

Rodolpho de los Santos

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
22ND JULY 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMEYTON
LORD LOWRY
LORD SLYNN OF HADLEY

[Delivered by Lord Lowry]

This is an appeal from a judgment of the Court of Appeal of Hong Kong (Sir Derek Cons V.-P., Fuad and Macdougall JJ.A.) on 26th June 1987 refusing the appellant leave to appeal against his conviction on 19th November 1985 in the Supreme Court of Hong Kong before Hopkinson J. and a jury on a charge of conspiring to traffic in dangerous drugs. The appellant had received a sentence of imprisonment for 13 years, which was on appeal reduced to 11 years.

The appellant and three others were charged in the first count of the indictment with conspiracy to traffic in dangerous drugs as follows:-

" CHO Campo Juan en Kui, Rodolpho De Los SANTOS, LUK Chin-wan and WONG Yue-wan on divers days between the first day of November 1984 and the 2nd day of February 1985 in Hong Kong conspired together with LAW Yiu-fai and other persons unknown, to traffic in dangerous drugs."

A second count (of possessing a forged bank note) was laid against the third defendant, but did not concern the appellant and is irrelevant to this appeal. The trial lasted from 29th October to 19th November 1985 and all the defendants were found guilty on the first count, the

appellant by a majority of five to two and the other defendants by a unanimous verdict.

The prosecution's case at the trial was that the appellant had telephoned to Hawaii on 22nd November 1984 and told Robert Prezioso (also known as "Bobbie Rizzo"), an undercover agent of the United States Drug Enforcement Agency ("DEA"), that the appellant knew of a source of supply of No. 4 heroin in Hong Kong. Prezioso stated in evidence that he had had dealings prior to that date with the appellant, who by reason of that fact had Prezioso's private telephone number in Hawaii. Pursuant to this information Prezioso and another DEA undercover agent, Jake Fernandez (also known as "Jake Santos"), met the appellant in Hong Kong on 12th December 1984 and it was agreed that the appellant would introduce them to a source of supply. On 14th December the appellant did introduce them to Cho, the first defendant, who then agreed with the agents for the supply of heroin to them, delivery to be made in New York and payment in Hong Kong. The agreement was later varied both as to the quantity of heroin and as to the place and date of delivery.

Following the initial introduction of Cho and various other parties, some of whom were co-defendants at the appellant's trial, most of the negotiations about the proposed transaction were handled by Cho and the other defendants and not by the appellant, although he continued to represent the agents, in their capacity of would-be purchasers, in his contacts with the conspirators. Finally, the agreement between Cho and the agents was for delivery in Thailand and payment in Hong Kong. Pursuant to this agreement the agents and two of the defendants went to Thailand, while the appellant remained in Hong Kong. After a short time the agents concluded that the transaction was not going to be carried through and the defendants in Thailand were arrested there, while Cho and the appellant were arrested on 2nd February 1985 in Prezioso's hotel room in Hong Kong, to which Prezioso had by then returned.

After their arrest the other defendants, Cho, Luk and Wong, claimed that it had never been their intention to supply heroin at all and that they had instead intended merely to cheat the putative purchasers and obtain the purchase money from them by deception. At the trial these defendants did not give or call evidence, but through their counsel put forward the defence already indicated.

The appellant gave evidence on his own behalf, but called no witnesses. His defence at the trial, both in the cross-examination of Prezioso and Fernandez and when giving evidence, was that he had been acting throughout, not as a trafficker promoting the sale of heroin to the agents, but as an informant working for them and on their behalf and solely in that capacity, and that it had been his hope to receive a share of the reward following a successful seizure of the drugs. In support of this defence the appellant made the case that he had been introduced to Prezioso by a friend

of the appellant called Ernesto Baiggorria ("Ernie") and subsequently, through them, to Fernandez. Ernie was a regular paid American Government informant who worked with Prezioso and Fernandez. The appellant's case further was that, some time before November 1984, he was already aware that Prezioso and Fernandez were United States Government law enforcement officers and that he had, prior to the drug transaction, supplied information to them either through Ernie or directly. He referred to and relied on the supply of one particular item of information concerning illegal sales of firearms in the United States by a Filipino known as Colonel Victor Villasenor, which had led to the arrest, trial and conviction of Villasenor. The inference sought to be drawn by the defence from the appellant's case was that, inasmuch as he knew that both of the agents were United States law enforcement officers, he would have been most unlikely to involve himself in a drugs transaction save in the capacity of an informant in response to the agents' request to be put in touch with drug dealers. The agents, however, denied at the trial that the appellant had ever enjoyed the status of an informant.

When giving evidence Prezioso denied that the appellant knew that he was a drugs enforcement officer, denied any knowledge of the Villasenor investigation and prosecution, claimed that it had been the appellant who had raised the subject of drugs with the agents and, when asked whether the appellant was acting as the agents' informer, replied, "Absolutely not". When further asked whether, in the other dealings which he had had with the appellant, the latter ever acted in the capacity of an informer, Prezioso replied, "No, he did not, but there are still charges pending against him in the United States because of those activities".

Fernandez, when asked if he had any reason to believe or suspect that the appellant knew that he (Fernandez) was a United States federal officer of any sort, replied "I don't know", and, when asked, "Have you any reason to believe or suspect that he might have done that?", replied, "It's hard for me to say, sir". Fernandez also denied that he had ever heard the name Ernie Baiggorria and stated that the question of drugs was raised by himself and not by the appellant. That evidence, of course, was not inconsistent with the appellant's having telephoned to Prezioso in Hawaii on 22nd November 1984 and Fernandez's having subsequently mentioned the subject of drugs to the appellant.

