CA. CRIMINAL LAW Trial Cocaine [importing, possession of, dealing in, exporting] undercover agent - Evidence - No Case Submission - Accomplice

(Card)

JAMAICA ✓comp

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 30/91

Evidence CRM Practice

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. PETER GORDON
WESLEY GORDON

Howard Hamilton Q.C. with Delroy Chuck for Appellants

Lloyd Hibbert Deputy Director of Public Prosecutions for Crown

September 23, 24 & November 11, 1991

FORTE, J.A.

Both appellants were convicted in the Resident Magistrate's Court for the parish of Westmoreland for the offences stated hereafter. Peter Gordon for -

1. Importing cocaine into the island of Jamaica for which he was sentenced to a fine of $50,000.00 or 18 months imprisonment at hard labour and 2 years imprisonment at hard labour.

2. Possession of cocaine for which he was sentenced to a fine of $50,000.00 or 18 months imprisonment at hard labour and 2 years imprisonment at hard labour.

3. Dealing in cocaine for which he was sentenced to a fine of $50,000.00 or 18 months hard labour and 3 years hard labour.

4. Exporting cocaine for which he was sentenced to a fine of $50,000.00 or 18 months hard labour and 3 years hard labour.

The appellant Wesley Gordon was convicted for all but one of those offences i.e. importing cocaine for which he was charged, but was acquitted at the trial. He was sentenced as follows:

1. Possession of cocaine - Fine $50,000.00 or 18 months hard labour and 2 years hard labour.

2. Dealing in cocaine - Fine $50,000.00 or 18 months hard labour and 2 years hard labour.

3. Exporting cocaine - Fine $50,000.00 or 18 months hard labour and 2 years hard labour.

Their appeals came before us, and having heard the arguments of counsel, we dismissed the appeals and affirmed the convictions and sentences. As promised, we now record our reasons in writing.

The evidence against both appellants, was acquired by virtue of the co-operation between law agents of the Government of the United States of America and of Jamaica. In effect, the appellants were targetted by law agents, who working undercover, participated in the commission of the offence so as to gather evidence upon which the appellants could be apprehended, and placed on trial.

The co-operation of drug dealers on an international scale has necessitated the co-operation of law agents throughout the world in their efforts to control the international trade in prohibited drugs. This was one such case.

Michael Davidson, who described himself as a "registered confidential informant" and Kenneth Gaul, a special agent of the United States Customs, were indeed the two major players and the main witnesses for the prosecution in this case.

In December 1989, Davidson had discussions with Carlos and Olaga Milian o/c "Ollie" in Miami Florida. It appears that discussions were again had in January 1990 when not only Olaga and Carlos were present, but also another gentleman named Gilbert Ruiz.

Subsequently Carlos and Ollie Milian had a discussion with the appellant Peter Gordon. This conversation concerned the importation of cocaine from Cali, Columbia to Jamaica and then unto Miami. At this meeting, it was agreed that the appellant Peter Gordon was to be paid U.S. $250,000 for his involvement in receiving the cocaine in Jamaica and arranging for its export to Miami. In furtherance of this endeavour, the witness Davidson came to Jamaica on the 14th July, 1990, where he met with Carlos, Ollie and Gilberto. In Jamaica, he was introduced to both appellants by Gilberto and Carlos. On the 18th July, 1990, Davidson returned to Miami for briefing with U.S. law agents and returned to Jamaica on the same day. During the period between the 14th and the 18th July, 1990, he had spoken to both appellants on many occasions but testified specifically to one occasion when he spoke to them at the "Chicken Tabin" restaurant about getting fuel for the aeroplane and fixing bomb-holes in the airstrip. On the 25th July, 1990 in keeping with the real purpose for his involvement Davidson met with a Jamaican police officer Cons. Hugh Lawrence and agents of U.S.A. Customs and Drug Enforcement Agency of the United States Government.

