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IN THE SEYCHELLES COURT OF APPEAL

THE REPUBLIC

V

WILBY ROBERT — 1ST ACCUSED

ANDRE DERJACQUES — 2ND ACCUSED

Criminal Side No. 8 of 1991

Mrs. Twomey for the Republic
Mr. C. Lucas for the first accused
Mrs. Georges for thesecond accused

JUDGMENT OF THE COURT

The appellant Wilby Robert was convicted by a Judge of the Supreme Court of Seychelles of trafficking without lawful authority in dangerous drugs in that he had in his possession on March 5, 1991 33.485 kgs. of cannabis. The appellant Andre Derjacques was convicted of trafficking in dangerous drugs in that he aided and abetted Robert in committing the said offence. Robert was sentenced to a term of imprisonment of 8 years and Derjacques to a term of6 years. Each has appealed against conviction and sentence. Neither has pursued the appeal against sentence.

Robert was a cargo clerk in the Cargo Section at Air Seychelles at the International Airport. On March 5, 1991 he was on duty on the 3.00 p.m. to midnight shift.

Benedict Hoareau is a Customs Control Officer at the Airport. His duties include collecting customs duty and ensuring that nothing illegal enters the country. On March 5, 1991 he was also working the afternoon shift. An Air France plane arrived at 8.20 p.m. and he went to the plane to supervise the unloading of the cargo and to escort it to the ramp. There was no cargo and he returned early to the Cargo Section.

While wandering there he saw Robert and a porter, Vidot

standing near a cargo box. Cargo is not supposed to be moved unless the Customs is notified. He asked Robert what was in box. Robert replied with a question in no way connected with Hoareau's enquiry. Hoareau repeated his question but got no answer. Robert left and loaded the box in the boot of a white Ford motor car S2959 with a "Mahe Car" sticker at the back. He then drove off.

Hoareau spoke to his superior Mr. Pillay and shortly after to Mr. Legras on his inter-com radio. Almost immediately Robert returned on foot, perspiring and breathing fast. Before being spoken to he said he was sorry, he had had to take the case to a Frenchman who had to take it with him on the flight. He apologised for not informing the security guard.

As instructed, Hoareau asked Robert to accompany him to Mr. Legras. Robert seemed somewhat shocked but did not refuse. They moved in the direction of the door on the terminal side of the building. Robert then ran into the building again and into the office. He was there for perhaps 2-3 minutes. Another employee, Mr. Talma, was there.

On the way, they met Mr. Legras and Mr. Pillay coming towards them. Robert repeated the story he had told Hoareau. He said he was sorry and would be responsible if anything was missing from the cargo. Having spoken to Mr. Pillay and Mr. Legras, Robert returned to his work area.

Hoareau was not satisfied. He sought permission to check whether the car really belonged to a Frenchman. This permission was granted and he left for the check accompanied by another officer. He found the car parked outside the building at the Airport near the Clock Tower. He watched the car while the other officer called the Supervisor who in due course arrived.

The door of the car was open. An officer pulled the lever to open the boot. In it was the same box Hoareau had seen the

appellant putting on the trolley in the cargo section. It was addressed to Jonise Lespoir, Foret Noire, Victoria, Mahe. The airway bill showed that it had arrived in Seychelles on March 3, 1991. Mr. Pillay reported the matter to Inspector Suzette.

Inspector Suzette called Robert and asked him to report. Robert came as requested and Inspector Pillay asked him about the parcel. He said he was aware of the parcel. It concerned a French national who was supposed to leave Seychelles that day for France by Air France. Robert had been too busy to send the parcel. He said the Frenchman was driving the vehicle - a Mahe car - the number of which he did not know. He was taken to the car park and there identified the car. The driver's window was open. Inspector Suzette opened the boot and showed him the parcel which he identified as the same parcel. Inspector Suzette showed him the address on the parcel. Robert could not explain the address but insisted that it was the same parcel. Inspector Suzette told Robert that the parcel might have been removed without the consent of the owner and would be kept as an exhibit. The parcel was moved to the guard room and in the words of Inspector Suzette -

> "Since that day until today the parcel has been kept under police sealed custody."