It should here be noted that neither by questions put to Prezioso and Fernandez in cross-examination nor in his own evidence did the appellant suggest at any time during the trial that he had had any conversation with either of the agents from which it could be inferred that the appellant was, or hoped to be, an informant (as distinct from an ordinary go-between whose function was to put Prezioso and Fernandez in touch with persons who

were willing and able to supply them with dangerous drugs). The appellant when examined by his own counsel said that he knew that Prezioso and Fernandez were agents. Then counsel asked, "Was there anything to give you the impression that they knew, that they - meaning Bobby and Jake - knew that you knew that they were agents?" and the appellant replied, "I don't think so". And when cross-examined the appellant agreed that he never said anything to Prezioso or Fernandez that would suggest that he knew that they were agents. The cross-examination proceeded:-

"Q. Why not?

A. I had to hide it, sir, because, once I disclosed that the undercover was open. They will just ...

Q. That's not so, that really is not so, that is nonsense, that makes no sense at all.

A. Why, sir?

Q. Why couldn't you work with them, as we now know, Ernie did?

A. Well, I was given an instruction just to keep it cool, just to play along.

COURT: Sorry, I was given instruction to play ...?

A. Just to play along with the game because this is what the agent told me in San Francisco."

and a little later:-

"Q. And never once did you make any suggestion that you were an informer?

A. No."

Two further passages in the appellant's cross-examination may be referred to at this stage.

(1) "Q. The agents were offering you a commission on the - quite a fat commission on what they might sell. I just want to ask you about that to make this quite clear. You are not thinking of that as reward money, are you?

A. Yes, I am.

Q. That's nonsense, isn't it? They are telling you that they will pay you - after it's all diluted there is going to be a fat profit, after it's diluted to 77 per cent, they can afford to give you 25,000 per kilogramme.

A. What is the question, sir?

- Q. Yes. They are telling you in that conversation they are going to give you on sale of the heroin \$25,000 per kilo.
- A. Yes, sir.
- Q. That's not reward money. They think you are a middle man and they are offering you a commission.
- A. In my mind I think it's reward money, but he just cannot say it.
- Q. I see. So at this stage, then, you thought the Americans knew you were an informer.
- A. I don't know.
- Q. Well, you thought this was reward money and they couldn't say it. Why couldn't they say it?
- A. No, in my mind, sir, not on their mind, what I am thinking of.
- Q. Yes. You thought they know you were an informer and not a drug trafficker?
- A. I don't know if they knew that because I tried to cover that up.
- Q. In your mind you thought that was reward money they were offering.
- A. Yes.
- Q. So in your mind you thought ...
- A. Because at that time he offered me about - I think he mentioned about 25 or 50,000 and he told me 'I will be giving this to you maybe about 4 to 6 weeks later. And I was just thinking maybe about 4 to 6 weeks later.' And I was just thinking maybe he has to go (through?) some government procedure to process that.
- Q. How could the Americans know you were an informer?
- A. Through Ernie, I have to discuss this with Ernie.
- Q. But you hadn't discussed it with Ernie.
- A. I haven't the opportunity yet because I am in Hong Kong and Ernie is in San Francisco.
- Q. Well, I suggest that's quite obviously the Americans playing the game and offering you a commission on sale of the heroin, nothing to do with a reward.

A. I don't know that is on their mind, sir.

Q. And again if that was the case, that would be just another charade, you know no commission would ever be paid because no heroin would ever be sold because they were agents.

A. Well, the other party cannot produce the heroin."

(2) The appellant was cross-examined about his meeting on 2nd February 1985, the day of his arrest, with a man called Brad Morgan in the lobby of the Hilton Hotel "to discuss some legitimate business dealings". He said that Prezioso had since the first trip wanted him to meet "Brad" and agreed that Brad was the man looking after Prezioso and Santos's money. The cross-examination continued:-

"Q. And Brad was masquerading as a legitimate financier.

A. I didn't see Brad there.

Q. No, I am so sorry, I've jumped on a bit. Brad was masquerading as a legitimate financier in the eyes of the other accused, a man providing the money.

A. To my knowledge, sir, no.

Q. What was he acting as?

A. He was acting as a financial adviser of Rizzo, Bobby Rizzo. He's investing his money, not Brad's money, but Bobby's money.

Q. But you knew or you must have assumed that he also was an agent.

A. Oh, yes.

Q. So tell us about this conversation you had with him on the day of your arrest when you met him to discuss legitimate business deals. Do you remember him asking you why you got involved in drug activities?

A. When I went down, he was having a drink at the lobby. I approached him because it's the only occasion at that time at the lobby and he told me 'Rudy' and I told him 'Yes', so he asked me to sit down, and he has to finish his drink and he invited me for - I think it was lunch or something at the coffee shop. We went down and eat lunch, and he was asking me what kind of business that we were going to talk. So I discussed with him about my business, my other business that I have, that I have already a contract from Marshall Island I explained to him how many vessel is available and he is interested.

Q. What's available?

A. Scrap vessel is available.

COURT: What?

