CR-APM-11/2013
CR-APM-15/2013
CR-APM-19/2013

IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

CRIMINAL DIVISION

BETWEEN:

ANTONIO LUCIANO

SHAMARDO HUTCHINSON

WILKIE ARTHUR

APPELLANTS

-V-

THE CROWN

RESPONDENT

Hearing Date: 9th August 2013

Date of Appeal Decision: 21ST August 2013

Mr. A. Hamilton for appellant Luciano

Ms. L. Maroof for appellant Hutchinson

Mr. W. Arthur appellant in person

Mr. L. Franklyn for the Crown

APPEAL JUDGMENT

BEFORE GOLDSBROUGH CJ.

1. These three matters are all appeals against orders made under the Police Force Ordinance allowing for the taking of samples from persons accused of criminal offences. There is one appeal against each of the Chief Magistrate, the Resident Magistrate Grand Turk and the Resident Magistrate Providenciales. The parties to the appeals have asked and consented to all the appeals being heard together, some of the grounds of appeal being the same or similar. This decision covers all three appeals and where necessary deals with matters raised only in one appeal separately.

Preliminary matter going to jurisdiction

2. Prior to dealing with any appeal, the Respondent to the appeals raised a preliminary issue. That issue goes to jurisdiction to file an appeal against an order made in these circumstances. The submissions made on the issue are premised on the orders being interlocutory in nature. There are no submissions made which are premised on the order being final in nature.

3. There is ample authority to suggest that there are severely limited, if any, rights to appeal an interlocutory order in a criminal matter. Those authorities all suggest that a criminal trial should not be interrupted by appeals during its course where interlocutory orders are made. There is little contained in submissions from the Appellants on this question, it being generally agreed that there is substantial and valid authority for that proposition. The real question, raised in this appeal, appears to be not whether there can be an appeal against an interlocutory order in a criminal matter, but whether these orders are themselves interlocutory or final.

4. There can be found guidance as to whether an order is final or interlocutory. As the majority of interlocutory orders are made in civil matters the guidance generally relates to civil proceedings but can be equally applied to criminal proceedings. Here an order, or orders, have been made allowing for the taking of samples from individuals, all of whom presently face criminal charges. It is said, by the respondent, that these orders are interlocutory to those criminal proceedings.

5. When one considers that the same orders could be made against persons who do not face criminal proceedings, it then becomes apparent that in that instance the orders would not be interlocutory orders, as there would be no other proceedings. Given that the orders are available to "tend to confirm or disprove" involvement in criminal activity, it must be the case

that they can be made to rule someone out and that person will never then face a criminal trial within which the order could possibly be described as interlocutory

6. Interlocutory orders have also been described as not having finally determined a right. Criminal proceedings, if they are ongoing, may result in a verdict that the accused in those proceedings is either guilty of not guilty of the alleged offence or offences. A criminal trial may not result in any order determining whether it was right or wrong to make an order under these provisions. The right which, in my view, is finally determined by the making of an order, is whether the person the subject of an order should provide a sample. The making of an order does not determine guilt of otherwise, and in any related criminal proceedings the propriety of making the order would not receive separate consideration other than by way of challenge to admissibility of the resultant evidence.

7. For these reasons it seems to this Court that orders such as those made in these appeals are final and not interlocutory orders, and the submissions on the preliminary issue, based as they are on the orders being interlocutory, must fail. These orders are final orders. An order made in a magistrate's court can be appealed by a party under section 176 of the Magistrate's Court Ordinance Cap 2.03.

Preliminary matter going to when an appeal begins

8. An appeal against an order in the magistrate's court may be brought to the Supreme Court by following the provisions of section 178 Magistrate's Court Ordinance Cap 2.03. Section 178 provides:-

> "The appellant within five days after the day on which the Magistrate has given his decision shall serve a notice in writing on the Magistrate and on the other party of his intention to appeal and also the general grounds of his appeal, and shall enter into satisfactory security before the Magistrate for the due prosecution of the appeal in the Supreme Court , and to abide the judgment of the said Court thereon."

9. Until there has been compliance with the above, it cannot be said that there is an appeal underway. It cannot, for example as counsel for the appellant in *19 of 2013* submits, be correct to say that there is a valid appeal at the time when counsel in the Court below indicates, verbally, an intention to appeal. There is good reason why the appeal does not commence with the verbal indication given at the time of the decision, for many then expressed intentions do not result in an actual appeal.

10. The appeal only begins with the filing, in writing, of notice of appeal and service on the magistrate and the opposing party in the case as well as the appellant having entered into a suitable recognizance to prosecute that appeal. Once those formalities have been completed, and only then, does the provision of section 180, suspending the execution of the decision

appealed against come into effect. That provision is an automatic provision requiring no intervention by the judicial officer or the parties to the appeal. Until it comes into effect, there is no automatic stay of the order. The suggestion, again from counsel in *19 of 2013*, that samples should not have been taken by the police from the appellant after verbal notice of the appeal had been given is in error. It is only when the written notice of appeal is filed and served and the recognizance entered into that the decision appealed is stayed. It is not clear from any appeal file that any recognizance has been entered into.

11. The appeal in 11 of 2013 was originally filed as an application for judicial review. It may be that the appellant was guided by what he had heard from the magistrate's court. In open court during the adjournment of the sufficiency hearing of the related criminal matters I directed that the application for judicial review be treated as a notice of appeal and ordered the preparation of the appeal record thereafter. After that step was taken, the appellant did not enter into any recognizance. The issue of whether a stay came into force absent a recognizance will have to remain moot, it being outside of this appeal against the making of the order *ab initio*.

Preliminary matter – intimate and non-intimate samples

12. Requests in all of these cases were made for the taking of both intimate and non-intimate samples. There appears to have been some confusion at first instance as to what constitutes an intimate sample and what is properly described as a non-intimate sample. On appeal, the parties to all of the appeals concede the question. As described in the relevant section (section 38) a sample taken from any bodily orifice falls within the definition of intimate. The mouth is a bodily orifice, in accordance with the ordinary meaning of the words used in the legislation. Support for that interpretation can be found, ironically, in the same place where the apparent confusion arose, in equivalent United Kingdom legislation.

13. In the relevant code of practice in England and Wales (the Police and Criminal Evidence Act and subsequent Regulations affectionately referred to a PACE) there can be found a reference to body orifice other than the mouth when considering the definition of intimate sample. This appears in the definition of intimate sample at section 65 of the Act. In the absence of that exclusionary provision, the mouth would have been regarded as a body orifice and the resultant sample within the intimate definition. There is no such exclusionary provision to be found in the local legislation.

14. Thus a sample of saliva taken from inside the mouth of a person (often referred to as a buccal swab) falls within the definition of an intimate sample in this jurisdiction. It would not so fall

under the more restrictive UK definition because of the specific exclusion of the mouth as a body orifice.

Appeal by Shamardo Hutchinson in 19 of 2013

15. Following determination of the preliminary issue and the question of what constitutes an intimate sample and given that the order in respect of the appellant Hutchinson permitted only a non-intimate sample of hair to be taken, counsel for the Appellant Hutchinson gave notice of the appeal against the order being withdrawn, and thereafter took no further part in the consolidated appeals.

Appeal by Antonio Luciano in 15 and 19 of 2013.

16. There are two grounds of appeal pressed by this appellant. The first is the same ground of being in the custody of the Prison Service at the time of the making of the application for the order. Given that this is identical to the appeal ground in 11 of 2013 I will deal with that when dealing with that appeal below.

17. The second ground relates to the signing of the affidavit made in support of the application. Although the matter was heard *inter partes*, there is no note of the evidence given to the magistrate other than the affidavit of the applicant police officer. That affidavit is signed by the applicant and by the magistrate who granted the order. It was not separately sworn before another Commissioner of Oaths of Justice of the Peace.

18. This, in submissions, counsel for the appellant submits makes the affidavit defective. He submits that the affidavit cannot be sworn before the magistrate who determines the application.

19. With respect to that argument, it cannot be grounds for overturning the order made. Under the relevant legislation, which is set out below for the convenience of practitioners, there is no requirement for the applicant to file an affidavit. If the officer appeared before the magistrate and did nothing other than swear that he had reasonable grounds for making the application in terms of the provisions, an order could be made. It is helpful and expedient to arrive at court with a sworn affidavit, but its absence is not fatal to an application. It is no doubt useful to have an affidavit sworn by another where time and practicality permits but it is by no means essential to the success of an application. As long as the magistrate hears on oath the grounds for the application and is satisfied form that evidence that the order is warranted there is no failure or bar to the making of an order through want of proper form. The affidavit process simply makes the magistrates' record keeping function a little easier.
20. I will deal with the custody question under the heading 11 of 2013.

