Court File No. 38129

IN THE SUPREME COURT OF CANADA
(On Appeal from the Nova Scotia Court of Appeal)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

-and-

DEAN DANIEL KELSIE

Respondent
(Appellant)

-and-

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ATTORNEY GENERAL FOR ONTARIO
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

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PART I – OVERVIEW, STATEMENT OF FACTS- PART II - POINTS IN ISSUE

Overview

1. The intervener, the Attorney General of Ontario, accepts the facts as disclosed in the record of the Court below. The Attorney General of Nova Scotia has raised four issues in this appeal. Ontario intervenes on one of them: whether the Nova Scotia Court of Appeal (NSCA) erred in law in concluding that the acts and declarations made by Dean Kelsie's co-conspirators which preceded Kelsie's involvement in the conspiracy could not be used as evidence against him at step three of the *R. v. Carter*, [1982] 1 SCR 938 test. It is the position of Ontario that the Nova Scotia Court of Appeal's judgment on the application of step three of the *Carter* test reflects a fundamental misunderstanding of the nature of the offence of conspiracy in the underlying rationale for the co-conspirators exception to the hearsay rule. The Court of Appeal erred in declining to follow judgments of this Court and decisions of its own Court. The Court of Appeal improperly conflated steps two and three of the *Carter* test and has extended many of the requirements in step two to step three. NSCA also erred in imposing an additional admissibility requirement in step three when one does not exist. The Court of Appeal confused admissibility and the assessment of the weight to be given co-conspirators acts and declarations in furtherance of the conspiracy and erred in restricting the jury's ability to assess the evidence in step three in this case. In the result NSCA has inappropriately limited the application of the co-conspirators exception to the rule against hearsay.

PART III – BRIEF OF ARGUMENT

Introduction

2. The co-conspirators exception to the rule against hearsay provides that the acts and declarations of a member of a criminal conspiracy or common criminal enterprise, made in furtherance of the conspiracy or enterprise, are admissible against all members of the conspiracy or enterprise.[1] In *R. v. Baron and Wertman*[2], Justice Martin for the Ontario Court of Appeal put it this way

> "i[f] A and B have agreed to achieve a common unlawful purpose, them by their agreement each has made the other his agent to achieve that purpose, with the result that the acts and declarations of A in furtherance of the common design are not only A's acts and declarations but, in law, are also B's acts and declarations. The rule of evidence is not limited to charges of conspiracy but applies to any offence which is the result of pre-concert. "… It only comes into play, however, where there is evidence fit to be considered by the jury that the conspiracy alleged between A and B exists"[3].

3. The last requirement presented a problem in the development of the case for the Crown which could only be resolved by admitting the evidence conditionally, on the understanding that the prosecution would prove the requirement by the end of the trial or the evidence would be considered not to be admissible for the purpose for which it was tendered. In 1982 in *R.v. Carter*[4] this Court definitively explained how this problem was to be resolved and how the trier of fact was to apply the co-conspirators exception to the hearsay rule to provisionally admitted acts and declarations of the conspirators. The rule involves three steps:

1. The trier of fact must be satisfied beyond reasonable doubt that the alleged conspiracy in fact existed.

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[1] *R. v. Carter*, [1982] 1 SCR 938; *Paradis* v. *The King* (1933) 61 CCC 184 (SCC); *Koufis* v. *The King*, (1941) 76 CCC 161 (SCC);
[2] *R. v. Baron and Wertman*, 1976 CanLII 775 at para. 54
[3] See also: *Koufis, supra*; R.v.*Chang*, [2003] O.J. No. 1076 (C.A.), at paras 53-61: R.v. *Khatchatourov*, 2014 ONCA 464, at paras 23-25: R.v. *Puddicombe* 2013 ONCA 506 at para.116-118; R.v. *Smith*, 2007 NSCA 19, at paras 194-196, aff'd on other grounds 2009 SCC 5; *R. v. Keen* [1999] E.W.J. 5578 (Q.L.) (C.A. Crim. Div.) at p. 7-10
[4] *R. v. Carter*, [1982] 1 SCR 938 and *R. v. Barrow*, [1987] 2 SCR 694, at para 73

2. If the alleged conspiracy is found to exist then the trier of fact must review all the evidence that is directly admissible against the accused and decide on a balance of probabilities whether or not [the accused] is a member of the conspiracy.

3. If the trier of fact concludes on a balance of probabilities that the accused is a member of the conspiracy then [the trier] must go on and decide whether the Crown has established such membership beyond reasonable doubt. In this last step only, the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the conspiracy as evidence against the accused on the issue of his guilt.

4. The validity of the three-step *Carter* test was confirmed by this Court in 1987 in *R.v Barrow* and in 2000 in *R.v. Sutton*[5] In 2005, this Court considered the rationale and application of the *R. v. Carter* co-conspirators jury instruction and confirmed its continued validity in light of the rules which govern the principled approach towards hearsay. Chief Justice McLachlin for the Court held that the co-conspirators exception to the hearsay rule and the *Carter* 3 step test met the necessity and reliability requirements of the principled approach and should not be set aside or altered. The *Carter* test was fair to the accused because it allowed the trier of fact to consider hearsay statements of co-conspirators made in furtherance of the conspiracy, only after the jury was satisfied (1) beyond a reasonable doubt, that the conspiracy existed and (2), based only on direct evidence against the accused, that the accused was probably a member of the conspiracy. The Court recognized the practical problem created and also those avoided by the exception and *Carter* test and in the end expressly rejected the need to impose any additional limitations or requirements on the rule or the test.[6]

5. In this case, in the Court below, counsel for Mr. Kelsie contended that the trial judge had erred in his charge to the jury because he advised the jury that they could consider as part of the third step of the *Carter* test, evidence which did not implicate Mr. Kelsie in the conspiracy. That

[5] *R. v. Barrow*, [1987] 2 SCR 694, at para 73, per McIntyre J. in dissent but in agreement with the majority on this issue. and *R.v. Sutton* [2000]2SCR 595

[6] *R. v. Mapara*, 2005 SCC 23, at paras 24-34.

they could consider events that occurred before Mr. Kelsie was a member of the conspiracy. The Nova Scotia Court of Appeal agreed with this submission and said:

> [163] On the Appellant's second point: the hearsay evidence introduced did not mention Kelsie, did not allude to him being involved in the conspiracy, and did not suggest that he in any way had any involvement in the conspiracy to murder Mr. Simmons. All of the hearsay evidence relates to a period of time when Kelsie could not, on this record, have been part of the conspiracy. Kelsie was not a member of the conspiracy when these acts and declarations occurred; they could not prove his membership in the conspiracy. The hearsay evidence could not possibly assist them to determine his membership beyond a reasonable doubt. He is not implicated in any way by that evidence.
>
> [164] The only evidence upon which the jury could come to the conclusion that Kelsie was involved in the conspiracy starts with the car ride to Dartmouth. It consists of direct evidence and admissions by the Appellant.
>
> [165] From the instructions given by the trial judge, the jury would be left with the impression that there was something in the extensive hearsay evidence that was likely to take them from the Appellant's probable membership in the conspiracy to his membership beyond a reasonable doubt when it could not. Again, this was in error.
>
> [166] In these circumstances, the determination of Mr. Kelsie's involvement in the conspiracy depended entirely on the evidence of his own acts and declarations.
>
> [167] Once again, the Crown invites us to discount the seriousness of these errors by the failure of trial counsel to object to the charge. I decline to do so. As with the first two grounds of appeal, it goes to the heart of the trial judge's charge on the conspiracy count. It left the jury with the mistaken impression that it could use evidence which was not admissible to determine Kelsie's involvement in the conspiracy.[7] (*emphasis added*)

6. It is the position of Ontario that the Nova Scotia Court of Appeal erred in its understanding of the *Carter* test in a variety of serious and compounding ways. The Court of Appeal placed a number of additional limitations on the application of the rule which are inconsistent with the judgments of this Court, the decisions of their own Court, and the underlying rationale for the co-conspirators exception to the hearsay rule[8]. The NSCA has not explained why they have chosen to severely restrict the application of the rule and they have not identified any jurisprudence which they would justify the limitations. . There are none.