A. Scrap vessel.

Q. Now this is Mr. Morgan's evidence. Having heard all that from you, he asked you why you were mixed up in drugs when you were doing so well in business in other fields.

A. Yes, he asked me that - 'Rudy, since your contract is good and your business is good, why are you dealing in this drug?' I told him, 'Well it's not my business, it's Bobby's business, I am just helping him', and he told me ...

COURT: Just a minute. 'It's Bobby's business'.

A. 'It's Bobby's business, I am just helping him'. then he told me that he is getting 5 per cent.

Q. He said that you said you were mixed up in the drug business because your capital was all tied up and you needed some money to finance other businesses.

A. Yes, I did say that.

Q. That's really the truth, isn't to? That's the honest truth in this case.

A. I did say that, yes.

Q. And it was a truthful answer; you needed money to finance your businesses.

A. Other business, yes, sir.

Q. And as Mr. Prezioso said he thought this was your first entry into the heroin business and you did it to provide finance for your other business, that's the truth, isn't it?

A. No, I did this to get all information to give to Bobby to get a reward money.

Q. So the answer you gave to Mr. Brad Morgan was untrue, you didn't need money from this business to put into your other businesses, you didn't need money for heroin to put into this business at all - into any of your other legitimate businesses?

A. I need money to finance my other business, yes.

- Q. And that was the reason you told Mr. Morgan you got involved in the heroin business.
- A. No. I told him I am assisting Bobby, this is not my business.
- Q. I suggest that was the precise truth.
- A. I don't get your question, sir.
- Q. You entered into this heroin business to try to make, as the expression goes, a quick buck out of it.
- A. No, sir.
- Q. Do you remember Mr. Morgan asking you or saying to you that if you conducted business like this, he might not be interested in working with you because the heroin deal wasn't going through at that stage, the 2nd of February?
- A. What is the question, sir?
- Q. I will put it again the other way round. At that stage there had been lots of delays and stories about where the heroin was, why it couldn't be supplied in a certain place, there was a history of delays, it was now the 2nd of February and only two samples had been produced in Bangkok and nothing else, the whole deal didn't look very promising.
- A. Yes, sir.
- Q. Now Mr. Morgan said to you, did he not, that if this was the way you conducted your other businesses, he wouldn't be interested in working with you?
- A. No.
- Q. Didn't he say that?
- A. He said that in a different way. He told me 'If you are going to conduct our business, of course with illegal business ...'
- COURT: 'If I would conduct our business with ...'?
- A. If I would conduct our business, if he would come in with me with illegal business, he is not interested to do business with me.
- Q. However, did you not then say to him that the delay is only because it was the first time you dealt with these people and that the next time the money could be - the whole deal could be dealt with better, or words to that effect?

A. Maybe, sir, maybe.

Q. Why would you say something like that? You knew that if this deal was successful there certainly would never be another deal because they would be arrested.

A. Well, as I have told you before, sir, I have to play along.

Q. I suggest that simply is not the truth. ...

A. No, I don't agree with him."

It should be stated, in addition, that there were put in evidence at the trial transcripts of numerous tape recordings of conversations, both by telephone and face to face, between the appellant and the agents, which contained no trace or hint of an agent-informant relationship.

On the appellant's application for leave to appeal against his conviction and sentence there was no complaint with regard to the conduct of the trial and the grounds of appeal were confined to one subject-matter as follows:-

- "1. By notice of motion dated the 23rd of June 1987 the applicant seeks leave to this honourable court to tender the evidence of witnesses whom the applicant avers would be likely to be credible and whose evidence would have been admissible in the proceedings from which this appeal lies in respect of the principal issue in the case, namely whether or not the applicant at the time that he embarked upon the negotiations with the co-accused in the alleged conspiracy, was aware of the identity of the two American Drugs Enforcement Agency officers and his participation was in the expectation of obtaining a reward from the said officers rather than as a co-conspirator. The said fresh evidence would have substantiated the applicant's claim and contradicted the Crown's case that he was a participant as a conspirator and not with a view to obtaining reward monies from the Drugs Enforcement Agency officers.
2. The fresh evidence, in particular that of Mr. A.J. Kramer would have refuted the testimony of the Crown witness Prezioso in respect of information provided by the applicant to the D.E.A. officers on an occasion prior to the 22nd of November 1984 which would have had the effect of both undermining the credibility of the evidence of the said Prezioso and substantiating the applicant's evidence that he both knew of the status of Prezioso before the 22nd of

November 1984 and had provided information to him when he, the applicant, was fully cognizant of the said Prezioso's status.

3. The said fresh evidence goes directly to the principal issue in the applicant's case at trial, contradicts the Crown's evidence and assertions in respect of the applicant's knowledge and belief and therefore his intentions, thus rendering the said conviction wholly unsafe."

Their Lordships observe that "the principal issue in the case" is stated in paragraph 1 of the grounds to be "whether or not the applicant, at the time that he embarked upon the negotiations with the co-accused in the alleged conspiracy, was aware of the identity of the two American Drugs Enforcement Agency officers and his participation was in the expectation of obtaining a reward from the said officers rather than as a co-conspirator". Paragraph 2 makes it clear (if it was not clear already) that being aware of the identity of the agents is intended to mean being aware not only of their names but of their status as agents.