On the evening of the 26th July, 1990 Davidson went with Carlos and Gilberto to a house where he saw both appellants. He then left with the appellant Wesley Gordon and a man called "Rasta" and in a car driven by Wesley Gordon went to "Little Bay". The three men went in a canoe, "down the coast", and pulled into some low cliffs south of Negril lighthouse. On the cliffs were the appellant Peter Gordon, Gilberto and a number of other men. At this point several rice bags were placed in the canoe by the men on the cliffs, on the instructions of the appellant Peter Gordon. The witness testified as follows:

> "The sacks were taken from the cliff into the canoe. Peter Gordon and several other persons who I dont know took these sacks from the cliffs unto the canoe."

After the canoe was loaded, it was driven several miles off shore where there was a U.S. Customs boat in waiting. The canoe docked beside the boat. In this boat, was Mr. Kenneth Gaul, who was working undercover in this operation, and with whom the witness Davidson had had discussions in Miami. The U.S. Customs boat (of course not recognized as such) was loaded with the rice bags which had been placed in the canoe. The appellant Wesley Gordon was still on the canoe at this time and indeed took an active part in throwing bags from the canoe into the boat.

The bags were taken by Mr. Gaul to Miami where the contents were subsequently tested and found to be cocaine by Mr. Coates, Government Analyst for Jamaica. As this forms the basis of a ground of appeal, the details of that evidence will be dealt with, when we come to address that particular ground of appeal.

Those, in summary, were the basic facts which led to the convictions of the appellants.

Before us, the following grounds of appeal were argued:

> "(1) The verdict is unreasonable and cannot be supported having regard to the evidence. In support thereof:
>
> (a) The evidence of Mr. Kenneth Gaul is untrustworthy and cannot be relied on. His breaking of the rice bags and placing of the packages in cardboard boxes outside of the presence of the accused is unreasonable. The real likelihood that packages containing cocaine could have been substituted at that point does exist.

" (b) Mr. Kenneth Gaul's evidence that he is in the business of deception undermines his evidence and leaves open the real probability that in order to buttress and to make this case foolproof that he could have put cocaine in the packages which were handed over to the Forensic Experts.

(c) Mr. Gaul's evidence that he has other exhibits with cocaine gives further credence to the fact that he could have interfered with the packages which were brought to the Forensic Experts.

(d) The failure of the Crown to show that the packages which were dealt with by the accused were the same packages that were tested for cocaine impeaches the case against the accused.

(e) Mr. Gaul's evidence that he packaged similar looking bags with talcum powder tends to support the preceding arguments that if Mr. Gaul wanted to, as indeed the appellants are suggesting, that he could have easily exchanged cocaine for other substance which may have been in the bags.

(f) In all the circumstances the case against the accused men rests solely on the evidence given by Mr. Kenneth Gaul whose control, supervision and behaviour leave ample room for tampering of the packages and his evidence ought not to be relied on.

In arguing this ground counsel incorporated two other grounds which read as follows:

"(i) That the Learned Trial Judge erred in admitting into evidence photographs which were not produced by the individual who developed the negatives thereto.

(ii) The Learned Trial Judge erred in holding that all due precautions had been taken by the witness Ken Gaul in relation to care and custody of the cocaine allegedly shipped from the island in 'rice bags'."

Other grounds argued were:

> "1. That the learned Trial Judge erred in failing to accept the submissions of no case at the close of the Prosecution in respect of Wesley Gordon.
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> 2. The Learned Trial Judge erred in relying on the evidence of the witness Ollie Milian, an accepted witness with overwhelming interests to serve, in that, she had been promised substantial reductions of sentence for both her husband and herself, on pending charges, in return for testifying against the Appellants."

Ground I

In developing this ground, Mr. Chuck contended -

(i) That the crown had failed to show that the packages which were put in card-board boxes were the same that were taken from the rice bags; and consequently, the Court could not be sure that the substance tested by the Government Analyst was in fact that contained in the rice bags.