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[7] *Judgement of the Court of Appeal,* at para.163-167.
[8] *R.v. Smith Supra*

7. The Attorney General of Ontario agrees with the appellants submissions on this issue. Ontario also submits that first, in concluding that the evidence which preceded Mr. Kelsie's membership in the conspiracy and the evidence which did not implicate him in the conspiracy should not have been considered by the jury in step three of the *Carter* test, the Court of Appeal improperly conflated steps two and three of the test. Second, in their analysis of the ambit of step three the NSCA confused the purpose of the rule and seems to have imposed a threshold admissibility requirement into step three, when one does not exist. Third, the NSCA also failed to distinguish between the admissibility of co-conspirators acts and declarations and the weight be given to this conduct. The NSCA erred in failing to recognize that it was the responsibility of the jury to assess the probative value of evidence in step three, not the Court. Lastly, NSCA's judgment reflects a fundamental misunderstanding of the nature of the offence of conspiracy and the underlying rationale for the co-conspirators exception to the hearsay rule.

The Court of Appeal conflated steps two and three of the Carter test

8. The Attorney General of Ontario submits that, in concluding that the acts and declarations made by Mr. Kelsie's co-conspirators, which preceded Mr. Kelsie's involvement in the conspiracy could not be used as evidence against him at step three, because Kelsie was not implicated in any way by the evidence, the Court of Appeal inappropriately conflated steps two and three of the *Carter* test. Step two not step three exists to ensure that the trier of fact does not improperly consider hearsay evidence of co-conspirators, in a situation where there is no evidence directly implicating the accused in the conspiracy. In *R .v. Mapara,* [9] Chief Justice McLachlin for this Court explained that reliability and fairness is satisfied by step one and two of the *Carter* test. It is step two not step three, which deals with evidence which directly implicates the accused. Ontario recognizes that the trier fact has to be satisfied that the threshold in step

[9] *R .v. Mapara, supra,* at para, 24-27.

two has been met, before the trier of fact can consider all the evidence, including the acts and declarations of the accused co-conspirators in step three. But once this threshold has been satisfied, all the acts and declarations of the co-conspirators, in furtherance of the conspiracy are admissible against the accused, including those acts declarations of the conspirators which preceded the accused's involvement - in determining guilt beyond a reasonable doubt. By limiting the jury's consideration in step three to evidence which implicated Mr. Kelsie while he was a member of the conspiracy, the NSCA effectively removed from the jury's consideration the very evidence the co-conspirators exception to the hearsay rule was designed to ensure the jury considered. At step three the acts and declarations of each member of the conspiracy become, in law, the acts and declarations of all the members of the conspiracy. In this case the Nova Scotia Court of Appeal has functionally extended many of the requirements in step two to step three and by doing so has inappropriately limited the application of the co-conspirators exception to the rule against hearsay. By restricting the jury's consideration of the evidence in step three, the Court of Appeal has turned an effective, useful rule of evidence to one that serves no point.

The NSCA erred in imposing an additional admissibility test in step three

9. The purpose of a *Carter* charge is to instruct the jury on how to analyze evidence it has already heard. Once the trier of fact has found beyond a reasonable doubt that the conspiracy existed and based only on direct evidence against the accused, that the accused was probably a member of it, the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the conspiracy, as evidence against the accused, on the issue of his guilt. It is the position of the Attorney General of Ontario that by concluding that the acts and declarations made by Mr. Kelsie's co-conspirators, which preceded Kelsie's involvement in the conspiracy, could not be used as evidence against him at

step three, because Kelsie was not implicated in any way by the evidence, the NSCA improperly imposed an additional admissibility requirement into step three, where one does not exist. There is no "implicated in the conspiracy" admissibility threshold in step three. Similarly, there is no rule which limits the jury's consideration of the evidence in step three to evidence which begins when the accused agreed to commit the crime. The Respondent acknowledges in paragraph 22 of his Memorandum of Argument that there is no hard and fast rule of the law that excludes the jury's considerations of in furtherance acts and declarations before the accused joined the enterprise. There is no basis in the existing jurisprudence to impose these additional limitations and no policy or common sense reason to do so, given the underlying rationale for the rule.

10. In *R. v. Mapara,*[10] this Court stressed that the "ultimate use" the jury makes of the evidence should not be confused with its role in determining threshold reliability – under steps one and two. The purpose of the *Carter* jury instruction is to assist the jury in the evaluation of evidence it has already heard. It is the jury who ultimately must make all of the findings. In their consideration of the issue, the NSCA spoke of the evidence of preceding acts in furtherance by co-conspirators, as not being capable of proving Kelsie's membership in the conspiracy and the Court of Appeal said the jury was wrongly left with the impression that the extensive evidence was likely to take them from the Appellant's membership in the conspiracy to his membership beyond a reasonable doubt. The Respondent contends that the pre-existing evidence in issue did not add to the case against the accused. It is Ontario's position that these statements by the Court of Appeal and the Respondent involve a consideration of the use and weight to be assigned to the evidence. This was an assessment and decision to be made by the jury, not the court. At step three the ultimate determination of the accused's membership in a conspiracy was a decision for the jury to be made on the basis of all the evidence including the evidence of pre-existing acts

[10] *R. v. Mapara, supra*, at para 25

and declarations. The jury was required to examine all the relevant circumstances and to assess their cumulative effect.[11] The Court of Appeal erred in concluding that much of this evidence should not have been considered by the jury and they compounded that error by concluding that the evidence was not capable of assisting the jury and was not likely to move to probable membership in the conspiracy beyond a reasonable doubt. The Court of Appeal usurped the jury's responsibility.