In his affidavit grounding the motion for leave "to allow the fresh evidence contained in affidavits of A.J. Kramer, William J. Murphy and Ernesto Baiggorria" (which was before the Court of Appeal) the appellant stated:-

"The critical evidence at my trial was whether or not I knew that [Prezioso and Fernandez] were in fact U.S. Government agents."

This was the question towards which the proposed new evidence was directed and, whatever its ultimate importance, it must be considered that it was material and that it was in issue, since the prosecution were contesting it.

Other averments in the appellant's affidavit are worthy of notice. In paragraph 3 he stated that he made his living by earning a commission in business transactions where he acted as a go-between, that he owed Ernie about US\$700 and that he agreed to help Ernie so that his debt could be set off by whatever sum of money he might earn from the information regarding the purchase of illegal arms. The appellant claimed in paragraph 16 to have introduced Villasenor to Ernie and Prezioso, but made no other allegation of direct contact with the latter in the arms transaction. If the appellant's statement that Prezioso was involved in the exposure and trial of Villasenor is true, as their Lordships will assume, then Prezioso lied on oath in denying that he had ever heard of Villasenor.

In paragraph 8 the appellant described his relationship with Ernie:-

"Ernie asked me for information on such matters as gun-running, cocaine, counterfeit money and arms for Contras. I knew that he received reward money from

the Government for information and anticipated that as a sub-informer I too would receive reward money. I owed Ernie US\$700.00 and needed cash for my business. I therefore become involved in these underworld activities to raise funds. I anticipated receiving 25 percent of the street value of the confiscated goods; this I believe is the maximum allowed under U.S.A. Law."

The appellant then described an incident in which he obtained a sample of counterfeit currency for Fernandez, with a view to showing that he knew both Prezioso and Fernandez were Government agents:-

"9. While in Hong Kong I found a supplier of forged U.S. notes and informed Ernie. He asked me to bring back 5 notes by way of sample as he could not then travel to Hong Kong. I was very worried about bringing them back with me to the U.S.A. Ernie told me not to worry as he had arranged matters with Bobby and that Jake would meet me at the airport in Honolulu. I already knew as attested by my Attorney Mr. William Murphy that Jake was an agent.

10. Jake approached me in the transit area at Honolulu airport and said 'Rudi Santos?' I followed him and showed him two pieces of counterfeit money which I left with him. I told him to please call Bobby about it. I did not know Bobby was in San Francisco. I was therefore surprised to see Bobby and Ernie awaiting me at San Francisco airport outside the customs area. I had been quickly ushered through customs by the customs official without inspection. I said thank you for the VIP treatment which I assumed Bobby had been able to arrange through his authority as an agent. I do not believe Bobby would have shown his hand in this way if I had not been working with him."

The appellant described the initiation of the drugs affair by means of a telephone call which he made to Prezioso in Hawaii, putting the date at 6th November 1984, and not 22nd November, as Prezioso had done in his evidence:-

"16. When I called Bobby in Hawaii on November 6th 1984 I already knew Bobby's telephone number as Ernie had given it to me, I knew he was a law enforcement agent because when I introduced Villasenor to Bobby in late 1983/early 1984. Ernie confirmed he was a law enforcement agent.

17. I was not able to call Ernie from Hong Kong to notify him about the counterfeit U.S. currency and the dangerous drugs available in Hong Kong and instead called Bobby in Hawaii. This was because Ernie was no where to be found. He had closed his office and was keeping a low profile after the arrest of Villasenor.

18. I proposed reporting to Ernie when I returned to San Francisco and for him to collect any information money due to us."

In his affidavit the appellant described his relations with the agents:-

"13. Bobby tape-recorded all the phone calls he made to me from Hawaii to Hong Kong. However he never produced any tape of my six or seven calls to him from Hong Kong because in these conversations while pleading with me for more information he advised me to be very careful because once the Defendants found out our true identities it could be rough. However he guaranteed my safety and said no harm would come to me because I was working with them.

14. During their first trip to Hong Kong at Excelsior Hotel on 12/12/84 or 13/12/84, Bobby and Jake assured me a number of times not to worry and that I was fully protected by them. They even advised me that I should behave and talk as a dealer on dangerous drugs, making it appear that this was not the first time I was doing a dangerous drugs transaction.

...

19. Of the 6 or 7 calls to Bobby in Hawaii I only go through to him 2 or 3 times. We talked in the unrecorded conversations about dangerous drugs and counterfeit money. Again Bobby advised me to be very careful and at the same time assured me of my safety."

In detailing conversations between the appellant and the agents in which the agent-informant relationship was expressly acknowledged, this account is completely at variance with the appellant's evidence at the trial in a crucial respect.

The fresh evidence can be summarised from the affidavits of the proposed witnesses.

A.J. Kramer, whose evidence was given priority in the grounds of appeal, was an Assistant Public Defender for the Northern District of California and, as the attorney for Villasenor, was provided by the Government with numerous reports and audio and video tape recordings. He stated that the main Government informant was Ernie, who had been a DEA informant for six years "and during this time had received approximately \$70,000 in payment". The reports and tapes contained the information that Prezioso and Ernie had met Villasenor three times, when the appellant's business with Villasenor was discussed, and had met him on two other occasions when the appellant was present (on one of which the appellant and Prezioso carried on an extensive conversation). Kramer also stated that Villasenor was arrested in July or August 1984, "so from that time on he knew the people with whom he had met were government agents".