(ii) That the Learned Resident Magistrate ought not to have relied on the evidence of Kenneth Gaul because -

(a) he admitted that he was in the business of deception, and admitted that even in the instant case he was practicing deception;

(b) the probability that his evidence could have been manufactured, as he had sole possession of the exhibit, and had the opportunity of replacing innocent and legal goods with cocaine.

In considering submission (i) it is necessary to examine the evidence to determine, whether there was adequate tracing of (a) the chain of possession and (b) the condition of the packages to come to a conclusion that no interference took place up until the Analyst examined them.

This evidence commenced with the acceptance into the boat by Gaul of the 14 rice bags. He testified that he took the boat to Guantanomo Bay, where he personally unloaded them and kept them in his custody until the following day when he took them by plane to Miami. There he locked the bags in a customs warehouse. Before doing so however, he had opened the bags, in which he found packages, which he subsequently sealed in boxes, then numbered and labelled them. These boxes were placed in a container and locked in a warehouse for which only Gaul had a key.

Gaul subsequently handed over those boxes (29 in number), on the 8th August, 1990 to Patricia Spiegel, Drug Enforcement Agent Administrator at the Drug Enforcement Agency Laboratory in Miami. Spiegel testified to receiving these sealed boxes, putting Lab No. 64 0 67 on each box, logging them and locking them in the vault. On the 21st August, 1990 these boxes were released by Spiegel to Arumar Kumar, Forensic Chemist in Miami. Kumar testified to opening the boxes and finding therein a total of 397 kilo-sized packages, all of which contained cocaine. He then re-sealed the boxes and returned them to the custody of Spiegel who again locked them in the vault.

On 14th September, 1990, Fitzmore Coates, Government Analyst of Jamaica and Cons. Hugh Lawrence attended the Drug Enforcement Agency Laboratory. In keeping with their request, and with the co-operation between the two Government Agencies, Miss Kumar again secured the boxes, from Spiegel, and on this occasion handed them over to Lawrence and Coates. Coates then marked each of 28 boxes with what he described as F.L. No. 1269/90. He examined the contents of each of 387 packages which he found and took samples from each. He was for some unexplained reasons,

allowed to examine the contents of 28 boxes only. He placed his samples in separate plastic bags, and marked each with the corresponding number of the packages from which each sample was taken. He weighed the packages, recorded the weight and thereafter returned the boxes to the custody of the Drug Enforcement Agency Laboratory. He returned to Jamaica with the samples, which he tested at the Forensic Laboratory and concluded that all the samples taken, were cocaine. Cons. Lawrence before leaving Miami took photographs of the packages at the Drug Enforcement Agency Laboratory.

This evidence if believed established quite clearly, in our view, that the same substance contained in the rice bags which were recovered by Mr. Gaul was in fact the same substance examined both by Mr. Kumar, and Mr. Coates and found to be cocaine.

Counsel for the appellants, argued however that this evidence depending as it does on the credibility of Mr. Gaul, should not have been accepted by the Learned Resident Magistrate, as Mr. Gaul is a self-confessed deceiver. This argument in our view is fallacious. Mr. Gaul's admission, related to his job of an undercover agent, who is forced to present a picture of co-operation to his criminal conspirators so as to have the opportunity to apprehend them at the time of the commission of the offence. Counsel, relied strongly on the admission by this witness that in Miami, he had prepared similar packages containing talcum powder, and replaced the original packages with these, so as to facilitate a delivery to Gilberto who would assume that the packages were the same. This was done, obviously to avoid the risk of losing the genuine packages during that operation, an act which in the opinion of this Court, was reasonable in the circumstances.

In dealing with this aspect the learned Resident Magistrate in his reasons for judgment stated -

> "I accept his explanation that he prepared similar looking packages to the sealed packages that were in the fourteen rice bags and delivered these similar looking packages to Gilberto Ruiz in Miami U.S.A."

