NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 38/01

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

R. V. NORMA VON CORK
CHRISTOPHER MOORE
MORRIS THOMPSON
RADCLIFFE ORR

R.N.A. Henriques, Q.C., Miss Norma Linton, Q.C., Delano Harrison, Q.C., George Soutar and Patrick Bailey for Appellants

Brian Sykes, Acting Senior Deputy Director of Public Prosecutions and Mrs. Nadine Guy, Crown Counsel for the Crown

January 14, 15, 16, 17, 18, 21, 22, 23, 24, 25
February 26, March 5, 6, 7, 8, 11,
April 29 & May 13, 2002

FORTE, P:

The appellants were convicted in the Corporate Area Resident Magistrate's Court by Her Honour Almarie Haynes for the offence of conspiracy to pervert the course of justice. They were sentenced to varying sentences as follows:

Norma Von Cork, Maurice Thompson, Radcliffe Orr and Clive Ellis twelve (12) months imprisonment at hard labour.

Christopher Moore ten (10) days imprisonment at hard labour.

The indictment upon which they were charged is the subject of complaint by all the appellants, and consequently it is set out hereunder, for easier understanding of the gravamen of their complaint. It reads as follows:

"Statement of Offence

Conspiracy to pervert the course of public justice.

Particulars of Offence

Norma Von Cork, Christopher Moore, Morris Thompson, Radcliffe Orr and Clive Ellis on divers days between the 1st day of September, 1997 and the 31st day of October, 1997 in the parish of Manchester conspired together and with Ron McLean, and other persons to pervert the course of public justice by causing the said Radcliffe Orr to enter a false plea of guilty to the charges of Possession of Ganja, Dealing in Ganja, Attempting to Export Ganja and Conspiracy to Export Ganja in order to cast doubt on the validity of the convictions of Brian Bernal and the said Christopher Moore, intending thereby to pervert the course of public justice."

The attack on the indictment was raised in three ways:

1. That it discloses no offence known to law, that is to say, "by perverting the course of public justice in order to cast doubt on the validity of a conviction."

2. The common law offence of perverting the course of public justice is well-settled law, and its ambit circumscribed. The various acts or activities

> that constitute the offence have been established by judicial decisions.
>
> The allegations in the Particulars of Offence do not fall within the ambit of the recognized activities, which can constitute the offence. For example, there is no act by any of the accused which could pervert the course of public justice in respect of convictions of Bernal and Moore, and in any event nothing was done by any of them to do so.
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> 3. It is well established law that persons cannot conspire to commit a criminal offence, for the acts which do not constitute an offence in law; persons cannot conspire to commit an offence unknown to the law.

In developing those arguments, Mr. Henriques, Q.C. for the appellants contended, firstly, that the indictment does not disclose an offence because the offence of perverting the course of public justice is not applicable when the proceedings, civil or criminal have been concluded. In respect of a criminal case, he argues that once a conviction has been entered, nothing can be done to interfere with that conviction, and consequently no act in that regard could amount to an act which perverts the course of justice in respect of that conviction. In extending that submission he was bold enough to maintain that proceedings in a Court of Appeal would not come within the ambit of the meaning of "public justice" as is applicable to the offence of perverting the course of public justice.

In my view, it would be remarkable, and perhaps absurd if the law excludes the process of Appeal as one of the integral aspects of the Administration of Justice. The term "course of justice" as it applies in an allegation of "perverting the course of justice" must by necessity include all the processes in the system from the moment an accused is arrested and

comes before the Court until all the issues involved in the case have been finally settled. A convicted person can have his conviction reversed on appeal, either to the Court of Appeal or to Her Majesty's Privy Council. Even after that process, there are provisions in the Law and in the Constitution, which enable the convicted person to petition the Governor General who in an appropriate case, may refer the matter back to the Court of Appeal to adjudicate on the matter as if it were a fresh Appeal. See Section 29 (1) (a) of the Judicature (Appellate Jurisdiction) Act which states:

> "29. (1) The Governor-General on the consideration of any petition for the exercise of Her Majesty's mercy or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either –
>
> (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; ..."

The above process may include the opportunity to offer fresh evidence which was not available at the time of conviction.

In the event, I have great difficulty in accepting this proposition offered by counsel for the appellant, and am of the opinion that the contrary is the correct principle of law – that is to say, all these processes, fall within the concept of "justice" as it applies to the particulars of the offence of perverting the course of justice.

The following dicta taken from the judgment of Brennan and Toohey JJ sitting in the High Court of Australia in the case of ***R. v. Rogerson and Others*** [1992] LRC (Crim) 680 at page 687, are in keeping with my own views expressed (supra).

> "Justice, as the law understands it, consists in the enjoyment of rights and the suffering of liabilities by persons who are subject to the law to an extent and in a manner which accords with the law applicable to the actual circumstances of the case. The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case: ***R v Todd*** [1957] SASR at 328. The course of justice is perverted, or obstructed, by impairing, or preventing the exercise of the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in, or prevented from exercising, its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions."

If the appellate proceedings are an integral part of the "course of justice" then it follows that any act done with the intention of impairing or perverting the appellate Court from exercising its powers and responsibility to dispense justice, must necessarily amount to perverting the course of justice.

In the instant case, the indictment speaks to "casting doubt" on the validity of the convictions of Christopher Moore and Brian Bernal. The

evidence in relation to this allegation will be the subject of discussion later in this judgment. It should be noted, however, that the conspiracy alleged was to cause Radcliffe Orr to plead guilty to offences for which others had already been convicted. The purpose of that, which need not have been pleaded but was pleaded, was to cast some doubt on those convictions. Any "casting of doubt" would by necessity involve an enquiry by way of fresh evidence in the Court of Appeal to determine the effect of Orr's confession on those convictions. Significantly also, the Crown led evidence that at the very time Orr was confessing to these crimes, Brian Bernal's attorneys were engaged in the Court of Appeal, tendering fresh evidence from another source.

If the prosecution successfully proved that the appellants conspired to cause Orr to plead guilty to the offences for which Brian Bernal and Christopher Moore were convicted, and to maintain that Brian Bernal and Christopher Moore were not involved in the commission of those offences, then the only reasonable inference to be drawn from those facts is that they were designed to have some effect on those convictions, and in particular on the conviction of the appellant Moore.

The possible effect would of course be dependent on the provisions of law which make it possible to bring the matter back to the Courts. Mr. Henriques, Q.C. argued strongly that there was no evidence of any act done by the appellants, to invoke any such procedure, which he maintained is a necessity in order to prove a conspiracy to pervert the course of justice. He cited some authorities upon which he relied. In my view that submission is misconceived. A conspiracy is nothing more than an agreement between two

or more persons to do an unlawful act, or to do a lawful act, by unlawful means (See ***Mulcahy v. R*** (1868) LR 3 HL 306.) A conspiracy to pervert the course of public justice is a conspiracy and nothing more. It is an inchoate offence in the sense that it is complete without the doing of an act save the act of agreeing to pervert the course of justice. (See judgments of Brennan and Toohey JJ in the ***Rogerson*** case (supra) at page 687). The prosecution therefore need only prove the agreement between the appellants and that it was intended to pervert the course of justice.

The appellants next argued that the offence of perverting the course of justice is well settled law and its ambit circumscribed in judicial decisions. In other words, they contend that the areas of conduct which can constitute the offence have already been defined by the cases, and consequently one has to look at those cases to determine whether the conduct of the appellants in the instant case falls within those circumscribed areas. This submission also contributed to the basis upon which the appellants contend that appellate proceedings cannot be the subject of the offence – all the cases cited having dealt with proceedings in the trial courts. Again, I disagree. Such conduct cannot be limited to the already decided instances. There is really no valid reason for coming to such a conclusion. Many of the cases cited, were dealing with particular facts which were never before then considered to meet the ingredients of the offence yet they were held to be acts which tended to pervert the course of justice (an attempt) or an agreement so to do (conspiracy). Mr. Henriques, Q.C. relied on the text in Blackstone's Criminal Practice 1998 Edition by Peter Murphy MA LLB where at page 632

paragraph B 14.31 the author sets out seven instances as acts which have been held capable of amounting to the offence. It should be noted, however, that the author at no time suggests that the list of those instances was an exhaustive list of the circumstances in which the conduct would amount to the offence.

Counsel also referred us to the case of **Rozamin Lalani** [1999] 1 Cr. App. R. 481 where Brooke, L.J. in the English Court of Appeal made reference in his judgment to a report of the Law Commission on "Offences Relating to Interference with the Course of Justice (1979)" and which at pages 44-45 included "a helpful list of examples of cases which fall within the general description of 'perverting the course of justice'." There is however no need to refer to that list, as the Commission itself recognized that the boundaries of the offence were uncertain: (paragraph 3.4 of the Report).

In the event, I would hold that the three propositions advanced by the appellants, must fail and that the Indictment was correct in law.

The Evidence

I turn now to deal with the appellants' contention that "the evidence of the prosecution has been so discredited by cross-examination, inconsistent, tenuous, self contradicting and so inherently weak, that no case has been made out and accordingly the accused ought not to have been called upon."

It is appropriate to note at this point, that "no case" submissions were made and overruled at the trial, and that the appellants offered no evidence in their defence.

The gravamen of this complaint revolves mainly around the credibility of the witness Cons. McLean who is the main witness in the case. A review of the facts is of course necessary for a determination of this complaint.

Perhaps a good starting point is what the prosecution alleges was the genesis of the alleged conspiracy. It is agreed, that one Brian Bernal, and Darren Bernal, together with the appellant Moore, were charged with the offences of possession of ganja, dealing in ganja, attempting to export ganja and conspiracy to export ganja in the Kingston Resident Magistrate's Court in 1994. At trial, Darren Bernal was acquitted, but Brian Bernal and the appellant Moore were convicted. Their subsequent appeals were dismissed by the Court of Appeal and the Judicial Committee of the Privy Council, the latter however, referring the case of Brian Bernal back to the Court of Appeal for the purpose of considering whether fresh evidence should be admitted.

That application was heard and granted by the Court of Appeal on the 8th October, 1997, and the Court proceeded to hear the fresh evidence between the 15th and 17th October 1997.

At the time Brian and Darren Bernal, and Moore first came before the Kingston Resident Magistrate's Court, the appellant Von Cork was the presiding Magistrate. They appeared before her on the 7th, 8th, and 14th April 1994, when their cases were mentioned. The case was later tried by another Resident Magistrate.

In October 1997, when the application to adduce fresh evidence was being heard in the Court of Appeal, the witness McLean was employed as a Judge's Orderly to the appellant Von Cork, Resident Magistrate, in the parish

of Manchester over which she exercised jurisdiction. At this time, the appellant Moore though convicted and sentenced, had absconded and was being sought by the police for the purpose of taking him in to serve the sentence imposed on him.

The story then begins with an allegation by Cons. McLean that in September 1997 while he was Von Cork's Orderly she asked him to look for a policeman from his station to do something "for a friend of hers". He agreed and she said nothing more. In pursuance of this promise, he contacted the appellant Cons. Thompson who agreed. He later told the appellant Von Cork that he had spoken to Cons. Thompson. Von Cork then asked if she could give her friend Cons. Thompson's telephone number and McLean said "yes." At about 2 – 2:30 a.m. on a morning between 10th and 12th October, 1997 McLean received a call from a male voice who identified himself as the Judge's (Von Cork's) friend. He called the Judge (Von Cork), told her of the call, and she told him that he could talk to the person because she had just spoken to him.

Cons. McLean, though employed as the Judge's Orderly was nevertheless attached to the Cottage Police Station where he worked at nights. He was on duty there between 8:00 p.m. on the 14th October 1997 and 6:00 a.m. on the 15th October 1997. At about 5:30 – 6:00 a.m. the morning of the 15th October he saw a brown Toyota Corona motor car drive into the station yard. The appellant Cons. Thompson was then at the station. He went to the car and spoke to the driver of the car. Two other men, identified as the appellant Orr and a Mr. Ellis (who absconded during the

trial) were in the car. The appellant Moore was the driver of the car. All the men left the car and went into the police station with the appellant Thompson but soon after all of them went upstairs where apparently the Court Room is located. At that time Cons. Thompson had ruled foolscap paper with him. When they came back downstairs the witness McLean left the station with Moore, Ellis and Orr in the car driven by Moore. They drove to his home on Villa Road in Mandeville where Moore and himself left Orr and Ellis sitting in Moore's car, and went in his (McLean's) car to the home of the appellant Von Cork at Confidence Avenue. The appellant Moore went into the house having been let in by Von Cork. The witness waited outside for a while after which Moore came back into the car, and they drove back to Villa Road. Ellis and Orr were still in the car. Moore then went back into his car and drove away.