All that this evidence, so far as it could be made admissible, showed was that Prezioso had been in charge of the Villasenor case (and therefore knew Villasenor) and that the appellant was associated with Villasenor, but had not been prosecuted. The "evidence" cast no light on whether the appellant had acted as an informant or whether he knew that Prezioso or Fernandez was a government agent.

Ernie's affidavit included the following statement:-

"I had actual knowledge that Rodolpho de los Santos was aware of the fact that, I, at various times, and at different places, was engaged in a multitude of different types of illegal activities with criminal elements. I know that Mr. Santos had knowledge of this for the last five or six years."

He was present, prior to the arrest of Villasenor, when William J. Murphy told the appellant that Fernandez was a government agent and was at San Francisco Airport with Prezioso when the appellant disembarked without going through customs. He said that Prezioso knew about the appellant's contact with Fernandez in Honolulu before the appellant's arrival at San Francisco. The affidavit concluded:-

"I know for a fact that Agent Prezioso knew Mr. Santos prior to the Hong Kong drug incident, as I had introduced Mr. Prezioso to Mr. Santos here in San Francisco at the inception of the Villasenor investigation."

This evidence tends to prove that the appellant knew before November 1984 that Prezioso and Fernandez were government agents, but that Prezioso knew the appellant before the drug incident was never in dispute. Indeed the facts surrounding the counterfeit money incident and the appellant's immunity from the customs check were not in dispute.

William J. Murphy was the San Francisco attorney for several years of both Ernie and the appellant and stated that they became friends and associates in freight forwarding and transportation business in 1979. The appellant knew before May 1984 that Ernie was a government informant. Mr. Murphy told the appellant in Ernie's presence that Fernandez was an agent and advised him to terminate his relationship with Fernandez. The affidavit, dated 18th June 1987 concluded:-

"7. Mr. Santos informed me that Mr. Baiggorria had gotten him through customs here in San Francisco when Mr. Baiggorria was accompanied by Mr. Bobbie Rizzo (also known as Special Agent Bobbie Prezioso), after Mr. Santos had left Honolulu (where he had met Mr. Fernandez). Mr. Santos was very impressed with Mr. Baiggorria's ability to get him through customs and so informed me of Mr.

Baiggorria's influence in that regard. This occurred before any transactions pertaining to the criminal prosecution in Hong Kong were initiated."

This evidence, as given by Mr. Murphy, was hearsay and the affidavit merely provided grounds for inferring that the appellant believed that Fernandez was a government agent.

In a supplemental affidavit dated 24th June 1987 Mr. Murphy described the visit of Mr. Oliver, the appellant's then attorney, to San Francisco before the trial. Ernie and the deponent agreed to provide affidavits. Mr. Murphy was not willing to fly to Hong Kong but Ernie was. Mr. Oliver declined their offer and expressed the view:-

"that under cross-examination he would be able to have Mr. Prezioso admit knowing Mr. Santos and substantiate Mr. Santos' contention that he had been working with Mr. Prezioso and Mr. Fernandez in the Hong Kong drug incident as the undercover associate."

The power to admit fresh evidence is contained in section 83V of the Criminal Procedure Ordinance, Chapter 221, which is in the same terms as section 23 of the Criminal Appeal Act 1968. It provides:-

- "(1) For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice -
- (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;
 - (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court of Appeal whether or not he was called in those proceedings; and
 - (c) subject to subsection (3), receive the evidence, if tendered, of any witness.
- (2) Without prejudice to subsection (1), where evidence is tendered to the Court of Appeal thereunder the Court of Appeal shall, unless it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise its powers of receiving it if -
- (a) it appears to it that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

- (b) it is satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.
- (3) Subsection (1)(c) applies to any witness (including the appellant) who is competent but not compellable, and applied also to the appellant's husband or wife where the appellant makes an application for what purpose and the evidence of the husband or wife could not have been given in the proceedings from which the appeal lies except on such an application.
- (4) For the purpose of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice, order the examination of any witness whose attendance might be required under subsection (1)(b) to be conducted, in manner provided by rules and orders made under section 9, before any judge or officer of the Court of Appeal or other person appointed by the Court of Appeal for the purpose, and allow the admission of any depositions so taken as evidence before the Court of Appeal.
- (5) In no case shall any sentence be increased by reason of or in consideration of any evidence which was not given at the trial."

Their Lordships first turn to see how the appeal was dealt with by the Court of Appeal. The first material observation in the judgment is that no adjournment was sought to enable a witness to be called when the cross-examination of Prezioso failed to yield support to the defence case with regard to the appellant's knowledge that Prezioso and Fernandez were government agents. Prezioso's evidence concluded on 7th November 1985 and that of Fernandez on 8th November. The summing up began on 15th November and the trial ended on 19th November. Ernie had volunteered to come to Hong Kong at three days' notice. The next point was that "no complaint is made as to any irregularity in the trial itself or as to any defect in the summing up".

