at about 2.15 p.m. according to Calmeta Thompson an acting Corporal of Police attached to the Financial Investigating Unit, on entering the Immigration Office, she saw a lady, (later identified as one Dulcie McLean), sitting in the office. The appellant was present. The lady was speaking on the telephone and apparently the purport of the conversation sufficiently aroused Thompson's suspicions so that she went to the outgoing section and reported to Actg. Corporal Blair and Constable Shirley what she had overheard.

In the Court of
Appeal
No.16
Judgment

Some 15 minutes later the appellant accompanied Dulcie McLean to the outgoing Immigration desk. He had a brown paper bag. After McLean was processed by the Immigration Officer on duty she and the appellant went through to the intransit lounge and up to the bar. This witness with Blair and Shirley kept the pair under surveillance. Thompson observed the appellant place the paper bag in the lady's travelling bag. She spoke with Blair and while both were going towards the Tarmac she saw the appellant look in their direction and then remove the brown paper bag from McLean's travelling bag. Later at about 3.55 p.m., the appellant and McLean walked towards an Eastern Airline aeroplane Flight 970 Miami bound and were about to board the aircraft when Blair, Shirley and Thompson accosted them and identified themselves as members of the Financial Investigating Unit. The lady then gave her name as Dulcie McLean. When Blair enquired of the appellant what were the contents of the bag and attempted to take it from him, the appellant refused saying "a fi me bag, a fi me bag - a no the woman bag unoo can't do that man." Thompson cautioned him and he said "mek we go in a 'office". Dulcie McLean who was not detained apparently departed on the flight as scheduled. On the way to the office the appellant is alleged to have said "a little money in the bag, me don't know how much in there is a friend give me to give her." Blair then opened the paper bag and in it was a brown leather bag marked "Mr. Travel Kit." In "Mr. Travel Kit" were 'wads' of U.S. currency notes, Canadian currency notes, U.S. and Canadian money orders amounting to the aggregate to \$16,464. When the bag was opened the appellant is alleged to have said "me never know say is so much money but unoo no kill me fi that, a the woman money, is a friend give me to give her." To Thompson's query as to the name of the friend he gave no reply. Thompson told him he was in breach of the Exchange Control Act and invited him to accompany her to the Financial Investigating Unit's office at Gloucester Avenue, Montego Bay. He declined and she communicated with Sergeants Barnaby and Roberts. Later on Market Street, Montego Bay at the request of Roberts he accompanied the officers to the office where a statement in question and answer form was taken down and subsequently tendered in evidence. On May 19, the appellant was arrested on a warrant. Thompson's evidence

was corroborated in the important material particulars by the other officers and in particular by Blair and Shirley.

The appellant gave evidence on oath to the effect that on the day in question he was acting as Inspector at the Airport when Wilbert Reid made certain enquiries by telephone concerning the Eastern Airline Flight and subsequently at 3.35 p.m. he arrived accompanied by Dulcie McLean. Reid departed and the appellant accompanied McLean through Immigration to the intransit lounge. They were having drinks at the bar when boarding time came. She had with her five parcels. At her request he assisted her by carrying two parcels and after going through the exit gate towards the plane Blair came up and enquired what was in a package he was then carrying - he told her he was not showing her. Thompson and Shirley were then there. McLean went on up the steps to the aircraft while they were speaking. He said he was embarrassed and suggested that they all go to the Immigration Office. On the steps to the office Blair took away the parcels, opened the mouth of the bag and said money was in it. According to him he then told her the money was McLean's and pointed out that the plane was still on the ground. That Blair then said "Is alright man I will see you" and he saw her later at 6 p.m. He denied that the money was counted at a room in the Airport - he denied saying at anytime that he knew money was in the parcel. In fact he was merely assisting a lady with her parcels.

10

20

In cross-examination he denied that McLean was in his office or that when first accosted he claimed the bag was his. He called as witness Wilbert Reid who said he made enquiries of the appellant by telephone and he conveyed McLean who have five parcels and a handbag in his car to the Airport. At the Airport he assisted in carrying her parcels to the entrance to Immigration but he could not remember who carried the parcel exhibited in Court.