This, however, was not the first time the witness was seeing the appellant Moore. He had seen him on Tuesday the 14th October at the Judge's home. She had telephoned him at the Mandeville Court and instructed him to come to her home. When he got there, the appellant Moore was there in the living room, seated at the dining table. The appellant Von Cork was seated beside him. She told the witness that she wanted him to do something for her. She had four sheets of foolscap paper and she was writing as Moore spoke.

She wrote about 3 ½ pages, after which Moore told him to take the "Judge" to the Spaldings Resident Magistrate's Court and return to him. The appellant Von Cork said "No", Moore should remain until she got back, which

would be about 1:30 p.m. They in fact returned at about 1:30 p.m. Moore was still there. He had seen him sitting on the bed in the bedroom when he went to put down the Judge's books. Von Cork then gave him the sheets of foolscap paper and asked him to photocopy them. Moore instructed him to take them to him at the Shopping Centre after they were copied. He went to copy them, but the process took longer than expected. When he went to the Shopping Centre he did not see Moore so he returned to the Judge's (Von Cork) home. The Judge told him that Moore had just left, so he went back to the Shopping Centre where he saw Moore and gave him the papers. Moore returned a copy to him and instructed him to give it to the Judge (Von Cork). This he did.

I return now to the 15th October, and to the Mandeville Resident Magistrate's Court where the witness McLean was at the time Court began. Cons. Thompson was also there. McLean, during Court went up to the Bench, as he often does, and spoke to the appellant Von Cork who was presiding. She asked him if Cons. Thompson had brought in "a man". He told her yes. She then asked the witness to show her the man and what type of clothes he was wearing. He told her. She acknowledged seeing the man. She asked the witness if Cons. Thompson had given him a statement to "witness". He told her "no". She then told him that Cons. Thompson was going to give him a statement to "witness" and he should "go and witness it". McLean then went into the Court's office where Cons. Thompson gave him "some statements" to sign. He signed them, gave them back to Cons. Thompson and went back into Court.

Cons. Thompson had in fact brought the appellant Orr to Court, charged with several drug offences. Orr was the man McLean had pointed out to the appellant Von Cork. He was represented by attorney-at-law Mr. Godfrey. When the appellant Orr was pleaded, he pleaded guilty to possession of ganja and other related offences allegedly committed on the 14th - 15th October 1997; as also to possession of, and dealing in ganja, attempting to export ganja, and conspiracy to export ganja, committed in 1994 in Kingston. Mr. Godfrey, so the witness McLean stated, objected to his plea to conspiracy, on the ground of lack of jurisdiction in the Judge, and after discussion the matters were put off to the following day – the recent offences for sentence, and the 1994 offences for mention.

After the adjournment McLean went to the Judge's Chambers where she said to him, "All that Mr. Godfrey ah say or do is nine months he going to get." She also told the witness McLean that he should go and tell Orr when he comes back in the morning and Mr. Godfrey is insisting that he should plead not guilty to the conspiracy charge he should tell Mr. Godfrey that he never had any money to pay him so he never wanted him to represent him.

On the following day, 16th October 1997 when Orr returned to Court, he pleaded guilty to all seven offences, and was accordingly sentenced to nine months at hard labour by the appellant Von Cork. She did so without the benefit of any statements before the Court setting out the circumstances under which the offences were committed. The Clerk of Courts Ms. Yvonne Brown testified that there were no statements on the file and that she informed the appellant Von Cork of that fact. Nevertheless, the appellant

proceeded to deal with the matters, including the charge of conspiracy, which is an indictable offence, and which required that a Resident Magistrate should be told the facts, upon which the Crown would rely, so as to determine whether an order should be made for indictment. It appears then that no outline facts could have been given to the Judge upon which she could determine whether an order for Indictment ought to be granted. In addition, there was no jurisdiction in the parish of Manchester, to deal with the summary offences, which occurred in the parish of Kingston in 1994. I will return to these matters at a later stage, when dealing specifically with the case against the appellant Von Cork.

Mr. McLean testified that subsequent to the matter being disposed of in Court, he was handed a statement by Cons. Thompson with the request that he transcribe it in his own handwriting. This, Cons. Thompson advised, was for the files in respect of the case against Orr. This was a statement, which contained, what the prosecution alleged, was a false account of Cons. Thompson and Cons. McLean being on patrol in the early hours of the 15th October, and accosting Orr, who was alleged to have been found with one pound of ganja in his possession. Cons. McLean wrote the statement in his own handwriting. Cons. Thompson also wrote a statement to that effect, in which he speaks to taking Orr into custody, and of Orr at that time confessing his involvement in the offences which occurred in Kingston in 1994. As a result, Cons. Thompson took a caution statement from him, and even though McLean states he was not present at the time, he was asked to "witness" it and he did.

Mr. McLean also testified that on the Friday following (which appears to be 17th October) while he was driving the appellant Von Cork to a party, she told him to stop the car when they had reached the intersection of New Green Main Road and Bonitto Crescent. He did so. She came out the car and told him to follow her down the road. As they walked, she told him she was afraid "they" had bugged the car, and then she said, "Mr. McLean once Orr goes to prison is a must that Christopher Moore and Bernal have to get off the trial."

On the 28th October 1997 the witness McLean was subjected voluntarily to an interview with the investigating officers, and the questions and answers recorded in writing. On that day, after the interview, he was taken into custody. He subsequently gave statements on the 5th and 7th November 1997 and again on the 13th January 1998 at which time he states he had decided to offer himself as a witness for the prosecution. On the 15th January 1998 it was decided that he would be used as such a witness, and he was thereafter released. He had been placed on an identification parade on the 31st October 1997, when he was identified by Orr and Ellis. It was on that date that he was charged for the same offence for which the appellants have been convicted.

While he was in custody, some members of staff of the Resident Magistrate's Court visited him. He was being held at the Porus Police Station. While the staff members were there, the appellant Von Cork also visited him. He heard her say to the staff, "I never knew you were coming down here, if I knew I would give you a ride." As a result of the kindness of

the Inspector, the appellant Von Cork was allowed to speak with McLean in the privacy of the Inspector's office. In the office McLean alleges that the following conversation took place. The appellant Von Cork first said "McLean if I knew they were coming I would not come and make them see me." He then said "Judge you see what you put me in a and me nuh know nutting bout it." He started to cry and said "Oh God judge me not even get cent and mi nuh have no money fe pay me lawyer." She told him she would pay the lawyer. Then she told him that she would tell him something which he should not tell anyone. She then told him that the "boy's father had money and would pay any money for the boy to get off. She knew his parents "good good." The boy's mother was in a Club she, Von Cork, was in charge of in Kingston and the boy's father knew everyone at DPP."

The above summary of facts represents the testimony given by the witness McLean in examination-in-chief which was subjected to thorough and detailed cross-examination, the result of which forms the basis of counsel's contention that the witness was so discredited, that he was incapable of belief by any reasonable tribunal. Against this background, it ought to be noted that the witness was put forward by the prosecution as a participant in the conspiracy for which the appellants were convicted and so he was an accomplice.

As there is other evidence in the case, which relate more specifically to the appellants Thompson and Orr, I turn now to deal with the appeals of each of the appellants.

The appeal of Radcliffe Orr

The case against Orr, does not essentially rely on the evidence of Mr. McLean. However, the evidence from that witness put him in the car with Ellis and the appellant Moore on the morning of the 15th October 1997 when it arrived at the police station. It also reveals that he had communication with the appellant Thompson when they all went upstairs together. He thereafter left in the car with Moore, Ellis, and the witness McLean. He (Orr) was taken to Court by the appellant Thompson, and pleaded guilty to charges which McLean testified had no basis, for the reason that Orr was never found with ganja that morning. As part of the conspiracy he signed a "false" caution statement in respect of the 1994 Kingston offences in which he confessed to those crimes.

The case against him became stronger, with the admission of a statement he gave to investigating officers, after he had been sentenced by the appellant Von Cork. Both Det. Sgt. Obediah Grant and DSP Duncan alleged that the appellant offered to give this statement. DSP Duncan had testified that he had taken Orr to DSP Lawrence's office and was taking him back to the CIB office, when Orr said "Mr. Duncan I want to talk to you and Mr. Grant because unnu mi trust, only the two a unnu mi trust right now." As a result he took him to Det. Sgt. Grant, and in Orr's presence told him that Orr needed to speak with him. Orr told them a story at the end of which he (Orr) said:

> "Me one nah go down the drain after dem tek back the money."

Grant thereafter recorded the statement (Exhibit 24) and subsequently gave it to DSP Salmon who was in charge of the investigations.

It is worthy of note that during the investigations the police officers went to the appellant's relative's home where a portion, $190,000 of the $300,000 paid to Orr was recovered.

At the trial there was a challenge to the admissibility of this statement. (Exhibit 24)

After the voir dire the learned Resident Magistrate admitted the statement, resolving the issue of whether Orr signed the statement in the Crown's favour. However as the case continued, other evidence emerged which caused counsel for the appellant Orr to challenge the statement once again. The learned Resident Magistrate, though finding that the appellant Orr should have been cautioned for the reason that the officers had basis for so doing, nevertheless exercised her discretion to admit the statement into evidence. In doing so she accepted that the statement was offered by Orr, but found that they knew he was incriminating himself and so should have cautioned him.

It was submitted both before the learned Resident Magistrate and again before us, that the appellant Orr was induced by special treatment and privileges from the police and in particular Det. Sgt. Reginald Grant which caused him to give the statement. Several acts of inducement were set out upon which counsel relied in order to submit that:

> "... had the learned Resident Magistrate properly borne in mind the burden and standard of proof in her review of the relevant material, she would reasonably have excised Exhibit 24 from the record

> and in the result, have withdrawn it utterly from her consideration of the case against the appellant."

This submission must largely depend for its success on the basis that the special treatment and privileges alleged, in fact induced the appellant to give the statement. It was alleged that this special treatment included the fact that the appellant was kept in custody at the Port Royal lock-up instead of being placed in prison, he having already been sentenced for the offences for which he pleaded guilty. The privileges included the following:

(i) he never slept with fellow prisoners;

(ii) he was put to move about;

(iii) he was sent on errands into the town;

(iv) he had access to Supt. Grant's home telephone number; and

(v) the relationship between Supt. Grant and himself was sufficiently close that Superintendent Grant described himself as "an associate of Orr's."

The learned Resident Magistrate in her findings, however, dismissed any success of this argument by her findings set out hereunder:

> "The issue is whether he went to Port Royal in exchange for his statement or whether the fact of Port Royal arose only after he gave his statement of the 24th.
>
> I do believe that it was after or at the time he was taken to Reginald Grant who was armed with his statement and upon perusing it he formed the view that he would use him as crown witness and thus took him to Port Royal in furtherance of that intention. The negotiations I believe began then with Orr and the officers as to the terms under which he would become crown witness at that point. I believe that it was in furtherance of that

> venture that McLean accompanied Grant and Salmon to Port Royal. These being my findings, the actions of the officers however inappropriate would not affect the voluntariness of the statement which was given on the 24th October."

In argument before us when the above passage was shown to Mr. Bailey who argued this point for the appellant Orr, he reluctantly saw the merits of the learned Resident Magistrate's finding and no longer put forward his contentions as strongly as he had been doing.

In my judgment, having exercised her discretion to admit the statement, although Orr had not been cautioned, (an exercise of discretion not challenged on appeal) and having found that the statement was given before the treatment at Port Royal and was not as a result of it, she was entitled to find that the statement was admissible.

In this statement (Exhibit 24) Orr who lived at the time in Tredegar Park in Spanish Town, St. Catherine speaks to an approach being made to him on the 14th October 1997 by a man whom he knew as "Runkus" who told him that " 'Version' boss want a man to appear in a Court fi him and fi one year but it would a work out to eight months in prison and the man would get One Million Dollars ($1,000,000.00)". He asked Orr if he knew anyone who could do the job. Orr then told Runkus that he could "do the job". Runkus told him, "When Version come me a go mek you and him talk." Orr knew Version before. His correct name is Clive and he was a golf-caddy. This turned out to be the accused Clive Ellis who was jointly charged in this case. He absconded during the trial but was nevertheless convicted in his absence.

About 15 minutes after his conversation with 'Runkus', Version came to where Runkus and Orr were at a telephone booth. Orr told Version that he heard he was looking for someone to do a job, and invited him to talk with him (Orr) about it. Version told him that a man "a go give me eight hundred thousand dollars to do a work and him nuh business weh mi want to do with the money so long as me no bank it." The man would give him $300,000 first and two weeks later he would get the rest. Version said he would see the man later and then left.