On considering the evidence of the proposed new witnesses, the court said that Kramer's was based on records and tapes supplied to him rather than upon any personal knowledge of his own and would not have been admissible. If he had brought documents signed by Prezioso it might have been possible to confront Prezioso, but the defence would have been bound by his answers. With regard to Ernie and Murphy, the judgment puts the case succinctly:-

"The other affidavits are from Baiggorria, the professional informer we have just mentioned, and from a Mr. Murphy, an attorney acting in America

for both Baiggorria and the Defendant. The evidence of these two would establish firstly, that Murphy had told the Defendant that Fernandez was an undercover agent for the authorities and secondly, that Prezioso had been together with Baiggorria in circumstances from which the Defendant might reasonably have inferred that Prezioso too was an undercover agent. To that extent their evidence would support the Defendant's evidence that he was aware that both were such agents. But it does not necessarily follow that even so his participation in the conspiracy was solely in a similar character. It is, of course, not likely that a person would genuinely undertake transactions in dangerous drugs with those whom he knows to be undercover agents for a foreign state. But against that there must be set the Defendant's silence during the whole course of the transactions, even though once in private he warned the agents that the other conspirators suspected them of being men from Interpol. There is some dispute as to what exactly was said when later, at his request, the agents and an inspector from the Hong Kong Police saw him in Laichikok Prison after his arrest. But even on the Defendant's version of that incident we do not find the indignant protests that the situation naturally demanded.

These are cogent factors. In addition there are the Defendant's comments to another undercover agent, one Brad Morgan, that he needed the money from the transaction in question to finance other ventures, and his own evidence in chief, inconsistent with that now proposed, that he did not think that Prezioso and Fernandez knew that he knew what they were. Despite the courteous and most able submission of Mr. Sarony, and even taking the proposed evidence at its present face value, we would not be persuaded to take a different view from that taken by the jury below.

There is yet another hurdle that has to be surmounted, namely to show that the evidence was not available at the trial or that there is good reason for its not then being called.

The evidence of Baiggorria was then available, and known to those who at the time were advising the Defendant. It must be that their failure to call him, after Prezioso had disappointed in his cross-examination, was a conscious decision taken in what was thought to be the best interests of the Defendant. We have no reason to think that they were not fully apprised of the situation as it then stood.

The evidence of Murphy was not available only in the sense that he refused, as he still does, to fly to Hong Kong. If his evidence were to be admitted it would have to be taken on commission. But in any event it would take matters no further than the evidence of Baiggorria.

In all the circumstances we are not disposed to admit evidence from the proposed witnesses. There being nothing else put forward in support of the application, the application for leave to appeal against conviction must be dismissed."

In his petition for special leave to appeal and before the Board the appellant attacked the Court of Appeal's refusal of leave to call the proposed fresh evidence. Their Lordships see little merit in the appellant's arguments on this point. The evidence of Ernie was available and Mr. Oliver, the appellant's attorney, had interviewed him and knew what he could say. Even after Prezioso's evidence, the attendance of Ernie could have been obtained either with or without the assistance of a short adjournment. A conscious tactical decision not to call a witness because of the danger of doing so, when compared with the importance of the facts to be proved by him, does not leave it open to the defendant, once convicted, to apply to call that witness under section 83V. The same reasoning applies to Murphy's evidence, in so far as it was admissible. The only thing which Kramer's evidence could have achieved was possibly a confrontation of Prezioso by means of the tapes, resulting in either an unconvincing denial or an admission that he knew Villasenor and had been in charge of the operation which led to his conviction. This result would in turn have cast doubt on Prezioso's credibility but not, their Lordships consider, in an area where the appellant would have derived a material advantage. Assuming, as appears likely, that Prezioso was telling a lie on this point, his behaviour creates one of those loose ends which are often found in complicated criminal trials but which do not support a relevant influence in favour of the defendant. And, in view of the appellant's own evidence and the admitted facts, the case against him did not depend substantially on the credibility of Prezioso. Accordingly, their Lordships consider that the Court of Appeal's decision against admitting Kramer's evidence was also justified.

In his petition and before the Board the appellant advanced a completely new argument, which it became their Lordships' duty to consider with the same care as the points which had already been rejected. This was (paragraph 11 of the petition) that the fact that no witnesses were called on behalf of the appellant "was due to gross negligence on the part of your petitioner's then solicitor, Mr. Robin Oliver". (In March 1987 Mr. Oliver, for reasons unconnected with the defence of the appellant, was struck off the roll of solicitors of Hong Kong, and the counsel whom he instructed at the trial has since died.) The petition set out the actions of Mr. Oliver, on the appellant's instructions, in going to San Francisco and interviewing Ernie and Mr. William Murphy and states in paragraph 16:-

"That it is submitted that the failure to adduce the evidence of Murphy and Baiggorria at the trial was due to the misconduct of the solicitor for your petitioner's defence."

The appellant's affidavit grounding the application for leave to call fresh evidence referred to Mr. Oliver's visit to America:-

"23. I did not call Mr. Murphy or Ernie from U.S.A. to adduce evidence at the trial because I was told by my solicitors that there was no more money to pay for their airfare and accommodation, and that Jake and Bobby were willing to prove my capacity as an informer in the trial."

(There was, of course, never any question of bringing Mr. Murphy to Hong Kong, in view of his inability or unwillingness to fly.)

"24. From what Mr. Oliver said to me on his return from U.S.A. I believe Ernie had told Mr. Oliver that Bobby would give evidence in my favour in Court but that Ernie would be available to fly to Hong Kong to give evidence at three days notice. At trial after Bobby's evidence I asked my Barrister Mr. Van Buuren to call Mr. Oliver and ask when Ernie was coming over. Later when Mr. Oliver arrived at Court he appeared to have changed his mind as he said it would be dangerous to call Ernie."