30

The trial on the Resident Magistrate's Court, St. James at Montego Bay was concluded on December 19, 1979, when the learned Resident Magistrate convicted the appellant on both counts of the indictment which reads:-

"STATEMENT OF OFFENCE - FIRST COUNT

40

Conspiracy to contravene section 24, contrary to paragraph 1(1) of Part II of the Fifth Schedule of the Exchange Control Act.

PARTICULARS OF OFFENCE

Herbert Stewart, between the 16th and the 18th of May, 1979, being a person in the Island, conspired with other persons unknown to export foreign currency amount to US (notes) \$13,176.00; US (Travellers cheques) \$1,410.00; US (money

order) \$1,570.00; Canadian (notes) \$67.00;
Canadian (money order) \$241.00."

In the Court of
Appeal

"STATEMENT OF OFFENCE - SECOND COUNT"

No.16
Judgment

Contravention of section 4 (1) and paragraph 1(1)
of Part II of the Fifth Schedule of the Exchange
Control Act.

PARTICULARS OF OFFENCE

10 Except with the permission of the Minister Herbert
Stewart during the month of May, 1979, being a
person in the Island who is entitled to sell
foreign currency and not being an authorised
dealer failed to offer foreign currency for sale
to an authorised dealer such foreign currency
amounting to US (notes) \$13,176.00 US (travellers
cheques) \$1,410.00 US (money order) \$1,570.00;
Canadian (notes) \$67.00; Canadian (money order)
\$241.00."

The appellant was sentenced:-

20 On Count I: "fined \$30,000.00 or six (6) months
imprisonment at hard labour."

On Count II: "Fined \$30,000.00 or six (6) months
imprisonment at hard labour.
Sentences of imprisonment to run
consecutively in default of payment
of fine. Foreign currency to be
forfeited."

30 Leave was sought and granted to argue a number of
additional grounds. We propose to refer
those grounds which merited careful consideration.

"Ground 2: It was not permissible in Law for
the prosecution to allege the
conspiracy in Count 1 and for the
Court to convict the Appellant of
such a conspiracy which was to
Breach the Exchange Control Act,
rather than a conspiracy to Breach
the Customs Act."

40 In support Mr. Phipps contended that a conspiracy to
export foreign currency was a conspiracy to contravene the
Customs Act and accordingly did not fall within the ambit
of paragraph 1(1) of Part II of the Fifth Schedule to the
Exchange Control Act being excluded by the proviso to the
sub-paragraph.

He relied on R. v. Goswami (1968) 52 Cr. App. R. p.197
- and R.M. Criminal Appeal No. 85/78, R. v. Mirchandani

In the Court of Appeal and another (unreported) delivered February 1, 1980.

No.16
Judgment

Mr. Downer in reply contended that because paragraph 1(1) of Part II of the Fifth Schedule expressly provides for the forum and stipulates the punishment there is no need for recourse to any other statutory or common law provision, and that as there are no statutory provisions under the Customs Act in relation to conspiracy, the offence with which the appellant is charged that offence is not excluded from the provisions of paragraph 1(1) of Part II of the Fifth Schedule by the proviso to that sub-paragraph.

10

He argued that Goswami's case is distinguishable in that the offence was specifically punishable under the Customs Act and so fell within the exclusionary proviso. Accordingly, in so far as the Mirchandani case purports to rest upon Goswami in holding that a conspiracy to export foreign currency was not an offence against the Exchange Control Act, he would respectfully submit it ought not to be followed.

Paragraph 1(1) of Part II of the Fifth Schedule provides:-

20

"Any person in or resident in the Island who contravenes any restriction or requirement imposed by or under this Act, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement as aforesaid, shall be guilty of an offence punishable under this Part:

Provided that an offence punishable by virtue of Part III shall not be punishable under this Part."

30

Paragraph 1(1) is similar to the English legislation and the meaning and effect of the proviso was considered in R. v. Goswami (supra) at p.198:-

"In order to resolve this dispute, it is necessary to examine in some detail the Act of 1947. The first three parts of that Act impose certain restrictions and prohibitions which need not be recited. They do not relate to imports or exports. It is important however, to observe that each of these restrictions and prohibitions is expressly stated to refer only to persons in or resident in the United Kingdom. Then comes Part IV of the Act which deals with imports and exports. It contains a group of three sections. Section 21 concerns restriction of imports, Section 23 concerns payments for exports. Section 22 (which is the one most relevant to this appeal) concerns restriction of exports. The material words of this section are as follows: "(1) The exportation from the United Kingdom of (a) any notes of a class which are ... legal tender in the United Kingdom ... is hereby

40

50

prohibited except with the permission of the Treasury." In the Court of
It will be observed that this section does not make Appeal
contraventions of the prohibition which it imposed an
offence. Section 32 (1), however, states that: "The No.16
provisions of the Fifth Schedule to this Act shall Judgment
have effect for the purpose of the enforcement of this
Act." Part III of the Fifth Schedule relates
exclusively to Part IV of the Act and, in the view of
this Court, contains the code for its enforcement.
10 Paragraph 1(1) of Part 11 before its amendment in 1952
reads as follows: "The enactments relating to Customs
shall ... apply in relation to anything prohibited to
be imported or exported by any of the provisions of
Part IV of this Act except with permission of the
Treasury [e.g. Bank of England notes] as they apply in
relation to goods prohibited to be imported or
exported by or under any of the said enactments and
any reference in the said enactments to goods shall be
20 construed as including a reference to anything
prohibited to be imported or exported by any of the
provisions of the said Part IV except with permission
of the Treasury."

Mr. Percival has argued that the words "enactments
relating to Customs" are confined to those statutory
provisions which relate to the imposition of customs
duties. This Court rejects that argument. It involves
much too strained and narrow a construction and,
moreover, one which is plainly contrary to the
manifest intention of Part III of the Fifth Schedule.
30 That Part was designed to make, and in the view of
this Court does make, the importation or exportation
of anything of which the importation or exportation is
prohibited or restricted in Part IV of the Act an
offence of the same kind and punishable in the same way
as the illegal importation or exportation of goods.
The opening words of paragraph 1 (1) apply to any
statutory provisions prohibiting the importation or
exportation of goods....."

The proviso read and construed with Part III of the
40 Fifth Schedule presents an example of legislation by
reference. The effect is that Part IV of the Exchange
Control Act should be read and construed as part of the
Customs Act and that Section 24, which falls within Part IV,
merely extends or adds to the list of articles, the
exportation of which is prohibited and a contravention of
the prohibition is an offence punishable under the Customs
Act.

It is against this background that paragraph 1(1) of
Part II of the Fifth Schedule must be interpreted. In that
50 regard we share the view expressed by Salmon L.J. in
Goswami at p. 204-5 thus:-

"This Court is satisfied, for the reasons already indicated, that Part III of the Fifth Schedule contains a complete code for the enforcement of the three sections (sections 21, 22 and 23) comprising Part IV of the Act. Certainly paragraph 1(1) of Part II of the Fifth Schedule is somewhat inelegantly and even clumsily drafted. But its meaning is tolerably clear. The proviso shows that an offence punishable by virtue of Part III is not punishable under Part II. Offences for the contravention of Part IV of the Act are clearly punishable under Part II of the Fifth Schedule. This Court, is therefore, of the opinion that paragraph 1(1) of Part II of the Fifth Schedule does not cover a contravention of the provisions of Part IV of the Act. Such a contravention cannot constitute an offence punishable under Part II since, being punishable under Part III, the proviso to Part II precludes it from being an offence punishable under Part II; and it is only such contraventions as are not punishable under Part III that are made offences under Part II. If Mr. Percival's argument were correct, one would expect to find a full stop after the word "offence" in paragraph 1(1) of Part II and the paragraph to continue 'such offences shall be punishable under the part of this Schedule unless punishable under Part II of this Schedule.'

10

20

The view that Part III of the Fifth Schedule is concerned with the enforcement of Part IV of the Act and Part II of the Fifth Schedule is concerned only with the enforcement of the first three Parts of the Act gains support, if any further support were needed, from the opening words of paragraph 1(1) of Part II "Any person in or resident in the United Kingdom who contravenes" As mentioned at the beginning of this judgment, the restrictions imposed by the first three Parts of the Act are expressly stated to relate exclusively to persons in or resident in the United Kingdom."

30

The legislative intent is clear i.e. to remove from the ambit and scope of paragraph 1(1) of Part II of the Fifth Schedule all restrictions and requirements in Part IV of the Act and consign them by virtue of Part III of the Schedule to the Customs Act generally and not merely as regards punishment. Accordingly, the requirements and restrictions that are offences under the Exchange Control Act do not include those restrictions or requirements in Part IV of that Act.

40

In our view, the proper interpretation of the co-ordinate clause in paragraph 1(1) of Part II of the Fifth Schedule - "..... and any such person who conspires or attempts, or aids, counsels or procures any other person, to contravene any such restriction or requirement as

50

aforesaid, shall be guilty of an offence punishable under this Part", giving meaning and effect to the words "such and "as aforesaid", is that the offences described therein are confined to such "restrictions and requirements", the breaches of which are substantive offences under the provisions of the preceding clause. In short, the sub-paragraph does not create a new species of conspiracy but contemplates the well established 'conspiracy to commit a statutory offence'. To put it another way, the conspiracy in contemplation is an agreement to contravene such restrictions or requirements as are in the actual contravention substantive offences.

In the Court of
Appeal

No.16
Judgment

10
20
30
Illustratively, although there is no specific offence under the Customs Act for "counselling" the exportation of foreign currency yet in our view no such offence would lie under paragraph 1(1) of Part II of the Fifth Schedule because the exportation of foreign currency is not an offence under the sub-paragraph. Mr. Downer's arguments in the main proceeded along lines similar to those of Counsel for the appellant in Goswami's case. The simplistic approach advocated by him overlooks the fact that despite its inelegant wording the sub-paragraph is clearly an offence creating provision and the proviso if interpreted accordingly excludes from the scope of its creation all restrictions and requirements falling under Part IV of the Act. It is only after the removal of those requirements and restrictions that the other remaining requirements and restrictions fall to be considered as offences either substantively or inchoately under paragraph 1(1) of Part II of the Fifth Schedule.

In the end after anxious reconsideration despite Mr. Downer's industry and enthusiasm we hold that on this point R. v. Mirchandani was correctly decided.

40
However, in relation to this count, Mr. Downer submitted that in the event the Court was not minded to over-rule - R. v. Mirchandani, this count of the indictment ought not to fail, as conspiracy was a common law misdemeanour and that having regard to the evidence for the Prosecution and the nature and conduct of the defence, there would be no miscarriage of justice in substituting the appropriate penalty as in cases where there was no special statutory provisions as to punishment.

50
It is clear that but for the difference in penalty between a conspiracy under the Act and a conspiracy at common law, the question would be academic. Despite observations in Mirchandani's case and the unwillingness of the Court to amend the indictment in that case Mr. Downer's submission is not without merit. In the instant case, we adopt, the approach in R. v. Newland (1954) 1 Q.B. 158 and grant the appropriate amendment to the Statement of Offence, so that it reads:- "Conspiracy to contravene the Customs Act as affected by Section 24 and Part III of the Fifth

Original Ground 2:

"That the Crown failed to establish that the Appellant had any opportunity to offer for sale and failed to offer for sale the contents of the parcel alleged to be taken from him."

Additional Ground 3:

"There was no evidence in support of an allegation in Count 2 that the Appellant was a person "entitled to sell foreign currency" as distinct from a bailee of foreign currency."

10

These grounds were argued together.

The Court adverted Counsel's attention to the fact that the Resident Magistrate made no written findings of fact as required by Section 291 of the Judicature (Resident Magistrate) Act, and the Judicature Resident Magistrate (Specific Offences Order), 1974. The enacting of these provisions was undoubtedly influenced by observations of this Court on the desirability of Resident Magistrate setting out the facts upon which they convict in cases tried on indictment or in the Special Statutory Summary Jurisdiction:-

20

"Per curiam; resident magistrates have a jurisdiction to try serious offences both summary and indictable and this case highlights the view which the court has on previous occasions expressed that the Law ought to be amended to require them to file reasons for their decisions when appeals are taken", R. v. Malek & Reyes (1966) 10 W.I.R. 97 at p. 98.