At about 11:30 p.m. the same day, while he was playing Ludo, 'Runkus' called him and told him that Version and the man "up deh so". Runkus pointed out a car to him, and in going to the car, the driver of the car said "A de youth this?" He said "yes". The driver said "Alright go round and come in a de car". He went into the car and sat at the left back seat. The driver drove him to 'Jungle' where his baby mother lived but she was not there. They then drove to Barbican. In Barbican, the driver pointed out a house to him and told him that it belongs to the Bernal family. The driver said "Brian Bernal a try fi f . . . him but in spite a that him a try fi the two a them." He then drove to Shortwood football field, stopped the car, and told him to go and look at the field but he must pay attention to the big tree because most Sundays that is where Darren Bernal, 'Tuber' and himself smoke after football game. They then drove to Tredegar Park. Version had been in the car with them all the time. The driver left them at 1:30 a.m. Wednesday 15th October 1997. Before doing so, he told Version to make his brother trim Orr.

About 3:45 a.m. the same morning (15th October 1997), the driver returned and picked up Version and himself, and they left for Manchester.

They arrived at Mile Gully Police Station at about 6.00 a.m. but before they got there the driver asked him "if the Police ask you if you know Christopher Moore what you tell them". He answered "No". The driver then touched his chest and said "A mi name Christopher Moore."

On arrival at the station, he saw a policeman sitting on a chair on the verandah. Orr thereafter described the driver of the car as Christopher Moore. He said Christopher Moore got out of the car and said to the policeman, "See the man yah and pointed at me." The policeman and Christopher spoke for almost 15 minutes, after which they came into the car and drive to a house near to a school. Christopher and the policeman left Version and himself in the car at this house, and went in another car and drove away. They returned about one and half hours later. Christopher went back into the car, and leaving the policeman at that house they drove to another house where Christopher got out of the car and knocked on a side door. A man came out to him and said "Come in". They all went into the house where they were invited to sit around a table. Christopher pointed out Orr to the man and said, "This is the man weh a go do the job." The man and Christopher then "went over a statement which I should give consent to." Christopher then dictated a statement to him, which he wrote down. The man then read over the statement to Orr and he signed it several times. Orr asked the "man who wrote the statement" his name and he said "Thompson". He later in conversation learnt that Thompson was a policeman

stationed at the Mile Gully Police Station. At this house he was given $300,000 all in five hundred dollar notes. He took out $1,000 and gave Version $299,000.00 and told him to give it to Runkus who would then give to it to his (Orr's) sister.

Before they left the house Thompson telephoned a man and asked him to witness the statement that Christopher Moore had dictated and that Orr had signed.

Mr. Thompson thereafter drove him to the Mandeville Court House. On the way Thompson asked him how much money the guy is paying him and he told him $700,000.00. Thompson told him to plead guilty and don't say anything. On arrival at the Court House, Thompson took him downstairs and gave the policeman who he had met at Mile Gully Police Station, the statement that Christopher had dictated, for him (the policeman) to sign as a witness. The policeman signed it.

He was taken into the courtroom by Thompson near to lunch time. He was taken back in the afternoon. The policeman Thompson spoke to a lawyer, Mr. Godfrey. He pleaded guilty to possession of ganja and dealing in ganja. Thompson had told him on the way to Court that he should plead guilty "for having one pound of ganja." He further pleaded guilty "for possession of ganja, dealing in ganja and attempting to export ganja" – this he said resulted from the statement Christopher Moore dictated and that he had signed. The lawyer Mr. Godfrey objected, and the case was put for mention the following day. On Thursday the 16th October 1997, he was again taken to Court where he pleaded guilty "on all five charges" and was

sentenced to a fine of $1,600.00 or 3 months hard labour for possession of ganja, $1,600.00 for dealing in ganja and 9 months for the other charges.

Moore had told him before leaving Thompson's house that Thompson would take care of everything including the lawyer and the fine he should pay. He then described the policeman he met at Mile Gully Police Station.

The statement Orr spoke of in his statement (Exhibit 24) was tendered in evidence as Exhibit 4. It relates a story of a conspiracy between Darren Bernal and the appellant Orr to export ganja. He (Orr) spoke of talking with Darren about Darren taking "weed" to the United States of America. He asked Darren how he going take it – "if it nuh risky" Darren told him to remember "him no get check". Darren said they could put it among the juice that his brother asked him to "carry up". Orr said he told him he could put at least a pound in each tin and Darren said it was 4 cases of pineapple juice he was planning to "carry up" Orr took on the task of getting the ganja put in the tins. He took four days "to deal with it". The morning when Darren was to leave he called him and said it is off because his brother and a friend gone to buy the juice. Later same day Darren called again and said "we lucky cause him miss the flight". They arranged for 1.00 a.m. the same night and Darren told him how to tape the four boxes to make two pieces "so dem favour de real juice dem. In all "a ninety-six (96) tins wid ninety-six (96) pounds a weed". Then he continues:

> "One o'clock the same night mi tek a taxi to Barbican and go a di address wey him give me. Me see Darren stand up a de gate a wait pon me. Me give him the two (2) boxes dem wid de weed and tek de two (2) boxes wid the juice. We lick fist and

> me left. Di next day me hear say Darren and him Bredda get bite at the airport.
>
> From that time Darren nuh check me and me lose everything and him get off.
>
> Although the two man dem nuh know nutten bout it dem gone a prison already. So you could'nt give me a chance boss."

This is the statement Orr alleges in his statement that was dictated by Moore to Thompson, who wrote it and had Orr sign it.

In so far as the case against Orr is concerned, his statement is a clear and unambiguous confession of his participation in a conspiracy in which he claimed liability for offences for which others had already been convicted. He did so for monetary reward which according to his statement ranged from $700,000 to $1,000,000 - $300,000 of which he got as an advance. He knew that he was being asked to enter pleas of guilty for offences which he did not commit, but nevertheless did so to facilitate the ultimate intention of the conspirators i.e. in some way to affect the recorded convictions against two other persons. Significantly, the conspiracy also included the alleged "caution statement" in which he confesses to the crimes, and specifically declares the innocence of the persons convicted. That certainly would "cast doubt on the validity of the convictions" of those two persons, and by necessity at least cause some judicial enquiry into those convictions. The appeal of Orr is devoid of merit and I would accordingly dismiss it.

The appeal of Norma Von Cork

I turn now to the appeal by the appellant Von Cork. Counsel for the appellant was very critical of the learned Resident Magistrate's finding in a

case in which he strongly argued, the major witness against the appellant Von Cork was severely destroyed in cross-examination and was thereafter left without credibility.

I have already outlined the main areas of the evidence of Cons. McLean which affects this appellant. After examination-in-chief the following evidence stood against her:

1. She asked McLean to find a policeman to do her friend a favour. This was sometime in 1997. McLean asked appellant Thompson if he would do the Judge a favour and he said yes. McLean reported to the appellant that Thompson would do the favour. She asked if she could give the friend his telephone number and he said yes. On a morning in October between the 10th and 12th October at about 2:30 – 3:00 a.m. McLean received a call. It was a male voice. The person identified himself as the Judge's friend. He called the Judge and told her that someone had just telephoned him and said he was the Judge's friend. She told him he could talk to the person because she had just spoken to him.

2. McLean sees Moore at Von Cork's house on the morning of the 14th October (Tuesday). When he got to the house he saw both Moore and Von Cork sitting beside each other at the dining table. Moore was dictating as she wrote. She told McLean she wanted him to do something for her. She wrote on about 3 ½ sheets of foolscap paper, after which the Judge and himself left for the Spaldings Court. They returned at about 1:30 p.m. when McLean sees Moore sitting on the bed in the bedroom. The appellant Von Cork gave him the four foolscap sheets of paper and asked him to photocopy them.

   The appellant Moore instructed him to take them to him at the Shopping Centre. The copying took longer than expected and when

he got to the Shopping Centre Moore was not there. He drove back to the Judge's home and she told him Moore had just left. He went back to the Shopping Centre – saw Moore and handed him the documents. Moore returned one copy to him and asked him to give it to the appellant Von Cork. This he did.

3. On the morning that the appellant Orr was taken to Court, the appellant Von Cork was presiding as Resident Magistrate. Cons. McLean went to speak with her while she was on the bench. She asked him if the appellant Cons. Thompson had brought in a man. He told her "yes". She asked McLean to show her the man and to tell her what type of clothes he was wearing. He did so. She then asked if the appellant Thompson had given him a statement to witness. He told her "no". She told the witness that appellant Thompson was going to give him a statement to 'witness' and he should go and witness it. The witness went into the Court's office where the appellant Thompson gave him some statements to sign. He signed them, gave them back to Thompson, and then went back into Court. One of the statements was identified as a "caution statement" given by Orr.

4. When the appellant Orr was called, and pleaded, he pleaded guilty, not only to the offences that he was alleged to have committed during the early morning of the same day, but to three other offences, possession of, and dealing with ganja, and conspiracy to export ganja, committed in the parish of Kingston in 1994. Attorney-at-law Mr. Godfrey objected to his plea in respect of those offences and questioned the jurisdiction of the presiding judge. The pleas in respect of the recent offences were accepted, and the other cases were adjourned to the following day for mention. At the adjournment the witness McLean went into the Judge's Chambers. There he alleged the appellant Von Cork said to him "All that Mr. Godfrey ah sey or do is nine months he going to get". She told him that he should go and tell Orr

that when he comes back in the morning and Mr. Godfrey is insisting that he should plead not guilty to the conspiracy charge he should tell Mr. Godfrey that he never had any money to pay him so he never want him to represent him. On the following day Orr was again called before the Court, pleaded guilty to all the offences and was sentenced. Significantly, he was sentenced to nine months imprisonment in respect of the 1994 offences.

Miss Yvonne Brown, the Clerk of Courts, and her Deputy who took over the case, because of Brown's illness, both testified that there were no statements on the file at the time the guilty pleas were taken. The appellant Thompson was not present in Court, and consequently no facts or the circumstances surrounding the offences were presented to the appellant Von Cork, the presiding judge. It is a provision of Statute that an application for an order for indictment must be made to a Resident Magistrate so that the Resident Magistrate, can be satisfied on the facts outlined, that he/she should make the order for indictment. No such procedure took place in this matter, although the appellant Von Cork had at that time, years of experience as a Resident Magistrate.

The appellant Orr was sentenced without the benefit of any evidence as to his antecedents.

In addition, the point of lack of jurisdiction was correct in so far as it related to the trial of the summary offences. Whereas on a charge for an indictable offence, an accused can be tried in the parish in which he is in custody, this is not so in respect of summary offences. The appellant Von Cork, therefore had no jurisdiction to deal with the 1994 offences of possession of and dealing in ganja. Again, as a Resident Magistrate of experience the appellant ought to have known that, and her mind ought to have been addressed to that, given the fact that the question of her jurisdiction was raised.

5. On the 16th October 1997 after the Court was adjourned, the witness McLean spoke with the appellant in her Chambers. She told him to make "the man" pay him. He said to her, "How me fi make de man pay me and me nuh know him." In response, she said when she went to Kingston she will collect – when she goes to Kingston "she will collect the money and bring to me."

6. On the Friday of the same week, the witness McLean was driving the appellant Von Cork to a party, when on reaching the intersection of New Green Main Road and Bonitto Crescent, she told him to stop the car. She came out and told him to follow her down the road. She said she was afraid they "bugged" the car. Then she said to him, 'Mr. McLean once Orr goes to prison is a must that Christopher and Bernal have to get off the trial.'

7. On the 28th October 1997, the witness McLean was taken into custody in relation to this offence. He was held at the Porus Police Station. While there, he was visited by members of the staff of the Courts office. At the time the members of staff were visiting the appellant Von Cork arrived. The witness heard her say to the staff members, "I never knew you were coming down here, if I knew I would give you a ride." At the kindness of the Inspector of Police, the appellant Von Cork was allowed to visit with the witness in the privacy of the Inpsector's office. When they were in the office Von Cork said to the witness concerning the staff members, "Mr. McLean if I knew they were coming I would not come and make them see me." The witness then said to her, "Judge you see what you put me in a and mi nuh know nothing bout it. He started to cry saying, Oh God judge me not even get cent and mi nuh have no money fe pay me lawyer." She told him she would pay the lawyer. Then she told him that the boy's father had money and would pay any money for the boy to get off. She knew his parents good, good. The boy's mother was in a Club

> she (Von Cork) was in charge of in Kingston and the boy's father knew everyone at DPP."