Mr. Murphy's supplemental affidavit, already referred to, described Mr. Oliver's interview with Ernie in terms which were clearly not intended to be complimentary:-

"The evening of the same day a meeting was held at the cocktail lounge in the Holiday Inn at 50-8th Street, San Francisco, California. At the meeting alcoholic beverages were consumed by Mr. Oliver, there was no notetaking by him and I learned from Ms. Chan that she and Mr. Oliver were sharing the same room."

The ability of the Court of Appeal in its discretion to admit fresh evidence which was available at the trial and the failure to call which was due to the flagrant incompetence of the conduct of the defence is fully supported by judicial authority. Their Lordships therefore consider it unfortunate that the appellant, whose dissatisfaction with his attorney had already been shown to exist, did not give the Court of Appeal the opportunity of considering his additional argument (for which such support as could be mustered already existed) while his defending counsel, since deceased, was available. Their Lordships, however, do not in any case consider the appellant's new argument to be tenable.

The principle may be understood by reference to the citation with approval by Lord Lane C.J. in *R. v Ensor* (1989) 89 Cr.App.R. 139 of a statement by Taylor J. in *R. v Gautam* (The Times, March 4, 1987), when considering

the deliberate omission to call evidence which was available:-

"It should be clearly understood that if defending counsel in the course of his conduct of a case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for an appeal."

Their Lordships are far from saying that the decision not to call Ernie was anything other than the right decision but, even if one is to regard it as a mistake, there were rational grounds to support it. Ernie had been for some years associated with Prezioso to whom he looked for his remuneration as an informer; the appellant had by-passed Ernie in the drugs transaction the subject of the case; the appellant, when Ernie was cross-examined, might have been shown up as a person who had acted as a go-between in dubious transactions; and the indirectness (to put it at its most favourable) of the appellant's relationship with the agents was likely to have been emphasised if Ernie had testified. Therefore the omission to call this witness could by no stretch of imagination be described as flagrant incompetency. Their Lordships might add incidentally that they regard with considerable reserve the appellant's statement that Mr. Oliver was against calling Ernie on grounds of expense, considering that the appellant, although not complaining of impecuniosity does not appear to have remonstrated with Oliver on this point. Much of the same reasoning could be applied to the failure to ask for Mr. Murphy's evidence to be taken on commission, especially since Mr. Goodman-Smith of the Legal Aid department, who took over the case after the appellant had been convicted, said that Mr. Murphy seemed to be disillusioned with the appellant.

Their Lordships now turn to section 83V. Subsection (1) confers a power, the exercise of which must depend on the facts of each case, and, having regard to the facts to which they will draw attention hereafter, their Lordships do not consider that the Court of Appeal could be faulted for not exercising that power. Subsection (2) imposes a conditional duty on the Court of Appeal to receive evidence which is tendered, if the evidence appears likely to be credible and would have been admissible and if the court is satisfied that there is a reasonable explanation for the failure to adduce the evidence at the trial. As their Lordships have held, the Court of Appeal were justified in considering that there was not a reasonable explanation for the failure to call at the trial the admissible evidence which the defence wished to adduce on the hearing of the appeal: a conscious decision, not to adduce evidence, unless it amounts to flagrantly incompetent advocacy, does not provide a reasonable explanation.

There is, of course, another condition in subsection (2): the duty of the court to receive evidence if satisfied on certain points is imposed only:-

"unless [the Court] is satisfied that the evidence, if received, would not afford any ground for allowing the appeal."

Clearly new evidence could afford grounds for allowing an appeal in some circumstances, whereas the same evidence given in other circumstances would not do so. One has to look at the new evidence in context or, putting it another way, to consider the evidence as a whole. In addition to the facts already noted, their Lordships wish to point to something which also seems to have impressed the Court of Appeal, namely, the way in which the appellant conducted himself after he had been arrested and taken to the police station on 2nd February 1985 and had asked if he could see Prezioso, who then came to him. He was cross-examined thus:-

"Q. After you were arrested you must have felt very sick about the whole thing when you were arrested and found yourself charged with a serious offence?

A. Yes, sir.

Q. What did you do about it then?

A. I asked Inspector Howard I would like to talk to Bobby.

Q. I suggest to you that even when you were arrested in the Hilton on the 2nd of February you had no idea that these men were agents.

A. I disagree with that, sir.

COURT: I didn't catch.

A. I disagree with that, my Lord.

Q. And it was only after you were charged and the facts of the case revealed in the magistrate's court during proceedings there for bail applications that you knew that they were agents.

A. I disagree with that, sir.

Q. When you saw Bobby Prezioso in the company of Inspector Howard at Lai Chi Kok why didn't you tell them then 'This is all a mistake, I was acting as an informer.'