Robert persisted in his story of the French national and Inspector Suzette released him to return to his work.

Later Inspector Suzette interviewed Vidot who had helped load the box into the boot of the car and having heard that account he had Robert arrested. Inspector Suzette took him to the Cascade Police Station at about 10.50 p.m. and handed him to P.C, Andrew Morel.

Next morning at about 8.45 Robert was brought to Central Police Station. The box was in the car and he helped bring it into the Station; it was sealed.

At about 11.00 a.m. the box was opened. Inside was a brand new suitcase which was locked. There was no key so

the lock was broken open. In the suitcase were 38 packets of dried herb material wrapped in carbonised plastic. Inspector Suzette stated that the exhibit was left under police supervision and next day was taken to the Government pharmacist for analysis. The certificate from the analyst was tendered and after argument, to which there will be reference later, admitted.

At the trial of the matter and before this Court considerable time was spent minutely examining the issue as to whether the exhibit had been securely kept from the time it was seized to the moment of its production at the trial. A review of the evidence establishes beyond doubt that it was.

After the box had been opened Robert was kept in an office at the C.I.D. A lawyer, Mr. Danny Lucas came at about 5.00 p.m. and sought a private interview with Robert. Inspector Banane refused to allow this. Mr. Lucas advised him not to give any statement if asked to do so. He acted on that advice when Corporal Hermitte asked him to give a statement next day.

His account of what took place was given on oath at the trial. Substantially he accepted the version of events given on oath at the trial, but he gave another version as to how he had come to be involved with the package since clearly the version of a Frenchman having attempted to shipit was false.

He stated that on March 4, 1991 he was at work at the Airport when he received a telephone call. The caller had asked to speak to him though he did not know who was calling. He asked who was speaking and the caller, a woman, replied that it was Mrs. Jonise Lespoir. She asked whether there was a consignment that had arrived for her by Kenya Airways. He checked the log, found out that a carton had arrived - a carton of 45 kgs. for Mrs. Jonise Lespoir. She asked whether he could help her take out the goods. He explained the procedures which involved customs examination. She said she did not want the goods to go through customs because there was some African craft in the package and she would have to pay SR.10,000.00 if it went through customs. She asked whether he could help her move the goods without customs examination. He said he could not.

About an hour later at about 10.20 p.m. she called again. He answered the phone and she asked to speak to him. He said he was speaking. She again asked for his help. He said what she wanted was impossible. She offered to pay him SR.5,000.00, half the estimated customs duty which might have to be paid. Anything she could do for him, apart from that she would do. He interpreted this as an offer of sex.

The offer was attractive (though he had never seen Mrs. Jonise Lespoir) and he told her that if it was to be done he would do it next day when he worked the afternoon shift ending at midnight. He wanted to know how to contact her. She replied that she would contact him. They arranged to meet at 1.00 a.m. at the Marine Charter car park.

Thereafter he checked the number of the carton and found the airway bill which described the contents as personal effects, batiks, frames and photos. The weight was stated to be 45 kgs.

After work that day he rang the second accused, Derjacques, who was a good friend. They had known each other for 2 years Derjacques worked at Mahe cars. He occasionally rented cars from Mahe cars and sometimes Derjacques lent him his car. He asked Derjacques if he (Derjacques) could do him a favour by lending him his car for the next night, Tuesday night. Derjacques asked why he wanted it and he told him that it was to meet a married woman. He wanted a car but would take a jeep if a car was not available. It was agreed that Derjacques would leave the car for him at the car park at the International Airport with the key under the mat.

He went to work next day. At about 8.10 p.m. an Air France plane landed. All the porters save Reginald Vidot had gone to perform their duties in relation to that plane. He went to the cargo room and attempted to lift the carton addressed to Mrs. Jonise Lespoir. It was heavy. He got a trolley and pushed it on to it. There was a scale nearby and he weighed the carton because to him it seemed heavier than the declared weight of 45 kgs.

Leaving the carton on the trolley he went to Vidot and told him he was going briefly to traffic. He then went to the car park, searched for and found the car which Derjacques had left. The key was under the mat. He drove the car to the cargo section and parked it near the entrance. He then got Vidot to help him put the carton in the boot of the car. He could not have done that by himself. He thought no one had seen him. He then drove the car back to the car park, placed the key under the mat and returned to work.

When he got back a security officer, Hoareau, asked him what had he just driven off with in the car. He was shocked. He did not think he had been seen. He gave the explanation involving the French tourist. Hoareau reported to his supervisors. He confirmed the prosecution's version of the course of events leading to the discovery of the carton in the boot of the car, when the boot was opened on Inspector Suzette's instructions. He repeated the explanation he had given to Hoareau. He described it as "the first thing that came to my mind". He was worried and in a state of panic. He told Inspector Suzette that he did not know what was in the box.

He appears to have regarded himself as being effectively in custody. He asked for and was granted permission to return to his office to lock drawers and to hand over keys to a fellow employee.

From the airport the police took him to the Cascade Police Station. This was closed but eventually a young man in shorts and shirtless, showing signs of having been recently awakened, opened a side door and let them in. He was checked in as a person suspected of stealing and placed in a cell.

His evidence was that it was now clear that he could not return the car to Derjacques as agreed. He asked for and was granted permission to make a phone call. He rang Derjacques and told him to help him, he was in the cell at Cascade Police Station and had been locked up. Derjacques reply was that he must be joking. he said he was not. A French tourist had come

with a hired car, a white Ford Laser with a Mahe car sticker. At the back of the car there had been a box. Derjacques asked what was in the box. He said he did not know. He asked Derjacques to help him and call his home to say that he would not be coming that night because of the delay of the aircraft but would be there in the morning.

The person who had opened the station was P.C. Morel who was on reserve duty. He had given permission to make the call and was close by when it was made. He gave a version of the call which differed significantly from that of Robert. Robert said the conversation lasted only a minute. Corporal Hermitte testified that Robert had told him in an interview that from the Cascade Police Station he had rung his mother and not Derjacques.

He confirmed that he was present when the carton was opened and that he saw the suitcase in it packed with herbal material. It was the same that was produced in court. He was shocked at what he saw. He had expected to see African crafts because that was what had been written on the airway bill and from his experience as a cargo clerk an airway bill could be taken as a document accurately describing the contents of the package to which it related. Had he known that the carton contained drugs he would have refused the request of the lady and informed the police.

On the issue of knowledge of the contents of the carton, once it was established, as it had been, that he was physically in possession of the carton there would be a strong presumption that he had knowledge of its contents. He could of course offer an explanation to displace that presumption. The first explanation which he gave was admittedly false, which in the circumstances would strengthen the presumption that he was aware of the contents.

The second explanation which he offered can only be described as incredible. A thirty year old cargo clerk in a position

of some responsibility would hardly agree to subvert the system he was employed to operate because of an offer of a bribe of sex and money over the telephone from a woman whom he did not know, whomhe had never seen and whom he could not contact. The trial judge did not believe it.

The strong presumption of knowledge of the contents arising from his physical possession becomes irresistible against the background of an admittedly false explanation of his possession followed by a totally incredible one. Mr. Lucas' submissions on lack of knowledge are totally without merit.

Once the challenge to knowledge failed,the appeal of the first appellant Robert, was bound to fail unless certain grounds which were argued by Mrs. Georges, relating to the certificate of the Government Chemist and the proof of proper custody of the carton with its contents seized from the car, succeeded. It would be convenient, therefore, to deal with these submissions at this stage.

In ground 13 of the second appellant's memorandum of appeal it was contended that the prosecution's failure to call A.S.P. Didon "the police officer in charge of the exhibits seized at the airport" resulted in a break in the chain of evidence linking the exhibits seized by the Police and the exhibits examined by the Government Pharmacist.

A careful reading of the evidence establishes that while A.S.P. Didon, as chief of C.I.D. was in overall charge of the investigation, the person in charge of the exhibit was Inspector Suzette He kept both keys to the room in which was locked the crate into which the drugs had been transferred. He testified that A.S.P. Didon did not have a key because it was not proper that the officer in charge of the investigation should have unrestricted access to the exhibits. This seems sound.

To establish the nature of the herbal material seized, the prosecution produced a certificate by the Government Pharmacist. This was regular on the face of it and the signature was not questioned. Proof by that method is authorised by section 4C of the Dangerous Drugs (Amendment) (No. 2) Act 1982 which reads -

> "A certificate purporting to be signed by the Government pharmacist relating to a drug to which this Part applies (which includes cannabis) shall, in any proceedings for an offence under this Act be prima facie evidence of all matters contained therein."

In 17 Halsbury (4th Edition) at para.28 it is stated -

> "Prima facie evidence" means evidence which if not balanced or outweighed by other evidence, will suffice to establish a particular contention."

The clear implication of that statement is that any evidence which is made prima facie evidence by law causes a shift in the evidential burden to the other side to displace the facts thus established by that evidence. Our attention was not directed to any evidence which in any way tended to outweigh or balance evidence contained in the certificate.

Mr. Fernando drew our attention to a footnote which stated that there was a shift in the legal burden. This refers to the Civil Evidence Act 1968 S11(1) the provisions of which are entirely different from the provisions under consideration.

There was a challenge to the methodology of the testing by way of sample. This was described by Inspector Suzette. The Inspector stated that the analyst opened each of the packets wrapped in plastic or carbonized papers, took a sample from the middle of each packet and placed that in plastic bag. In the end there were 38 plastic bags each with a marking identifying the packet from which it had been taken. There was no evidence to show that this was an improper method of sampling.

Much was made of the fact that the weight of the drugs and the packaging was lighter by just under 2kgs. than the 45kg. weight shown on the airway bill. In the absence of evidence that the carton had been properly weighed at 45kg. the point has no merit. Nor in the circumstances would the deficiency, if established, have derogated from the weight to be attached to the certificate.

Comment was made on the failure to produce the samples. It would have been preferable that they should be produced. Inspector Suzette on the record sounds unconvincing attempting to explain what happened to them though he acknowledges having received them. It is stated on the face of the exhibit that the samples were returned to S.I.M. Suzette on 7th March, 1991. This is prima facie evidence that the samples which had been taken had been tested and returned.

Finally, there were arguments on the issue of whether the Government Pharmacist was a State witness who should at least have been made available for cross-examination. The tendering of a certificate signed by the Government Pharmacist does not make him awitness in the case. The Dangerous Drugs (Amendment) (No.2) Act 1982 provides a method of proof by certificate to make unnecessary the calling of the Pharmacist as a witness. Since the Pharmacist was not a witness there was no obligation to make him available for cross-examination. In the result the nature of the substance seized was identified as cannabis in the certificate. That was prima facie evidence that it was cannabis. There was no evidence which could raise any doubts on that issue and consequently it was proved beyond reasonable doubt. The trial judge did not misdirect himself on any issue relating to the certificate.

This conclusion disposes of the appeal of the first appellant, Wilby Robert, which is accordingly dismissed. His appeal against sentence was not argued and is dismissed.

To establish against the appellant, Derjacques, the charge of trafficking in drugs by aiding and abetting Robert to commit that offence it was necessary to establish that he made the car

S2959 available to Robert knowing that it was going to be used for the transportation of drugs.

In ground 16 of her amended grounds of appeal Mrs. Georges contended that the trial judge failed to consider that although mens rea may have been established in relation to Robert, it did not necessarily follow that it had been established against Derjacques. The judgment makes clear that the trial judge kept the two cases distinct in his mind. He stated -

> "The burden of the prosecution in the present case therefore was to prove beyond reasonable doubt that when the 2nd accused lent the car to the 1st accused, he had knowledge that it was being used to transport illegally a carton box containing dangerous drugs but not necessarily cannabis."

The significant complaint running through several of the grounds of appeal is that the trial judge did not approach the evidence properly having regard to the fact that it was all circumstantial. It was contended that he had not applied the proper test to the burden resting on the prosecution where the evidence led is circumstantial. He stated -

> "In the absence of direct evidence, the prosecution necessarily had to rely on circumstantial evidence to infer knowledge and thereby establish possession. Before analysing the evidence for the prosecution I warn myself that it is not possible to decide on conviction unless and until I find that the inculpatory facts disclosed are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

It was submitted that there was a further test to be applied, that formulated in Lejzor Teper v. The Queen (1852) A.C. 480. Having warned of the need for close examination of circumstantial evidence because it may be fabricated to cast suspicion on another, the Board stated at p. 489 -

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

That was the only test applied in that case. The formulation used by the trial judge, which is abundantly sanctioned by authority, was not mentioned.

In our view the tests are no more than alternative methods of formulating the identical standard. If the inculpatory facts disclosed are incompatible with the innocence of the accused and incapable of explanation upon any hypothesis other than guilt, it necessarily follows that there would be no other co-existing circumstances which would weaken or destroy the inference. If there were such circumstances there would be an explanation on a hypothesis other than that of guilt. The facts of the case may make one formulation seem more apt than the other, but the proper application of either test should lead to the same result. Prudence may require setting out both to avoid the slightest chance of criticism, but the proper application of one rather than the other does not amount to error.

The appellant, Derjacques, gave his account as to how Robert came to be in possession of motor car S2959 belonging to Mahe cars in a statement to the police on March 8, 1991. A.S.P. Didon had telephoned him saying he wanted to see him. It was about noon. He went to C.I.D. and there saw A.S.P. Didon. His brother, Mr. Tony Derjacques, who is an attorney was also present. A.S.P. Didon asked him whether he knew that there had been 45 kgs. of drugs in a box in the car S2959. He says he was shocked and responded "What?" A.S.P. Didon arrested him. Mr. Tony Derjacques had till then been approached to represent Robert. In the light of developing events he said he could no longer represent Robert and would have to represent his brother. He asked and was allowed a private interview with the appellant Derjacques.

It would appear that Derjacques was at all times prepared to make a statement. Corporal Hermitte eventually recorded a statement from him on March 8, 1991, the day after he was arrested at 9.40 p.m. In substance he repeated that account on oath at the trial.

He confirmed Robert's account of how he had come to make the car S2959 available. He had fixed the time of delivery to suit his convenience. Robert had asked that the car be left at the airport car park. He had arranged for his brother to drive to the airport in a mini-moke - to bring him back home after he had dropped the car leaving the car key under the mat. His brother called as a witness confirmed that they had driven back home from the airport getting home about 9.00. He had gone to his room, listened to music and then dozed. He had not been aware of his brother's movements later.

Derjacques stated that he had had something to eat, showered and gone to the Coral Strand on foot. He had expected to meet a friend there. In the car park he did not see the car of that friend so he went back home without entering the hotel. He got home about 10.00 p.m. to 10.30 p.m. He undressed and watched television.

Around 11.00 p.m. the telephone rang. It was Robert. He gave an account of that call substantially similarto that given by Robert. He phoned Robert's parents as requested and then drove to his girlfriend's home at Mont Buxton. She also works at the airport. She was not home. He went back home to his room.

He testified that he was bothered over Robert's call. He could not uderstand what it meant. He knew that he had left the white Ford car at the car park and that there had been no box in it. There was no question of the car having been rented out to a Frenchman. Robert was in trouble. Eventually he concluded that Robert wanted him to make it appear that the car which he had left at the airport had been rented out to a Frenchman.

At about 12.30 a.m. to 1.00 a.m. he went to the office, checked the files to find the name and driving licence number of a Frenchman who had previously rented a car and filled out a form with those particulars making it appear that a Frenchman had rented S2959 on March 5, 1991. Thepreparation of this false contract, he thought, would help Robert [illegible]

he should not have done. He did not, however, leave the fictitious contract in the office where it should normally have been. He took it with him.

Next morning very early he rang his brother, the lawyer, Mr.Tony Derjacques, and asked him to stop at the Cascade Police Station to see Robert and find out what had happened to him. As has already been mentioned Mr. Derjacques, the lawyer, had not been able to see Robert.

Derjacques stated that he handed the false contract in when he learnt from a telephone call he received from Barbara Hoareau, the Secretary at Mahe Cars, that the police had been making inquiries about the Ford Laser S2959. They wanted to know who had rented it. It was necessary then to commit himself.

As a result of Derjacques' arrest he was unable to attend at his work place. When he was released from bail, he asked his employers whether he could resume. He received a letter stating that he was suspended until further inquiries. He was "the subject of investigation by the Police" as a result of his "alleged lending of one of the Company's cars to a friend without permission." This constituted "a serious industrial offence". Additionally management had been asked not to allow him to have access to the company records.

The account which Derjacques had given of his movements on the day the car was lent, March 5 and the evening of that day was subjected to close scrutiny by the prosecution and the judge. It is unfortunate that the judge deviated significantly from the norms of judicial objectivity in his approach to this scrutiny. He misstated facts and drew inferences which were not justified by the evidence and certainly showed that he had not applied the warning he had properly given himself relating to circumstantial evidence.

In the penultimate paragraph of his judgment he stated -

"As I have stated earlier the 1st statement made by him to

the police was recorded on 8th March. It was sought to establish that he had volunteered to make a statement on the 6th and 7th March, but the police were too busy. Corp. Hermitte (P.W.13) however, discounted this suggestion and stated that if he had so volunteered, arrangements could have been made to record a statement. The second accused therefore had ample opportunity to formulate a defence as his lawyer brother had already interviewed the 1st accused in the morning of the 6th March at the C.I.D. and withdrew to appear for him when A.S.P. Didon decided to arrest him. I do not wish to comment on the propriety of his decision. The 2nd accused was taken into custody only on 8th March. I therefore attach no significance to either of the statements made by the 2nd accused produced as Exhibits 8 and 12 respectively."

The defence of Derjacques was summarily rejected because it had been "formulated" after the attorney Mr. Derjacques had obtained information from Robert. The record conclusively established that the attorney, Mr. Derjacques, had never been allowed to speak privately to Robert. He had been refused permission to do so and had done no more than advised him not to make a statement if he had not yet done so.

The cross-examination of Corporal Hermitte on this issue of Derjacques' willingness to make a stat ement reads -

"Q. Would I also be correct in saying that on the very same afternoon on the 7th March, the 2nd accused indicated that afternoon that he was prepared to make a statement but the police at the time was very busy, very occupied with investigation of the case. In fact you were occupied and he was asked to wait until the next morning.

A. As far as I remember he was prepared to give but he would give it in the presence of his lawyer and his brother.

Q. He did not offer to do that Thursday afternoon, but because the matter was still being investigated he was told to wait for the morning of the 8th?

A. No, I don't think we would have asked him to call the next day. If he was prepared to give a statement we would have made arrangements to take down his statement.

Q. Were you not asked by the Attorney for the second accused at the time, his brother Mr. Derjacques that the 2nd accused was prepared to make a statement, but you said "I am very busy at the moment. We might even have to be taking the 1st accused to court for a remand. Can the statement wait for the next morning?.

A. We were very busy as we were making arrangements for coming to court.

Q. So you might not recall because you were very busy and then (sic) is the possibility that the offer was made to you?

A. There is a possibility."

This exchange has been set out verbatim to confirm that on any objective evaluation its effect could not be that Cpl. Hermitte discounted the suggestion. He ended up admitting its possibility. The basis on which the trial judge rejected the defence did not exist.

The trial judge elaborated a number of inferences adverse to Derjacques which he drew from the evidence. He found that Robert and Derjacques had not developed a close friendship. The basis for this finding was that Robert had stated that the friendship with Derjacques had begun when he had given lifts to work and from work at the airport. He found their time schedules did not make this possible. The evidence did not support this. Derjacques was off work from midday. Robert could be going to work for 3.00 p.m. or leaving work at 2.00 p.m. At both times Derjacques would have been free and driving around on his own concerns on routes which might make a lift possible. In any event a close friendship would certainly not have been incompatible with an approach for help in an enterprise such as that proved against Robert.

The trial judge rejected the account by Derjacques of his movements after he left work on the afternoon of March 5. He said he had gone to the RTS office to pay for an advertisement and had also gone to register a company. He produced receipts. There was no counter-balancing evidence from the prosecution. The trial judge nonetheless rejected his evidence. His reasoning was that the money might have been paid by someone else and the receipt issued in the name of Derjacques, or he may have paid it at some timethat day other than that at which he said he had. Again the lack of objectivity in the approach of the trial judge is patent. The trial judge had engaged in speculation as a basis for refusing to give weight to evidence which had not been counter-balanced by evidence from the prosecution. The trial judge correctly stated that the receipts do not prove anything. There is, however, no burden of proof on the defence. What the receipts do is to make it more likely that the story is true. That is all the defence needs to achieve.

The alleged surreptitiousness in the taking of the car to the airport, parking in the general car park and leaving the key under the mat instead of handing it to Robert, in our view, added nothing to case. Once S2959 had been traced as having been used in any way in the transaction, Derjacques as operations manager would have been called upon to give an account as to its user. Any attempt at concealment earlier would have been meaningless.

The trial judge argued that Derjacques in fabricating the contract was not attempting to save himself from the consequences of having lent a company car to a friend without permission. He stated that the letter of suspension was a solicited letter and showed that Derjacques' employers did not treat the matter as serious. The fact is, as has been noted, that Derjacques had lent the company's car to a friend without permissi on and that had been adjudged "a serious industrial offence". Additionally it was noted that he was to be denied access to records. Again the judge's statement of the facts was misleading and skewed to the detriment of that accused.

The trial judge rejected Derjacques' explanation that he had prepared the fabricated contract partly to save himself from the consequences of the unauthorised loan of the car and partly to help Robert in so far as he could make sense from the telephone message he had received. The trial judge correctly stated that this would not have helped Robert since he had been found with inward cargo addressed to someone in the Seychelles. There is, however, no evidence that Derjacques would have been aware of that when he fabricated the contract. In any event it was the first excuse Robert himself had put forward. Despite the fact that Robert had put forward the excuse and that the document had been fabricated in the belief that Robert wished to make it appear that the car had been in the possession of a Frenchman, the trial judge concluded that the fabrication was intended to inculpate Robert. The argument is devoid of logic.

We are satisfied that the reasoning of the trial judge is faulty, his statement of the facts on occasion regrettably inaccurate and his approach seriously wanting in judicial objectivity. This makes his conclusions unacceptable.

Nonetheless the duty of the appellate tribunal in such circumstances is to examine the evidence itself and decide applying the proper principles whether on the evidence before the Court the guilt of the appellant Derjacques had been established or not.

The crux of the case is the telephone call made by Robert from the Cascade Police Station. He is reported to have told Cpl. Hermitte that he had spoken to his mother but on oath he stated that he had spoken to Derjacques and Derjacques' evidence is to that effect. P.C. Morel stated that Robert said no more than that he was not able to come that night becausehe had been arrested and that he would come tomorrow. Although the conversation was that brief he estimated that the call had taken 5 minutes. The defence argued that P.C. Morel who was relaxing when interrupted by the arrival of the police party bringing

Robert was sleepy and inattentive. There would have been no need to pay particular attention to a conversation by a person locked up for suspected theft - which was the charge then being considered against Robert.

The defence also urged that P.C., Morel's behaviour was unusual leading the trial judge at one stage to ask him whether he was ill. This comment does not appear on the record but it has been accepted that it was made.

The trial judge accepted P.C. Morel's evidence. If P.C. Morel's evidence is accepted, it follows that having heard no more than that Robert had been arrested, Derjacques had proceeded to fabricate the contract that S2959 had been rented to a Frenchman, a fabrication which would have supported Robert's first explanation that it was a Frenchman who had brought the package to the airport in that car. That action could only have been the result of a pre-arranged plan which would have been set in motion by news of arrest. The inference then that Derjacques was party to the enterprise would have been irresistible.

Normally the appellate tribunal accepts the evaluation of a witness's credibility by the trial judge on the basis that the judge has had the advantage of having heard and seen the witness. In this case, however, we do not consider it safe to accept that evaluation. The trial judge's failure to be objective makes this prudent.

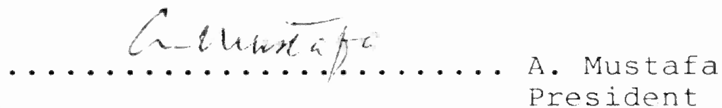
The issue must be decided on the basis that the telephone conversation took place in the terms related by Robert and Derjacques. Derjacques' evidence was that he concluded from the message that that Robert was in trouble and that it would have helped him if it were made to appear that the car S2959 had been rented and was that evening in the possession of a Frenchman. The conclusion is plausible.

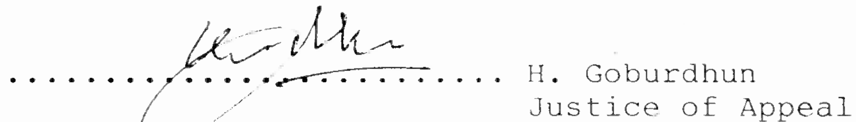
The trial judge in effect sought to negate this by finding in the surrounding circumstances conduct which pointed towards guilty knowledge. None of these in our view achieved this.

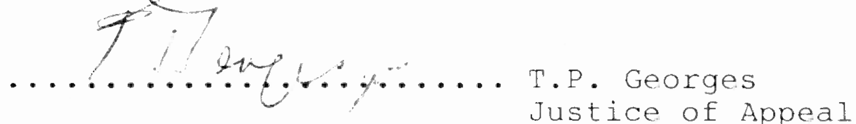
The trial judge as has been indicated had dismissed the defence of the second appellant, Derjacques as a fabrication on a basis which was misconceived and failed objectively to evaluate it.

The only factor of significance in determining guilty knowledge on the part of Derjacques was the forgery of the contract to support the Frenchman story. Once the explanation which he gave for this was plausible the circumstantial evidence against Derjacques weakens. The judge's conduct of the trial lacked a proper judicial approach, and his evaluation and assessment of the case against Derjacques as a whole could not be said to be completely impartial; and this could have resulted in Derjacques missing an acquittal opportunity. It may well be that Derjacques' conduct was highly suspicious, but it would be unsafe to uphold the conviction. We do not think in the circumstances it could be said that an irresistible inference of guilt must be drawn.

The appeal of Derjacques will accordingly be allowed.


.... A. Mustafa
President


.... H. Goburdhun
Justice of Appeal


.... T.P. Georges
Justice of Appeal

16th October, 1991