21. Before leaving this appeal it is necessary to comment upon correspondence sent by counsel for the appellant to the Magistrate's Court about the taking of samples after having given verbal notice of intention to appeal. Counsel raised this question in the Supreme Court at the Sufficiency hearing and then wrote to the magistrate in terms suggesting that the Supreme Court had endorsed counsel's suggestion that it was wrong to allow the samples to be taken after the court had been told of an intention to appeal. That is clearly not the correct position in law, as set out above and certainly was not the view expressed, as counsel purported to set out in his letter to the magistrates' court. Until the order is stayed by effect of section 180 a sample can be taken. If it be the case that this appellant has not entered into a recognizance, it may be that the order was never stayed pending the appeal.

22. I note that more than half of the record of the proceedings in the magistrate's court in 15 of 2013 form a discussion, or more correctly a view, as to whether an appeal was possible. It might be thought that the correct forum for such a discussion is within the appellate court and not the court at first instance. Whatever may have been the better way, the magistrate is clearly in error in his view. An appeal record need contain nothing more than the material placed before the court and does not need to contain the presiding officer's view as to whether the same matter may or may not be the subject of an appeal.

Appeal by Wilkie Arthur in 11 of 2013

23. This is an appeal against a decision of the magistrate sitting in Grand Turk whereby the police were authorized under sections 39 and 40 of the Police Force Ordinance as amended [Cap 18.01]. The order was made on 30 May 2013 at a time when the appellant was in the custody of HM Prison Grand Turk.

24. The relevant legislation is set out below. It has been amended since the Revised Edition and the amendment is not easy to follow if one only has access to the Revised Edition. It was not possible to be provided with a consolidated version. That fact itself may explain why the subject matter is so often misunderstood or misinterpreted.

25. The application for the order was supported by an affidavit from a Detective Inspector who also gave evidence on the application before the presiding magistrate. Perhaps unusually the appellant was present and was afforded an opportunity to cross examine the officer. In his evidence the Inspector said he was requesting an order for non-intimate samples, although in

his affidavit what he described appears in law to be an intimate sample, that is to say a buccal swab. The officer confirmed that at the time of the making of the application, the appellant was in custody at H M Prison Grand Turk.

26. There is but one ground of appeal and this relates to whether it is proper, given the legislative provisions, for an order to be made when a person is in the custody of H M Prison as opposed to being in police custody or detention. To determine that question one needs to consider whether section 39 or section 40 is in play.

27. Section 39 governs intimate samples and provides that a sample may be taken from a person in police detention only if there is a court order or with appropriate consent. That provision can be found in subsection (1) of section 39. Subsection (2) provides the restrictions on when a court can make an order for intimate samples to be taken and provides:-

(2) the court may only make an order if there are reasonable grounds –

(a) for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence; and

(b) for believing that the sample will tend to confirm or disprove his involvement.

28. It is then necessary to examine what is not to be found in section 39. Section 39 does not limit the jurisdiction of the court to cases where a person is charged with an offence. It does not limit the court to making an order only when the person from whom the sample is to be taken is in some form of custody. Only the restriction on the taking of samples which appears in section 39 (1) provides that where a person is in police detention then either consent or an order is necessary.

29. The appeal based on the sole ground that an order cannot be made unless at the time of the order the person from whom the sample is taken is in police custody is therefore misconstrued. A person might be still at large and yet to be taken into police custody. Seeking an order in advance is not prohibited. A person may be in custody elsewhere and arrangements made after the order is sought for him or her to be taken into police (as opposed to any other form of) custody.

30. This appeal is against the making of the order, not the actions of the police in taking the actual sample. It is an appeal that cannot succeed. The requirements to be considered and met when

considering the making of an order are that there are reasonable grounds for suspecting that the person from whom the samples are to be taken is or was involved in a serious arrestable offence and that there are reasonable grounds to believe that the sample will tend to confirm or disprove his involvement.

31. In this instance there was evidence pointing to reasonable grounds to suspect that the person from whom the sample was to be taken was involved in a serious arrestable offence. That came from the answers given to the police in interviews with other people and the alleged offence being an aggravated burglary. The motor vehicle which was alleged to have been stolen and driven from the scene by the persons said to have been involved in the burglary had been recovered so there existed the reasonable grounds to believe that comparison between that which was found in the motor vehicle and the sample taken could confirm or disprove involvement.

32. That the proper grounds did not exist is not, indeed, part of this appeal, an appeal brought solely on the ground of not being in police detention.

33. Section 40 relates only to non-intimate samples, but a non-intimate sample was also requested, that being a hair sample. Section 40 provides that a non-intimate sample may be taken from a person without the appropriate consent if he is in a police detention or is being held in custody by the police on the authority of a court; and there is a court order for it to be taken without the appropriate consent.

34. Again there is no restriction on when the order can be made or applied for in terms of where the person from whom the sample is to be taken at that time. The place restriction applies only at the time of the actual sample taking, so the appeal will not succeed under this section if based solely on this ground.

35. The subsection does refer back to an order for the taking of samples under subsection (3) and therefore it could be said that there is a duty to ensure no order will be executed other than in accordance with the section, which may be the substance of the complaint in this case, but there is certainly no restriction imposed on the judicial officer in terms of where the suspect may be at the time the order is made.

36. This appellant was already on remand in HMP Grand Turk at the time this application was made. He had been on bail following an appearance at court for robbery and then after his arrest for this and other offences of burglary he was remanded in custody. The order of remand placed him as a remand prisoner in HMP Grand Turk. This is not an issue. For all purposes during his remand he was under the custody and control of the Superintendent of Prisons. That position is governed by the Prison Ordinance and regulations made thereunder.

37. The Prisons Ordinance and the regulations made thereunder permit the Superintendent of Prisons to release a prisoner under his custody in various circumstances. He may, for example, release a person who needs medical treatment that is not otherwise available in the prison (see section 7) and can be placed in the care and control of either prison officers or police officers (see Prisons Regulation 26). He may release a prisoner into the custody of police officers who seek to interview him in relation to further allegations or other unrelated matters that the prisoner himself wishes to see the police about. Some situations require the consent of the detainee, other situations do not. Release to another in compliance with a court order is most likely to falls within the former.

38. It is not therefore correct to say that after he has been received into the custody of HM Prison that a prisoner cannot thereafter be released to the custody of police and during that time described variously as being held in police custody on the authority of a court or being in police detention in addition to being in the lawful custody of the Prison Service.

39. On the very narrow ground under which this appeal is brought, this appeal must fail. The order for samples is not only available when the person from whom samples are to be taken is then in police detention. It is the sample that can only be taken when the person is in police detention. Whether the person is in police detention at the time the actual sample is taken is the real question, which question is not raised within this appeal. The answer to that question, when answered on the facts of the case after evidence and argument, may lead to a claim for damages and may lead to an application within a trial for the exclusion of evidence said to be illegally or unfairly obtained, but will not inevitably lead to the making of the order being overturned on appeal. It is not a ground which can properly prevent an order being made.

Decision on all of the appeals.

40. Aside from the appeal which was abandoned during argument, each of the appeals against the orders made in the Magistrate's Court for the taking of samples are hereby dismissed for the reasons given above.

41. I have released this decision in draft form given the pressing requirement for the decision on the appeals taking into account the related criminal proceedings. There remains the possibility that this draft contains spelling grammatical and other errors for which I reserve the right to publish a final version of this same judgment.

Goldsbrough CJ

The relevant legislation

38. For the purpose of sections 39 and 40—
"appropriate consent" means—

(a) in relation to a person who has attained the age of 16 years, the consent of that person;

(b) in relation to a person who has not attained the age of 16 years but has attained the age of 14 years, the consent of the person and his parent or guardian; and

(c) in relation to a person who has not attained the age of 14 years, the consent of his parent or guardian;

"intimate sample" means a sample of blood, semen or other tissue fluid, urine saliva or pubic hair, or a swab taken from a person's body orifices;

"non-intimate sample" means—

(a) sample of hair other than public hair;

(b) a sample taken from a nail or from under a nail;

(c) a swab take from any part of a person's body other than a body orifice; and

(d) a footprint or a similar impression of any part of a person's body other than a part of his hand

(Inserted by Ord.2 of 2002)

Intimates samples

39. (1) An intimate sample may be taken from a person in police detention only—

(a) if there is a court order for it to be taken; or *(amended by 19 of 2009)*

(b) if the appropriate consent is given.

(2) The court may only make an order if there are reasonable grounds—

(a) for suspecting the involvement of the person from whom the sample is to be take in a serious arrestable offences; and

(b) for believing that the sample will tend to confirm or disprove his involvement.

(3) The appropriate consent shall be giving in writing.

(3A) The court may order the use of reasonable force for the purpose of taking the non-intimate sample *(inserted by 19 of 2009)*

(4) Where—

(a) a court order has been made; and

(b) it is proposed that an intimate sample shall be taken under the court order,

an officer shall inform the person from whom the sample is to be taken—

(i) of the court order; and
(ii) of the grounds for making it.

(5) The duty imposed by subsection (4)(b)(ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.

(6) If an intimate sample is taken from a person—

(a) the court order by virtue of which it was taken; and *(amended 19/09)*

(b) the grounds for making the order; or
(c) the fact that the appropriate consent was given,
shall be recorded as soon as is practicable after the sample is taken.

(7) If an intimate sample is taken from detained at a police station, the matters required to be recorded by subsection (6) shall be recorded in his custody record.

(8) An intimate sample other than a sample of urine or saliva, may only be taken from a person by a medical practitioner.

(9) Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence—

(a) the court, in determining—
(i) whether to commit that person for trial; or
(ii) where there is a case to answer; and

(b) the court or jury, in determining whether that person is guilty of the offence charged,
may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as or as capable of amounting to, corroboration of any evidence against the person in relation to which the refusal is material.

(Inserted by Ord.2 of 2002)

Other samples

40. (1) Except as provided by this section a non-intimate sample shall not be taken from a person without the appropriate consent.

(2) Consent to the taking of a non-intimate sample shall be given in writing.

(3) A non-intimate sample may be taken from a person without the appropriate consent if —

(a) he is in a police detention or is being held in custody by the police on the authority of a court; and

(b) there is a court order for it to be taken without the appropriate consent.

(4) The court may only make an order under subsection (3) if there are reasonable grounds—

(a) for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence; and

(b) for believing that the sample will tend to confirm or disprove his involvement.

(5) The court may order the use of reasonable force for the purpose of taking the non-intimate sample.

(6) Where—

(a) a court order has been made; and

(b) it is proposed that a non-intimate sample shall be taken under the court order,

an officer shall inform the person from the sample is to be taken—

(i) of the making of the court; and
(ii) of the grounds for making it.

(7) the duty imposed by subsection (6 (b)(ii) shall include a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.

(8) If a non-intimate sample is taken from a person under subsection (3)—

(a) the court order by virtue of which it was taken; and

(b) the grounds for making the order,

shall be recorded as soon as is practicable after the sample is taken.

(9) If the non-intimate sample is taken from a person detained at a police station, the matters required to be recorded by subsection (8) shall be recorded in his custody record.

(Inserted by Ord. 2 of 2002)

IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS **CR 51/2012**

HOLDEN AT PROVIDENCIALES

Before: Joyner, J

APPLICATION UNDER SECTION 8(2) OF THE EVIDENCE (SPECIAL PROVISIONS) ORDINANCE, CAP. 2.07

IN THE MATTER OF REGINA v LORRAINE KENLOCK BOVELL

Appearances:

Ms J Meloche – Director of Public Prosecutions (D.P.P.)

Ms L Maroof – for Defence

Heard: 23 January 2014

Decision: 24 January 2014

DECISION

1. The Prosecution applied to have two statements admitted into evidence under the provisions of section 8(2) of the Evidence (Special Provisions) Ordinance Cap 2.07. This section sets out the conditions which must be satisfied before a witness statement may be admitted as evidence in the absence of the person who made it.
2. Section 8 provides:

> "(1)Subject to-
>
> (a) Any rule of law whereby evidence given orally at an original trial must be given orally at a retrial; and
> (b) Section 11,
>
> a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if-

(i) the requirements of one of the paragraphs of subsection (2) are satisfied; or

(ii) the requirements of subsection (3) are satisfied.

(2) The requirements referred to in subsection (1)(i) are-

(a) that the person who made the statement is dead or by reason of his bodily or mental condition in unfit to attend as a witness;

(b) that-

(i) the person who made the statement is outside the Islands; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement but he cannot be found.

Section 10 ibid provides guidance as to which principles are to be followed by the court in exercising its discretion under section 8. Section 10 provides:

"(1)If, having regard to all the circumstances the court is of the opinion that in the interests of justice a statement which is admissible under section 8 or 9 nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of subsection (1) the court shall have regard-

(a) to the nature and source of the document containing any statements and to whether or not having regard to them and any other circumstances which appear to the court to be relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be available;

(c) to the relevance of the evidence that it appears to supply to an issue which is likely to have been determined in the proceedings; and

(d) to a risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."

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PROSECUTION'S ARGUMENTS

2. The Prosecution called ASP Kenville Charles who, on affirmation, answered questions as to the steps taken to locate Kent Crotty and Hans Kalter. ASP Charles stated that he had supervised Insp. Dwayne Baker who had sent emails to Kent Crotty regarding his availability for the upcoming trial. ASP Charles also stated that he, himself, had sent emails to Hans Kalter to which he had received responses. The Prosecution exhibited an affidavit signed by Inspector Dwayne Baker stating that from February to November 2013, he had also made repeated calls to the last known telephone number of Kent Crotty without success.

3. After ASP Charles had been cross-examined and released, the D.P.P. stated that she had received late information from him that the witness Hans Kalter with whom contact had been made, may be available to give evidence by SKYPE. In light of this development, the court will not consider the application regarding Hans Kalter at this time.

4. The court will concentrate on the application regarding Kent Crotty. Prosecution contends that Mr Crotty is outside the islands and all reasonable steps have been taken to find him. In support of the reasonable steps taken, the Prosecution refers to email messages sent to both his email addresses to which there has been no response. The court notes that two (2) such emails are exhibited. These were sent to Mr Crotty's email addresses by Inspector Baker and are dated, October 31, 2013 and November 5, 2013 respectively. The Prosecution also refers to the telephone calls which Insp. Baker, in his affidavit, stated that he made.

5. Counsel for the Prosecution stressed that "reasonable steps" cannot be said to include contacting the US army in Germany where Mr Crotty stated he was employed in 2011. She further urged that Mr Crotty's statement is not controversial but merely corroborative of evidence to be given by Janet Burleson, a witness who will attend trial. Counsel drew the court's attention to the cross-examination of Mr Crotty at the previous trial and stressed that this cross-examination did not shake the evidence he had given in his examination –in-chief which evidence was based on his witness statement. The D.P.P. argued the court should have no difficulty in allowing the statement to be admitted at trial.

6. Counsel for the Prosecution cited two cases in support of her arguments: **Regina v James Francis Turks and Caicos Islands Supreme Court CR 23/09; and Ludwis Allen Wheatley, Wesley Penn v the Commissioner of Police of the British Virgin Islands (2006) Privy Council Appeal No 15 of 2005.** Both these cases underscored the principle that a witness statement the contents of which do not impinge on the nature of the proposed defence, may be rightly admitted and read into evidence without the witness being called to testify.

DEFENCE ARGUMENTS

7. Defence counsel argued that neither the provisions of section 8(2)(b) nor those of section 8(2)(c) had been satisfied as the Prosecution had not done all that they could do to locate Kent Crotty. She drew the court's attention to Mr Crotty's evidence (in a previous trial) that he was residing in Germany and working for the US army and showed that no efforts had been made to contact the US army to request assistance in locating Mr Crotty. No only this but no efforts had been made to locate Mr Crotty at his given address in Germany. She stressed that seeking the assistance of the US army in locating the witness was reasonable.

8. Defence counsel argued further that the witness statement of Kent Crotty was controversial in that the Defence challenges every assertion he made in that statement. As such, it was vital to the defence that Kent Crotty be cross-examined. She stressed that the core of the defence was such that the cross-examination would need to be extensive. The core of defence's case is that Kent Crotty was employed and paid by Lorimar and that these payments were in excess of the $25,000 which he admitted receiving as a bonus.

9. Defence counsel cited two cases in support of her arguments: **Regina v Arran Charlton Coughlan (1999) WL 34854707[UKCA]; and Regina v Mei Hua Yu, Chang Shu Yu [2006] EWCA Crim 349.** The Charlton case illustrated that a conviction was ruled unsafe because the lower court had erred in admitting a witness statement where the statutory requirements had not been met. The Mei Hua Yu case stressed that in exercising its discretion as to the admissibility of a written statement, the court "has to consider the