The evidence outlined above, if believed would certainly show an inter-relationship between the appellant Moore and the appellant Von Cork, as also a coming together of the minds of Moore the witness McLean, and herself. The evidence demonstrated that she had intimate knowledge of the conspiracy to have Orr plead guilty for an offence he did not commit for the purpose of affecting the already recorded convictions of Brian Bernal and Christopher Moore. It also shows that she participated in the process of carrying out the object of the conspiracy. The statements she made to the witness McLean concerning the possibility of clearing Bernal or Moore, once Orr had gone to prison if she did make it, indicates that she had intimate knowledge of and was an active participant in the conspiracy. Added to this is the fact that her conduct of the case, when Orr was brought before her was inconsistent with the efficient, fair and correct exercise of jurisdiction in the Court. She had made up her mind to inflict punishment on Orr for the 1994 Kingston offences and insisted on doing so. Her statement to the witness that "no matter what Mr. Godfrey say," the appellant Orr would get nine (9) months demonstrates that she had more than a Magisterial interest in that case. Her attempt to have the witness advise the appellant Orr to dismiss his lawyer also indicates that she did not want to have any hurdles in the way.

It is also of great note that she made sure through the witness McLean that she would be dealing with the "correct" person, when she asked him to point out Orr and to describe his clothing.

In addition she obviously had intimate knowledge of what was happening in respect of the conspiracy because she it was who asked the witness McLean if the appellant Thompson had asked him to witness a statement, and in receiving a negative answer, sent him to do so. That statement it must be noted was tendered in evidence and was disclosed to be a "confession" by the appellant Orr in relation to the 1994 offences. This was a statement which sought to state that Brian Bernal and the appellant Moore were innocent of those charges as it was Darren Bernal and himself (Orr) who had committed them, to the ignorance of the former two gentlemen. Significantly, in this context, it should be noted, that Darren Bernal was acquitted of those charges and could not be tried again.

She was also concerned with the lack of payment to the witness McLean for his part in the transaction, making promises to collect the money for him when she went to Kingston. In addition, she also disclosed to the witness McLean her friendship with the family of the appellant Moore.

If this evidence stood the test of cross-examination and the witness was left with sufficient credibility after challenge was made then it follows that a case would have been made out. The appellants, and particularly counsel for the appellant Von Cork says the witness was so discredited by cross-examination, that no reasonable jury could act upon his evidence, and consequently the learned Resident Magistrate should have acceded to

the no case submission. The learned Resident Magistrate called upon all the appellants to answer the case for the prosecution, and all chose to remain silent. As the findings of the learned Resident Magistrate were strongly and severely challenged perhaps it would be a good starting point to look at how she dealt with the evidence. This must be done, however, against the background, that the learned Resident Magistrate saw and heard the witness and had opportunity to assess his demeanour, and to determine in all the circumstances, including any discrepancies whether he was telling the truth or not.

Also to be remembered is that this was a witness who was an admitted accomplice, and who admits that he made untruthful written statements for the purpose of the furtherance of the conspiracy.

The learned Resident Magistrate showed that she recognized this in her findings when she said:

> "The Crown called Mr. Ron McLean in support of its case. District Constable Ron McLean the Crown's Star witness:
>
> (1) is an accomplice
> (2) has been granted immunity from prosecution.
>
> Also his evidence has been undermined to some extent by discrepancies and 'I don't know' and lies.
>
> It is therefore very important that I scrutinize his evidence microscopically to see whether it is so bad that it falls on its own inanition and thus cannot be corroborated."

Then she set herself the test posited by Lord Hailsham in ***Reg. V. Kilbourne*** [1973] A.C. 729 at 746:

> "If a witness testimony falls on its own inanition it is not revived or resurrected by the presence of corroborative evidence."

Having stated the principle the learned Resident Magistrate asked herself the question:

> "What is Ron McLean's evidence and how has it withstood the assault of cross-examination?"

Thereafter the learned Resident Magistrate examines in detail, the discrepancies which arose in the cross-examination of the witness.

She first dealt with the telephone call he had received in the early morning. As we have seen in his examination-in-chief he testified that this occurred between the 10th and 12th of October. In cross-examination, as the learned Resident Magistrate recorded, he stated that if the 13th was a Monday then he would have received the call in the morning of the 14th. His explanation was that he had problems with dates. Having noted that the witness appeared confused by the cross-examination the learned Resident Magistrate dealt with this as follows:

> "Is this uncertainty in his answers relating to the telephone call a result of faulty memory or is it that he is just being untruthful? I think it is the former."

The learned Resident Magistrate saw him testify and was in the best position to determine from the witness' demeanour whether he lied in this regard or although speaking truthfully, his memory failed him. In my view this Court cannot interfere – there being nothing to suggest that this decision of the learned Resident Magistrate is unreasonable.

The learned Resident Magistrate next dealt with the disclosed discrepancy that on some earlier occasion he had said that he saw the

appellant Moore in the bedroom of the appellant when he went to the latter's home in the morning of the 14th October. In his testimony, he stated that it was when he returned from Court at Spaldings at about 1:30 p.m. that he saw the appellant Moore in the bedroom. His previous statement was given to him and he was asked to read the following passage:

> "On arrival at house I saw a brown Toyota Corona parked behind Mrs. Von Cork Benz. Mrs. Von Cork came out and invited me to the direction of a bedroom and I saw the said man who drove the car to my house in dark glasses sitting down on Mrs. Von Cork's bed in her bedroom."

On being cross-examined as to this, he said it was false when he told the police in his statement that he (Moore) was sitting in the bedroom before he left for Spaldings and the truth is that they were sitting around the living room table before he left for Spaldings.

The learned Resident Magistrate also recalled that the witness was challenged with regards to his having said in an earlier statement to the police, that it was Mrs. Von Cork who gave him the statements to copy whereas in evidence he said it was Moore. It appears however that it was the other way around because in evidence the witness did say that it was the appellant Von Cork who gave him the statements. However, the learned Resident Magistrate also points to the fact that at one point he told the Court that the appellant Von Cork passed them to Moore who handed them to him. In respect of these two discrepancies the learned Resident Magistrate asked herself the following:

> "Are these discrepancies material? It is immaterial whether it was handed to him by Mr. Moore or Mrs. Von Cork. It is also immaterial whether he was

> around the dining room table or in the bedroom. The issue is whether I believe he was there."

In my view the learned Resident Magistrate was quite correct in not treating these so-called discrepancies as material. In recognizing the real issue that is to say whether the appellant Moore was present at Mrs. Von Cork's house, the learned Resident Magistrate appears to have resolved it in the witness' favour inspite of the discrepancies which she correctly found could not affect her conclusion in this regard. In short, it really didn't matter whether it was in the morning that the appellant Moore was seen in the bedroom or in the afternoon on their return from the Spaldings Court. Nor did it matter whether the sheets of foolscap paper were handed to the witness by Mr. Moore or Mrs. Von Cork. It is significant also that an independent witness also testified that the witness McLean did come to her office on that day and with her consent, copied documents.

The learned Resident Magistrate next examined the discrepancy which by estimate of time had the appellant Mrs. Von Cork arriving at Court in Spaldings at 11:00 a.m. Mr. Insang, the Clerk of Courts testified that on that morning the Court began at 10:50 a.m. Again, the learned Resident Magistrate found this to be immaterial. Before us, counsel for the appellant argued that this was a most material discrepancy. The witness had said that he arrived at Von Cork's home at 10:15 a.m. and that the dictation by Moore to Mrs. Von Cork who wrote on the foolscap paper took about 25 minutes which at conclusion would put the time at 10:40 a.m. Counsel contended it would only have been possible for the Court to have commenced at 10:50 a.m. if no writing had taken place at Mrs. Von Cork's home – that is – that

the estimated time (25 minutes) would have been used in travelling to Spaldings – thereby allowing the appellant Von Cork to arrive for the commencement of the Court at 10:50 a.m. Again, counsel put this forward as material which ironically "cast doubt" on the veracity of the witness' evidence. The learned Resident Magistrate said no. She found that the discrepancy was immaterial.

When one deals with estimates of the duration of time it is difficult to assess whether the differing time factors can really be classified as discrepancies, except of course where the discrepancy relates to long periods of time. All the times given by the witness related to times and duration of time as he remembered them and were not divulged from accurately recorded times. In those circumstances given the difference of 10 minutes between the time the witness said he arrived at Spaldings (11.00 a.m.) and the time the Clerk says the Court commenced (10:50 a.m.), the learned Resident Magistrate, having seen the witness, had the opportunity to determine whether that discrepancy was in fact immaterial, and she found so. On a clear objective assessment of the evidence as recorded, I would conclude that the learned Resident Magistrate was also correct in this finding.

The learned Resident Magistrate thereafter addressed a segment of the evidence which has formed the foundation for the strongest challenge to the credibility of the witness. He (the witness) testified to an event which he alleged occurred at the Porus Resident Magistrate's Court in October 1997 on the "Monday after the 16th October." He alleged that the appellant Von Cork had asked him on that day at the Porus Court to telephone the office of the

Chief Justice. He attempted to call that number but it was continuously busy. On giving the appellant Von Cork this information, she gave him another number asking him to call Mrs. Cover, the secretary to the Chief Justice. He got through to Mrs. Cover, spoke to her, and went back to Mrs. Von Cork and spoke with her. She told him then that she would go to Kingston after Court to see the Chief Justice. On the following Tuesday there was no Court and so he saw her on the Wednesday at the Mandeville Court. She told him then that she had spoken to the Chief Justice who said "Me should just cool myself because dem just have fe go through the motion."

The evidence later revealed that there was no Court held on that "Monday after the 16th" as that was National Heroes Day, a public holiday. Consequently, the Court did not sit in Porus until the following Monday the 27th. The learned Resident Magistrate dealt with this in two places in her Reasons. Firstly, she addressed it thus:

> "He told the Court that it was the following Monday they went to Porus. Court is held at Porus every third Monday but Monday the 20th October was a public holiday so it was not held until the 27th October, the following Monday. Under cross-examination he insisted that it was the 20th October. Is it that he was mistaken. Or was he concocting the story?"

The learned Resident Magistrate gave no answer to this question at that stage. In reviewing the evidence she again returned to this issue when she states:

> "Could Mr. McLean have been confused as to the date? He told this Court that he has problems with dates. Is this understandable considering the dullard he appears to be, or is he deliberately lying? He told

> the court she told him sometime after that the Chief Justice said, "Mi must just cool miself."

Again the learned Resident Magistrate offers no express answer to her own question and it can only be assumed from her final conclusion that she answered these questions in favour of the witness.

Mr. Henriques, Q.C. very strongly submitted that if nothing else did, this particular piece of evidence demonstrates that this witness is without credibility. He pointed to the witness' insistence that this incident in fact took place on the 20th October. He demonstrated that it could not have taken place on the following Monday, the 27th October, as the witness had been taken into custody on the 25th October. Mr. Henriques Q.C, mounted this argument, apparently based on an apparent error which found its way into the learned Resident Magistrate's findings where she stated that the witness had been taken into custody on the 25th October. This is incorrect. The evidence as the Senior Deputy Director of Public Prosecutions Mr. Sykes for the Crown showed in his reply is that he was taken into custody on the 28th October, and so could have been at Court in Porus on the 27th October. The learned Resident Magistrate's query as to whether he might have been mistaken, rather than deliberately lying, could therefore be answered in the way she has by implication answered it. Although the following was not canvassed in argument before us, it is significant that the appellant's Orr's statement, which disclosed the plot, was not given to Sgt. Grant until the 24th October. Would it then be more accurate given the contact with the Chief Justice that such a contact would not become necessary until after the 24th October. This in my view would give some

credence to the conclusion that the witness was mistaken rather than deliberately lying.

This, however, still left the allegation by the witness that he spoke to the appellant Von Cork on the following Wednesday in Mandeville. Had it really been the 27th October when he allegedly made the call to the office of the Chief Justice then on the Wednesday, he would have been in custody, as he was later taken into custody on the 28th October. Noticeably, he had begun to say in his evidence that this conversation took place on the Tuesday but thereafter changed to saying it was on the Wednesday. In any event, having regard to the totality of all the other evidence in the case, I would conclude that given the learned Resident Magistrate's detailed examination of the witness' evidence, in all its aspects, this is not evidence that is so significant as to interfere with her findings.

Another discrepancy arose in the cross-examination of the witness. In evidence, in cross-examination, he stated that he knew a man named Michael on the premises where the appellant Von Cork lived. He never knew what Michael did, but admitted seeing him there about four times. He denied knowing that Michael was the caretaker. His statement was put to him in which it was recorded that he said in a narrative "Michael who lives there". He denied that he told the police that Michael lived there. Again the learned Resident Magistrate treated this evidence as immaterial. I agree.

Discrepancies were also disclosed between what he had said in statements while he was an accused, and what he said in his evidence.