A. Bobby told me he would try to help me.

Q. Yes.

- A. And he asked me to cooperate fully with Inspector Howard, to give a statement.
- Q. So you seem to agree with Bobby's evidence then.
- A. That is what, sir?
- Q. You have just recited it, he said he would try and help you and he suggested you make a full statement.
- A. Yes, sir.
- Q. You did not give a statement to the police incidentally, did you?
- A. I wrote a statement and gave it to my solicitor.
- Q. But not to the police.
- A. No, sir.
- Q. Why didn't you say 'Look, this is all a terrible mistake, don't you realise all the time I was trying to help you, I was acting as your informer. You check up with Ernestil about that, he will tell you that's right'?
- A. I didn't say it in that particular way, sir.
- Q. I am asking you why didn't you.
- A. I told Bobby 'You know I had been helping you, assisting you'. and he told me 'Well, you have to give full cooperation to Inspector Howard'.
- Q. I don't think that was that suggestion, you didn't say you have been assisting him, it wasn't suggested to Mr. Prezioso that you said you have been assisting him.
- A. I have been helping him, I told him.
- Q. Anyway, I will not argue about that. Why didn't you say 'Go and check up with Ernie, he will tell you this.'?
- A. At that moment, sir, I don't think I said that because he knows himself that I'm attached with Ernie.
- COURT: Sorry?
- A. He knows, Bobby Prezioso knows, that I am working with Ernie Baiggorria.

Q. How on earth did he know that? Do you mean working with him in his capacity as informer?

A. Ernie, yes.

Q. Do you mean that Bobby knew that you were working with Ernie as an informer?

A. I don't know that, sir. I don't know whether Ernie told him or not but I was the one who brought these people, these two Filipinos in San Francisco."

The arrest had been briefly dealt with during the appellant's direct evidence:-

"Q. Now after you were arrested you had indicated to Inspector Mike Howard, had you not, that you wanted to see Bobby Rizzo, Bobby Prezioso?

A. Yes.

Q. Why did you make that request?

COURT: Sorry, we are coming now to March.

MR. VAN BUUREN: After the arrest in February, my Lord.

COURT: We are now jumping from March to February.

MR. VAN BUUREN: Yes.

Q. Why did you make that request?

A. I made that request because I would like Bobby to help me.

Q. Did Bobby come to the prison to visit you?

A. Yes, Bobby came to visit me.

Q. Did he come alone or did he come with other people?

A. He came with Jake and Inspector Howard.

Q. How did the conversation go on that visit?

A. He told me that he cannot help me here in Hong Kong and for me to cooperate fully with Inspector Howard and for me to give a statement to Inspector Howard."

It will be recalled that the Court of Appeal's reaction to all this evidence was to say "... even on the defendant's version of that incident we do not find the indignant protests that the situation naturally demanded". Their

Lordships respectfully concur, but would go on to point out that from start to finish, according to the appellant's own evidence, he treated the agents, and the agents treated him, in a manner which was entirely consistent with a proposed purchase of dangerous drugs from dealers known to the appellant by Prezioso and Fernandez who would pay a commission to the appellant either on completion of the purchase or on effecting resale in America. On that footing, whatever the objects of Prezioso and Fernandez, the appellant was conspiring to effect a sale from Cho and his associates to the agents and there was no evidence the other way. It will also be recalled that, on the appellant's own evidence, he initiated the proposed transaction with Prezioso and said nothing then or later about acting as an informer or expecting a reward for having so acted.

Clearly, one legitimate inference from the appellant's knowledge that Prezioso and Fernandez were government agents, if regarded in isolation, was that a person who knew that he was dealing with agents would have been most unlikely to try to promote an illegal transaction between them and would be vendors of dangerous drugs. But the alternative inference is that a person in the appellant's position, who had already acted as a go-between in various transactions and who had been involved in illegal dealings in arms and had procured a sample of counterfeit currency, would, when proposing (in the role of an informer who was looking for a reward) to put known agents in touch with drug suppliers, take steps at once to establish his informant-agent relationship. This would ensure his safety from prosecution and also be in his commercial interests. So far from that being the situation, the evidence is overwhelming that the role of an informer was never mentioned and that the agents by their talk of paying commission and possibly diluting the drugs before sale in America were unequivocally treating the appellant as a real go-between and criminal. This fitted in with the appellant's expressed reluctance to handle the drugs himself, which ought not to have mattered if there was an informer-agent relationship. His conversation with Brad Morgan, another agent, again points only to his acting as a go-between in an illegal transaction, and particularly significant is the appellant's change of front when for the first time in his affidavit he avers, quite incredibly in view of what has gone before, that the agents made several remarks to him which recognised him as one of the team. The conclusion is inescapable that the appellant intended dangerous drugs to be sold by his co-defendants to the Americans, whatever might be the public or private purpose of the latter. The appellant's conduct at all times before his trial, both before and after his arrest, can be explained on no other basis. His failure to establish an informer-agent relationship is all the more significant when it is remembered that (whatever his knowledge of these men) his only previous experience for which he received no reward, was

according to himself indirect, when he was helping Ernie in connection with the arms dealing operation.

There was in fact no evidence, even from the appellant, that he had performed any function except that of a person who was negotiating a sale of heroin to the agents.

Paragraph 2 of the petition for leave to appeal reads as follows (emphasis supplied):-

"2. That the principal questions raised by this appeal are whether or not the Court of Appeal erred in refusing to admit fresh evidence which tended to prove most persuasively that at the time that Your Petitioner entered into the conspiracy he did so in the belief that he was acting only as an informer for and on behalf of the United States Drug Enforcement Agency officers and not as a genuine conspirator."

In reality the principal issue was not, as suggested by the defence and by the appellant in his affidavit, whether the appellant knew that Prezioso and Fernandez were government agents, but whether he was conspiring with his co-defendants to traffic in dangerous drugs. On that issue the appellant stands convicted by his own evidence and none of the proposed new evidence could have availed him or afforded any ground for allowing his appeal, as required by section 83V(2).

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed.