DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Wallis* [2011] QDC 25
PARTIES:	**R** *Applicant* *V* **FLEUR ANGELIQUE WALLIS** *Respondent*
FILE NO/S:	DC 3494 of 2009
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland, Brisbane
DELIVERED ON:	30 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2011; 10 March 2011; 30 March 2011
JUDGE:	Clare SC DCJ
ORDER:	**1. The application is allowed.** **2. The written statement of Antonio Cavello sworn on the 8 April 2009 and tendered at the committal hearing may, without further proof, be read as evidence on the trial of the respondent on indictment number 3494/2009.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE –application to admit evidence-where witness is incapable of giving oral testimony-whether a statement tendered at committal without cross examination can be admitted as evidence in trial. STATUTORY INTERPRETATION – construction of section 110A (13) *Justices Act 1886* (Qld). *Criminal Code* 1899 (Qld), s 568(3), s 590AA *Criminal Law Amendment Act 1892* (Qld), s 4 *Justices Act 1886* (Qld), s 110A, s 111
COUNSEL:	Mr C. Kershaw for the applicant Mr C.F.C Wilson for the respondent
SOLICITORS:	Director of Public Prosecutions for the applicant

Ryan & Bosscher Lawyers for the respondent

[1] **CLARE DCJ:** Fleur Wallis faces trial for fraud. The prosecution now seeks an order that the statement of Antonio Cavello sworn on 8 April 2009 be admitted as evidence at the trial. The application is opposed.

[2] The accused was Mr Cavello's friend. Mr Cavello had a business partnership. He kept chequebooks for the business at his home. Over $ 30,000 was withdrawn from the business account through a series of cheques made out to cash. On their face, each of 72 cheques bore the signature of Mr Cavello. They were all endorsed by the accused and applied to her benefit. Mr Cavello swore a statement to the effect that he did not sign the cheques or authorise their payment. From time to time she had stayed at the house where the cheque books were kept.

[3] He attended at the committal hearing but was not required for cross examination. His statement was handed up pursuant to section 110A of the *Justices Act 1886* (Qld). The magistrate committed the accused for trial on 5 counts of fraud relating to the cheques. The indictment now before this court is for a single count of fraud with a yield in excess of $30,000. The indictment expressly refers to section 568 of the Code.[1]

[4] After the presentation of the indictment, Mr Cavello suffered a stroke. Sadly, there was serious permanent damage. His prognosis is poor. He is no longer competent to testify. The admissibility of his statement at the trial is dependent upon the application of the *Justices Act 1886* (Qld), and in particular sections 110A and 111.[2]

[5] The defence submitted that the admission of the statement is beyond the power of the court or alternatively that it would be unfair to admit it.

Procedural requirement: proof at trial

[6] This matter was originally argued as a pre-trial application pursuant to section 590AA of the *Criminal Code* 1899 (Qld). The procedural requirement in section 111(3)(a) for "*proof at the trial*" was overlooked. The parties agreed upon the desirability of finalising the issue in advance of the trial proper. To that end, the matter was adjourned so that the accused could be present. Securing her presence proved problematic. Today she appeared by telephone, was arraigned and pleaded not guilty. By virtue of section 576 C (3) of the *Code* the trial is deemed to begin when the accused is arraigned. After the accused was arraigned, the prosecution led evidence from Dr Kong Goh concerning the health of the complainant.

Section 111(3) (a)

[7] In the written submissions, the primary objection to the evidence was expressed in terms of non compliance with section 4 of the *Criminal Law Amendment Act 1892*

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[1] Section 568(3) of the *Criminal Code 1899* (Qld) is the mechanism for combining multiple offences of fraud in one count.

[2] Section 110 A and section 111 unamended by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) form the appendix to this judgment.

(Qld). The argument was based upon a misreading of section 111(3)(a) of the *Justices Act 1886* (Qld). While the subparagraph does refer to section 4 of the *Criminal Law Amendment Act 1892* (Qld), compliance with section 4 is not mandatory. As Mr Wilson fairly conceded on behalf of the accused, it is simply one of several ways in which the subparagraph may be satisfied. An alternative path involves the proven availability of the witness due to illness, or more precisely: "a *witness who is proved at the trial by the oath of a credible witness to be…so ill as not to be able to travel.*"

[8] The defence concedes the evidence given by Dr Goh to be credible proof of the complainant's incapacity to travel. Mr Cavello has been unable to return to his home since he had the stroke 8 months ago. He was recently discharged from a rehabilitation unit into the care of a nursing home. He suffers severe cognitive defects. He would require substantial assistance to travel. The expectation is that he will need to remain in a high care residential facility.

[9] I am satisfied on the evidence that Mr Cavello is too ill to travel. The requirement of section 111(3)(a) in so far as it relates to the written statement has been met.

Section 111(3)(b) does not apply

[10] At the hearing the focus of the challenge to admissibility became section 111(3)(b). Mr Wilson submitted that the prosecution's application must fail because the accused had not had *"the full opportunity for cross examining*" Mr Cavello.

[11] The underlying premise was that the admissibility of the written statement depended upon the application of section 111. The crown prosecutor, Mr Kershaw, took the same approach.

[12] Section 111 is headed "***Depositions*** *of persons dead or absent etc*". Section 110A deals with "***written statements"*** tendered at the committal proceeding.[3]

[13] Subsection (12) of section 110A provides that a written statement admitted in accordance with section 110A is to have the same effect and may be used at trial in the same way as a deposition. The prosecution's argument was that the effect of section 110A(12) is to convert the tendered written statement into a deposition for the purposes of section 111. Such argument seems unnecessarily complicated, even perplexing, in light of the express provision in section 110A(13) for the use of the statement at trial. It is also inconsistent with two other provisions within section 110A which purport to extend the application of particular pieces of legislation relating to "depositions" to also include section 110A "statements". Section 110A(13) adopts the pre-condition set out in section 111(3) (a) and modifies it by substituting the term "*written statement*" for "*deposition*". Subsection (13A) nominates section 4 of the *Criminal Law Amendment Act 1892* (Qld) to apply *"for* ***the purposes of subsection (13)*** *as though the reference to 'depositions or 'deposition' is a reference to 'written statements' or 'written statements*". Those two provisions would be superfluous if the written statement was actually a deposition. By implication, they contradict the suggestion of some general classification of section 110A statements as depositions. They are narrowly targeted and purposeful. It follows that the term "deposition" as used in the Act will not extend to a written statement in the absence of an express provision.

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[3] Emphasis added

[14] I have concluded that sections 110A and 111 both make provision for the reading at trial of certain committal evidence without requiring further proof of that evidence. Section 110A(13) allows the reading of a written statement tendered at the committal proceeding. Section 111 allows the reading of a deposition. The operation of each subsection is subject to specific preconditions.

[15] The provisions use identical terms to describe the way in which the committal evidence may be used at trial. Both section 110A(13) and section 111(1) make the evidence admissible "*without further proof (to) be read as evidence on the trial of the defendant, whether for the offences for which the defendant has been committed for trial or for any other offence for which an indictment shall be presented, arising out of the same transaction or set of circumstances as the offence for which the defendant has been committed for trial, and whether or not combined with other circumstances*." The distinction between the sections is that one considers the admissibility of written statements and the other the admissibility of depositions. Moreover, while the express preconditions for admissibility have commonality they are not identical.

[16] The extent of the variations are explicable by the differing nature of the evidence that they attach to, and the different rules that govern the admissibility of such evidence at the committal proceeding. By way of example, section 110A(13)(a) requires that the written statement be signed by the witness as well as the magistrate, whereas for depositions, section 111 requires only the signature of the magistrate.[4] It is not surprising that evidence given on oath or affirmation in front of the magistrate and transcribed in the absence of the witness does not require the signature of the witness.

[17] Section 110A (13) provides that a written statement admitted at the committal proceeding in accordance with section 110A may be read at trial without further proof if the statement bears the requisite signatures in paragraph (a) and the condition set out in paragraph (b). Paragraph (b) expressly adopts the condition set out in section 111(3)(a), subject to the substitution of the term "*written statement*" for the word " *deposition*". Section 111 (3) (a) requires either agreement that the witness is not required, or proof that the witness is incapable of attending for one of the reasons specified. This then is an express condition for both the reading of a written statement pursuant to section 110A(13) and the reading of a deposition pursuant to section 111(3).

