REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Criminal Appeal No. 23 of 2006

BETWEEN

WINSTON PHILLIPS JR. **APPELLANT**

AND

THE STATE **RESPONDENT**

Panel: R. Hamel-Smith, JA
S. John, JA
A. Mendonca, JA

Appearances:
Mr. E. Welch for the appellant
Mr. W. Rajbansie for the respondent

Date: February 26, 2008

JUDGMENT

R. Hamel-Smith, J.A.

On May 22, 2006 the appellant was found guilty of the offence of Receiving Stolen Property to wit: one Red Hilux Toyota Motor car and sentenced to five years imprisonment with hard labour. He filed an appeal, raising two grounds of appeal against the conviction and complained that the sentence was too severe.

The first ground against conviction complains that the comments made by the trial judge deprived him of a fair trial. Counsel for the appellant submitted that the trial Judge went far beyond the bounds of proper judicial comment by repeatedly referring to and commenting on various aspects of his testimony as "*inherently improbable*". This, in counsel's view, had the effect of nullifying and rendering meaningless the earlier directions that the jury may reject the judge's opinion on the evidence and thus leaving the jury with the indelible impression that the appellant's testimony could not and should not be believed.

This had the trickle down effect of unbalancing the rest of the summation, weighing the scales heavily in the prosecution's favour, and causing the judge's summing up to border on *advocacy*. All this gave rise to the serious possibility that a miscarriage of justice might have occurred.

The second ground was the overall effect of the learned trial judge's summation on the issue of the alleged oral and written statements would have been to leave the jury with the impression that there was some onus on the Appellant to establish that the statements were untrue or involuntary.

The two cases were diametrically opposed to each other. The case for the prosecution was simply that from information received the police obtained a warrant to search the appellant's home for the stolen vehicle. They also had a warrant to search Webster's garage for parts to that vehicle.

The police arrived at the appellant's home at about 4.30 in the morning. The appellant was sleeping. He came outside where he was shown a warrant. He denied that he had anything to do with the stolen vehicle. A search ensued but nothing was found. According to the police, the appellant however took them to a spot on Cameron Hill some distance away and showed them the remains of the vehicle. A wrecker was required to retrieve the parts that were eventually taken to the Wrightson Road station in Port of Spain for storage.

The appellant was cautioned and he responded by saying that *"ah tief the vehicle with some fellas. Ah strip it and sell the parts to Jeff in Rich Plain."* The party therefore proceeded to Webster's garage where the other warrant was executed. There the appellant told Webster that he had come for the parts he had sold him. The parts were recovered and also taken to the storage area. .

The appellant was later taken to the Port of Spain CID. The following day the owner identified the vehicle as the one that had been stolen from his premises. The appellant was then transferred to the West End Police Station. P.C. Nanan took over the investigation and on the following night the appellant indicated to him that he wished to give a statement. P.C. Nanan contacted officer Brisbane. They escorted the appellant to the CID office for the interview.

The appellant asked Nanan to write the statement and he recorded what the appellant told him. He read it over to him and then the appellant read it himself. He then signed it. The statement was inculpatory and revealed that the vehicle was stolen by the appellant's cousin on April 1, 1999 and brought to his home. He said that he had assisted his cousin over two days in stripping the vehicle and hiding the parts in the bushes up in Cameron. Later, he sold the parts to Jeff Webster for cash, with payment by instalments.

The following morning the Justice of the Peace, Fitzroy Forde, arrived at the station to authenticate the statement. He read over the statement for the appellant who told him that he had given it freely and that it was correct. He asked him if he wished to change or add anything and he did. He added a note setting out the instalment he had received from Webster in the total sum of $2,500.00 owed to him by Webster.

Of course, the case for the prosecution was not without its inconsistencies and contradictions. The judge directed the jury on how to approach such issues and in his summation of the case he highlighted each and every one of them for the jury's consideration. He made it clear to the jury that those were issues of fact and that they were the ones to find the facts. There is no complaint with his directions in this area.