11. Evidence which does not implicate an accused person or which precedes his or her membership in the conspiracy often advances the Crown's case. This type of evidence may be relevant to a variety of different issues depending on the nature of the crime. Evidence which does not implicate a particular co-conspirator or which precedes his or her membership may nevertheless provide context to the nature of the crime the accused agreed to join and/or his or her understanding of it at the time he or she joined the conspiracy. Acts and declarations in furtherance of the conspiracy which do not implicate a particular co-conspirator or predate membership may explain the actions and motivations of other co-conspirators when they later interact with the accused person. Ontario recognizes that acts and declarations from other co-conspirators in furtherance of the conspiracy may often implicate the accused .The Appellant and Respondent have both provided hypothetical examples of just that sort of inculpatory evidence.[12] Other examples of evidence implicating the accused may be found in *R. v. N.Y.*; *R. v. Bogiatzis,* and R v. *Mota, supra,*[13]. While evidence which directly implicates an accused person in the conspiracy will often represent cogent evidence against the accused, this circumstance should not

[11] *R. v. Mota,* [1979] O.J. No. 793 (Ont. CA), at para. 15-20.
[12] *Appellant's Memorandum of Argument,* at para 93; *Respondent's Memorandum of Argument,* at para 62. The Appellant's hypothetical is designed to illustrate how incongruous would be the exclusion of it, especially powerful evidence against an accused person derived from the statement made before his entry into the joint crime; the Respondent's example is designed to illustrate how by contrast the facts in Kelsie's case such earlier evidence may in fact unquestionably implicated an accused.
[13] *R. v. N.Y.*, 2012 ONCA 745, at paras 105-106; *R. v. Bogiatzis,* 2010 ONCA 902 at paras 14 and 42; *R. v. Mota, supra*, para 23 and 24.

obscure the fact that less powerful evidence may nevertheless be material and capable of taking the jury from an accused probable membership in a conspiracy to prove beyond a reasonable doubt. In any event at step three the acts and declarations of the each member of the conspiracy become the acts and declarations of all the members of the conspiracy. At step three the evidence that implicates one of the conspirators implicates all of the conspirators.

The NSCA misunderstood the nature of the offense of conspiracy and the underlying rationale for the co-conspirators exception.

12. It is the position of Ontario that the NSCA's judgement on the application of step three of the *Carter* test reflects a fundamental misunderstanding of the nature of the offence of conspiracy and the underlying rationale for the co-conspirators exception to the hearsay rule. The co-conspirators exception to the rule against hearsay and the *Carter* three-step test are both rooted in the same underlying idea. Section 465 of the *Criminal Code* makes it a crime to agree to commit an indictable offence. Conspiracy is an inchoate offense. It involves a common criminal enterprise. The *actus reus* is the fact of the agreement. The *mens rea* involves knowledge of the general objects of the agreement and intent. The offence is complete once two or more persons agree with the requisite *mens rea*. The object of the conspiracy does not have to be achieved. Sometimes conspiracies are ongoing and conspirators join and withdraw from ongoing conspiracies along the way. They do not need to have been involved with other co-conspirators as long as there is a linked person. Co-conspirators can participate in different, separate aspects of the object of the conspiracy. None of this matters. The focus of the offence is not on when a particular conspirator joins the conspiracy but whether he or she agreed to the general objects of the conspiracy with the requisite knowledge and intent when they joined. What matters is that the late joining co-conspirators adopted and agreed to the pre-existing conspiracy while the conspiracy was ongoing. The co-conspirators exception to the hearsay rule

recognizes and responds to the nature of the offence and its constituent elements. It is based on principles of agency and admissions against interest. The rationale for the rule is based on the proposition the various conspirators or co-actors have, in effect, appointed each other to an agency for the duration of the common enterprise. The rule applies to the actions of all members of the conspiracy whether or not they stand charged in the particular prosecution. In this case Nova Scotia Court of Appeal erred in concluding that step three of the co-conspirators exception requires that only the acts and declarations in furtherance of the conspiracy which occurred at or after the accused joined the conspiracy can be considered against him at step three. This is not right. When the conditions for step one and two have been met, the acts and declarations of each member become in law, the acts and declarations of all the conspirators. Again, what matters is not when a particular co-conspirator joins the conspiracy but whether he or she agreed to the general objects. What matters is that the late joining co-conspirators adopt and agree to the pre-existing conspiracy. In the end, it is up the trier of fact (not the Court) to determine whether on all the evidence the crown has proven the offense beyond a reasonable doubt.

PART IV – SUBMISSIONS CONCERNING COSTS

12. The Attorney General for Ontario makes no submission as to costs.

PART V – REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

13. The Attorney General for Ontario requests permission to present oral arguments at the hearing of this appeal.

14. It is the position of the Attorney General for Ontario that the issues should be resolved in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2019.

For Michael Bernstein
Counsel for the Attorney General for Ontario

For John Neander
Counsel for the Attorney General for Ontario

PART VI
TABLE OF AUTHORITIES

Jurisprudences

	Para.(s)
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R.v. Carter, *[*1982] 1 S.C.R. 938	3 and 4
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R. v. Keen [1999] E.W.J. 5578 (Q.L.) (C.A. Crim. Div.)	2
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PART VII
LEGISLATION

	Para.(s)
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Case No: 99/5711/12/13/S3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM PLYMOUTH CROWN COURT
(HHJ Griggs)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th December 1999

B e f o r e :

LORD JUSTICE ROCH
MR JUSTICE CONNELL
and
HIS HONOUR JUDGE MELLOR
(Sitting as a judge of the Court of Appeal Criminal Division)

- -

Ronald Charles KEEN
John Francis WILLIAMS
Stephen William HEWSON

- -

(Transcript of the Handed Down Judgement of
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- -

Ian Glen QC and Miss J Miller appeared for the Crown.
Christpher Wilson-Smith, QC appeared for the appellant Williams.
Philip Mott. QC and Mr W Hart appeared for the appellant Hewson.
Robert Linford appeared for the appellant Keen.
On 5 December 1999, Mr C Wilson-Smith QC appeared for the appellant Keen.

Judgment
As Approved by the Court

Friday, 5 November 1999

JUDGMENT

LORD JUSTICE ROCH:

These are applications for leave to bring an interlocutory appeal under s. 35(1) of the Criminal Procedure and Investigations Act, 1996 against the ruling of HHJ Griggs given at the Plymouth Crown Court on the 14th September of this year. The judge ruled that an exhibit VHC/21 was admissible as evidence against the appellants at their trial on a count of conspiracy. That trial is scheduled to commence on the 14th November. We grant leave and treat the hearing of the applications as the hearing of the appeals.

The appellants are Stephen Hewson, who was employed by the Ministry of Defence as a Principal Explosives Maintenance Officer at Plymouth, John Francis Williams and Ronald Charles Keen, both partners in the firm of SWK Contract Cleaners. That firm consisted of four partners, Mr Williams, Mr Keen, Mr Willcocks, and Mr Seymour. The firm was in business as industrial cleaners in the Plymouth area. Mr Williams and Mr Keen had larger shares in the partnership than the other two partners, each of them holding 37% shares.

The administration of the firm was conducted from Mr Keen's home. A small bedroom at Mr Keen's house was set aside as the partnership office. Mr Keen was responsible for the administration of the business and the keeping of partnership records. It was Mr Keen who supplied the information necessary for the preparation of partnership accounts to Mr Brightwell, the partnerships' accountant. Mrs Keen was employed as secretary to the partnership. Exhibit VHC/21 consisted of two books found by the police in the small bedroom at Mr Keen's home, that is to say the room used as the businesses office. One of those books is material to this appeal. The main part of the book is headed "CURRENT ACCOUNT: Record of Cheques Issued". There then follows an itemised record of cheques issued by the partnership between the 8th July 1991 to 26th October 1993 covering some 71 pages. That records the numbers of the cheques drawn on the partnership's current account or, if the entry represents a payment to the partnership the words "paid in"; the date; the payee or, if it is a payment to the partnership, the payer; the amount of the cheque and the balance of the current account, which was always overdrawn.

Following those pages were pages recording entries of payments to and drawings by the partners; detailing the date; the partner's name; the cheque number and the amount. On one page, the name at the top of the page is "Steve Hewson" and listed below are five payments. The details are the number of the payment, i.e. "1st payment" through to "5th payment"; the amount (£1,000 in each case); the date and in the 3rd, 4th and 5th entries the cheque number.

