

4 pages.

ROYAL COURT
(Samedi Division)

163.

18th September, 1996

Before: F.C. Hamon, Esq., Deputy Bailiff, and
Jurats Myles, Potter and Quérée.

The Attorney General

- v -

Ian MacKenzie

Trial before the *Assise Criminelle* following not guilty pleas to:

14 counts of larceny as a servant;
14 counts of false accounting.

Judgment on preliminary point: whether the accused may, whilst giving evidence, refresh his memory, by referring to a document prepared by him.

Advocate N.M. Santos Costa for the accused.
T.J. Le Cocq, Esq., Crown Advocate.

JUDGMENT

THE DEPUTY BAILIFF: Mr. Costa, on behalf of MacKenzie, makes application for his witness to refer to notes. These notes - and I use the term loosely - which have not previously been shown to the Crown contain, as we see it, eleven closely typed pages and it is in fact the whole of the statement or an apologia of the accused's actions but is not, of course, the statement made to the police. It is a full summary of the facts as he recalls them. We are told that it was made shortly after he was suspended on 12th September, 1995, but it refers to the whole history of his employment back to the time where it starts with the contract long since gone in 1989 with BCIF. Coupled to it are also two handwritten pages of notes which are really notes made in

reference to matters that have been raised at the trial and in no particular order.

5 The Rule as to refreshing memory is clearly set out in R. -v- Richardson [1971] 2 QB 404 where the Court said that a distinction had to be drawn between a witness being allowed to read over his statement before going into Court to give his evidence and a witness being allowed to refresh his memory from a document while in the witness box. "A line is drawn" the Court said "at the moment when a witness enters the witness box and when giving evidence there in chief he cannot refresh his memory unless the document he wishes to use falls within the conditions prescribed by the memory refreshing rule". The Rule is stated as follows:

15 *"A witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with the facts to which he testifies".*

20 That is found in the Attorney General's Reference (No. 3 of 1979); (1979) 69 Cr.App.R. 411. "Contemporaneously" is a somewhat misleading word in the context of the memory refreshing rule. It is sufficient for the purpose of the rule if the writing was made or verified at a time when the facts were still fresh in the witnesses' memory and to understand what that actually means we need to look at paragraph 8/69 Of Archbold [1995 Ed'n]. It says there:

"Contemporaneous.

30 *The question of whether a note is to be regarded as contemporaneous is a matter of fact and degree (R. -v- Simmons [1969]). The mere fact that the note was not written at the first available opportunity does not mean that it fails the test of contemporaneity. The true test is that a document must have been written (or checked) either at the time of the transaction or so shortly afterwards that the facts were still fresh in the witnesses' memory. This definition does provide a measure of elasticity and should not be taken to confine witnesses to an over-short period. R. -v- Richardson [1971] 2 QB 484/490."*

45 In our view these are not notes made at the time to bring them within that contemporaneous rule. There is, as we see it, a clear distinction to be drawn between Mr. Barber in the witness box referring to salaries and bonuses from company records and a witness referring to the whole of his evidence by way of refreshment. These are not, in our view, original notes of events that occurred - as I said at the beginning of this short judgment - they are a complete apologia for his actions and therefore the request is refused. However, Mr. Costa, what we are prepared to do - should your client wish to avail himself of this opportunity

50

- is to pass the notes down to you and you can use them as best you can. If he wants to retire to a room on his own and read them through before he goes into the witness box, we are quite happy for that to happen.

○ ○

Authorities

R. -v- Richardson [1971] 2 QB 404.

Attorney General's Reference (No. 3 of 1979); (1979) 69 Cr.App.R.
411.

R. -v- Simmonds (1969) 1 QB 685.

Archbold [1995 Ed'n]: Para 8/69.