[18] Paragraphs (a) and (b) are the only express conditions for admissibility under section 110A (13). While section 110A(13) specifically adopts the condition in subsection (3)(a), it does not mention subsection (3)(b) of section 111. There is therefore no expansion of the word "deposition" where it appears in section 111(3) (b). The clear meaning is that section 111(3)(b) is not a precondition for the admissibility of written statements under section 110A(13).

[19] Under section 111(3) (b), the deposition must be proved to have been taken either: (a) in the presence of the accused; (b) at a time when the accused was excluded for misconduct; or (c) at a time when the accused's presence was excused and her lawyer was present. In addition the accused must have had "*the full opportunity of cross-examining the witness*". Those conditions in subparagraph (b) of section 111 mirror the legislative procedure for taking a deposition. Such requirements however would

[4] Section 111(3)(c) *Justices Act 1886* (Qld).

have no reasonable connection to the making of a written statement which might later be tendered under section 110A. Thus the absence of such a condition in section 110A(13) can readily be understood. Further, the symmetry with section 111 is maintained by the opening words of section 110A(13). The introduction limits the admissible evidence under that provision to "*a written statement admitted in accordance with*" section 110A. In other words, the rules relating to the tendering of the statement at committal must be complied with before the hand up statement is eligible for admission at trial.

[20] The only reasonable construction is that the Act provides separate and independent tests for the admissibility of section 110A statements and depositions. The test for the admissibility of written statements is set out in section 110A(13). The words of that provision are very clear. All of the preconditions for the admissions of the statement at trial are set out in it. It specifically incorporates an adaptation of section 111(3)(a). It does not include section 111(3)(b). Therefore section 111(3)(b) does not apply to it.

Derogation?

[21] Mr Wilson argued that subsection (1) of section 110A as it was at the time of the committal hearing, applied to make section 111 the dominant provision. Subsection (1) had declared that the provisions of section 110A "*were additional to and not in derogation of any other provisions of the Act...*" That qualification was removed by amendment on 1 November 2010, when reforms for the committal process were introduced. Nonetheless it remains part of the legislative scheme for the present case. This is because the operation of the amendment is expressly restricted to prosecutions originating after the commencement of the amendment. The present prosecution commenced before the amendment. By virtue of section 277 of the *Justices Act1886* (Qld), amendments made by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) and which are contained in provisions relating to committals do not apply to proceedings which originated before the amendments. Section 110A is a provision relating to committal proceedings. For the purposes of this case, it must be read as it was at the time the prosecution commenced, with the original subsection (1).[5]

[22] The defence submission was that to construe section 110A as a mechanism for the admission of evidence from the committal hearing would circumvent the strict conditions of section 111 and thereby amount to an impermissible derogation from its requirements. No authority was cited. In my view the argument is misconceived.

[23] A "derogation" from section 111 would require a deviation or some detraction from the ambit of that section. Giving effect to the plain meaning of section 110A(13) does not compromise the scope or operation of section 111. The two provisions govern two different categories of evidence. They do not overlap. Each provision lays down its own test for admissibility. So construed, section 110A(13) does not take away from or diminish the effect of section 111. There is symmetry between them. They are not inconsistent. There is no scope for subsection (1) to intrude. On the other hand, to deny section 110A(13) as the test for the admission of written statements, would render it meaningless. There is no other purpose for subsection (13).

[5] Section 110A (13) and section 111 (3), were unchanged by the 2010 amendments.

[24] Accordingly, it is my view that, the test for the admissibility of Mr Cavello's statement is that set out in section 110A(13).

Application of section 110A (13)

[25] The test in section 110A will be satisfied by proof of the following circumstances:

1. the charge on indictment arises out of the same transaction or set of circumstances as the offence for which the accused was committed for trial;
2. the statement is in writing ;
3. it was admitted at the committal proceeding in accordance with section 110A;
4. the trial is for an offence arising out of the same set of circumstances as the offences for which the defendant was committed for trial;
5. the statement is signed by the witness & the magistrate; and
6. either: the defence has given the prescribed notice that the witness is not required, or it is proved, by credible sworn evidence, that the witness is so ill that he is unable to travel or is indisposed in other specified ways.