Significantly, no challege was made, (except to whether Michael lived on the appellant's premises), in respect of any inconsistencies between the statement he gave on the 13th January 1998 when he was being considered as a witness for the Crown, and his evidence. The major discrepancy, on which counsel focused, was in relation to whether the witness had taken his wife to work, and his child to school on the morning of the 15th October. In his earlier statement given in November while he was in custody, and arrested on the charge of conspiracy, he stated that he had left Thompson with the others, Ellis, Orr and Moore at the station and had gone to take his wife to work and his son to school. This is what he said in his statement of November 5, 1997:

> "Mi left and go about mi business the morning that is the 15th October. I saw the said Toyota car drive inna Cottage Police Station at about 6:30 inna the morning. The same man weh mi see inna judge bedroom him and two men. Mr. Thompson talk to them. Mr. Thompson and the two men go inna the CIB office and Mr. Thompson tek up some foolscap. All a we come out, Mr. Thompson, the two youth and the same man weh mi see inna judge house go up the stairs. Them up deh fe sometime, time a run out pon me fe go meet the judge so me drive out mi car and go home. Carry mi daughter go school, come back and carry mi missis go work and mi go work. The judge come, sametime court start going up to 11 o'clock."

The learned Resident Magistrate then records that the witness admitted in evidence that that statement was not true. He had told the police that to protect the Judge.

There was also his contradictions as to whether he went upstairs when the men were there. In his statement to the police he never stated that he

went upstairs. In his examination-in-chief he did not speak to going upstairs but in cross-examination he admitted to going upstairs for 5 minutes.

In so far as all those discrepancies were concerned, the learned Resident Magistrate then concludes:

> "Are these discrepancies material? Do they affect the import of the evidence which essentially is that these men with his knowledge and assistance at the time were party to an agreement to have the accused Orr plead guilty to the offences? I do not think they are material discrepancies nor do I think they affect the import of his evidence.
>
> Are these discrepancies understandable in the light of what the crown is alleging, that is, Mr. Ron McLean was part of the conspiracy and so he gave false stories to the police. Firstly in furtherance of the conspiracy, in his statement dated 23rd October 1997 in which he told them he and Constable Thompson arrested Mr. Orr. Then his statement and question and answer dated 28th October 1997 in which he repeated the story. Later after his arrest and detention, and after he was identified, he gave false stories to conceal his role in the conspiracy and shield himself, hence his statements dated the 5th and 7th of November in which he told the police that he never went upstairs but left the men at the station. Is it that he was still trying to shield himself and minimize his role (the conspiracy) when he said in his evidence that he only spent five minutes upstairs, or is it that he is a compulsive liar? I think it is the former.

In my judgment, the above is an analysis and assessment of the evidence, which the learned Resident Magistrate as an arbiter of the facts was entitled to make. She recognized that the witness, being an accomplice had lied, and admitted so doing, in furtherance of the conspiracy. In respect of the November statements she seemed to have accepted that at that point he was shielding himself as he was then an accused. Hence his stating that

he left the men at the station and went to take his wife to work and his child to school. This is reasoning and finding with which this Court cannot interfere.

In the end, the learned Resident Magistrate, despite concluding that the witness had spoken several untruths, and in many instances, not remembering or not knowing things about which he was asked, still concluded that he was a witness whose evidence could still be acted upon. The learned Resident Magistrate then looked to other evidence to see if there was any support for the witness' testimony. She found it in the following areas:

> (1) The occurrence in Court and the manner in which it was dealt with. There was evidence from the Clerk of Courts in respect of the appellant Orr pleading guilty in spite of his attorney's advice. That there was a point made in respect of jurisdiction as a result of which the case was adjourned to the following day.
>
> (2) That the appellant Orr pleaded guilty to 1994 offences concerning Darren Bernal and was sentenced to nine (9) months imprisonment.
>
> (3) Inspector Findley agreed with Mr. McLean that the appellant Von Cork visited him at the Station while he was in custody and was given the privacy of his office to speak with the witness. Also that the staff members from the Court were there at the time the appellant visited. These staff members also supported the latter.

The learned Resident Magistrate thereafter reviewed the evidence in the case which has been outlined earlier in this judgment and on the basis of that evidence came to a conclusion of guilt. In doing so she expressed her

opinion of the witness as follows "this witness having seen him and observed him in the box is far from being bright."

In my view, the learned Resident Magistrate came to her conclusion after a careful and detailed analysis of the evidence against the appellant Von Cork, and cognizant of the dangers of acting upon the evidence of an accomplice who was an admitted liar, and in the end came to a finding based on the evidence she accepted. It is not for me to say whether I would have convicted on that evidence but to say firstly that the evidence was sufficient for the appellant to be called upon and having done so the learned Resident Magistrate came to her finding based on her own assessment of the demeanour of the witness and the evidence as a whole. Having concluded that that finding is reasonable there can be no interference with the learned Resident Magistrate's conclusion of guilt. I would dismiss the appeal of the appellant Von Cork.

The appeal of Maurice Thompson

The evidence from the witness McLean established that it was this appellant whom he approached and who agreed to do the favour for "a friend" of the appellant Von Cork. McLean also speaks to Thompson being met at the Cottage Police Station by the appellants Moore and Orr as also Ellis, and having engaged in conversation with them. He went upstairs with them with sheets of foolscap paper. The witness also testified that the allegations by the appellant that while on patrol with him (McLean) he accosted, searched and found ganja in possession of Orr, were in fact false. They were on patrol together, but they did not accost Orr, and take him into

custody. The statement he signed in which he states that the appellant Orr, was found in possession of ganja, was false. He had been given that statement by Thompson and requested to transcribe it in his own handwriting and sign it. This he did. McLean also averred that he did not witness the giving of the caution statement by Orr in which Orr confessed to the crime. He was given the statement by Thompson for the purpose only of "witnessing" it. Thompson presented the statement as a caution statement which he had taken from Orr. This statement was very important in the conspiracy, as it sought to make the appellant Orr confess to the crimes for which Brian Bernal and the appellant Moore had been convicted and to state specifically that they knew nothing about them.

The evidence was that it was Thompson who presented that statement and alleged it to be a genuine caution statement. It was he also who took the appellant Orr to Court, and who laid the charges against him not only for the alleged offences supposedly committed in the early morning of the 15th October 1997, but also for the 1994 offences committed in Kingston. In that regard, as the learned Resident Magistrate noted in her findings, the entry in the Station Diary at the Police Station in respect of the offences on the 15th October, 1997 were not entered by Thompson until the 16th October, 1997 the day after he had been taken to Court. This Sgt. Allyson testified was not in keeping with the rules.

When asked by Det. Allyson why the entry had not been made on the 15th October, 1997 he told him that he was in a hurry and he believed it could be made the following day. Asked by Sgt. Allyson why he did not

have a senior officer, as was the practice, take the caution statement, the appellant Thompson said he collected it himself and it was on the case file. This conversation took place on the 17th October 1997. The evidence of course revealed that at least up until the 16th October, 1997 when Orr was before the Court, there were no statements on the file.

The learned Resident Magistrate in her findings accepted Sgt. Allyson as a witness of truth and accepted his evidence. Indeed, the learned Resident Magistrate found as fact all of the evidence summarized heretofore, and specifically in relation to the evidence of McLean found as follows:

> "I find there was no genuine arrest and I accept Mr. McLean's evidence when he told the Court that Mr. Orr was not arrested at Mile Gully and that he was given his statements by Cons. Thompson to transcribe and that he never witnessed any statement written by Mr. Orr on the 15th October. I also accept his evidence that Mr. Orr was taken to Cottage Police Station that morning by Mr. Moore."

Also of importance is the fact that the appellant Thompson took the appellant Orr directly to the court that morning. In normal circumstances, he would have been required to take him first to the Police Station, have the matter entered in the Station Diary and thereafter have the file vetted by his superior officer Sgt. Allyson before going to Court. As Sgt. Allyson says, Orr could have been offered bail to attend Court on a subsequent date.

This led the learned Resident Magistrate to ask in her findings:

> "Why did he (Cons. Thompson) rush such an important case to the Court that morning? The unchallenged evidence is that he told Sgt. Vaughn that Orr was connected to Bernal and Moore case."

The learned Resident Magistrate was entitled to put some weight on the above stated conduct of Thompson, as a confession to offences committed in 1994 in another parish, and which exonerated two persons who were already convicted for those offences, ought to have aroused in a police officer, a curiosity as to whether the matter ought not to be further, properly and thoroughly investigated before, as the learned Resident Magistrate said, "rushing" to Court.

In conclusion, I need only state that there was ample and sufficient evidence to support the learned Resident Magistrate's decision that the appellant was a participant in the conspiracy, and consequently there is no reason to interfere.

Appeal of Christopher Moore

In considering the evidence against the appellant Moore, the learned Resident Magistrate explicitly stated that she recognized that the case against him rested entirely on the credibility of the witness McLean. What was that evidence?

It began with McLean's seeing the appellant Moore at the appellant Von Cork's home on the 14th October 1997 and observing him dictating to Von Cork as she wrote on sheets of foolscap paper. Whatever was the content of that statement, both appellants were desirous of having it copied, with a copy being returned to Von Cork. Before this, Von Cork had asked McLean to ask someone to do her friend a favour. Thompson agreed to do that favour. Then in the early morning of the 15th October, 1997, Moore drives the appellant Orr, and Ellis into the police station where all three met

with Thompson. Significantly, when they went upstairs, Thompson took foolscap sheets of paper with him. Later that morning McLean leaves the station in the car which the appellant Moore drove. In the car also were Orr and Ellis, whom they left in Moore's car and went in McLean's car to the home of Von Cork where Moore entered and stayed for about an hour and a half. On their return to McLean's home, Moore went back into his car and left with Orr and Ellis. The next time McLean sees Orr, was at the Mandeville Court house, in the custody of the appellant Thompson and as an accused. It is reasonable to infer that sometime between leaving McLean and the time McLean saw Orr in Court, the appellant Moore must have made contact with Thompson.

The above evidence as was found to be factual by the learned Resident Magistrate portrays a scenario, which reveals by reasonable inference that the "friend" of whom Mrs. Von Cork spoke, and who needed the favour was the appellant Moore. The inference can be drawn from the fact that soon after Thompson agrees to do the favour, he is seen in particular circumstances with the appellant Moore, and the appellant Orr, with paper in his hand, suggesting that statements would be taken. Soon after a statement by Orr is produced declaring the innocence of Moore in respect of offences committed in 1994 in Kingston for which Moore had been convicted. This statement of course, is produced by the appellant Thompson as a caution statement. In addition Thompson takes Orr to Court on charges including the Kingston charges and Orr pleads guilty. McLean who was obviously privy to all of this, now declares in his latest statement and in

evidence that the whole episode concerning the arrest of Orr and his confession to the 1994 Kingston offences is false.

The learned Resident Magistrate having found that McLean is a witness upon whom she could rely, lays bare the conspiracy as charged on the indictment with the appellant Moore being the pivot and architect of it all.

This was ample evidence upon which the learned Resident Magistrate could have found the appellant Moore guilty, and I therefore see no reason to interfere. I would also dismiss his appeal.

It is appropriate to set out hereunder the words of the learned Resident Magistrate at the conclusion of her reasons - words with which I can find no fault, having regard to the evidence disclosed in the transcript, and in the knowledge that it was she who saw and heard the witnesses and who thereby had the opportunity to assess their demeanour. She stated thus:

> "I therefore find that there was in fact a plan to have Mr. Orr enter a false plea of guilty before the number one accused Mrs. Norma Von Cork for the offence for which Brian Bernal and Christopher Moore were already convicted by his Honour Mr. M. Dukharan.
>
> I find the intention was to cast doubt on the aforesaid convictions with a view to exonerating the defendant Christopher Moore.
>
> I find that Mr. McLean's evidence despite the discrepancies was essentially true could be relied on as to the thrust of the conspiracy and he was supported by an abundance of evidence both as to objective facts and independent evidence which make his testimony quite reliable."

This was a case in which the appellants offered no evidence nor any account of their own in defence of the charges. Significantly, the witness McLean was never directly challenged in relation to the conversations he had with the appellant Von Cork. Counsel was content to challenge his credibility by testing his evidence on other periphery matters such as whether he first saw the appellant Moore in the bedroom or not, and upon his previous statements given at the time he was in custody and an accused, whom the learned Resident Magistrate found was, at that time, protecting himself and the "Judge". This was indeed a case which depended on whether the evidence proffered by the Crown, could be accepted by the learned Resident Magistrate in the context of an accomplice witness. The learned Resident Magistrate having analysed and examined the evidence in detail, came to her conclusion on the background of having had the opportunity of assessing the demeanour of the witness. For the reasons heretofore advanced I find no reason to interfere with her findings of fact and consequently in my judgment the appeals of all the appellants ought to be dismissed.

LANGRIN J.A.:

The four appellants in this case were convicted before Her Honour Mrs. Almarie Haynes, Resident Magistrate for the Corporate Area on an indictment in the following terms: "Conspiracy to pervert the course of public justice".