In our view this finding is adequately supported by the evidence, and in those circumstances, the admission of "the act of deception" ought not to have affected the learned Resident Magistrate's finding as to the credibility of the witness..

Submission 1 (ii) (b)

The question whether Mr. Gaul's sole possession and control of the packages, gave him the opportunity for tampering with the exhibits, and whether or not he did so was indeed a question of fact for the learned Resident Magistrate. The evidence, however, does not reveal any suggestion that he did so. The defence pointed to his access to other such exhibits, and the possibility that he could replace legal goods with cocaine taken from other sources. It appears, however that this submission is predicated on the fact that the appellants were never confronted with the subject matter at anytime at all. Though, it is desirable that this should be done, or ought to be done wherever the subject matter is present and available, different considerations must apply in cases such as these, where officers of two States are involved in the investigation, and the subject matter is allowed to leave one jurisdiction for the purpose of successfully completing those investigations in another jurisdiction. There is no rule of law that an accused must be confronted with the subject matter of the crime/offence and where as in the circumstances of this case the accused are arrested at a time when the exhibits would have already been recovered and sealed, and in addition out of the jurisdiction, the trial judge must assess the evidence to determine whether there has been any irregularity in

respect of dealing with the exhibits. In this case the learned Resident Magistrate has shown by his reasons that he did so. He found -

> "The fact that the accused were not confronted with exhibits, does not in my view prevent a finding and I so hold that the sealed packages that were in the 14 rice bags were the same ones that Kenneth Gaul took to Miami handed over to the D.E.A. Technician in carton boxes who handed them over to Fitzmore Coates who took samples from them and found them to contain cocaine. Due precaution was taken to keep the sealed packages in the same condition they were in from the time they left Jamaica to the time they were delivered to the D.E.A. Lab in Miami."

In our view this court cannot interfere with these findings supported as they are by the evidence, and which are reasonable, given the testimony that the learned Resident Magistrate heard at the trial. In these circumstances we concluded that there was no merit in this ground.

Mr. Chuck also contended that certain photographs were tendered in evidence although the maker was not the person producing same. This contention was however, not strenuously pursued. It arose during the evidence of Cons. Hugh Lawrence, who had photographed the exhibits in the Drug Enforcement Agency Laboratory in Miami, and having had them developed at a commercial photographic organization, sought to tender the negatives and the corresponding photographs. Objection was taken as to their admissibility on the same ground advanced before us, but the learned Resident Magistrate nevertheless admitted them into evidence. These photographs were tendered to show the condition of the exhibits at the time they (the photographs) were taken, and included the marks of identification put thereon by Mr. Gaul and Mr. Coates the Government Analysts; - these witnesses testifying as did Mr. Lawrence himself that the photographs represented a true replica of the condition of the exhibits, as seen by them at the

time. In our view, the photographs added very little, if any, to the case for the prosecution and in the absence of detailed arguments on this point, it is sufficient to say that in the circumstances of this case the photographs were correctly admitted into evidence for the purpose for which they were tendered.

Ground 2 - No case submission re Wesley Gordon

It was contended that the learned Resident Magistrate should have acceded to the submission at the end of the prosecution's case, that a prima facie case had not been made out against the appellant Wesley Gordon.

Before us Mr. Hamilton contended that the only evidence seeking to incriminate the appellant Wesley Gordon was that of Michael Davidson, and that there was no evidence to establish that the appellant knew that he was dealing with cocaine. This contention is summarily answered by the reasoning of the learned Resident Magistrate, with which we agreed and which in our view is a correct assessment of the evidence. The learned Resident Magistrate stated:

> "As regards the accused Wesley Gordon he was not a party to any discussion in Miami to import cocaine into Jamaica. Therefore, there was no direct conversation with him about cocaine. However, I hold that his clandestine conduct of leaving Negril in the night, of securing a canoe from Little Bay, of receiving the fourteen rice bags with its contents into the canoe, of delivering the rice bags and contents to a boat, which he did not know was a U.S.A. Custom Boat, demonstrate that he knew he was engaged in an unlawful activity. It also demonstrates that he knew the rice bags contained illegal substance.
> The witness Michael Davidson who had come to Jamaica in an undercover capacity for the specific purpose to deal in a smuggling operation of cocaine from Colombia, Miami to Jamaica was introduced to Peter Gordon and Wesley Gordon by Carlos and Gilberto. With the exception of Wesley Gordon all the other persons had actual discussion of what the operation was about. The first accused who is the

> "brother of the second accused were both present at the Chicken Tabin Restaurant discussing refuelling for aeroplane and bomb holes of an air-strip. Wesley Gordon was conspicuously in the company of persons who had committed themselves to a joint enterprise to import, export and deal in cocaine. I hold that inferentially the accused Wesley Gordon knew that an aeroplane was to arrive in Jamaica from Colombia and that he knew what was the cargo of this aeroplane. He knew not only that the packages in the rice bags contained unlawful substance but that the substance was cocaine. In the alternative I hold the circumstances of Wesley Gordon's actions were of such a nature he had opportunity and means to ascertain from his brother and or the witness Michael Davidson what was the cargo of the aeroplane and what was in the sealed packages in the rice bags. No questionswere asked because he deliberately shut his eyes to an obvious means of knowledge."

We find that there was ample evidence upon which to call upon the appellant Wesley Gordon to answer those charges which he was required to answer, and cannot fault the learned Resident Magistrate in this respect.

Ground 3

Mr. Hamilton submitted that in our jurisdiction the practice has been established and approved that -

> "An accomplice who has been jointly indicted or charged but not indicted shall not give evidence for the prosecution except in the following circumstances -
>
> (a) He/she is omitted from the indictment,
>
> (b) Pleads guilty on arraignment;
>
> (c) No evidence is offered and an acquittal entered,
>
> (d) A nolle prosequi is entered.

He further submitted that in circumstances where the accomplice pleads guilty the practice is that he should be sentenced before testifying. He contended that if the above circumstances do not exist, the inducement of the beneficial treatment in respect of his own sentence, would be so great that he may give evidence to assist in the conviction of the accused so as to ensure the benefits to himself. He contended therefore that in those particular circumstances the evidence of the accomplice is inadmissible. In advancing these submissions he relied substantially on the case of R. v. Pipe 51 Cr. App. R. 17 in which the prosecution had called as a witness an accomplice who had been charged arising out of the incident, but whose case had not yet been tried. At the trial, counsel for the defendant submitted that the accomplice being a person charged and against whom criminal proceedings were to begin the very next day, should not be allowed to be called. The chairman ruled, that despite the fact that the accomplice had been charged, he was a competent witness and that there were no grounds in his discretion for excluding the evidence. The accomplice was called. On appeal to the Appeal Court (Criminal Division) the learned Chief Justice, on the question of the admissibility of the accomplice testimony stated thus:

> "In the judgment of this court, the course taken here was wholly irregular. It may well be, and indeed it is admitted, that in strict law Swan was a competent witness, but for years now it has been the recognized practice that an accomplice who has been charged, either jointly charged in the indictment with his co-accused or in the indictment though not under a joint charge, or indeed has been charged though not brought to the state of an indictment being brought against him, shall not be called by the prosecution, except in limited circumstances. Those circumstances are set out correctly in