[26] Mr Wilson acknowledged that all of the conditions in subsection (13) appeared to be satisfied. I am satisfied on the evidence that all 5 conditions are met. The statement is therefore admissible, subject only to the general discretion to exclude it.

[27] In the event that I am wrong about the application of section 110A, I note that I would have reached the same conclusion if required to assess admissibility under section 111(3). The only element of section 111(3) in dispute pertains to the "*full opportunity of cross-examining the witness*" in subparagraph (b).

[28] The requirement for full opportunity to cross examine does not mean there must be actual cross examination. It is simply the opportunity to do so which is critical. Further, it must be a complete and unrestricted opportunity. It is expressed in the past tense.

[29] The accused was given the opportunity to cross examine Mr Cavello at the committal hearing. The witness was present at the proceeding for the purpose of cross examination. Section 110A(8) allowed the admission of a statement subject to agreement that the witness be present for cross examination. There is no suggestion that any restraint or qualification or limitation was placed upon the accused's legal entitlement to cross examine Mr Cavello. There is no suggestion that her rights were curtailed in any way. It is accepted that the decision not to cross examine the witness was hers. She had the benefit of legal advice. She therefore had the full opportunity to cross examine and chose not to exercise it. The fact that she made a voluntary election not to cross examine does not derogate from the opportunity she was given. Thus, if section 111(3)(b) applied, it would be satisfied.

Discretion

[30] While the legislation imposes no requirement for actual cross examination, Mr Wilson argued that it would be unjust to admit the contents of the statement of such a pivotal witness in the absence of cross examination. He submitted that it would be

contrary to fundamental principles to enforce a consequence which the accused would not have foreseen at the time she agreed to the hand up of the statement. In my view this is not a viable argument. While there has been subsequent reform of the committal process, the basis for admissibility under section 110A(13) is not affected by the amendments. Section 110A(13) was in force when the accused elected not to cross examine Mr Cavello. Furthermore, a pathway to the operation of section 110 A (13), namely the indisposition of the witness, is of its nature likely to be an unforeseen event.

[31] It is true that the credit of Mr Cavello appears critical to the crown case. It is also true that his credibility may be affected by his relationship with the accused and a potential motive to falsely deny responsibility for the cheques to protect himself from blame by his business partner. His statement referred to the accused as a prostitute with a drug habit. It was his business partner who initiated the complaint to authorities. Mr Cavello admitted in his statement that he had allowed the accused to return to his house after she was charged with the fraud.

[32] The accused chose not to use her opportunity to explore these things with Mr Cavello in the Magistrates Court. His absence at trial will impact on both parties. The defence may still raise the issues relevant to Mr Cavello's credit. It is Mr Cavello who will have no opportunity to respond. The accused will also retain her right to give or call evidence. If she does testify about private matters with Mr Cavello there will be no witness present at trial to directly contradict her. The prosecution has lost the opportunity of having a witness to answer the defence allegations. It has lost the advantage of having a complainant in person before the jury.

[33] The trial judge will be obliged to point out the weaknesses in the crown's evidence and the disadvantages for the defence. He or she will have to warn the jury to exercise care before relying on Mr Cavello's statement.

[34] Mr Cavello's statement goes to the heart of the prosecution case. The prejudicial effect of its tender without a fresh opportunity to cross examine him does not outweigh the probative value of the evidence. I am satisfied that the admission of the statement will not prevent a fair trial. I am satisfied that the interests of justice favour the admission of the evidence. It follows that the crown's application is allowed. The written statement of Antonio Cavello sworn on the 8 April 2009 and tendered at the committal hearing may, without further proof, be read as evidence on the trial of the accused for the offence of fraud with the circumstance of aggravation set out in indictment number 3494/2009.

Appendix

Justices Act 1886

Reprinted as in force on 14 October 2010
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110A Use of tendered statements in lieu of oral testimony in committal proceedings

(1) The provisions of this section are additional to and not in derogation of any other provisions of this Act in relation to proceedings in the case of indictable offences.

(2) Justices conducting proceedings with a view to determining whether a defendant should be committed for trial or sentence in relation to an indictable offence may, subject to the provisions of this section being satisfied, admit as evidence written statements of witnesses tendered to them by the prosecution or the defence without those witnesses appearing before them to give evidence or make statements.

(3) Written statements so admitted as evidence shall be deemed to be evidence given or statements made upon an examination of witnesses in relation to an indictable offence under section 104 and they shall be admissible as evidence to the like extent as oral evidence to the like effect by the persons making the written statements.

(4) Written statements shall not be admitted where the defendant or, where there is more than 1 defendant, 1 of the defendants is not represented by a lawyer.

(5) A written statement shall not be admitted unless—

(a) the prosecution and the defence agree to its admission;

(b) a copy of it is made available, by or on behalf of the party proposing to tender it, to the other party or parties;

(c) it is signed by the person making it and contains—

(i) a declaration by the person under the *Oaths Act 1867*; or

(ii) a written acknowledgment by the person;

that it is true to the best of the person's knowledge and belief and that the person made the statement knowing that, if it were admitted as evidence, the person may be liable to prosecution for stating in it anything that the person knew was false;

(d) the other party does not object or, as the case may be, none of the other parties objects, before the written statement is admitted in evidence, to the statement being so admitted pursuant to this section.

(6) Subject to this section, where—

(a) all the evidence before justices (whether for the prosecution or the defence), without reference to other evidence by way of exhibits, consists of written statements admitted in accordance with this section; and

(b) the lawyer for the defendant consents to the defendant

being committed for trial or, as the case may be, for sentence without consideration of the contents of the written statements;
the justices, without determining whether the evidence is sufficient to put the defendant upon trial for an indictable offence, shall formally charge the defendant and, with necessary adaptations, the provisions of section 104 shall apply and, subject thereto, the justices shall order the defendant to be committed for trial or, as the case may be, for sentence.
(7) Where some of the evidence before justices consists of written statements admitted in accordance with this section and some of the evidence is evidence given orally by witnesses upon their examination under this part, the justices shall, when all the evidence to be offered on the part of the prosecution is before them, consider such evidence and determine whether it is sufficient to put the defendant upon trial for an indictable offence, whereupon the provisions of this part shall apply as in the case of an examination of witnesses where there are no written statements admitted pursuant to this section.
(8) A written statement may be admitted as evidence by justices pursuant to this section subject to agreement between the prosecution and the defence that the person making the statement shall be present when the written statement is tendered to be cross-examined by the other party or parties, as the case requires, and in any such case the justices shall consider both the written and the oral evidence in respect of that person.
(9) Notwithstanding that a written statement made by any witness is admissible by virtue of this section as part of the prosecution case or as part of the defence case, whether it has been admitted in the proceedings before justices or not, the justices may require that witness to attend before them and to give evidence, and in respect of those proceedings the justices shall consider all the evidence, oral and written (and exhibits (if any)), whether the defendant's lawyer has consented to a committal for trial or sentence or not, and determine whether such evidence is sufficient to put the defendant upon trial for an indictable offence, whereupon the provisions of this part shall apply as in the case of an examination of witnesses where there are no written statements admitted pursuant to this section.
(10) Where all the evidence before justices consists of written statements admitted in accordance with this section and counsel or the solicitor for the defendant does not consent to the defendant being committed for trial or for sentence, the justices, after hearing any submissions the prosecution and the defence desire to make, shall determine whether the evidence is sufficient to put the defendant upon trial for an indictable offence, whereupon the provisions of this part shall apply as in the case of an examination of witnesses where there are no

written statements admitted pursuant to this section.
(11) A written statement admitted in accordance with this section shall, on being so admitted by the justices, be signed by the justices.
(12) A written statement admitted in accordance with this section shall have effect as if it is the deposition of the witness whose statement it is, and it may be used at the trial of the defendant in the same manner, to the same extent and for the same purpose as a deposition may be used.
(13) A written statement admitted in accordance with this section may, when the defendant has been committed by justices to be tried for an indictable offence, without further proof be read as evidence on the trial of the defendant, whether for the offence for which the defendant has been committed for trial or for any other offence for which an indictment shall be presented, arising out of the same transaction or set of circumstances as the offence for which the defendant has been committed for trial, and whether or not combined with other circumstances, if—
(a) the written statement purports to be signed in the manner prescribed by the person making it and by the justices before whom it purports to have been tendered as evidence; and
(b) the condition mentioned in section 111(3)(a), read with the words 'written statement' substituted for the word 'deposition' where twice occurring, is satisfied.
(13A) The provisions of the *Criminal Law Amendment Act 1892*, section 4 apply for the purposes of subsection (13) as though the reference to 'depositions' or 'deposition' is a reference to 'written statements' or 'written statement' referred to in this section.
(14) If a written statement admitted in accordance with this section refers to any other document as an exhibit, the copy given to any other party to the proceedings under subsection (5) shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party to whom it is given to inspect that document or a copy thereof.
(15) Any document or object referred to as an exhibit and identified in a written statement admitted in accordance with this section shall be treated as if it had been produced as an exhibit and identified during the proceedings by the maker of the statement.
(16) For a law about taking certain children's evidence for committal proceedings for certain offences, see the *Evidence Act 1977*, part 2, division 4A, subdivision 2.

111 Depositions of persons dead, absent etc.

(1) When a defendant has been committed by justices to be tried for any indictable offence, the deposition of any person taken before justices, or the transcription of the record of evidence given by any person before justices where the evidence is

recorded under the *Recording of Evidence Act 1962* and the transcription is certified to as correct in accordance with that Act, with respect to the transaction or set of circumstances out of which has arisen the charge on which the defendant has been committed to be tried may, if the conditions mentioned in subsection (3) are satisfied in the case of the deposition and if the conditions mentioned in subsection (3)(a) and (b) are satisfied in the case of the transcription, without further proof be read as evidence on the trial of that person, whether for the offence for which the person has been committed for trial or for any other offence for which an indictment shall be presented, arising out of the same transaction or set of circumstances as the offence for which the person has been committed for trial, and whether or not combined with other circumstances.

(2) Moreover, when any person has been charged before justices with an indictable offence of a sexual nature alleged to have been committed on a child under the age of 12 years, and has been committed for trial, the deposition of such child or of any other child under the age of 12 years, or the transcription of the record of the evidence or statement given or made by such child or of any other child under the age of 12 years where the evidence or statement is recorded under the *Recording of Evidence Act 1962* and the transcription is certified to as correct in accordance with that Act, may, in the discretion of the judge of trial and if the conditions mentioned in subsection (3)(b) and (c) are satisfied in the case of the deposition and if the condition mentioned in subsection (3)(b) is satisfied in the case of the transcription, without further proof be read as evidence on the trial of that person, whether for the offence for which the person has been committed for trial or for any other offence for which an indictment shall be presented, arising out of the same transaction or set of circumstances as the offence for which the person has been committed for trial, and whether or not combined with other circumstances.

(3) The conditions mentioned in subsections (1) and (2) are the following—

(a) the deposition or the transcription of the record of evidence must be the deposition or the transcription of the record of evidence either of a witness whose attendance at the trial is not required by the accused person, in accordance with the provisions of the *Criminal Law Amendment Act 1892*, section 4 and which accused person has duly signed the statement in the manner provided by the said section 4 and the schedule to that Act, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on the accused's behalf;

(b) it must be proved at the trial, either by a certificate purporting to be signed by the justices before whom the deposition purports to have been taken or before whom the evidence or statement was given or made or by the clerk of the court or any person acting as such, or by the oath of a credible witness, that the deposition was taken or the evidence or statement was given or made in the presence of the accused unless the accused was excluded from the proceeding whereat such deposition was taken or such evidence or statement was given or made pursuant to the provisions of section 40 or, where the deposition, evidence or statement was taken, given or made in a case where and at a time when the accused was not required to be present in person, that the same was taken, given or made in the presence of the accused's lawyer and that the accused or the accused's lawyer had the full opportunity of cross-examining the witness;

(c) the deposition must purport to be signed by the justices before whom it purports to have been taken.

(4) However, the provisions of this section shall not have effect in any case in which it is proved that the deposition, or, where the proof required by subsection (3)(b) is given by means of a certificate, that the certificate was not in fact signed by the justices or clerk of the court or person acting as such by whom it purports to have been signed.