The particulars of the offence were that the appellants, and one named Clive Ellis who had not filed an appeal, "on divers days between the 1st day of September, 1997, and the 31st day of October, 1997 in the parish of Manchester conspired together and with Ron McLean, and other persons to pervert the course of justice by causing the said Radcliffe Orr to enter a false plea of guilty to the charges of possession of ganja, dealing in ganja, attempting to export ganja and conspiracy to export in order to cast doubt on the validity of the convictions of Brian Bernal and the said Christopher Moore, intending thereby to pervert the course of public justice.

The circumstances which gave rise to the conspiracy are that Christopher Moore and Brian Bernal were convicted by His Honour Mr. Dukharan for a number of offences committed in breach of the Dangerous Drugs Act. The Court of Appeal dismissed the appeal. They further appealed to the Privy Council. The appeal of Moore was dismissed by the Privy Council and the appeal of Bernal was remitted to the Court of Appeal with a direction that the Court of Appeal should

hear an application for fresh evidence to be adduced. The application to adduce fresh evidence was heard on the 25th January, 1996 in the Court of Appeal and the application was dismissed by the Court.

In May, 1997 the Privy Council heard that appeal. The Court of Appeal received the Order in Council in June, 1997. Pursuant to that Order an application on motion for the re-listing to adduce fresh evidence was heard in the Court of Appeal on 15th, 16th and 17th October, 1997 when the application was dismissed.

Events were set in motion which were designed to cast doubt on the validity of the conviction of Brian Bernal and Christopher Moore.

The picture of conspiracy which the record discloses is that the appellants procured the assistance of Ron McLean who was the orderly assigned to the 1st appellant, she being a Resident Magistrate in the parish of Manchester. The nature of the assistance is that the 1st appellant wanted to know if McLean knew a Police Officer who could do something for a friend of hers. The person found was Constable Morris Thompson, a member of the Constabulary Force in the parish of Manchester. Essentially, the plan was that an individual should be found who would be arrested and charged for the offences for which Brian Bernal and Christopher Moore were previously convicted. The pretext for the charge would be that the person would be found in possession of

ganja and that would form the basis on which he would be taken into custody.

A summary of the prosecution's case is that Orr was a party to a plan to plead guilty to charges of possession, dealing in and attempting to export ganja which were already adjudicated upon and which went on appeal to the Judicial Committee of the Privy Council. Ellis participated in the conspiracy to accompany Orr to Manchester with full knowledge of what should happen on arrival in Manchester. He knew that Orr was to be taken before the Court to enter a plea in exchange for money. McLean and Thompson were the instruments by which Orr would be arrested thereby providing the opportunity for him to "confess" to his misdeed of three years ago. Finally for the plan to work there had to be a judge who would be prepared to accept the plea regardless of whether she had jurisdiction in law, thereby ensuring that the conviction was established. It is significant to note that at the time Orr appeared in court to plead guilty to the 1994 offences for which Bernal and Moore were convicted, the Court of Appeal was engaged in hearing the Motion to adduce fresh evidence in the Bernal case.

The first point that has been taken on behalf of the appellants is that the Indictment does not disclose an offence known to law because the offence of perverting the course of justice does not apply where the criminal case or civil action has been concluded. The argument

continues that the course of justice does not apply to any appellate proceedings because appellate courts are review courts which only determine whether the first instance court had done its work correctly. The appellants have also said that the exercise of discretionary powers under Section 29 of the Judicature (Appellate Jurisdiction) Act and similarly Section 90 of the Constitution do not constitute "course of justice" for an offence.

The appellants further submitted that for the purpose of the offence the course of justice begins with the filing of an originating document in the case of civil actions and the issue of process or the arrest and charge of the defendant in relation to criminal cases. The course of justice ends when the Court delivers judgment. This means in civil cases that the course of justice ends when the court awards the remedy that the plaintiff seeks and in criminal cases justice ends when there is a verdict of guilty and sentence is imposed.

Mr. Henriques Q.C. has cited numerous cases on behalf of the appellants which he says establish the above propositions. However, these cases only establish particular instances in which the act complained of has been held to be within the scope of the offence. The fact that all these cases have been concerned with acts done prior to conviction provides no basis for saying that the offence in question

applies only to first instance proceedings where the matter has already been concluded.

The critical issue is whether there is any good reason why the course of justice does not extend to appellate proceedings, or by necessary implication, a court of judicial review since these courts, by definition, review the decisions of inferior tribunals.

In the case of ***R v Rogerson*** [1992] LRC (Crim) 680, Mason C.J at page 684 (e) said:

> " The course of justice relevantly includes the proceedings of judicial tribunals. That is tribunals, having authority to determine the rights and obligations of parties and having a duty to act judicially".

Further, the following passage in the joint judgment of Brennan and Toohey, JJ at 687 (e – i) states:

> "Justice, as the law understands it, consists in the enjoyment of rights and the suffering of liabilities by persons who are subject to the law to an extent and in a manner which accords with the law applicable to the actual circumstances of the case. The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case: ***R v Todd*** [1957] SASR at 328. The course of justice is perverted, or obstructed, by impairing, or preventing the exercise of, the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in, or prevented from exercising, its capacity to do

> justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying, it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions. An act which has a tendency to effect any such impairment is the *actus reus* of an attempt to pervert the course of justice: It seems that the act, though otherwise lawful, may be unlawful by reason of the intent to pervert the course of justice: ***R v Kellett*** [1975] 3 All ER 468 at 481, [1976] QB 372 at 391. An act which effects any such impairment is the *actus reus* of a perversion of the course of justice. An agreement that an act be done which has such an effect and which is not otherwise justified in law is the *actus reus* of a conspiracy to pervert the course of justice. Each of these offences requires a specific intent. In the case of an attempt to pervert the course of justice, and in the case of perverting the course of justice, the intent which must accompany the relevant *actus reus* is that the course of justice should be perverted in one of the ways mentioned. To define the intent required in a case of a conspiracy to pervert the course of justice, the law of conspiracy must be examined."

In my view, it is clear that the capacity of an appellate court to declare and adjust the rights of persons must mean that appellate proceedings are a part of the "course of justice".

Any act which has a tendency to pervert or taint the appellate proceedings must fall within the offence of perverting the course of justice. It follows that the adducing of fresh evidence in the Court of

Appeal in the case relating to the conviction of Bernal and Moore was a proceeding in which the appellants could cast some doubt on the outcome, thereby perverting the course of justice.

I turn now to the point of whether the prosecution should have alleged and proved that the appellants did some further act to that in the Indictment and that this omission is fatal. The classic description of the crime of conspiracy at common law is that it consists of an agreement, to do an unlawful act or a lawful act by unlawful means. The agreement itself constitutes the offence. The mens rea of the offence is the intention to do the unlawful act while the *actus reus* is the fact of agreement. Where the Indictment charges a conspiracy the prosecution need not prove any further than the agreement. This proposition is supported by the judgment in ***R v Rogerson*** (supra) where the Court said at page 688 (f):

> "A conspiracy to pervert the course of justice may be entered into though no proceedings before or before any other competent judicial authority are then pending (see ***R v Sharpe***[1938] 1 All ER 48 at 51) or are even contemplated by anyone other than the conspirators. A coven of criminals who agree to commit a crime and to mislead the subsequent investigation so that an innocent person will be prosecuted for the crime to be committed are guilty not only of a conspiracy to commit the crime but also for a conspiracy to pervert the course of justice by inducing the institution of a false prosecution. At the time of such a conspiracy, no prosecution for the yet-to-be-committed crime could be pending and no prosecution for that crime

> would be contemplated by anyone other than the conspirators, yet the conspiracy to pervert the course of justice would be complete."

In my judgment what the indictment says and means is that the appellants all agreed to cast doubt on the validity of the convictions of Bernal and Moore which is not an intrinsically unlawful act. However, the means of casting doubt involved the commission of an unlawful act which was procuring a false plea by Radcliffe Orr. Hence there was no need for the indictment to allege any further conduct i.e. anything beyond the false plea. What is critical is the agreement, not the act done in pursuance of the agreement.

For the foregoing reasons I reject the submissions made on behalf of the appellants on the points dealing with the Indictment.

The case against the defendants largely depended on the evidence of District Constable Ron McLean an accomplice, on what he was alleged to have said and done. The evidence against them is clearly set out in the judgment of my brother, Forte P, It is therefore not necessary to repeat them here. In the course of the trial a number of inconsistencies developed in McLean's evidence and the defence stressed those discrepancies. A great deal was sought to be made in the appeal to this Court in relation to these discrepancies.

Essentially a determination on these points is for the Learned Resident Magistrate who heard the evidence, saw the witnesses and had

the benefit of counsel's speeches in her careful assessment of the evidence. In my judgment there is nothing of merit in these points.

The Learned Resident Magistrate in her findings at p. 486 of the record had this to say:

> "I find that Mr. McLean's evidence despite the discrepancies was essentially true could be relied on as to the thrust of the conspiracy and he was supported by an abundance of evidence both as to objective facts and independent evidence which make his testimony quite reliable".

I cannot leave this case without referring to the enormous industry and skill displayed by counsel on both sides in presenting the arguments.

For the reasons given by Forte, P and Panton J.A. I too would dismiss the appeal.

PANTON, J.A.

The appellants were convicted on April 28, 2000, in the Resident Magistrate's Court for the Corporate Area, of the offence of conspiracy to pervert the course of public justice. Her Honour Mrs. Almarie Haynes, Resident Magistrate, presided at the trial which commenced on May 3, 1999. Mrs. Von Cork and Messrs. Thompson and Orr were each sentenced to twelve months imprisonment at hard labour whereas the appellant Moore, who had been in custody for more than a year, was sentenced to ten days imprisonment at hard labour. These appellants were tried with one Clive Ellis who was also sentenced to twelve months imprisonment. His situation was somewhat different from the others as he was sentenced in absentia, he having chosen to abscond on July 26, 1999, while the trial was in progress.

The convictions recorded by the learned Resident Magistrate were based on her acceptance of the statement of the appellant Radcliffe Orr which was admitted in evidence as exhibit 24, as well as her acceptance of the evidence of the prosecution's main witness Ron McLean. Of course, the statement of Orr affected him and him alone. So far as McLean's evidence was concerned, the learned Resident Magistrate expressed herself thus near the end of her 45-page reasons for judgment:

> "I find that Mr. McLean's evidence, despite the discrepancies, was essentially true, could be relied on as to the thrust of the conspiracy and he was supported by an abundance of evidence both as to objective facts and independent evidence which make his testimony quite reliable".

This finding, as well as the others, came under vigorous challenge before us by Mr. R.N.A. Henriques, Q.C., on behalf of the appellants.

It should be noted that, apart from making no-case submissions, all the accused persons elected to remain silent at the end of the case for the prosecution. That means that the learned Resident Magistrate had only the prosecution's case for consideration. Having rejected the no-case submissions, she convicted the appellants.

The Prosecution's case

The particulars of offence alleged by the prosecution read thus:

> "Norma Von Cork, Christopher Moore, Morris Thompson, Radcliffe Orr and Clive Ellis on divers days between the 1st day of September, 1997 and the 31st day of October, 1997 in the parish of Manchester conspired together and with Ron McLean, and other persons to pervert the course of public justice by causing the said Radcliffe Orr to enter a false plea of guilty to the charges of possession of ganja, dealing in ganja, attempting to export ganja and conspiracy to export ganja in order to cast doubt on the validity of the convictions of Brian Bernal and the said Christopher Moore, intending thereby to pervert the course of public justice".

The prosecution's case goes back to April, 1994. During that month, the appellant Moore and Brian and Darren Bernal were arrested at the Norman Manley International Airport for breaches of the Dangerous Drugs Act. The accused were taken before the Kingston Resident Magistrate's Court sitting at Sutton Street, Kingston. They appeared on the 7th, 8th and 14th April, 1994, before the appellant Von Cork who was then a Resident Magistrate for Kingston. Eventually, the charges were tried by His Hon. Mr. Mahadev Dukharan (as he then was). Moore and Brian Bernal were convicted on March

29, 1995, while Darren Bernal had been earlier acquitted. The convictions recorded were for possession of ganja, taking steps preparatory to exporting and dealing in ganja. The ganja had been placed in 98 pineapple juice tins bearing the Grace label.