The appellants are charged with conspiracy to accept and give corrupt gifts contrary to s.1(1) of the Criminal Law Act 1977 and s. 1(1) of the Prevention of Corruption Act, 1906. The particulars of offence contained in the indictment, on which the prosecution would have the appellants tried, are:

> "STEPHEN EDWARD WILLIAM HEWSON, JOHN FRANCIS WILLIAMS AND RONALD CHARLES KEEN between the 1st day of October 1992 and the 1st day of April 1995, conspired together and with Margaret Allison HEWSON and Margaret KEEN that Stephen Edward William HEWSON, an agent of Her Majesty's Ministry of Defence, would corruptly accept gifts or

considerations from the partners of SWK as inducements or rewards for showing favour to SWK (or disfavour to others) in the award of paid work being part of the Ministry's business at HM Dockyard, Devonport."

The prosecution allege that Mr Williams and Mr Hewson were friends. That in 1992 the Ministry of Defence wished to use the Royal Naval Auxiliary Depot at Bull Point as a training establishment. That depot had previously been used for ordnance. In order that such use could be made of that depot it was necessary to carry out work to enable the area to be certified free from explosives. This is known as the CFFE process. Mr Hewson was appointed the technical supervisor of the CFFE process at RNAD Bull Point and as such, claim the prosecution, Mr Hewson secured the early work of clearing parts of the site for SWK without SWK having to compete against other potential tenderers. That in turn led to SWK as the only people with experience and training obtaining extremely lucrative contracts for clearing the rest of the site. The total contract values for clearing the whole site exceeded £4½ million.

In return, it is said by the prosecution, SWK showed certain favours to Mr Hewson. First they employed his son. Then they made a number of cash payments to Mr Hewson. It is the prosecution's case that five such cash payments each of £1,000 were made to Mr Hewson on the 20th March 1993, the 16th April 1993, the 6th August 1993, the 22nd December 1993 and the 10th February 1994. The evidence of those five payments are the five entries in Exhibit VHC/21 under the name "Steve Hewson". There are other entries in that book on those five dates in which, say the prosecution those payments are dressed up to look like legitimate drawings by partners or management. Each of the drawings save one exceeded a £1,000 but all were cash drawings part of which, say the prosecution went to Mr Hewson, namely in each case £1,000. The prosecution will seek to prove that other benefits were conferred by Mr Williams on Mr Hewson, in particular financial assistance to buy a caravan, and a holiday in Florida enjoyed by Mr & Mrs Williams and Mrs and Mrs Hewson, in which Mr Williams paid the lion's share of the cost. On the other side, the prosecution will seek to prove that Mr Hewson played an important role in securing the contracts for SWK without disclosing to other officers of the Ministry of Defence his close friendship with Mr Williams and the fact that his son was employed by SWK.

Mr Keen was arrested in November 1995 and was interviewed by the police on the 7th of that month. During interview Mr Keen stated that he had made all the entries in VHC/21. Subsequently expert handwriting evidence was to show that Mr Keen had not made all the entries in that book. Included in the entries not in Mr Keen's handwriting were the five entries under the heading "Steve Hewson". However, Mr Keen had made the five entries relating to alleged drawings by partners on those dates. The entries under the heading "Steve Hewson" were made in different inks so that the inference can be drawn, say the prosecution, that they were made at different times and made on the dates shown. Mr Keen stated that the book was his personal record. Moreover, he claimed that there was an explanation for the five entries of £1,000 under the name "Steve Hewson" which would show that the entries were not of payments to Mr Hewson, but that he did not chose to give that explanation at that time, but would give it, if it became necessary, to a court. In that interview, Mr Keen clearly adopted the book as being his and those particular entries on which the prosecution wish to rely, as being his.

Mr Linford sought to argue that these entries were not statements by Mr Keen because he had

not written them. There can in the judgment of this court be no doubt but that this exhibit is relevant and admissible against Mr Keen. A jury could consider, on the material at present available, that these entries were the acts of Mr Keen in furtherance of the offence charged and statements made by him against his interest.

The fact that entries were made in different inks, but the same inks as other entries made on the same date, is evidence from which a jury could infer that the entries were made on the dates stated. Mr Keen's answers in interview are such that a jury could conclude that he made the entries in the book relating to the cheques and that the five entries under the name "Steve Hewson" were made at his direction. Those entries, by which we refer to the five entries under the name "Steve Hewson" and the entries in respect of the cheques are entries which a jury could find to be acts in furtherance of the conspiracy in that the conspiracy was still in progress on the dates placed against the entries, and the entries were to make money available to pay Stephen Hewson whilst concealing the fact that payments were being made to him, by creating entries which appeared to be legitimate cash drawings.

The judge made his ruling in these terms:

> "I am quite satisfied so far as Mr Keen is concerned that a proper approach is to regard the book as his book and that the entries, who ever actually made them, were made with his knowledge. I am satisfied that as against him the book, including the Hewson entries, can properly be adduced in evidence and that that can be done when the case is opened to the jury..... Apart from anything else it seems to me that as he was asked about these entries during the course of his police interview and accepted them as his, that fact alone means that the details could properly be put before the jury even though the prosecution now accept that the actual entries were recorded by the hand of another."

The judge went on to find that the other entries in the exhibit represented "other independant evidence that Keen was a conspirator". The judge was referring to the other entries in the book made in Mr Keen's own hand which provided a different explanation for the cash payments and which formed the basis of the information passed on to the partnership's accountant to enable him to prepare the partnership accounts. The judge then added:

> "The reasonable and realistic inference is that the entries (the "Hewson entries") were made directly on behalf of Mr Keen. In that event they are his entries and he can plainly be asked about them. They are in my judgment clearly admissible on that basis against him as direct evidence."

In our judgment the judge's ruling on that issue was plainly correct.

This leaves the question of the admissibility of this exhibit in the cases against Mr Williams and Mr Hewson. The judge dealt first with the position of Mr Williams. He came to the conclusion that the partners had appointed Mr Keen as the person with responsibility for the day to day administration of the partnership and the records contained in the books which formed exhibit VHC/21 were to be regarded as "partnership records". The judge went on to hold that:

"The entries in these books are admissible in the case against Mr Williams merely for the purpose of showing where payments were apparently being made. Mr Keen and his wife were in effect agents for the other partners in keeping the book. In that circumstance the book can be referred to in considering the case against him. That fact does not, of itself, prove that Mr Williams was guilty of the offence. It is merely part of the evidence to be considered in the overall case against him."

The judge then went on to hold that there was other potential evidence of Mr Williams's involvement in the conspiracy at the earliest stage: namely, Mr Williams signing three of the cheques which, it is said, raised the cash that was paid to Mr Hewson; the evidence that Mr Williams was involved in the acquisition of a van for £1,750 with a balance of that cheque, £1,000 being available to be paid over to Mr Hewson. Finally there was the coincidence of the timing of the payments in relation to the awards of contracts.