This in effect was the case for the prosecution. It is without doubt that the oral admissions and the written statement were pivotal to the success of the case. The vehicle was not found in the appellant's possession and there was no evidence to suggest that he had been seen stealing the vehicle or in possession of it at anytime. The success of the case therefore turned on what view the jury took of the oral and written statements. If they accepted that the appellant had made the statements and that they were true, then there was only one conclusion – guilty.

The appellant's defence was a complete denial of the prosecution's case. He knew nothing of the stolen vehicle. He knew about a motor-bike and claimed that the police were searching for one on the night in question. He had only that day retrieved the bike from one Karim Bocas who had seized it from him previously. He was compelled to pay over monies that he owed to Bocas in order to retrieve the bike. He had done so that very day. According to him, the police had found the bike that night by his brother's house and had taken it to the station, together with him and his brother. He even suggested, although he never put it to Officer Grant, that he, Grant had attempted to start the bike and was unable to do so. Grant then asked him to kick start it and he did, in spite of his claim to have been intoxicated at the time. Grant then rode the bike to the station.

He suggested that the police arrived at his house much earlier than they had claimed. They got there about 1 a.m. (and not 4 a.m). He was at the time somewhat intoxicated, having consumed whisky (coloured blue) by a friend's home that night. It was his birthday and they were celebrating. The police never showed or read to him any search warrant but simply asked him about the bike. They eventually found the bike by his brother's home and officer Grant rode it to the station.

He claimed that he never took the police to Cameron Hill, as they had alleged. He was taken to the station and after they had beaten up on him he was taken to Cameron Hill where he was shown a stripped vehicle hidden in the bush. He never told them that he had stolen the vehicle with his cousin or that he had sold parts to Webster. The police however took him to Webster's garage and there recovered other parts belonging to the vehicle. He never asked Webster for the "*parts that I sold you*" as alleged by the police. He acknowledged that a wrecker was used to retrieve the vehicular parts on Cameron Hill.

He claimed that when he was taken back to the station and placed in a cell, he asked P.C. Nanan for a cigarette. He was told by Nanan that he would give him one when he was prepared to give a statement about the stolen car. Later that night he told Nanan that he would give a statement. Nanan gave him a hemp cigarette to smoke. He smoked it and felt *"a little dark, kind of blurry head dark"*.

Having agreed to give the statement, he asked Nanan to write it down. He claimed, however, that Nanan did not write down what he was saying and was concerned only with what PC Bruce had told him about the stolen vehicle. Nonetheless, Nanan read it over to him; he then read it and signed it. He also prepared the certificate and signed it too. Significantly, it was never put to Nanan that he did not write down what the appellant had told him.

When the Justice of the Peace came the following morning, the statement was read over to him. He made no complaint. The JP told him that he could make changes or add to the statement and he added in the instalment payments he had received from Webster. In the certificate, which he signed in the presence of the Justice of the Peace, the appellant certified that the statement was correct except that he had collected $2500.00 from Webster as follows: $500.00 on the first occasion and afterwards sums of $60.00, $300.00, $600.00, $500.00 and a further $500.00. The balance due was $40.00.

However, at the trial, for the first time, he said that the instalments were payments made to him by Webster for monies due to Karim Bocas. He had received the sum of $2460. out of a total of $2500. and was due $40. It was on receipt of that money that Bocas returned the bike to him (as promised) on the same day that the police obtained the search warrant. In fact, when Bocas first came to see him about the money, Bocas had pistol-whipped him across the face, breaking his nose. He did nothing about it, not even seek medical attention.

Anyone reading the statement could hardly be faulted if he concluded that the instalments were in connection with the monies Webster owed the appellant for the stolen parts. He challenged the statement on a voir dire but the judge ruled it admissible.

In the written statement, the appellant disclosed that on March 30, 1999, his cousin came to his home with another man and told him "*to line up a scene with some cow*". By this he meant that I should organize to steal a van. The appellant told him that he did not have anything lined up. He had some keys on a table and his cousin asked him if they were

Toyota keys and he told them they were. Both of them knew that Toyota keys worked in most Toyota vehicles and his cousin picked them up and left.

The following morning his cousin returned with a red four-door van (the stolen vehicle). The appellant panicked because it was almost morning and he was afraid that someone would see the van. They took the van up Cameron Road and left it there. He suggested to his cousin that since the van was a "*make out scene*" (too obvious) it was better that they strip it. They did so and hid the parts in the nearby bush. He told his cousin that he would organize a buyer for the parts and he ended up going to see Jeff Webster about them. The appellant eventually took some of the parts to Webster's garage and was paid $500.00. Webster told him that when he got the rest of the parts he would pay him the balance of the money. The next day he went with Webster and pulled out the remaining parts except the doors "and some other major body parts" including the tray.

The following Sunday the appellant went back and brought the tray, a fender and rails and Webster paid him another $300.00. According to the statement, Webster had more money for him and told him to bring the balance of the parts. He carried some small parts to Webster on his birthday, April 14 but Webster did not give him any more money. On leaving, Webster told him that when he brought the balance of the parts he would "handle meh" (pay the money).

He said that was the last time he saw Webster because the following morning the police came to his house asking about a motorbike. He was a bit intoxicated at the time as he was drinking whisky (coloured blue). He said that he told them he did have a bike but he had sold it. The police, he claimed carried him down to his brother's home where they saw the bike. According to him, the police tried to start the bike but could not. They asked him to kick start it and he did. He said the police then took him and the bike to Port of Spain and asked him about a red van and he ended up telling them about it. He took them to Cameron Hill where he showed them the scrapped van. There he recovered the number plate for the van, i.e. TAT 8631. He then took them to Webster's garage where they retrieved the rest of the parts.

In the certificate, which he signed in the presence of the Justice of the Peace, Fitzroy Forde, the appellant certified that the statement was correct. He however, added to it by stating that he had collected $2500.00 from Webster as follows: $500.00 on the first occasion and afterwards sums of $60.00, $300.00, $600.00, $500.00 and a further $500.00. The balance due was $40.00.

Apart from the reference to the motorbike, a matter denied by the police, the time of the execution of the search warrant and being taken to the station *before* the stolen vehicle was recovered, the statement was consistent with the testimony of the police officers. The motorbike issue would be irrelevant to the extent that the appellant nonetheless had admitted taking the police to see the vehicle on Cameron Hill and then going to Webster's for the other parts. It was sufficient to establish that the appellant was a receiver of stolen goods. As indicated earlier, it was never put to Grant that he tried to

start the bike or that he had asked him (the appellant) to kick-start it or that he (Grant) had ridden it to the station.

In the course of his evidence, the appellant claimed that PC Bruce had it *out for him* and had even threatened that if he had to wait ten years he would get him. He suggested that Bruce set him up with the charge because (i) he had climbed up on Bruce's wall some months before the incident and the wall had fallen on him. Bruce abused him for this. He nonetheless had received no injury. (ii) Bruce had come at him with a piece of wood at Bentley's garage and cursed him in the worst way. (iii) Bruce had it out with the appellant's mother because she had stopped him building on her land and (iv) Bruce was missing *things* from his *basement* and accused him of taking them.

Bruce denied the wall incident, saying that he knew that his son had fallen off the wall but that had nothing to do with the appellant. In any event Bruce and the appellant and the appellant's mother and father were neighbours for over twenty years and they had a good relationship. The Bentley's garage incident was never put to Bruce but when the appellant was pressed to say what obscenities were hurled at him by Bruce the best he could muster was "*yuh mudder so and so*" – hardly words of profanity. The building of a structure on the appellant's mother's land was never put to Bruce but Bruce was able to demonstrate that the land issue had occurred two years **after** the appellant had been arrested for the offence in relation to the stolen car. While the appellant had put the *missing things from the basement* issue to Bruce, in his evidence it turned out to be *music* missing from his *car.*

By the end of the case the appellant had extended this *sworn intention* of Bruce to *get him* to include Nanan, Brisbane and the JP. Nanan was only prepared to write what Bruce had told him about the theft and Brisbane was agreeing with Nanan. The JP too did not want to listen to him. He had told the JP a lot of things but he too was not listening. He admitted that the JP read over the statement for him but, in the end, he finally admitted, *I was not really listening to him. They were all setting me up*" By the time the JP told him he could change anything in the statement the only thing going through his mind was *"What next?"*

It is clear from the verdict arrived at that the jury rejected the appellant's story and accepted that he had made the oral and written statements, clearly implicating himself in receiving the stolen goods. As already indicated, the appellant's attempt to change his story by suggesting that the monies he had received from Webster were for the account of Bocas and not him, would have run counter to the general trend of the statement. It was not in dispute that the JP invited him to add or make any change he wished. That was the opportunity to put the payment for the parts in its proper perspective and show the role played by Bocas in the scheme of things. The addition he made certainly did not change the general story but simply added to it. He had every opportunity to correct the statement if, as he had claimed, Nanan had refused to write down what he had said. As the judge pointed out, the JP's evidence was not seriously challenged, if at all.

At the end of the day the judge summed up the case on both sides. He dealt with every conceivable inconsistency and contradiction in the prosecution's case, leaving the issues of fact for the jury. Of this there is no complaint.

Since it is clear that the jury must have rejected the appellant's story and convicted him on the basis of the statements made by him, it was critical that the trial judge, in his directions to the jury, make it abundantly clear to the jury that there was no onus whatever on the appellant to prove or disprove any thing that may arise in the case. It was for the prosecution to prove everything so that the jury was sure of the guilt of the appellant.

In this regard, it was equally critical that the judge warn the jury that in order to succeed the prosecution had to establish that the accused made the oral and written statements, that they were true and that they were made voluntarily (see ***R v Mushtaq*** [2005] 2 Cr.App.R). He needed to direct them that it was only if they were so satisfied that they could convict the appellant of the offence. If there were any reasonable doubt they would have to acquit.

Ground 2.

It is therefore convenient to deal with ground 2 of the appeal at this stage. The complaint is that the trial judge gave inadequate and erroneous directions on the oral and written statements, the overall effect of which would have been to leave the jury with the impression that there was some onus on the appellant to establish that the statements were untrue and involuntary.

The respondent, on the other hand, contends that the directions on the onus of proof were adequate and submits that the judge adequately addressed the question of the burden of proof, the overall effect of which was that the judge never shifted the burden on to the appellant.

The circumstances under which the oral and written statements came about have already been rehearsed. As regards the onus of proof, there were four occasions on which the trial judge dealt with the issue. The first is at page 3 of the summation (lines 24-29). The judge directed as follows:

> *A defendant is presumed throughout his trial to be innocent. That presumption may only be displaced if you were to decide that he was guilty of the charge that he faces. The burden of proving the defendant's guilt, if it can, is upon the State. That is known as the burden of proof.*

The second is at page 13 (lines 3-14):

> *Again, you have a direction, a legal direction on that. Whilst there is no burden whatsoever on an accused to prove or disprove anything in a criminal trial, it is difficult, you may think, to disprove oral admissions,*

especially if more than one witness gives evidence of the oral admission. There are many inherent dangers with which this kind of evidence is fraught. For instance, it is easy to fabricate evidence of oral admissions against accused persons. All it takes, does it not, "He said that to me".

The judge was dealing with the issue of whether the statement was in fact made and in reiterating his previous direction that there was no onus on the accused to prove anything he was at the same time explaining to the jury that evidence of oral admissions were always fraught with danger since they were difficult to refute.