> "Archbold, in paragraph 1297 of the current edition, where it is said that where it is proposed to call an accomplice at the trial, it is the practice (a) to omit him from the indictment or (b) take his plea of Guilty on arraignment or before calling him either (c) to offer no evidence and permit his acquittal or (d) to enter a nolle prosequi. Mr. Ryman for the prosecution has explained how it came about that Swan was not dealt with before he gave evidence, the reason being that there were difficulties in the case being adjourned in that the defence had a witness or witnesses who would not be available at a later stage. Nevertheless, this court is quite satisfied that if the case had to go on, and the prosecution were still minded to call Swan, they must have let it be known that in no event would proceedings be continued against him. In the judgment of this court, it is one thing to call for the prosecution an accomplice, a witness whose evidence is suspect, and about whom the jury must be warned in the recognized way. It is quite another to call a man who is not only an accomplice, but is an accomplice against whom proceedings have been brought which have not been concluded. There is in his case an added reason for making his evidence suspect. In the judgment of this Court, this well-recognized rule of practice is one which must be observed, and, accordingly, in the circumstances of this case there is no alternative but to quash the conviction."

The learned Chief Justice, Mr. Hamilton submitted, considered the evidence of an accomplice inadmissible unless the exceptions outlined existed.

This case however, was considered by the Court of Appeal in England in the case of R. v. Bryan James Turner & Others [1975] 61 Cr. App. R. 67.

In dealing with the competence of an accomplice Lawton L.J. in delivering his judgment stated at page 77:

> "There can be no doubt that at common law an accomplice who gave evidence for the Crown in the expectation of getting a pardon for doing so was a competent witness ... It is manifest that in the eighteenth century the courts did not consider an accomplice to be incompetent to give evidence because any inducement held out to him to do so was still operating on his mind when he was in the witness box. Blackstone considered that an accomplice could not expect to receive his pardon unless he gave his evidence 'without prevarication or fraud.' The nineteenth century brought about no change in the competence of accomplices to give evidence even though the prospect of immunity from prosecution was before them: see all the editions of S.M. Phillips' Treatise on the Law of Evidence which appeared between 1814 and 1852 - there were ten. The contribution of the nineteenth century to this topic was the rule of practice that judges should warn juries of the dangers of convicting on the uncorroborated evidence of accomplices. In this century that practice became a rule of law."

There is really no doubt then that an accomplice is a competent witness, and any decision to rule his evidence inadmissible must be in pursuance of the exercise of the trial judge's discretion to exclude it. In commenting on the dicta in **Pipe's** case as set out earlier in this judgment, Lawton L.J. in the **Turner** case (supra) stated thus:

> "In our judgment Pipe (supra) is limited to the circumstances set out in Archbold. Its ratio decidendi is confined to a case in which an accomplice, who has been charged, but not tried, is required to give evidence of his own offence in order to secure the conviction of another accused. Pipe (supra) on its facts was clearly a right decision. The same result could have been achieved by adjudging that the trial judge should have exercised his discretion to exclude Swan's evidence on the ground that there was an obvious and powerful inducement for him to ingratiate himself with the prosecution and the Court and that the

> "existence of this inducement made it desirable in the interests of justice to exclude it. See Noor Mohamed v. The King [1949] A.C. 182 per Lord du Parcq at p. 192 and followed in Harris v. Director of Public Prosecutions [1952] A.C. 694 and 36 Cr. App. R. 39 per Viscount Simon at p. 707 and p. 57. To have reached the decision on this basis would, we think, have been more in line with the earlier authorities. Lord Parker C.J. in Pipe (supra) seems, however, to have viewed the admission of Swan's evidence in the circumstances of that case as more than a wrong exercise of discretion. He described what happened as being 'wholly irregular.' It does not follow, in our judgment, that in all cases calling a witness who can benefit from giving evidence is 'wholly irregular.' To hold so would be absurd. Examples are provided by the prosecution witness who hopes to get a reward which has been offered 'for information leading to a conviction,' or even an order for compensation or whose claim for damages may be helped by a conviction. If the inducement is very powerful, the judge may decide to exercise his discretion; but when doing so he must take into consideration all factors, including those affecting the public. It is in the interests of the public that criminals should be brought to justice; and the more serious the crimes the greater is the need for justice to be done."