Moore and Brian Bernal appealed unsuccessfully to the Court of Appeal and to the Judicial Committee of the Privy Council. However, the Judicial Committee by an order dated May 28, 1997, had remitted for the consideration of the Court of Appeal an application to adduce fresh evidence which had been filed on January 25, 1996, but had been struck out by the Court of Appeal on January 26, 1996. The Judicial Committee's order was received by the Registrar of the Court of Appeal on June 25, 1997. Notice of the relisting of the notice of motion was filed on July 8, 1997, and the application was heard by the Court of Appeal on October 6, 7 and 8, 1997. On the last mentioned date the application was granted. Consequently, the Court of Appeal heard the fresh evidence on October 15, 16, and 17, 1997. On the latter date, the Court dismissed the application and ordered that the conviction and sentence were to stand.

During the month of September, 1997, that is, between the filing of the notice of the relisting of the notice of motion referred to above, and the hearing of the application in the Court of Appeal, the appellant Von Cork, who was then the Resident Magistrate for the parish of Manchester, made a significant request of her orderly, District Constable Ron McLean. The latter had been a district constable for ten years, and a judge's orderly for three years (page 52 of the record). However, he had been **her** orderly for only

about two months up to September, 1997(page 32 of the record). She asked him to look for a policeman at his station to do something for a friend of hers. The orderly complied with the request and spoke to the appellant Thompson who agreed, although the nature of what was to be done was communicated neither to McLean nor Thompson at that stage. McLean informed Von Cork of the fact that he had secured the services of Thompson. Thereupon, Von Cork inquired of McLean whether she was at liberty to pass his (McLean's) telephone number to her friend. McLean said yes. It happened that during the month of October, 1997, a male person called McLean on the telephone at his house one night between 2.30 and 3.00 a.m. McLean immediately called Von Cork at her residence and informed her of the telephone call he had received and that the man had said that he was her friend. She replied that he (McLean) could talk to the man as she had just spoken to him.

The next significant step in the prosecution's case was the communication of information to the appellant Orr that a man was offering One Million Dollars $1,000,000) for a man to appear in a Court, and to serve a year's imprisonment which would "work out" to be about eight months. Later, Orr was told that a man would give him $800,000 to do the job but the money was not to be lodged in a bank. Payments, he was told, would be in two instalments- $300,000 at first, and the balance two weeks later. Orr agreed to be a part of this plan. Orr, while in the company of two men, was driven to various points in the Corporate Area during the night of the said October 14 while certain personal arrangements and preparations were made

for him in view of his impending departure into confinement as a guest of the state. At about 3.45 a.m., he and the two other men left the Corporate Area for the parish of Manchester. They arrived at Mile Gully Police Station at about 6 a.m. There, the driver of the vehicle and a policeman spoke for about 15 minutes. They made stops at two houses. At the final stop, the driver dictated a statement to the policeman who wrote it down and read it over. Orr signed the statement. At this house, he was given $300,000 in $500 notes. He took $1000, and gave the rest to one of the men who had travelled from the Corporate Area with him for him to deliver it to his sister Annette.

The next important fact in the prosecution's case was the laying of charges against Orr and his appearance in the Resident Magistrate's Court, Mandeville, before the appellant Von Cork. The charges were laid on the 15th October, 1997, at the instance of the appellant Thompson. The following were the informations laid by Thompson:

1. Number 16235/97- for possession of ganja at Mile Gully on the 15th October, 1997.

2. Number 16237/97 – for possession of ganja on a day or days around Easter time in March to April 1994.

3. Number 16238/97- for unlawfully dealing in ganja (at the time stated in 2 above).

4. Number 16239/97 – for unlawfully attempting to export ganja from Jamaica (at the time stated in 2 above).

5. Number 16240/97- for unlawfully conspiring "with Darren to export ninety six (96) pounds of ganja in the Corporate Area", contrary to Common Law.

The Corporate Area was the place of offence stated in the informations listed at 2, 3, and 4 above.

In respect of the conspiracy charge at 5 above, the appellant Von Cork made an order for indictment on the said 15th October. Pleas of guilty were entered by the appellant Orr and sentence was postponed until the following day. Mr. Norman Godfrey appeared for the appellant Orr at the time the pleas were entered. Mr. Godfrey objected to the course being taken by Orr and submitted that the Court had no jurisdiction to deal with the conspiracy charge. Mrs. Von Cork said that she would adjourn the matter to allow Mr. Godfrey to speak to his client as well as to inform himself further on the question of jurisdiction. The matter was adjourned until the following day when the pleas were confirmed and the appellant sentenced to nine months imprisonment on the informations numbered 16237,16238,16239 and 16240. In respect of the information numbered 16235/97, he was fined $1600 or three months imprisonment at hard labour.

On the 15th October, 1997, prior to Orr's appearance in Court, Von Cork had asked her orderly whether he had seen Thompson bring in a man. McLean responded in the affirmative whereupon, she asked him to indicate the man and how he was dressed. She further asked McLean if Thompson had given him a statement to witness. He replied in the negative. She then informed him that Thompson would be giving him a statement to witness and he should oblige by signing it. McLean went into the Mandeville Court House where he saw Thompson who gave him some documents to sign, which he signed and returned. The documents bearing McLean's signature as a witness

were admitted in evidence as Exhibit 4. They comprise four and a half pages of foolscap purporting to be a cautioned statement recorded by the appellant Thompson as having been dictated by the appellant Orr. It purports to be Orr's account of the events of the period March/April 1994 when the appellant Moore and the Bernals were arrested for breaches of the Dangerous Drugs Act.

While McLean was on duty at the Mile Gully/Cottage Police Station early on the morning of the 15th October, he had seen Christopher Moore, Radcliffe Orr and Clive Ellis arrive at the station. Constable Thompson and these men had gone upstairs the building which houses the Court. Thompson had ruled foolscap paper with him at the time. Moore was the driver of the car in which the men had arrived at the station. Later that very morning, McLean and Moore went to Von Cork's residence in Mandeville. This was not the first time that McLean was seeing Moore as he had seen him on the Tuesday prior to the 15th October. Moore was then in Von Cork's house to which McLean had been earlier summoned by Von Cork. At that time, both Moore and Von Cork were seated beside each other and the former was dictating a statement which the latter recorded on about three and a half pages of foolscap. There followed a discussion between Moore and Von Cork on the time of her expected return from Court at Spaldings later that day. Von Cork and McLean left for Court at Spaldings and returned at approximately 1.30 p.m. At that time, McLean noticed Moore sitting on Von Cork's bed. Von Cork gave the foolscap papers to Moore who gave them to McLean with a request for him to have them photo-copied. McLean

proceeded to Mr. Godfrey's office to have the documents photo-copied. There was a delay in the photo-copying process as the machine malfunctioned. McLean took the documents to Moore in the Mandeville shopping centre. Moore gave him one set of the documents to give to Von Cork. McLean complied that very afternoon.

Subsequent to the adjournment of the Mandeville Court on the 15th October, the appellant Von Cork spoke thus to her orderly McLean:

> "All that Mr. Godfrey ah sey or do is nine months he is going to get".

She further told him that he should tell Thompson to tell Orr that if Mr. Godfrey insisted on the entering of a not guilty plea to the conspiracy charge, Orr should tell Mr. Godfrey that he had no money to pay him and did not wish to be represented by him.

On the next day (October 16), while at the Mandeville Court House, Von Cork advised McLean that he should "make the man pay him". McLean inquired how could he do that when he did not know this man. Von Cork then informed him that when next she visited Kingston she would get the money and bring it to him.

The following Monday, McLean accompanied Von Cork to the Resident Magistrate's Court held at Porus. There, Von Cork gave him a telephone number with the instruction that he should call the Chief Justice. He never succeeded in making the connection. As a result, Von Cork gave him another number to call. This was the number for the Chief Justice's secretary. McLean spoke to Mrs. Cover. After communicating with Von Cork, McLean was told by

her that she would be going into Kingston to see the Chief Justice. On the Wednesday, at the Mandeville Court House, Von Cork told McLean that she had spoken to the Chief Justice who had told her to "just cool (herself) because dem just have fi go through the motion".

On the Friday of that week, McLean drove Von Cork to a private function in the evening at the residence of a Mr. Shields. He said that they drove in her Mercedes Benz. On reaching the intersection of New Green Rd. and Bonito Crescent in Mandeville, Von Cork instructed him to stop the vehicle. He obeyed. They alighted. She beckoned him to follow her down the road as she was fearful of speaking to him in the car as it may have been bugged.

During the conversation that followed between them, Von Cork said thus:

> "Mr. McLean, once Orr goes to prison is a must that Christopher Moore and Bernal have to get off the trial".

McLean was arrested on the 28th October. He was placed in custody at the Porus Police Station. While in custody there, he was visited by Von Cork. McLean remonstrated with Von Cork for the predicament he claimed she had placed him in. She said that she would "go for the money to pay the lawyer". McLean also said that she said she knew the boy's parents quite well; that the boy's mother was in a club of which she (Von Cork) was in charge in Kingston, and that the father knew everyone at the office of the Director of Public Prosecutions.

McLean first appeared in Court as an accused on the 6th November, 1997. On the 15th January, 1998, he was advised that the proceedings against him were being discontinued. Thereupon, he became a witness for the prosecution.

The response of the appellants at the trial

In the face of the serious allegations made by McLean against them, the appellants Von Cork, Moore and Thompson chose to say nothing. This was in the exercise of a right given to them under our law. The appellant Orr who had given a damning statement as to his part in the scheme also chose to remain silent. However, submissions of no case to answer were made. These submissions were rejected and the appellants convicted as charged.

Findings of fact

The learned Resident Magistrate, who is the only person empowered to make findings of fact in a situation such as this, deliberated on the evidence and the submissions, and found that although the witness McLean had made untruthful out of court statements to the police, his evidence before her was credible and she accepted it. In other words, she found that McLean respected the sanctity of the oath he took.

In accepting the evidence of McLean, the learned Resident Magistrate found that:

(1) The conversations between McLean and Von Cork did take place;

(2) McLean engaged the services of Thompson;

(3) Thompson effected the arrest of Orr as required;

> (4) Moore was responsible for driving Orr to the destination and for colluding directly with Thompson and with Von Cork in effecting the scheme.

So far as the appellant Orr was concerned, the learned Resident Magistrate accepted his statement (Exhibit 24) to the police as having been voluntarily given.

The grounds of appeal

The appellants filed many grounds of appeal. On the 1st May, 2000, Von Cork filed notice of appeal. In that notice was a further notice which reads thus:

> "... the Ground of Appeal is that having especial regard to the palpably discredited evidence of alleged accomplice, Ron McLean, the principal Crown witness against the appellant, the verdict of the learned Resident Magistrate is unreasonable and wholly against the weight of the evidence".

On the 5th May, 2000, the other appellants filed a notice identically worded as that above. They added a second ground of appeal:

> "...that the learned Resident Magistrate misdirected herself on the law and the evidence before her".

On the 7th January, 2002, the appellants filed thirteen supplementary grounds of appeal, and on the 5th March, 2002, they filed a fourteenth supplementary ground challenging the admission of exhibit 24, the cautioned statement of the appellant Orr, into evidence.

Taken as a whole, the grounds of appeal allege that the Resident Magistrate erred in failing to uphold the no case submission as:

(1) the offence charged is unknown to law;

(2) the evidence of the principal prosecution witness Ron McLean has been discredited; and

(3) the Resident Magistrate did not understand or appreciate the principles of the law of evidence, and the principles relating to corroboration and accomplices.

The submissions before us were concentrated on the summary given above.

Submission of no case

Courts in Jamaica are guided by Lord Parker's Practice Direction [1962] 1 W.L.R. 227as well as the judgment of the English Court of Appeal in **Reg. v. Galbraith** [1981] 1 W.L.R.1039 in respect of submissions of no case to answer. The practice direction, it will be recalled, said that such a submission may properly be made and upheld when there has been no evidence to prove an essential ingredient of the offence charged or when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. In ***Galbraith,*** the quality of the evidence was put in focus. Where the judge finds that the evidence is weak, vague or tenuous and a jury could not properly convict on it, the submission should succeed. Where, however, it is a question of assessing the reliability of the witnesses for the prosecution, that being a matter for a jury, and there is evidence on which the jury could properly convict depending on what view they took of the witness or witnesses, the submission should fail.

If the offence charged is not one that is known to the law, then there would also be no case to answer. That is what Mr. Henriques, Q.C. submitted to the Resident Magistrate. He repeated the submission at length before us. There are no similar decided cases, and there is nothing in the textbooks to suggest the existence of this category of offence, he said. "Course of justice", he said, is a term of art. When interpreting same, one cannot isolate "justice", he said, as it leads to a diversion into uncertain notions of what justice is. "Course" means a process leading to a conclusion. It ends with the determination of rights, that is, the decision of the tribunal. The invoking of the appellate level is merely for review purposes. He submitted that it is untenable that the course of justice is never ending. The course of public justice ends with the conviction. Anything done after conviction even to unlawfully and improperly influence the appellate tribunal is irrelevant so far as perverting the course of justice is concerned. Perverting the course of justice, he said, must relate to matters that happened before conviction. Anything done after a conviction to invoke say the discretionary power of the Governor-General cannot be to cause doubt on the conviction. The exercise of the discretionary power under section 29 of the Judicature Act does not form part of what constitutes the course of justice; similarly, section 90 of the Constitution.