The other reference is at page 28. The judge states as follows:

What use you should make of this second oral utterance? If you are satisfied so that you are sure that the accused did, in fact, make it, it will be open to you to find that, as a fact, by speaking those words, he was retracting the first oral utterance said to have been made on Cameron Hill to Gay and Bruce, provided of course you were already sure that he had made it and that he was now prepared to tell the officers what really happened".

The jury would have appreciated from the previous directions that there was no burden on the accused to prove anything but if they found that the second oral admission had in fact been made by the accused, it was open to them to draw a certain inference from it.

The final extract at pages 39 to 40 is relied on by the appellant and in fact is the core of his complaint. The judge directed the jury as follows:

"I remind you, he admitted in cross-examination to knowing Webster, where it is undisputed, some of the parts were found and he admits selling Webster parts previously.
Before you can act on an admission you must feel sure that the statement was made as alleged. It is for you to say how you construe what is alleged to have been said as for example, whether it amounts to an admission. If you so find, you must ask yourself the question whether you are satisfied so that you are sure that the admission is true.
The accused has raised several allegations of being beaten by the police on the morning of the day preceding the taking of the statement. However, he did not testify that this alleged earlier violence was operating on his mind at the time when he called Cpl. Nanan to the cells and agreed to give the written statement and ultimately sign it.
Moreover he testified that Nanan told him that he would only get a cigarette if he gave a statement.
You will recall that he had arrived at the police station from Webster's at around 2pm the previous day and, according to Cpl Nanan, a prisoner is not permitted to smoke in a police station. Immediately prior to dictating his account to the officers, he testified that he had smoked a hemp

cigarette given to him by Nanan which made him feel a little dark. Not really really high, a "little dark after smoking hemp. After not smoking so long you get a kind of blurly head dark".
He testified to consuming what you may think is a large of quantity of hard liquor over a short space of time, a few hours prior to the arrival of the police and that he was intoxicated. He did not suggest in evidence that he was still under the influence or ill effects of alcohol consumption and I remind you that on the totality of the evidence including his account of the alleged drinking approximately 49 hours had elapsed since he stopped and the statement commenced.
Additionally he testified that he was never cautioned although, I remind you of my observation in respect of the cautionary preamble that I gave you before---- or informed of his constitutional right to have an attorney, a relative or friend present during the taking of the statement. If you consider that the written statement and the second oral utterance were or may have been obtained by oppression inducement, promise, or any other improper conduct as alleged by this accused, you should disregard them both."

The gist of the complaint is that the judge may have unwittingly transferred the onus onto the accused to prove oppression i.e. that he was drunk at the time of giving the statement and/or that he was affected by the hemp cigarette when he did so and/or he was beaten to do so. We do not agree. The trial judge was at the time dealing with the evidential burden of establishing the issue of oppression. The accused is not permitted merely to suggest that there was oppression and throw the onus onto the prosecution to prove that there was none. He must at least provide some evidence of oppression for the state to answer.

In the instant appeal, the appellant claimed that he was intoxicated and beaten when arrested and given a hemp cigarette before giving the written statement. The judge was quite correct to make the observation to the jury that the evidence of the appellant did not suggest that the alleged intoxication or beating, which had occurred some 49 hours before, were operating factors when the written statement was made.

Having made the observation, the judge proceeded to direct the jury that if they considered the alleged beating, and/or intoxication and/or hemp cigarette to have had any effect on his giving the statement they could reject the statement outright.

The jury first had to determine whether the appellant made the statement and if he did whether it was true. The judge gave the necessary directions on this score and then proceeded to direct them (quite properly) that if they found that the statements (oral or written) were made as a result of oppression they should reject them completely. We can find no fault with these directions and the trial judge certainly did not transfer the onus of proving oppression to the appellant.

We reject the submission and would dismiss this ground of appeal.

Ground 1.