Mr Wilson-Smith QC for Mr Williams had submitted that the second condition which must exist before evidence of the acts or declarations of one conspirator can become admissible in the case against a co-conspirator, namely that there should be other evidence independant of the first conspirator's acts or declarations incriminating the co-conspirator in the same conspiracy, had to exist contemporaneously with the acts and declarations of the first conspirator. Mr Wilson-Smith had conceded that there was potential evidence indicating Mr Williams's involvement in the alleged conspiracy from June 1994 onwards. But Mr Wilson-Smith had submitted that evidence came too late to satisfy the condition and render the acts and declarations of Mr Keen admissible as evidence against Mr Williams. The judge declared that the law did not require such evidence to be earlier in time or contemporaneous with the acts and declarations of the first conspirator.

When it came to deciding on the admissibility of this exhibit in the case against Mr Hewson, the judge ruled that there had to be some independant evidence of Mr Hewson's involvement in the conspiracy beyond the exhibit itself. The judge recorded that Mr Mott, QC for Mr Hewson conceded that the later evidence relating to the acquisition of the caravan in 1994 and the benefits provided for the trip to Florida were separate and independant pieces of evidence. Mr Mott's submission had been that such evidence could not provide the independant evidence in support of his client's involvement in the conspiracy to enable the exhibit to be admitted against his client if there was no conspiracy at the time the entries came to be made. The judge found that there was "a realistic and reasonable case that there was at the time of the "Hewson" payments referred to in the exhibit an ongoing conspiracy". In the judge's judgment the entries in the book were admissible against Mr Hewson if there was other independant evidence of his involvement in that conspiracy. The judge was persuaded that there was such evidence.

Mr Mott made a further submission and that was that there exists a third condition which has to be met before the acts or declarations of one conspirator can become admissible in the case against a co-conspirator, namely, that there be further evidence of the first conspirator's involvement in the conspiracy, which is independant of the acts or declarations of that conspirator which the prosecution seek to have admitted as evidence in the case against the co-conspirator. The judge said that he was not persuaded that there was this further requirement, but if such a requirement existed then in his judgment such further independant evidence of Mr Keen's involvement in the conspiracy was to be found in what the judge called "the covering

entries" in the earlier part of the book; that is to say those entries which the prosecution said were designed to disguise the fact that payments were being made to Mr Hewson. The judge then apparently heard further submissions from Mr Mott and having heard them altered his view and concluded that, "As against Mr Hewson it (the exhibit) does not provide independant evidence that Mr Keen was involved in the conspiracy". The judge went on to modify his original ruling by holding

> "so far as Mr Hewson is concerned, that there needs to be evidence that there was in fact at the material time a conspiracy in existence: that there is independant evidence of his involvement in it: but that it is not necessary that there be independant evidence that Mr Keen and/or his wife were parties to that conspiracy."

The submissions made by Mr Wilson-Smith on behalf of Mr Williams before this court were that the prosecution's purpose in adducing the exhibit in evidence is to prove that five payments each of £1,000 were made to Mr Hewson by the partnership. Those entries are in reality hearsay statements by Mr Keen to the effect that such payments were made. The Crown cannot use this exhibit in this way. The entries in the book have no other relevance or value as evidence in this case. If Mr Keen was not on trial this exhibit would cease to be admissible.

The judge in his ruling had been wrong to say that the exhibit was admissible because the exhibit was a partnership record and Mr Keen was Mr Williams's agent for keeping such a record. That approach, submitted Mr Wilson-Smith was contrary to the law of partnership, namely that a partner has authority to perform legitimate acts on behalf of the other partners but has no authority to carry out illegal acts. Illegal acts are not "acts for carrying on in the usual way business of the kind carried on by the firm."Mr Wilson-Smith referred us to s. 5 of the Partnership Act 1890.

Mr Wilson-Smith adopted the submissions of Mr Mott made on behalf of the appellant Hewson.

Mr Mott made in effect two submissions. The first is that set out under the heading "Question of Law" in the application on behalf of Mr Hewson for Leave to Appeal against the Judge's ruling. Put in the form of a proposition rather than a question, the submission is:

> "It is necessary for there to be independant evidence tending to show that the author of the document was in fact a co-conspirator and party to a common purpose with Mr Hewson."

Mr Mott assumed for the purposes of this appeal that the five entries under the heading "Steve Hewson" were the acts of Mr Keen being entries written at his instigation, and that there was other evidence to link Mr Hewson with a conspiracy to accept and give corrupt gifts, albeit that that evidence related to a period of time after the five entries in the exhibit were made. As the Crown seek to justify their admission of the exhibit against Mr Hewson on the ground that the exhibit represents the acts or declarations of a co-conspirator with Mr Hewson made in furtherance of the conspiracy, Mr Mott submits that there has to be evidence independant of the exhibit establishing that Mr Keen is involved in the alleged conspiracy. As it is conceded by the Crown that there is no evidence of Mr Keen's involvement in the alleged conspiracy, apart

from the exhibit, the judges' ruling that the exhibit was admissible against Mr Hewson was wrong.

The second submission made by Mr Mott was that the entries in the exhibit on which the prosecution wish to rely are only relevant if they are treated as evidence of five payments of £1,000 each being made by the partnership to Mr Hewson. Those entries are not evidence of payments to Mr Hewson unless it is assumed that Mr Keen was recording acts which he performed himself. There is no evidence that Mr Keen handed any money to Mr Hewson or indeed that Mr Keen and Mr Hewson ever met. If Mr Keen did not make the payments himself, then the entry represents Mr Keen recording or causing to be recorded something that he has been told by an unknown person, namely that such payments had been made to Mr Hewson. That is hearsay as against Mr Hewson. It is a statement by Mr Keen of something he has been told by an unknown person in Mr Hewson's absence. There is no evidence that Mr Hewson was at any time prior to his arrest aware of these entries in this exhibit, or indeed of the existence of the exhibit itself. Mr Mott submitted that that analysis is the analysis of the majority of the House of Lords in *R -v- Kearley* [1992] 95 Cr App Rep 88. The fact that there are five separate entries does not alter the nature of the entries as being hearsay evidence against the Hewson (ibid.).

Mr Mott following the analysis of Sir John Smith in "More on Proving Conspiracy" [1997] Criminal Law Review 333 drew a distinction between acts and declarations which can be admitted to prove the nature and extent of the alleged conspiracy and the involvement of the doer of the acts and maker of the declarations in the alleged conspiracy and acts or declarations of an alleged conspirator which are in addition statements of an alleged co-conspirator's participation in the alleged conspiracy. In the latter case, the acts or declarations are hearsay evidence against the alleged co-conspirator and are not admissible as evidence of the guilt of the alleged co-conspirator unless they can be brought within one of the recognised exceptions to the hearsay rule. Mr Mott submitted that no such recognised exception to the hearsay rule exists. Alternatively, if an examination of old cases show that the courts in the past have permitted such an exception, such an exception cannot withstand careful analysis and, because of the House of Lords' decision in *Kearley's case,* should not be followed.

We accept the submissions of Mr Glen, QC for the respondent prosecution that the judge's rulings were correct and the exhibit VHC/21 is properly to be admitted in evidence at the appellants' trial for conspiracy.