The course of justice had already been run in the Bernal and Moore ganja case by way of the conviction on March 29, 1995, so there could not have been any perversion of justice as the course of perversion of justice entails the doing of a series of acts intended to affect the adjudication by

obtaining a verdict which is not true. He said further that if a scheme were to be concocted so as to put forward fresh evidence, he would not say that that would not be something wrong. However, the real question in the instant case is whether the prosecution should have waited for something else to be done for there to be a conviction on the charge. As far as he was concerned, the prosecution had jumped the gun.

One noticeable feature of the manner in which Mr. Henriques, Q.C. treated the matter before the Court was his penchant for rolling the "particulars of offence" into the "statement of offence", thereby effectively extending the statement of offence from being a "conspiracy to pervert the course of justice" to read instead "conspiracy to pervert the course of justice by casting doubt on the conviction". In so doing, he attempted to make something out of nothing.

One of the very cases on which he relied confirms the existence of the offence of "conspiracy to pervert the course of justice" as a "well-known head(s) of conspiracy:" ***Reg v. Withers*** [1975] A.C.842 at 860 D. In that case, the question for determination was whether counts one and two of an indictment containing six counts disclosed an offence known to the law. The statement of offence in respect of both counts was "conspiracy to effect a public mischief". In the first count the particulars alleged that the accused conspired together to effect a public mischief by unlawfully obtaining private and confidential information from officials of certain banks and building societies by false representations that (they) ...were persons authorised to receive such information.

The second count alleged the obtaining of similar information from officers of certain departments of government and local government. Viscount Dilhorne placed the question before the House of Lords in this context. He said:

> "The question which has to be considered is not whether to attach the label of conspiracy to effect a public mischief is an apt or inapt description of the conspiracy but whether conspiracies with that object and which do not come under one of the other heads form a separate class, recognised by the law. Our attention was not drawn to any case prior to this century where a person was charged with effecting a public mischief or where the charge was conspiracy to effect one". (page 856 H)

After reviewing the decisions in ***Rex v. Brailsford*** [1905] 2 K.B. 730, ***Rex v. Porter*** [1910] 1 K.B. 369, ***Joshua v. The Queen*** [1955] A.C. 121 and ***Reg. v. Foy*** [1972] Crim.L.R. 504, he concluded thus:

> "In the light of these decisions, a judge must, I think, in any case involving public mischief, be in considerable difficulty when he has to sum up to a jury. What direction is he to give them as to the law? The two cases, ***Brailsford*** and ***Porter***, give no guidance as to that. If the judge directs the jury that, if they find the conduct proved, it is a public mischief, he may be held to have usurped the functions of the jury and in so doing, he may treat as criminal conduct not previously so regarded. On the other hand, if it is simply left to the jury to decide whether the conduct amounts to a public mischief, then the jury may create a new offence by deciding that conduct not previously held criminal is criminal. It is at least clear that in the present state of the law, the inclusion of the words "public mischief" can lead to very considerable difficulties".(page 857 G)

Viscount Dilhorne went on to say that it had been clearly established that the courts did not have the power to create new offences. However, he warned:

> "To say that there now is no power in the judges to declare new offences does not, of course, mean that well-established principles are not to be applied to new facts. Fraud, like contempt of court, may take many forms and a conviction for conspiracy to defraud may well be sustained though the fraud has taken a novel form". (page 859 E).

Although the appellants have sought to rely on this case, I fear that it does not help them one bit. On the contrary, it confirms the thinking that the novelty of the circumstances in the instant case does not result in the creation or attempted creation of a new offence or of an offence unknown to the law. The offence of conspiring to pervert the course of justice is well-established. The circumstances though will not always be the same.

In ***R. v. Sharpe and Stringer*** [1938] 1 All ER 48, the appellants had been indicted for conspiracy to defeat the ends of justice. The question for the English Court of Criminal Appeal was whether persons who conspire to destroy evidence of the commission of a crime, and get persons to conceal a crime, and attempt to mislead a police officer, are guilty of the indictable offence of conspiracy. It was argued that there could be no offence of conspiracy to prevent the course of public justice unless proceedings were pending or had commenced. In other words, it was argued, "a crime has not been committed by a person who conspires with others to help him to conceal what has taken place, and persuades other persons to make untrue statements, unless proceedings have already begun" (page 51D).

du Parcq, J., delivering the judgment of the Court which included Lord Hewart, L.C.J. and Humphrey's, J said:

> "That seems to this Court to be a hopeless proposition, and so absurd that it does not form part of the law of this country" (page 51D).

He went on to say:

> "Public justice requires not only that people should not take steps to avoid the concealment of a crime, or destroy evidence once a summons has been served upon somebody, but also that every crime should be suitably dealt with, and a man who obstructs public justice as soon as a crime is committed, and endeavours to avoid the consequences of his wrongdoing by conspiracy with others, is just as much guilty of an offence if he waits until after proceedings are actually pending. It is impossible to say more on a matter which can be said in a few sentences. It is desirable to say only that there is nothing whatever in the contention put forward in the argument addressed to this court." (page 51E and F).

The argument before us is very similar. It is only that it comes to us from the other end of the spectrum. In view of the fact that convictions have already been recorded in the matter of Bernal and Moore, the argument is that the course of justice has ended in the matter so there can be no conspiracy to affect it. I see no good reason for that argument to receive any better treatment than that which was meted out by du Parcq, J. above. Notwithstanding the dismissal of the appeal by the Judicial Committee of the Privy Council, it had directed that the Court of Appeal consider the fresh evidence application that had been earlier summarily dismissed by the Court. This begs the question: to what end would the Judicial Committee have directed the consideration of the application? Clearly, it was with a view to

determining whether the conviction should stand after the fresh evidence application had been heard. So, it follows that the course of justice cannot be regarded as having ended upon the first determination of guilt. If the course of justice ends with a verdict of guilty at a first instance trial, what is the position when an appellate court upsets that verdict? It surely cannot be that the course of justice would have ended long before the convicted appellant has had his day in the appellate court. Although the law is a legendary ass, I think it is an insult to its majesty to put forward or support such a view. In my view this ground fails.

The evidence of Ron McLean

This witness gave a narrative of events which commenced with the request by the appellant Von Cork that he find a policeman at his police station to do a favour for a friend of hers. Thereafter, the link was apparently easily made with Constable Thompson who clearly co-operated with the scheme that evolved. That he arrested Orr is undoubted. The station diary entries and the informations condemned him whereas Orr's cautioned statement condemned Orr himself. The evidence of McLean was crucial in respect of Von Cork and Moore.

So far as Moore was concerned, McLean saw him visit the police station with Orr, and saw him converse with Thompson on the morning prior to the arrest of Orr. This was followed by Moore's presence at Von Cork's residence in a situation where Moore apparently dictated a statement on foolscap paper to Von Cork. The statement was later photocopied at Godfrey's office. Godfrey's secretary confirmed that McLean brought

documents there to be photocopied. McLean returned the documents to Moore.

In relation to Von Cork, the various statements attributed to her by McLean show her as being a key participant in the scheme. There was one area of McLean's evidence however which, according to Mr. Henriques, Q.C. shows that McLean cannot be believed at all. It relates to McLean's claim that he was instructed by Von Cork to call the Chief Justice's office to make an appointment for her to see the Chief Justice. On the following Wednesday he said that she told him of a conversation she had had with the Chief Justice. The problem with this evidence by McLean is that the day on which he claims that he made the telephone call was Monday, the 20th October, a public holiday. It goes without saying that the call could not have been made on that date. The call was supposed to have originated from Porus, an out-station court. No court would have been convened on that date. However, the court sitting would have been, and indeed was, re-scheduled for the Monday next, the 27th October. The conversation with Von Cork on the Wednesday following would have been impossible as he was arrested on the 28th October.

The learned Resident Magistrate did not specifically say how she resolved this problem. However, she did say in her judgment that the witness had a problem with dates. Mr. Henriques, Q.C. said that this was not a proper explanation as the witness had been very specific about the date. In this regard, it cannot be ignored that judicial experience is not short of witnesses who while being very emphatic have been proven by other

evidence to be wrong on the very matters that they have been emphatic about. So, notwithstanding McLean's definiteness as to the date, he could have been wrong as to the date, assuming that the incident spoken of did indeed occur. The situation therefore remained one for the Magistrate, as trier of the facts, to determine what to accept and what to reject. In any event, her failure to indicate how she resolved the matter suggests that this area of the evidence did not play any significant part in her deliberations. This seems to be the logical conclusion as nothing turns on the evidence except that it may have indicated that Mrs. Von Cork wished to give McLean the impression that she had the backing of the highest judicial officer in the country. By October 20, all that should have been done had been done. So, it would not really have mattered what was being said then.

An appellate court is usually wary as regards interfering with the findings of fact of a tribunal that has had the distinct advantage of seeing and hearing those who have testified as to the facts. The appellate court will only interfere in circumstances where the tribunal below has squandered the advantage it has of seeing and hearing the witnesses. In ***Benmax v. Austin Motor Co. Ltd***. [1955] 1 All E.R.326, at 327H, Viscount Simonds in dealing with the power of the Court of Appeal to draw inferences of fact said:

> "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness".

Lord Reid, in making his contribution, said:

> "Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness' memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations". (pages 328 I to 329 B)

In the instant case, the Magistrate saw and heard the witness McLean for a total of eleven days between May 4 and October 6, 1999. During that period, he was vigorously cross-examined by the attorneys-at-law, as would have been expected. The Magistrate took time to consider the evidence. Her written findings clearly indicate that McLean's evidence was, quite properly, given pride of place in her thinking. She reflected on the fact that he had given untruthful statements to the police and that he had an interest to serve. She even expressed the view that he was a dangerous witness. Having taken all these things into consideration, this experienced Magistrate

found the evidence given by McLean worthy of credit. In the circumstances, I see no good reason to doubt the honesty of the finding, as we have been urged to do. The grounds relating to the credibility of the witness also fail.

Alleged lack of understanding or appreciation of principles of law

The appellants have submitted that the Resident Magistrate did not understand or appreciate the laws relating to the admission of evidence, corroboration and accomplices.

The appellants contended that exhibit 4 was wrongly admitted in evidence. They said that there was no evidence that it was signed by Orr, so it ought not to have been admitted as a statement of his. It is my view that taken as a whole, the evidence in the case strongly suggests that the statement was a product of Orr. In exhibit 24, he refers to a statement that he signed, such statement having been dictated by Moore and written by Thompson. A statement is produced by Thompson who requests that McLean signs it. Upon the compliance of McLean, that statement would be clearly admissible in evidence against Thompson as it shows his participation in the conspiracy. The statement would also be admissible against Moore, he being the person who composed it, and against Orr once the learned Resident Magistrate is satisfied that the circumstances point in one direction and one direction only so far as the signature on it is concerned. It is clear that she was so satisfied. I see no justification whatsoever for the assertion that this statement was wrongly admitted.

So far as the other complaints in respect of directions on the law are concerned, it is my view that they are of no moment. The learned Resident

Magistrate recognized that the main witness was an accomplice. There is enough in the findings of facts to indicate that she appreciated the nature of an accomplice and what was required of the tribunal in that respect. She also demonstrated her awareness of what is corroboration. It is a fact that she may not have written a perfect piece for the satisfaction of the purists, but that is not what is required of her. She is required to write her findings of fact, not a treatise. In the circumstances, she acquitted herself fairly well in demonstrating an appreciation of what was before her for determination.

Conclusion

The evidence which was accepted by the learned Resident Magistrate indicates quite clearly that all the appellants were engaged in a plot to pervert and derail the course of justice. The involvement of a judicial officer in such a scheme is most shocking.

It was observed that most of the submissions were directed against the conviction of Mrs. Von Cork. This may well have been because of her status. However, her role in the affair was very significant. She was no hapless victim drawn into a web by the others. Her haste in seeing to the dispatch of the appellant Orr was judicial misconduct of the highest order, confirming that she had more than a passing judicial interest in the proceedings. The haste was evident when it is considered that:

(a) The Clerk of Courts had no statements:

(b) She signed an order for indictment without the facts having been stated by the Clerk of Courts; and

(c) She sentenced Orr without having the slightest idea of his antecedents.

On the basis of the foregoing, I agreed with my learned brothers, Forte, P. and Langrin, J.A. that the appeals were without merit and should be dismissed.

FORTE, P:

Appeals dismissed. Convictions and sentences affirmed.