The complaint is that the effect of the judge's comments about the appellant's evidence was to unbalance the summation against the appellant. It is trite law that a judge is entitled to comment on the evidence in a case. In fact there are times when he may be obliged to direct the jury's attention to the improbabilities and inconsistencies in the defence.

In ***John v The State*** [1] de la Bastide CJ (as he then was) addressed the question of judicial comments. He said that:

> "*It is no part of the trial judge's duty to cover up the weaknesses of the defence case.. Indeed the Judge is entitled, and may be bound, to direct the jury's attention to the improbabilities and inconsistencies in the defence*.

Rose LJ in ***R. v Tuegel, Saia and Martens*** [2] (quoting from what Simon Brown LJ in ***R. v Nelson*** [3] stated that:

> *"Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But this is not to say that he is entitled to have it rehearsed blandly and uncritically in summing up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities - as plainly this appellant's defence was - there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis.*
>
> *Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge give full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side, so as to correct any substantial imbalance. He has no duty to cloud the merits, either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."*

[1] (2001) 62 WIR 314
[2] (2000) 2 Cr. App. R 361 at 382
[3] [1997] Cr.im LR 234

We think that the words of Simon Brown LJ speak for themselves. It is clearly within the trial Judge's jurisdiction to point out to the jury inconsistencies and improbabilities in the defence case. Were it otherwise, he would simply have to recite the evidence and leave the jury, bereft of any proper analysis of it.

We also agree that a man's defence is not to be belittled or ridiculed in any way. To do that would certainly leave the jury with the impression that there is no merit whatsoever in it and should be rejected. It follows that an accused is entitled to have his defence placed before a jury for its consideration. If, however, it is illogical or so replete with inconsistencies the trial judge is entitled to put it in its proper context.

Further, the entitlement of a judge to comment on the evidence extends to the use of *robust language*; and if there is an imbalance in the evidence, the summing up will reflect that language, but it is preferable for a judge who merely echoes an argument of an advocate, to remind the jury of the point as one made by the advocate concerned (see **R v Butler.**[4])

It is however, impermissible for a judge to leave the jury with the impression that he favours the prosecution case against the defendant: **R v Bryant.**[5] The judge must not usurp the function of the jury and the case must be left to the jury to decide. But the judge is entitled to express his opinion strongly in a proper case provided that he leaves the issues to the jury.

In the instant case it is evident that in many instances the appellant's case was inconsistent, with material differences between the evidence given in his examination- in chief and cross-examination. It left the impression that he was making up his defence as the case unfolded. For instance, the appellant testified that the police officers with their hands, books and torchlight beat him. In examination-in-chief he stated that Bruce fired the torchlight, then Gay hit him twice with the station diary, and then the rest of the officers started to hit him with their hands. In cross-examination, he altered his story and stated that Bruce, Gay and the rest of the officers beat him with their hands. On this basis it was clear that the appellant's evidence was conflicting and at times confusing.

It was put and denied by Bruce that he and Gay beat the appellant with the torchlight. Mr. Bruce stated that he had nothing to benefit…*"How could I live next to a neighbor and beat, or have others beat him in my presence? If I have a little dispute, that's easily settled. I would never allow anything to be involved. I would not sit there, and he knows that well."*

Additionally, none of the eleven officers who came in contact with the appellant saw any mark or injury on his body and more particularly on his head and face from the alleged beating. The accused made no complaints to them nor did he appear to be in any pain or discomfort.

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[4][1999] Crim. LR 595, CA, & Archbold 2007, para. 3-376 at page 502.
[5][2005] 9 Archbold News 3, CA.

The accused also did not mention the alleged beating at the station until as late as 2006. While in the Remand Yard he never went to the hospital, he never requested any painkillers, although he claimed to have been beaten with a metal chrome-tin torchlight. Surprisingly, however, he claimed that when he secured bail some six months later he visited the Port of Spain General Hospital for treatment but did not keep the medical certificate given to him nor could he remember the name of the doctor.