The law is well established by decisions of the Courts of England and Wales. The acts and statements of one alleged conspirator are admissible as evidence against his alleged co-conspirators if they are acts done or statements made in furtherance of the conspiracy, and if there is other evidence independant of those acts or statements that the alleged co-conspirators were involved in the conspiracy. The authorities go back to the previous century in cases such as *R -v- Blake & Tye* [1844] 6 QB 126 and those principles have been applied in more modern cases such as *R -v- Donat* [1986] 82 Cr App Rep 173, *R -v- Devonport and Pirano* [1996] 1 Cr App Rep 221, *R -v- Brian Jones and Others* [1997] 2 Cr App Rep 119, and *R -v- Reeves & Others* [Unreported].
The principle has almost universal recognition in works on evidence and the criminal law. For example paragraph 33-60 of the 1999 Edition of Archbold Criminal Pleading Evidence & Practice states:

"The acts and declarations of any conspirator in furtherance of the common design may be given in evidence against any other conspirator."

The 1999 Edition of Blackstone at page 2166 states:

"The rule permits the actions and declarations of one party A, to be used in evidence against the other, B, and is thus an exception to the general rule that B is not to be prejudiced by the acts or statements of another, and an exception to the hearsay rule in so far as it may involve reliance on a statement as evidence of their truth. As an exception to the hearsay rule it defies classification ....."

A similar passage appears in Phipson on Evidence at page 659. At paragraph 25-11 it is said:

"In criminal cases the above rule holds, although the acts and declarations proceeded from persons not charged, or were done in the absence of the party against whom they are offered, or without his knowledge, or even before he joined the combination; and the possession of one conspirator is that of all..... but the acts and declarations of other conspirators, before any particular defendant joined the association, are receivable against him only to prove the origin, character and object of the conspiracy, and not his own participation therein, or liability therefore, and if they were not in furtherance of the common purpose (e.g. were mere narratives, descriptions or admissions of past events), or were done or made after his connection with the conspiracy had ceased, they will not be admissible against him."

In Cross and Tapper On Evidence, 9th Edition at page 560 the principle is stated in these terms:

"The admissions of one conspirator are receivable against the other, if they relate to an act done in furtherance of the conspiracy, but not otherwise."

The reason for this principle of the law of evidence is that stated by Sir John Smith in the 1996 CLR 386 in an Article headed "Proving Conspiracy":

"Conspirators are rarely overheard conspiring together. The unlawful agreement usually has to be inferred from their acts and declarations subsequent to the alleged conspiracy. If these are not reasonably explicable except on the basis that they had made the agreement alleged, it is proved."

Sir John Smith refers to the rule as "this common sense principle".

In *The Queen -v- Blake & Tye* [above] an entry made by Tye in his day book was held admissible evidence against Blake, although the entry was not made in Blake's presence where Blake and Tye were charged with conspiring to cheat the Crown of certain Customs Duties payable on goods. It is to be noticed that Tye was not before the court because he had not appeared. At page 139 Williams J said:

"As to the Day Book, I agree that it is not necessary that the charge of conspiracy

should be made out "per saltum": this cannot be requisite, unless we are prepared to say nothing can prove a conspiracy except hearing the parties talk together. If this be not necessary, it follows that the existence of a conspiracy may be shown by the detached acts of the individual conspirators. Therefore the entry made by Tye in his Day Book was admissible, in order to show one act done with the common purpose."

One rationale of the principle is that one conspirator is the privity or agent of the other parties to the conspiracy. That analysis highlights a logical difficulty in the application of the principle, namely that the admission of the evidence presumes the existence of the conspiracy. If there is no conspiracy then the parties named in the indictment are not conspirators and there can be no privity or agency between them. Thus their individual acts and declarations, should not have been admitted in evidence. This rationale of the principle, the logical difficulty created, and the practical solution for judges considering the admissibility of the acts and extra judicial statements of one alleged conspirator against the other alleged conspirators in deciding on their admissibility have been recognised by the courts. For example in *R -v- Donat* [above] at page 179 where in giving the judgment of the court Lord Lane, CJ said:

"The next complaint is the judge was wrong in allowing the jury to consider the documents in exhibits 6, 7 and 8 as evidence against anyone except Slack; they should not have been allowed to be considered as evidence against Donat.

The problem of to what extent documents made out in furtherance of a conspiracy and action done in furtherance of a conspiracy by people other than a particular defendant are admissible is never an easy one to solve. The matter is dealt with in *Cross on Evidence*, 6th Ed 1985, in a manner which seems to us to be helpful at p. 527, and it reads as follows: "In determining whether there is such a common purpose as to render the acts and extra-judicial statements done or made by one party in furtherance of the common purpose evidence against the others the judge may well have regard to these matters, although their admissibility is in issue, as well as to other evidence. This doctrine is obviously liable to produce circularity in argument:

"Since what A says in B's absence cannot be evidence against B of the truth of what was said unless A is B's agent to say those things, how can one prove that A was B's agent to say them by showing what A said?" [MAYET 1957 (4)SA 491, 494] Mr Warner rightly points out that is apparently running round in a circle.

But the learned editor of *Cross* goes on as follows: "The answer is that the agency may be proved partly by what A said in the absence of B, and partly by the other evidence of common purpose. It makes no difference what is adduced first, but A's statement will have to be excluded if it transpires that there is no other evidence of common purpose; it is another instance of conditional admissibility. [TRIPODI v. R (1961) 104 CLR 1, applied and possibly extended in ZAMPOGLIONE (1982) 6 ACR 287. 306]." There was in fact here ample evidence apart from the documents in the shape, if it is accepted, of Salmon's evidence in chief.

> There is only one other matter to which, perhaps reference should be made in deference to the arguments placed before us, and that was the decision of this court in WALTERS, TOVEY & OTHERS (1979) 69 Cr App Rep 115. There is a short passage in the judgment of Lord Widgery CJ on p. 121 where he deals with the direction given by the learned judge of which the Court approved. It reads as follows: "He goes on on the following page to emphasise the two steps which the jury have to take in order to find the conspiracy proved. In the middle of the page he says "Let me just explain to you these various points. First of all, what the conspirator said or did, in furtherance of the common object, or common agreement, is evidence against all the rest of the conspirators. That is to say, you can consider those acts and declarations, as I have said, things said. You can consider those against them all, either before you have decided that there is an overall conspiracy and in order to decide that point - or after you have decided there is an overall conspiracy - if you do find - and when considering whether any particular defendant is within that conspiracy; provided that you do consider both of those aspects and you do find there is a conspiracy in the end."

The passage in the judgment of Schreiner JA in the South African Case of *R -v- Mayet* [1957] [4] SA 492 at 494 cited in the passage in *Cross on Evidence* 6th Edition quoted by this court in *Donat* is helpful:

> "Since what A said in B's absence cannot be evidence against B of the truth of what was said unless A was B's agent to say those things, how can one prove that A was B's agent to say them by showing what A said? That is certainly one side of the picture. But there is another side, namely, that,
>
> "on charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy, or the *participation* of the defendants be proved first, though either element is nugatory without the other"
>
> (Phipson, 9th Ed p 98). Although this principle may have originated in the English law of criminal conspiracy it applies also where parties are charged with a crime and the case against them is that they acted in concert to commit it; it makes no difference whether the particular trial is of one or some or all of the conspirators. Words that are said as part of the carrying out of a purpose stand on the same footing as acts done; they differ from a mere narrative. All the evidence of acts, and of words that, being executive, are indistinguishable from acts, must be looked at in order to ascertion whether there was a conspiracy, and if so, who were the conspirators. If all the evidence brings the court to a conviction that the existence of the conspiracy and the identity of the conspirators are proved, the law does not find an insuperable difficulty in the logical objection that some of the evidence could only be used if the eventual conclusion were established."

Mr Mott accepted the existence of this principle governing the admissibility of evidence in cases of conspiracy, subject to his submission that there is a third condition for such evidence

being admissible, namely that there exists evidence independant of the acts and declarations of the conspirator which the prosecution seek to have admitted in evidence that that person is a party to the conspiracy charged.

Mr Mott accepts that such evidence is admissible if it is confined to proving the existence nature and extent of the conspiracy. If that is all the evidence does then it may be that the principle is not an exception to the rule against hearsay evidence.

Mr Mott's argument is that Mr Keen's entries in the exhibit under the heading "Steve Hewson" make statements against Mr Hewson which breach the rules against hearsay evidence and are therefore inadmissible.

We reject this submission. In our judgment acts done or declarations made by one alleged conspirator, even where those acts or declarations amount to a statement incriminating another alleged co-conspirator, are admissible in evidence at the trial of the alleged co-conspirator, provided that they are acts done or declarations made in furtherance of the alleged conspiracy and are not simply mere narrative, descriptions or admissions of past events. Such acts and declarations are not hearsay, anymore than the statements of one robber uttered during the course of a robbery but not in the presence or hearing of another robber are hearsay evidence against the second robber. Conspiracy is a continuing offence which continues until the offence which the conspirators have agreed to commit is completed or the commission of that offence is abandoned or frustrated by the discovery and arrest of the conspirators. Such acts and declarations do not become hearsay evidence simply because they make a statement against an alleged co-conspirator. Indeed it could be said that all acts and declarations of an alleged conspirator in furtherance of the alleged conspiracy make a statement against the alleged co-conspirators in that it is the fitting together of the independant acts and declarations of the alleged conspirators that proves the conspiracy and the alleged conspirators' participation in it.

Thus in *R -v- Devonport and Pirano* [above] a document dictated by one defendant showing the proposed division of the proceeds of a conspiracy among all five defendants, was admitted in evidence against all the defendants although there was no evidence that the defendants other than the maker of the document had been a party to its preparation nor was there any evidence of any link or connection between those defendants and the document.

In *Donat* [above] documents found on one alleged conspirator S were admitted in evidence against Donat where S and Donat were charged with conspiracy to import controlled drugs. The documents were pieces of paper on which, so the prosecution alleged, were recorded various sums spent by the conspirators and the share of the profits that was going to be made by each conspirator. In *R -v- Jones and Others* one of the appellants Barham was convicted of being knowingly concerned in the evasion of the prohibition on the importation of cannabis. The evidence against him was of two types: circumstantial evidence and evidence of recorded telephone conversations between other defendants and third parties which referred to him and which the prosecution submitted were admissible against him. That evidence was admitted and the admission of that evidence was upheld by this court "since the conversations were contemporary evidence of the progress of the offence charged". Finally in *R -v- Reeves and Others*, again a case of five defendants being knowingly concerned in the fraudulent evasion on the prohibition on importing a Class A Drug, cocaine, an entry in the diary of a man Hutton,

who was not a defendant in the trial before the jury, but who had pleaded guilty to the offence, although the jury did not know this, was admitted in evidence. It was the Crown's case that Hutton was a party to the offence. The diary entry, claimed the prosecution, was capable of being treated by the jury as an act in furtherance of the offence, namely the recording of a message which Hutton had to pass to one of the defendants, Bryan Doran as to the steps that had to be taken before the importation of the drug went ahead. Counsel for Doran had sought the exclusion of the entry on the basis that it was no more than "the private musings of Hutton", about which Doran and the other defendants had known nothing. On appeal this court held that the diary entry had been properly admitted in evidence.

In all these cases, the acts or declarations in furtherance of the conspiracy also made statements incriminating alleged co-conspirators. Nevertheless in each case this court held that the admission of such evidence had been correct.

Mr Mott, in effect, argued that all these decisions were wrong and should not be followed in cases where the acts or declarations make statements incriminating alleged co-conspirators in the light of the decision of the House of Lords in *R -v- Kearley* [above]. Kearley was charged with a number of drug offences. The effective charge for the purposes of the appeal heard by Their Lordships was one of possession of a controlled drug with intent to supply, namely a relatively small quantity of amphetamine see Lord Ackner at p. 103. As Lord Ackner observed the quantity was not such as by itself to give rise to an inference that Kearley was a commercial supplier of amphetamines. The police had arrested Kearley and searched his flat on the 7th October 1988. During that search the quantity of amphetamine was found. After Kearley had been removed to a police station, the telephone in Kearley's flat rang many times and when the phone was answered the caller asked for Kearley and also asked for drugs. There were visits to the flat by a number of people who also sought Kearley and sought drugs. The House of Lords by a majority of three to two held that the evidence of police officers as to those phone calls and those visits should not have been admitted as evidence against Kearley at his trial. In so far as the conduct of the callers and visitors impliedly asserted that Kearley was a supplier of drugs, evidence of that conduct was inadmissible as hearsay. The fact that the prosecution were able to tender evidence of a multiplicity of such requests did not alter the nature of the evidence but merely showed a common reputation of Kearley and evidence of Kearley's reputation was inadmissible. The first important difference between that case and the present is that Kearley was charged with an offence which it was alleged that he had committed on his own. It was not an offence in which it was alleged that the callers or visitors had participated or could have participated. Indeed by the time the telephone calls and the visits to his flat were made, Kearley was in custody and the amphetamine was in the possession of the police so that Kearley was no longer in possession of it. Consequently there was no scope in that case for the application of the principle on which the prosecution relies in the present case. It is our view therefore that the House of Lords decision in Kearley does not help the appellants. The acts and declarations which the prosecution wish to adduce in evidence in that case were not the acts or declarations of an accomplice nor were they acts or declarations done in furtherance of the offence on which Kearley stood his trial. This is to be contrasted with a conspiracy case, where it is the accused's own behaviour considered in the light of the behaviour of another or others which is the evidence against him.

We do not consider there is anything in the point that the independant evidence of Mr Hewson's participation in the conspiracy relates only to the times after the date of the 5th

payment recorded under his name in the exhibit. This ignores the evidence that the Crown will lead, which the Crown say will establish that Mr Hewson was instrumental in SWK obtaining the initial contracts between November 1992 and August 1993.

With regard to Mr Mott's other submission that a third condition must be fulfilled before the entries in the exhibit can become admissible evidence against Mr Williams and Mr Hewson, namely that there must be other independant evidence that Mr Keen as the maker of the entries is a conspirator. We accept the submission of Mr Glen that there is no mention of such a condition either in any decided case or in any text book upon the law of evidence. We accept that it is of some significance that no mention of the alleged third condition was made by those representing Mr Hewson or Mr Williams in their skeleton arguments submitted to HHJ Griggs. Moreover such a third condition would in effect impose a requirement for corroboration in a situation where Parliament had abolished the obligatory requirement for a court to give a jury a warning about convicting an accused on the uncorobborated evidence of a person because that person was an alleged accomplice of the accused, see s. 32 of the Criminal Justice and Public Order Act 1994.

The judge's rulings were, inevitably, based upon the material contained in the depositions. The judge, in our view rightly, looked to see if there was potential evidence that the entries in the exhibit were acts in furtherance of the alleged conspiracy and whether there was potential evidence, independant of the exhibit, that Mr Hewson and Mr Williams were involved in the alleged conspiracy, and that that potential evidence amounted to a prima facie case for the prosecution on both matters.

The evidence that emerges before the jury may not be the same as the potential evidence contained in the depositions.. The prosecution's case that the entries in the exhibit were acts in furtherance of the conspiracy and that Mr Williams and Mr Hewson were involved in the alleged conspiracy may become stronger or weaker. For example it may be that Mr Keen will give an explanation of the entries in the exhibit under the heading "Steve Hewson" which will show that these entries were not acts done in furtherance of the alleged conspiracy. If that were to occur, the trial judge would have to direct the acquittal of Mr Keen; he might have to discharge the jury in the cases of Mr Williams and Mr Hewson and, if he did not, he would have to give the clearest directions to the jury that they should not rely on the exhibit as evidence against Mr Williams and Mr Hewson.

Were the potential evidence in the depositions to emerge, as the prosecution hopes and expects, then we accept the submission of Mr Glen that a direction on the use that the jury may make of exhibit VHC/21 will be required. The precise direction to be given will depend upon the state of the evidence at the conclusion of the hearing of evidence. No doubt the trial judge will seek the assistance of counsel at that stage. An appropriate direction will probably include directing the jury to consider any explanation of those entries proffered by Mr Keen and the evidence of Mr Williams and Mr Hewson, if they give evidence, that no such sums were paid to Mr Hewson. The jury will probably have to be told that if either Mr Keen's explanation or the evidence of Mr Williams and Mr Hewson might be true, then they should make no further use of the exhibit as evidence against the defendants, they should acquit Mr Keen and then go on to consider the cases against Mr Williams and Mr Hewson excluding any consideration of the exhibit. On the other hand if the jury did not accept the explanation offered by Mr Keen, if any, and the denials of Mr Hewson that he had received any such sums, if made, then the jury

when considering the entries in the book as part of the case against Mr Williams and Mr Hewson should remember that those entries were made in their absence and that the jury should not convict either Mr Williams or Mr Hewson on the evidence of the entries in the exhibit alone. The judge may have to add, if Mr Keen does not give evidence, that the jury should remember that counsel for Mr Williams and Mr Hewson had not had the chance to cross-examine Mr Keen concerning the entries.

Finally we would make this observation that in this judgment we have looked at the potential evidence available to the prosecution and narrated the case which the prosecution hopes and expects to establish by the evidence. We are aware that witnesses sometimes do not come up to proof; that during cross-examination a different complexion can be put on evidence which on the face of it appears to be incriminating. In short we are conscious that we have not heard the evidence for or the points that can be made on behalf of the defendants. It should not be thought that anything contained in this judgment or the conclusions we have come to represent an expression of our view on the factual issues which a jury will have to decide in this case, still less upon the guilt or innocence of any of the defendants.

For these reasons, these appeals will be dismissed.

MR GLEN: My Lord, Mr Keen is not legally aided and evidence shows that he has money. Indeed, once the enquiry in this case was afoot and Mrs Hewson was arrested, or spoken to, Mrs Keen, his wife, transferred a sum of money into another building society account, and that sum of money, and I will be corrected if I am wrong, was more than £200,000, no doubt derived from the income at the dockyard. We see no reason why Mr Keen should not bear his one-third proportion of the costs, which we estimate at £3,000. Therefore we apply against him. Of course we remind ourselves that the point on his behalf was dealt with very quickly. We would say it was unarguable, and it was not a point which should have detained you at all. I think in fact that other counsel in the case conceded that that was the case.

LORD JUSTICE ROCH: Is anybody appearing for Mr Keen this morning?

MR WILSON-SMITH QC: My Lord, I do. This application is, in our submission, most unsatisfactory and unfortunate. Your Lordship released the Bar on the last occasion and indicated that only need one of us need be here to take the judgment. There was no indication made to Mr Linford at that stage that the Crown were minded to apply for an order for costs against him. He had been given notice of this application only yesterday afternoon and unfortunately he was not able to attend, so I address you on behalf of Mr Keen.

If the Crown had intended to pursue such an application, we would respectfully suggest it would have been far better if they had given greater notice of it.

I am not in a position to help you with regard to the Keens' financial position at all, but in relation to the appeal, may I suggest that to attach a third of the costs to Mr Keen does not bear any sensible consideration. Mr Keen's part in the appeal was taken very briefly indeed, both in his submissions and in your Lordships' time, and he occupied the court for a very short period of time. In any event, I respectfully submit that you would have had to consider in passing, if for no other reason, the admissibility of the document against Keen when considering the

submissions on behalf of the other applicants.

My Lords, the reality is that this Court would have been assembled in any event to consider the appeals of Williams and Hewson, and we respectfully suggest that the costs that the appeal of Keen has added would be minimal, and in those circumstances we would suggest that it would be wrong to make that order for costs or make any order for costs. Unless I can assist you further, those are my submissions.

LORD JUSTICE ROCH: Thank you (slight pause).

Mr Wilson-Smith, our view is that there is force in the last point that you have made - that the time occupied by Mr Keen's appeal was relatively short - and we think the appropriate order in this case is £750.

MR WILSON-SMITH QC: As your Lordship pleases.

LORD JUSTICE ROCH: Yes, Mr Mott.

MR MOTT: Have your Lordships, can I just confirm, had the opportunity, albeit late, to see the written submission that I have put in overnight?

LORD JUSTICE ROCH: Yes. Can we make this comment, Mr Mott? The idea of submitting the judgment to counsel in advance is so that typographical errors and errors of factual detail, which often creep in because of the volume of work the Court has to do, can be corrected. It is not to give counsel the chance to invite the Court to rewrite the judgment. I think your application is that we certify a question for their Lordships. We have read your written submissions on that.

MR MOTT: My Lord, I do not want to develop it further. In our submission there is a clear point of general public importance. It is a matter where my learned friend Mr Glen made it perfectly clear and openly told us from the beginning that if he was unsuccessful he would seek to take the matter to the House of Lords. In our submission, whatever your Lordships decide on leave, it would be a case for a certificate, and we invite your Lordships to certify in the terms that I have indicated.

LORD JUSTICE ROCH: Thank you. Do you want to say anything, Mr Wilson-Smith?

MR WILSON-SMITH QC: My Lord, I associate myself with that application. I hope I did not trespass on the facts.

LORD JUSTICE ROCH: No, Mr Wilson Smith, those remarks were not addressed to you.

MR WILSON-SMITH: I understand.

LORD JUSTICE ROCH: Yes, Mr Glen.

MR GLEN: My Lord, the logic of Mr Mott in saying that the Crown would have gone to the House of Lords if it could, therefore he must is nil. There is no logic in that at all. If you had

found that there was this third condition, which would have become an obstacle to conspiracy prosecutions, then the Crown would have had to consider its position, but you have not, rightly holding, if we may say so, that there is no authority at all for this third condition, and there is no logic in the point that had you found the other way, the Crown would have gone to the House of Lords. Your decision is very clear, if I may say so, and it does not follow at all that because the decision the other way might have gone to the House of Lords that the decision this way should, so I take issue with the logic of that. We want to get on with this trial, which is on Monday.

LORD JUSTICE ROCH: Thank you (slight pause).

Mr Mott, we are not going to certify a point. We have stated that in our view the law is well established; all the authorities are one way. There may be scope for academic argument about the rationale that underlies the principle and about the logical difficulty that the application of principle raises, but in our view there cannot be any doubt at this time as to what the law is.