30

Mr. Phipps said in effect that he was making no issue of this as he did not regard the omission as causing any miscarriage of justice.

This waiver was a Grecian gift; it enabled him to be at large in relation to the probable findings of fact that may conceivably originate or be based on the utterances of the appellant. Thus he was able to contend that the Prosecution had failed to produce evidence to establish that the appellant was a person entitled to sell foreign currency as his admissions and conduct were as consistent with his using his position to provide a protective cover for the exportation of the currency as with ownership and accordingly the Crown had failed to prove that he was a "person entitled to sell"; further, on the totality of the evidence the more probable inference was that he was assisting another to smuggle currency out the Island.

40

Section 4 of the Exchange Control Act provides:-

In the Court of
Appeal

"1. Every person in the Island who is entitled to sell, or to procure the sale of, any gold, or any foreign currency to which this section applies, and is not an authorised dealer, shall offer it, or cause it to be offered, for sale to an authorised dealer, unless the Minister consents to his retention and use thereof or he disposed thereof to any other person with the permission of the Minister."

No.16
Judgment

10

.....

"6. In any proceedings in respect of a failure to comply with the provisions of this section, it shall be presumed, until the contrary is shown, that the gold or currency in question has not been offered for sale to an authorised dealer."

20

From the evidence it is inescapable that the learned Resident Magistrate found that the appellant was in physical possession of the bag of money. It was open to him to prefer the appellant's earliest admission in the presence of Dulcie McLean that the bag was his. From this evidence and giving effect to the purposeful presumption in Section 4(6) of the Exchange Control Act, it was open to the Magistrate to hold that he was entitled to sell and that his conduct was incompatible with any intention to sell to an authorised dealer.

30

This was at its best a tongue -in-the-cheek submission by which Counsel smoothly sought a verdict of acquittal for one who implicit in the submission, aided and abetted the owner of foreign currency in not offering it for sale to an authorised dealer.

We find no merit in this ground of appeal.

Additional Ground 4:

40

"The Appellant should not have been charged, tried and convicted for two offences which amount to one activity. In this case the allegation in Count 2 was merely incidental to the substantive offence in Count 1 or any allegation alternative thereto."

It is clear from the evidence that what transpired at the Airport and which amounted to an offence against the Exchange Control Act was an attempt to carry out the unlawful purpose of the conspiracy alleged in Count 1. There is no evidence that the ramifications of the conspiracy extended to cover or had in contemplation any other transaction in

In the Court of
Appeal

No.16
Judgment

foreign currency. Accordingly although it was quite proper for the Prosecution to plead as they did, in the circumstances of this case it would manifestly be excessive to impose substantial penalties on both counts.

For these reasons as regards Count 1, the conviction is affirmed but the sentence is set aside and a sentence of a fine of \$100 or three months imprisonment with hard labour substituted.

As regards Count 2 the appeal is dismissed and the conviction and sentence are affirmed.

10

No.17
Conditional Order
for leave to
Appeal
4th May 1981

No. 17

CONDITIONAL ORDER FOR LEAVE TO APPEAL

IN THE COURT OF APPEAL
RESIDENT MAGISTRATE CRIMINAL APPEAL No. 23/80

BETWEEN THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT
AND HERBERT STEWART RESPONDENT

UPON THE MOTION of the Applicant coming on for hearing on the 29th day of April, 1981 and after hearing Mr. F. Algernon Smith, Deputy Director of Public Prosecutions for the Applicant and Mr. Frank Phipps, Q.C. for the Respondent - it was ordered that leave to appeal to Her Majesty in Council be granted on the following condition:

20

That the Applicant take steps to have the records prepared and dispatched to the Registry of the Privy Council within ninety (90) days.