We now turn to the specific complaint by counsel for the appellant - the comments of the trial judge. Having completed his analysis of what he perceived to be key aspects of the prosecution and defence cases, the trial Judge asked the jury to consider whether it was "*inherently improbable"* that Bruce would swing the torchlight at the appellant and beat him with the others especially since they were neighbors and long-standing family friends, who all went to the same church. This latter part is a non sequitur. As regards the confused nature of the evidence as it relates to the beating itself at the station, the comment may have been justified but there is nothing *inherently improbable* with an officer beating a person notwithstanding that they are neighbours and long-standing friends or belong to the same church. The judge therefore erred when he asked the jury to consider the issue in that way.

The judge also asked if it would have been *inherently improbable* that Bruce would have approached the accused with a piece of wood at the garage, as the appellant had alleged. The judge posed the question in light of the fact that this was not the appellant's case when Bruce was cross-examined. It was only when he took the stand that he alleged that Bruce had attacked him with a piece of wood. This made it all the more improbable, inherently so, that it had occurred at all. The judge could not be faulted on this comment.

The judge also referred to the prosecutor's suggestion of the inherent improbability that Bruce cursed the appellant on several occasions. When the appellant was pressed to give examples of this, he could only refer to one instance where he claimed that Bruce said "*yuh mudder so and so*…". Those words could hardly be considered words of profanity and the comment cannot be seriously faulted.

His Lordship referred to the inherent improbability that the police would have requested the appellant's help to get the engine up the precipice, when on the unchallenged evidence, the police obtained the services of a wrecker to do the job. The appellant had in examination-in-chief accepted that a jeep had been used to do the job. This would certainly suggest implausibility or improbablity but not *inherently improbable*.

The judge noted the *inherent improbability* of the appellant's evidence that he was able to see or make out that Constable Nanan was not writing what he had told him having regard to where the appellant was seated. It was improbable or highly unlikely that the appellant would be able to actually see what Nanan was writing, given the seating arrangement. He was not looking over Nanan's shoulder but sitting across from him. Significantly, when Nanan was on the stand it was never suggested to him that he was not recording what the appellant was telling him.

Despite this, when the statement was read over to him by the Justice of Peace, he signed, initialed and dated it and included additional information about the moneys that he collected from Webster. He accepted that the statement was correct and was given of his own free will. At no time did he complain to the Justice of Peace that Nanan did not write what he had told him, that he had been beaten previously by various officers, or that he had only given a statement after he was given a hemp cigarette and he was not permitted to smoke since he had gone into custody. It was in this light that the judge echoed the views of the prosecutor in pointing out the inherent improbability of the appellant purporting to see that Nanan was not writing his version of the events at the time.

We are concerned with the use of the words complained of because the word *inherently* does add to the implausibility or unlikelihood or improbability of the event occurring. It seems that from the summation the judge was echoing the words of the prosecutor who had attempted to convince the jury that these incidents were inherently improbable. It also seems to us that the words were justified in some of the instances but certainly not in others. Nonetheless, we do not think, in all the circumstances, that the trial judge in making these comments undermined the trial process or usurped the function of the jury. His comments were not of such an extent to render the summing up fundamentally unbalanced and flawed that the Court should set aside the conviction.

It must be recognised that a summing up will not be held to be unbalanced if it accurately reflects the strength of the case for the prosecution, on the one hand, and the weakness of the case for the defence, on the other: **R v O'Neill.**[6] As was emphasised by Simon LJ in ***Nelson*** cited above, if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities, there is no reason for a judge to withhold from the jury the benefit of his own powers of logic and analysis.

In **Hume v Attorney General**[7] the appellant submitted that a miscarriage of justice may have resulted from the judge's repeated use of the comment in his summing up that his defence "***stretched credulity.***" The Court of Appeal on this point disagreed and relying on the case of **Evans v R**[8] held that the judge's summing up was not improper and no miscarriage of justice was caused by the use of this expression "*stretching credulity*" in reference to appellant's version of events.