In our view this dicta of Lawton L.J. confirm our opinion that an accomplice was and still remains a competent witness, and the question of whether or not his evidence should be admitted depends on the exercise of the trial judge's discretion, based on whether "there was an obvious and powerful inducement for him to ingratiate himself with the prosecution and the Court and that the existence of any such inducement made it desirable in the interests of justice to exclude it."

What then are the facts of the instant case, upon which this ground of appeal is based. It relates to the evidence of Olaga Milian who was an admitted and undisputed accomplice. It is conceded by the appellants, that the witness was not charged with

these offences in this jurisdiction and therefore there was nothing else that the prosecution could do in respect of the witness' competence to testify.

The contention however is based on the testimony of the witness that she had signed a Plea Agreement in the United States of America on an indictment unconnected with this transaction and in which she was charged for the importation of cocaine into the United States of America. However, a reference to the notes of evidence of the witness should put the submissions of counsel in context:

> "Q. Were you not promised anything to give evidence in Jamaica?
>
> A. Not just evidence in Jamaica, the promise, the agreement was that if there was substantive co-operation there would be a substantive reduction in sentence.
>
> and: Yes it is my belief that my husband would benefit if I gave evidence in this case."

Later the witness stated:

> "I have not come to this court to lie to save my own self and my husband. The case I am facing in the U.S.A. is still pending. The case for which I have signed a Plea Agreement I have not yet been sentenced on."

The Plea Agreement though not in respect of charges arising out of occurrences in Jamaica which caused the prosecution of the appellants, nevertheless required the witness to give substantive co-operation to the prosecuting authorities in the United States of America; this co-operation including giving testimony in the instant case.

In respect of the prosecution in the jurisdiction of Jamaica, the elements required in the Pipe case for admission of the evidence obtained i.e. immunity having been given, there was no charge in respect of those offences against the witness, and consequently in so far as Jamaica was concerned there was no benefit accruing to the witness in this jurisdiction. The only benefit that could accrue to the witness was in relation to offences for which she was charged in

the United States the prosecution of which, the Jamaican prosecutors had no involvement, and most certainly could not interfere.

We are of the view that all these factors would necessarily form a part of the learned Resident Magistrate's determination as to how he should exercise his discretion. However at the time the witness was called, no objection was taken as to her competency to give evidence, and it is only after her answers in cross-examination set out above, that counsel for the defence as part of a no case submission addressed the court on this point.

The learned Resident Magistrate dealt with the evidence of this witness in his reasons for judgment in the following words:

> "... I look at the evidence of the witness Olaga Milian. She is an accomplice. She has signed a Plea Agreement under which she expects both herself and husband to benefit she has a charge pending for the offence arising from the same transaction in Miami.
> In the witness box she gave her evidence in my view clearly and comfortably. She was straightforward in corss-examination and emphatic in her denial to any suggestion that she was not speaking the truth or that she was giving evidence merely to ensure the interest of her husband and herself. Having seen her I believe her as a witness of truth. I warn myself it is dangerous and unsafe to act on uncorroborated evidence of an accomplice. I further warn myself it is even more dangerous to act on her evidence where there is a charge pending against her in another jurisdiction where the prosecution has taken all steps on this ground to remove all charges arising out of this trial against her. Having given myself these warnings I find as a witness I am prepared to rely on her uncorroborated evidence because I believe her."

He therefore relied on the witness' testimony in coming to his conclusion, and therefore impliedly indicated that in his view the evidence was properly admitted in spite of the promises held out to her in the Plea Agreement she signed in the United States of America.

We agree with the learned Resident Magistrate. The prosecution had done all in its power, to dispose of any possible charges against the witness in our jurisdiction before calling her as a witness in the case. The fact that she had charges pending in another country, over which the prosecution in this case had no control, and in respect of which benefits had been offered to her, cannot in our view be said to be in the purview of the decision in **Pipe**. We would conclude, that this was a case in which the exercise of the learned Resident Magistrate's discretion in admitting the testimony into evidence could not have been faulted.

These then are our reasons for dismissing these appeals.