The Court in granting leave, certified the following point of law to be of exceptional public importance namely:

Whether a conspiracy to export foreign currency in contravention of the restriction imposed by Section 24 of the Exchange Control Act is punishable by virtue of Part II of the Fifth Schedule of the Act

30

and that it is in the public interest that a further appeal should be brought.

Dated this 4th day of May, 1981.

Sgd Illegible

Ag REGISTRAR
COURT OF APPEAL

Files by the Director of Public Prosecutions, Attorney-at-Law whose address for service is Public Building West, P.O. Box 633, King Street, Kingston.

40

No. 18

In the Court of
Appeal

ORDER GRANTING FINAL LEAVE TO APPEAL
TO H.M. IN COUNCIL

No.18
Order Granting
Final Leave to
Appeal to H.M.
in Council

IN THE COURT OF APPEAL

APPLICATION FOR LEAVE TO APPEAL TO
HER MAJESTY IN COUNCIL

RESIDENT MAGISTRATE CRIMINAL APPEAL No. 23 of 1980

BETWEEN DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT/
APPELLANT

10

AND

HERBERT STEWART

RESPONDENT

UPON the Notice of Motion coming on fo hearing this day and upon hearing Mr. F. Algernon Smith, Deputy Director of Public Prosecutions for the Appellant and Mr. Frank Phipps, Q.C. for the Respondent,

IT IS HEREBY ORDERED THAT:

FINAL LEAVE BE GRANTED TO THE APPELLANT TO APPEAL TO HER MAJESTY IN COUNCIL.

Dated this 13th day of August 1981

20

Sgd S. PLATT
Registrar

In the Privy
Council

No. 19

ORDER GRANTING SPECIAL LEAVE TO CROSS-APPEAL
TO H.M. IN COUNCIL 24th November 1981

No.19
Order Granting
Special Leave to
Cross-Appeal to
H.M. in Council
24th November
1981

At the Court of Buckingham Palace
the 24th day of November 1981

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

30

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 27th day of October 1981 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Herbert Stewart in the matter of an Appeal from the Court of Appeal of Jamaica between the Director of Public Prosecutions Appellant and the Petitioner (Respondent) (Privy Council Appeal No. 36

In the Court of
Appeal

No.19
Order Granting
Special Leave to
Cross-Appeal to
H.M. in Council
24th November
1981

of 1981) setting forth that the Petitioner prays for special leave to cross-appeal from the Judgment of the Court of Appeal of Jamaica dated 13th March 1981 which affirmed the Petitioner's conviction in the Resident Magistrate's Court for the Parish of St. James at Montego Bay on 19th December 1979 on charges laid under the Exchange Control Act: And humbly praying Your Majesty in Council to grant the Petitioner special leave to cross-appeal from the Judgment of the said Court of Appeal dated 13th March 1981 and for further or other relief:

10

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute his Cross-appeal against the Judgment of the Court of Appeal of Jamaica dated 13th March 1981."

20

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of Jamaica for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N.E. LEIGH

30

Exhibit 1

Exhibits

Statement by Herbert Stewart

Exhibit 1
Statement of
H. Stewart
18th May 1979

Friday 18th May 1979 6:45 p.m. Montego Beach Apt. Montego Bay, Saint James. Present Sergeant C.P. Barnaby, Det. Sergeant J.J. Roberts, A/Cpl. V. Blair and E.H. Crookson, C. Thompson, Cons. V. Blake and R.W. Shirley and Immigration Officer Sergeant Stewart of Albion, Saint James. Cautioned Sergeant H.C. Stewart as follows:-

10 "You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.

Sgd: Herbert C. Sreewart
J. Roberts D/Sgt. #277
18.5.79

1. Q. What is your name?
A. Herbert Clarice Stewart
2. Q. What is your address?
A. Apt. 27, Albion Courts, St. James
3. Q. What is your Nationality?
20 A. Jamaican
4. Q. What is your occupation?
A. Immigration Officer.
5. Q. Do you know Delcie McLean?
A. Yes I know her she is the girlfriend of one Mr. Bryce who is a friend of mine living abroad (U.S.A.)
6. Q. Do you know her address?
A. No I know her home address all I know is that she is a Telephone Operator.
7. Q. Did you see Miss Delsie McLean today 18.5.79?
30 A. Yes, I saw her today at the Airport she was a passenger on Eastern Airlines Flight #970 destined to Miami at about 4:00 p.m.
8. Q. Today 18.5.79 at 4:00 p.m. whilst yourself and Dulcie McLean were proceeding to an Eastern Aircraft parked on Tarmac preparing to depart to Miami from the Donald Sangster's Airport, yourself and Dulcie Mclean were accosted by members of the Financial

Exhibit 1

Statement of
H. Stewart
18th May 1979

Investigative Unit. You claimed a brown paper bag you had in your hand as yours. This brown paper bag contained Foreign Currency notes and Travellers cheques and money orders amounting to £16,464. Who's money is this?

- A. This bag was given to me by Miss McLean who asked me to assist her in taking this bag to the aircraft because her hand was full.
9. Q. When you took this brown paper bag from Dulcie Mclean did you know the contents of this paper bag? 10
- A. No.
10. Q. Why did you claim this paper bag as yours to the officers when occosted?
- A. Because I just merely say it was mine since I thought if I said it was mine it would be O.K.
11. Q. Were you dressed in your Immigration uniform?
- A. Yes I was.
12. Q. Do you know where she was taking this paper bag which you said was yours?
- A. I know she was going to Miami but I don't know where in Miami she was taking same. 20
13. Q. When was the first time you know that this bag contained Foreign currency?
- A. I knew for the first time when the F.I.U. personnel A/Cpl. Blair opened same in the airport building.
14. Q. Where was Miss Dulcie McLean at the time when the brown paper bag was opened by A/Cpl. Blair?
- A. I don't know but her flight was still on the ground.
15. Q. Since you now discover that this paper bag when opened contained foreign currency why did you not inform C/Apl. Blair and party that the Foreign Currency was not yours but belonging to Dulcie McLean. 30
- A. I did inform A/Cpl. Blair and party that the Foreign Currency was not belonging to me at this point.
16. Q. Do you know when Dulcie McLean is returning to Jamaica?
- A. She said that she will be coming back on Wednesday 23.5.79.

17. Q. Is it a common practice for you to take packages on board aircraft for people when these aircraft are leaving?

Exhibit 1

Statement of
H. Stewart
18th May 1979

A. Yes.

18. Q. Do you know whether these packages that you are taking onto aircraft for people contain Foreign Currency?

A. No I don't know.

19. Q. Shown brown paper bag with brown leather bag marked Mr. Travel Kit containing the following:-

10

| | |
|------------------------------|-----------------|
| 1. US Currency Notes | \$13,176 |
| 2. Canadian Currency Notes | 67 |
| 3. US Travellers cheque | 1,410 |
| 4. US Money orders totalling | 1,570 |
| 5. Canadian Money orders | <u>241</u> |
| Total US & C | <u>\$16,464</u> |

Is this the Foreign Currency taken from you by F.I.U. personnels at the Sangsters International Airport today 18.5.79.

20

20. A. Yes that was the money in the bag I had in my hand.

21. Q. Were you the Immigration Officer who embarked Dulcie McLean today 18.5.79

A. No.

I have ready over the foregoing questions and answers numbering 1 to 21. The questions and answers are true I made it of my own free will.

Sgd: H.C. Stewart
18.5.79

Sgd: J.J. Roberts D.Sgt.277
18.5.79

30

The foregoing questions and answers numbering 1 to 21 were put to Herbert Stewart by me the questions and answers were recorded by and read over by Stewart who signed to its correctness.

Sgd. Christopher P. Barnaby Sgt.
18.5.79

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

- AND -

HERBERT STEWART Respondent

AND BETWEEN :

HERBERT STEWART Appellant

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.
Hale Court
Lincoln's Inn
London WC2A 3UL

Solicitors for the Appellant and
for the Respondent in the Cross-
Appeal

PHILIP CONWAY THOMAS & CO.
61 Catherine Place,
LONDON
SW1E 6HB

Solicitors for the Respondent
and for the Appellant in the
Cross-Appeal