The court noted that the judge would, in any event, have been entitled when summing up to express his own opinion on witness evidence, provided he warned the jury that it was for them to decide the facts and that they should disregard any comments he make with which they disagreed. The court noted however, that while it would have been better to avoid repeated reference to incredibility, the summing up was not in any way improper or amounted to or caused any miscarriage of justice.

[6] (1988) 48 SASR 51.
[7] [2005] JLR 327
[8] (1990) 91 Crim. App. 173.

What is important is that the summing up must be looked at as a whole. This was confirmed in **R v Courtney-Smith (No. 2)**[9]:

> *"The assessment of the overall balance requires a consideration of the whole of the summing up. Isolated phrases taken from here and there are no substitute for a consideration of the entire charge, looked at as a whole and in its context in the trial. In many cases the summary of the Crown's case on the facts will necessarily take somewhat longer than the summary of the case for the accused. Often, the accused may give no evidence or may call only character evidence. The Crown's case being circumstantial may require some elaboration. It is not the length of time devoted to the case of the Crown or the accused, which is in issue. It is the fairness, balance and impartiality of the summing up which the appellate court must review and safeguard."*

This was reiterated **in B v R**[10] where Brennan J (as he then was) stated that whether or not a trial judge has gone too far in expressly or impliedly deprecating a defence case "*depends on the impression gained by reading the summing up as a whole*." It is a quite impermissible exercise to dissect out arguments of a summing up and criticize them in isolation.

In **R v Papple and anor**[11] the appellants were convicted of a number of fraud charges after a jury trial and were sentenced to imprisonment. They appealed this conviction on the general ground that the summing up was unfair to the defence. In dealing with the unfair summary of the defence case, Justice O'Reagan noted that the criticism of the way the judge summarized the defence case was not a criticism of the adequacy or comprehensiveness of the summary. Rather, the criticism focused on a number of comments, which the judge interpolated in his summary. It was argued that this undermined the defence case and was unfair.

After making an overall assessment of the criticisms of the summation, it was noted that the overall defence case was clearly put to the jury in extensive and generally accurate directions, and the interpolations which were made were within the boundaries of the judge's entitlement to comment on the evidence. The judge made it clear that it was for the jury to determine factual matters, and that his comments should be disregarded if the jury had a different view from his.

The summing up, in our view, taken as a whole, provided the jury with an adequate summary of both the defence and the prosecution cases. The judge's use of the words "*inherently improbable*", albeit inappropriate at times in our view, were not such as to undermine the appellant's case or to render the trial unfair. It may be that the judge would be well advised not to use such expression in the future unless the facts can support such

[9] (1990) 48 Crim. R 49.
[10] [1992] 175 CLR 599 at 606.
[11] [2006] NZCA 276.

use. The judge however, made it clear to the jury that they were entitled to reject his comments and that the facts were for their determination.

We would reject this ground of appeal. Had it become necessary, however, we would have applied the proviso under section 44 Supreme Court of Judicature Act, Chapter 4:01. The evidence of the appellant on the issue of making the written statement was so unreliable that any reasonable jury properly instructed would have found that he had indeed given the statement to the police. The instances in which the use of the words *inherently improbable* was not called for would hardly have detracted the jury from making that finding of fact.

As regards the sentence imposed we find the term of imprisonment to be reasonable in the circumstances, given that the appellant had no previous convictions. Car stealing is far too prevalent in this society today and it abounds because there are persons only too willing to take them off the felon's hands for a small price. It is an offence that cannot be tolerated and given that the maximum sentence for receiving is ten years, the appellant is fortunate that the judge imposed the sentence he did. The sentence will stand.

In the circumstances, the appeal is dismissed and the conviction and sentence confirmed. The sentence will run from May 22, 2006.

R Hamel-Smith
Justice of Appeal

S John
Justice of Appeal

A Mendonca
Justice of Appeal