[2023] JMCA Crim 53

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA

PARISH COURT CRIMINAL APPEAL NO COA2022PCCR00009

SANJA ELLIOTT v R

Norman Godfrey and Joel Nelson for the appellant

Ms Channa Ormsby and Ms Jameila Simpson for the Crown

17, 18 May 2023 and 24 November 2023

Criminal Law — Indictment – Inconsistency — Duplicity — Whether counts bad for duplicity

Criminal Law — Practice and Procedure — No case submission — Whether case to be withdrawn from tribunal of fact

Criminal Law — Proceeds of Crime — Criminal property — Whether predicate offence required to prove money laundering offence — Proceeds of Crime Act, ss 2, 91, 92 and 93

Criminal Law — Practice and Procedure — Prosecutorial misconduct — Police speaking to witness before and after he commenced giving evidence – Whether conduct of police officers and/ or prosecuting counsel amount to prosecutorial misconduct — Whether appellant afforded a fair trial

BROOKS P

[1] Mr Sanja Elliott was charged, along with seven other defendants, on an indictment containing 32 counts. Mr Elliott was charged in 21 of those counts. These counts related to offences committed against the Manchester Parish Council ('the Council') and included conspiracy to defraud, engaging in a transaction involving criminal property, causing

money to be paid out by forged document, obtaining money by false pretences and committing an act of corruption. His trial came on for hearing before Her Honour Mrs Ann Marie Lawrence-Grainger in the Parish Court for Manchester. Defence counsel made a submission of no case to answer on behalf of Mr Elliott, following which, three of the counts were dismissed. On 15 May 2020, the learned Judge of the Parish Court convicted Mr Elliott on 16 counts. On 27 July 2020, she sentenced him on various counts to sentences ranging from 18 months to three years' imprisonment. She ordered that the majority (counts 2 – 11, 13 and 14) were to run concurrently (a maximum of three years) but ordered that the following counts were to run consecutively to those but concurrently with each other:

a. Count 1 - conspiracy to defraud (18 months' imprisonment);
b. Count 25 - obtaining money by false pretences (two years' imprisonment);
c. Count 26 - obtaining money by false pretences (two years' imprisonment); and
d. Count 30 – committing an act of corruption (18 months' imprisonment).

[2] The result was that she sentenced Mr Elliott to a total of five years' imprisonment at hard labour.

The prosecution's case

[3] The case for the prosecution, which was largely based on circumstantial evidence, is that Mr Elliott was employed by the Council, which is now renamed the Manchester Municipal Corporation. Between 1 January 2013 and 31 July 2016, Mr Elliott, along with two other employees of the Council, defrauded the Council. According to the prosecution, Mr Elliott inveigled some of his friends and acquaintances to participate in a scheme whereby invoices were sent to the Council in their names falsely claiming that they were contractors who had carried out work for the Council.

[4] According to the prosecution's case, the purported contractors (who will be referred to below as "contractors") provided their tax registration numbers and other particulars to Mr Elliott who used the information to facilitate the production of contractor's invoices, payment vouchers and cheques. In some cases, the signatures on the fraudulent invoices were not that of the "contractor". Mr Elliott and two other employees of the Council (who were also charged on the indictment) approved the documentation, purportedly as part of their normal duties for the Council. He then instructed the "contractors" when the cheques were ready (in some cases he sent the cheques to them) and how to encash them, as payment of the fraudulent invoices rendered to the Council. In none of these cases, however, was any work done by any of these "contractors" in relation to the fraudulent invoices. The "contractors", on cashing the cheques, either delivered the proceeds to Mr Elliott or a third party of his choosing. The sums involved in these fraudulent transactions, the prosecution asserted, amounted to approximately $48,792,130.00 and were from time to time deposited, in large amounts, in cash, to several bank accounts bearing Mr Elliott's name, were otherwise invested, or spent on a lavish lifestyle.

[5] The prosecution also asserted, through its witnesses, that Mr Elliott, also used some of the proceeds of the fraudulent scheme to purchase assets, including land and motor vehicles. The fraudulent scheme, the prosecution asserted, is the sole reason for Mr Elliott's assets, since his sources of income did not justify the sums in his account or his investments. The deposits, the prosecution asserted, only commenced after Mr Elliott was appointed the Council's Deputy Superintendent of Works and continued while he acted in the post of Superintendent of Works. Before he was appointed to the post of Deputy Superintendent he was employed to the Council since 2007 as a Building Officer.

[6] The fraudulent activities were unearthed in 2016. Officers from the Major Organised Crime and Anti-Corruption Agency ('MOCA') along with officers from the Financial Investigation Division ('FID') among others, raided and searched the Council's offices and Mr Elliott's home. Cash, computers, documents, his telephone and other

communication devices were taken from Mr Elliott's home. Shortly after Mr Elliott was arrested, his mother and his wife (who were both charged on the indictment for facilitating the retention of criminal property) withdrew millions of dollars from accounts they each held jointly with him.

The defence's case

[7] Mr Elliott gave an unsworn statement from the dock. He averred that in addition to being employed with the Council, firstly as a Building Officer and then as the Deputy Superintendent in 2012, he had other employment. These included, he said:

a. being a freelance draftsman, contractor and providing consultancy services (which increased when he was promoted at the Council);
b. buying and selling used cars;
c. managing his aunt's deceased husband's furniture factory;
d. operating a furniture and appliance store; and
e. managing his aunt's financial affairs (which caused monies to be deposited into his accounts until she passed away in 2016).

[8] He denied having received any monies from the "contractors" or anyone else. He asserted that the monies in his safe were from loans he had taken from a bank in May 2016. He insisted that he has never defrauded the Council. He advanced that he executed his duties in accordance with written instructions and occasionally, verbal, as well as in accordance with programs that Councillors, Members of Parliament and the Council's Chief Executive Officer submitted.

Grounds of appeal

[9] Being dissatisfied with the learned Judge of the Parish Court's decision, Mr Elliott appealed her decision on conviction and filed the following grounds of appeal:

"1. The verdict is unreasonable and is against the weight of the evidence.

2. The Learned Trial Judge erred in law when she rejected [Mr Elliott's] No Case Submission and thereby deprived him of a fair trial.

3. The Learned Trial Judge erred in law when she held that the interference with Prosecution witnesses by the Police and in particular with one witness in the presence of Prosecutors was not persistent so as to rise to the level of Abuse of the Process amounting to Prosecutorial Misconduct and thereby deprived [Mr Elliott] of a fair trial."

[10] Mr Elliott also filed the following supplemental grounds of appeal, one of which amended ground one of the original grounds of appeal. They are:

"1. The verdict on counts 25 and 26 is unreasonable or is not supported by the evidence as disclosed by the testimony of the witnesses Melissa McFarlane and Natasha Heron.

By virtue thereof [Mr Elliott] was deprived of a fair trial as the other counts on which he stands convicted are predicated on the said counts 25 and 26.

4. The Learned Trial Judge misdirected herself when she directed that [Mr Elliott] has not addressed some of the material allegations made against him and thereby deprived [Mr Elliott] of a fair trial."

[11] The grounds will be considered in sequence.

Ground 1: Whether the verdict in respect of counts 25 and 26 is unreasonable

Submissions

[12] Mr Godfrey, on behalf of Mr Elliott, submitted that the learned Judge of the Parish Court should not have relied upon the evidence of Mr Tyrone Merchant, Ms Melissa McFarlane and Ms Natasha Heron relating to counts 23, 25 and 26 respectively. Learned counsel argued that some of the evidence of these witnesses was wholly inconsistent

with their previous statements to the police. He also submitted that the charges were duplicitous. Mr Godfrey submitted that although Mr Elliott was acquitted on the charge contained in count 23, the circumstances were such that it brought the issue of prosecutorial misconduct into sharp focus, and undermined the validity of the other counts.

Inconsistency

[13] Mr Godfrey averred that the evidence related to count 23 was elicited from Mr Tyrone Merchant, who, during his cross-examination, admitted that his evidence, given during his examination-in-chief, that Mr Elliott gave him cheques to encash, was given for the first time. Mr Elliott agreed that this was because the police motivated him to give that evidence. Mr Godfrey submitted that when the police motivated Mr Merchant to give evidence against Mr Elliott, two members of the prosecution team were present. Learned counsel challenged the basis on which the Crown indicted Mr Elliott on this count since the prosecution did not possess that information until the trial, or failed to disclose that information to the defence. Learned counsel acknowledged that Mr Elliott was eventually acquitted of count 23 but still challenged the fairness of the trial.

[14] Learned counsel argued that Ms Natasha Heron's testimony at the trial that she had done no work on behalf of the Council, conflicted with her statement to the police. It was the latter that had been disclosed to the defence. He noted that in her police statement, she indicated that she employed persons to do work on behalf of the Council, collected the money then paid those persons. He advanced that the account outlined in the police statement was not sufficient to form the basis of the count against Mr Elliott. Learned counsel relied on the cases of **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 and 52/1986, judgment delivered 3 June 1987, **Negarth Williams v R** [2012] JMCA Crim 22, **R v Curtis Irving** (1975) 13 JLR 139 and **R v Irwin** 13 JLR 109. He acknowledged that the learned Judge of the Parish Court addressed it when dealing with inconsistencies

but argued that the absence of the prejudicial evidence from the statement was not just an omission; instead, he submitted, it was a different version.

[15] Learned counsel acknowledged that Mr Aldane Foster also gave evidence on behalf of the Crown, which differed from his statement to the police. Mr Godfrey noted that the Crown called other witnesses to support other counts against Mr Elliott and those counts hinged on counts 25 and 26. He therefore submitted that if counts 25 and 26 fail on appeal, then, the other counts against Mr Elliott would also fail.

[16] Ms Ormsby, on behalf of the Crown, submitted that irrespective of whether the witnesses' testimony at trial differed from their police statements, Mr Elliott was always aware of what he was being charged for. She argued that the learned Judge of the Parish Court was tasked with determining credibility, in the face of inconsistencies, discrepancies and omissions. Learned counsel asserted that the learned Judge of the Parish Court properly exercised her discretion and submitted that this ground had no merit.

[17] As regards Mr Godfrey's complaint that Mr Merchant's evidence at trial contradicted the statement given to the police, Ms Ormsby contended that defence counsel was aware of the information supporting the count. She stated that Mr Merchant gave two police statements in which he indicated that there were payment vouchers with his name but that he did not do the work recorded on them. Learned counsel also noted that, in the statements, Mr Merchant said a cheque was prepared in his name, from the Council's account, endorsed by Mr Sibblies, but that he did not do any work for that payment nor did he receive the money. Additionally, learned counsel stated that Mr Merchant testified that the police showed him numerous cheques but only two bore his signature. Accordingly, learned counsel submitted that the evidence supporting count 23 was present in Mr Merchant's two police statements. She argued that, in any event, Mr Merchant explained during his testimony that the reason he gave additional information at the trial was that he was being asked certain questions for the first time during the trial. She noted that the learned Judge of the Parish Court considered this omission and argued that she correctly found Mr Merchant to be a credible witness.

[18] Learned counsel contended that Mr Godfrey did not particularise the alleged interference with Mr Foster, but, in any event, Mr Foster's statement was consistent with his testimony at trial, save that he gave more information during the trial relating to certain exhibits. This, she argued, was an omission for the consideration of the tribunal of fact and the learned Judge of the Parish Court found Mr Foster to be credible. Learned counsel submitted that the prosecution had sufficient reason to bring the relevant counts against Mr Elliott.

[19] Learned counsel argued that although Mr Elliott was acquitted on count 23 (relating to Mr Merchant), that does not mandate an acquittal of all charges against him, since he was freed on count 23 on a technical point, namely that the count was bad for duplicity. She noted that the learned Judge of the Parish Court acknowledged that in relation to Mr Merchant, there were four cheques with his name as the payee totalling $400,000.00 between 1 December 2016 and 31 December 2016. It was unclear, the learned Judge of the Parish Court found, which cheques related to the count so she acquitted him on count 23.

Duplicity

[20] Mr Godfrey also argued that count 25 was bad for duplicity. Count 25, he stated, charged Mr Elliott with obtaining $300,000.00 between 1 December 2015 and 31 December 2015 with the intent to defraud the Council. He asserted that the prosecution contended that Mr Elliott received that sum as monies for work done by Ms Melissa McFarlane on behalf of the Council. Mr Godfrey argued, however, that there was no single cheque in the sum of $300,000.00. Instead, the evidence consisted of several sums obtained over a period of time, which learned counsel insisted ought not to be done. He contended that the prosecution failed to produce the documentary evidence to substantiate this count. He relied on Archbold Criminal Pleading Evidence and Practice in Criminal Cases, 35th Edition, para. 1936 and **R v Robertson** 25 Cr App R 208, in support of his submissions on this point.

[21] In this regard, learned counsel particularly complained about Ms Heron's testimony. He challenged count 26 with the particulars that between 1 January 2015 and 31 December 2016, Mr Elliott intended to defraud the Council when he obtained $1,000,000.00 from the Council by falsely pretending that Ms Natasha Heron had done work for the Council.

[22] Ms Ormsby argued that counts 25 and 26 were not bad for duplicity. Learned counsel argued that count 25 was based on a single transaction. In relation to count 26, Ms Ormsby argued that it consisted of a continuous taking and it would be oppressive for Mr Elliott if the prosecution itemised each individual transaction as separate counts. Learned counsel acknowledged that a count on an indictment should not charge a defendant with two or more offences but asserted that an exception to that principle is "continuous taking", which is what obtains in the present case. Learned counsel relied on rule 14.2(2) of the Criminal Procedure Rules, 2013 of the United Kingdom, as persuasive authority. Learned counsel recognised Mr Godfrey's reliance on **R v Robertson** but stressed that it does not invalidate the counts. She asserted that if this court was persuaded by Mr Godfrey's submissions about count 26, that was not fatal to the count. She argued that where there is a defect or error on the indictment, that defect or error can be cured if the appellate court amends it, where the amendment would not prejudice Mr Elliott. She cited section 302 of the Judicature (Parish Court) Act.

[23] Learned counsel asserted that if this court amends count 26, that would not be unfair to Mr Elliott as it would only be an amendment to the form of the indictment but not its substance. The character of the offence would not be affected. She added that it would not be in the interests of justice for this court to allow the count to fail due to a technicality. Instead, she insisted that it would be in the interests of justice to amend the count or apply the proviso if this court finds that the count is defective.

[24] Learned counsel submitted that the evidence supporting each count should be considered independently. She further submitted that the issue of determining whether or not a count fails depends largely on the supporting evidence that count and the learned

Judge of the Parish Court's assessment of the relevant evidence. With respect to counts 25 and 26, she outlined that the prosecution was tasked with proving that:

(i) Mr Elliott made a false pretence to the Council as outlined in the count;

(ii) as a result of (i), monies were paid from the Council's account;

(iii) the false pretence was made, intending to defraud the Council; and

(iv) Mr Elliott knew it was false.

[25] Learned counsel candidly stated that, in relation to count 25, there were no physical cheques that were admitted into evidence, but, insisted that it was not fatal to the conviction as the prosecution still adduced sufficient evidence to prove its case and the learned Judge of the Parish Court, as the tribunal of fact, properly accepted the evidence.

Discussion and analysis

[26] This ground of appeal involves two issues, namely, inconsistency and duplicity.

Inconsistency

[27] Discrepancies and inconsistencies are common in trials. Where a witness gives evidence that contradicts that witness' previous statement, it does not automatically mean that a case has failed to be made out against an accused person. It is the duty of the jury, or where the judge sits alone, the judge applying his or her jury mind, to determine whether that witness is still credible. Harris JA, in **Steven Grant v R** [2010] JMCA Crim 77, at paras. [68] to [69], highlighted the principle in this way:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. **The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused**. **The existence of**

> **contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited**…
>
> [69] It must always be borne in mind that **discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony**." (Emphasis supplied)

[28] Where a witness gives evidence that amounts to a discrepancy or inconsistency, the witness should give an explanation. This court made the point in **Negarth Williams v R** where the sole eyewitness for the prosecution made inconsistent statements. Additionally, in **R v Williams and Carter**, this court expressed that, save where the inconsistency is immaterial, the witness must provide an explanation before the court can accept and rely on the evidence. The jury is to determine the credibility of a witness but, where the prosecution's sole witness is badly discredited resulting in evidence that is so unreliable that a reasonable tribunal cannot rely on it then the judge can refrain from leaving the case to the jury (see **R v Irving**). In the present case, there was no jury, the Judge of the Parish Court sitting alone had to act as the judge of the facts and of the law.

Mr Merchant

[29] Mr Merchant, during examination in chief, described his interaction with Mr Elliott, relative to the Council, between the period 2013 and 2016 on page 172 of the record of proceedings, as follows:

> "Outside of the welding work I did for [the Council] I did no other work for [the Council]. Between 2013 and 2016 I was never contracted by [the Council] to do beautification work.

> Between the same period [sic] I was never contracted by [the Council] to paint bus sheds.
>
> **As far as I know in June 2016 I did not perform any work for [the Council] for which I am now owed any money**. Outside of cheques I received for work performed I did not receive any cheque from [the Council] in my name for which I had not performed any work.
>
> **Between 2013 and 2016 I encashed cheques at the request of someone. I did so at Mr Elliott's request**. I mean [Sanja] Elliott, same person I call Elli. A few times I can recall doing that. I do not know the amount of times. I just get a call from Mr. Elliott to pick up a cheque. Me pick up the cheque on the road from Mr Elliott. Me go to encash it at Scotia Bank. Either the one Uptown or the other one downtown by the stop light in Mandeville, Manchester.
>
> **Me cash the cheque me give Mr Elliott the money.** These cheques I encash and give to Mr. Elliott sometimes 270 or $450,000. I would call Mr. Elliott in order to get the money to him." (Emphasis supplied)

[30] During cross-examination, Mr Merchant admitted that he did not include in his police statement that Mr Elliott gave him cheques to encash. The exchange occurred on page 178:

> "**Q: In [your first statement] would you agree with me that nowhere in it did you say that Mr [Sanja] Elliott gave you any cheques to be encashed?**
>
> **A: No sir**
>
> **Q: Not contained it?**
>
> **A: No sir**
>
> Q: Nowhere in this statement is it recorded that Dwayne [Sibblies] gave you cheques to be encashed on several occasions?
>
> A: No sir

Q: Neither is it in the statement that you encashed cheques and gave cash to him?

A: Correct." (Emphasis supplied)

[31] A similar discourse is recorded on pages 178 to 179 in relation to Mr Merchant's second police statement:

"Q: In that second statement not once did you mention that Mr. Elliott gave you any [cheque] to be encashed?

A: Correct

Q: You agree that in that [second] statement you made no mention of cashing cheques and delivering the cash to Mr. Sanjay Elliott

A: Correct sir

Q: In that [second] statement you made no mention of Mr [Sibblies] calling you to pick up cheques?

A: Correct

Q: You made no mention of you [sic] and cashing cheques and delivering the cash to Mr. [Sibblies]

A: Correct

Q: Would I be correct in saying that you were saying for the first time yesterday that Mr [Sibblies] called you to pick up cheques[?]

A: Yes Sir

Q: Yesterday was the first you were saying that you encash cheques and return the cash to Mr. [Sibblies]?

A: Yes Sir"

[32] Mr Merchant also gave a reason for the difference between his testimony in court and his police statements. It was given during cross-examination and is recorded on page 177 of the record of proceedings:

"Q: [Were] you told what could happen to you if you don't give the evidence you are expected to give?

A: Yes sir

Q: Is it as a result of what you were told would happen why you are here giving the evidence you gave?

A: Yes sir"

[33] This was clarified during re-examination, as recorded on pages 180 to 182:

"Q: In response to Mr Godfrey you said he was correct that discussions you had with the police included the type of evidence you are expected to give in court, what do you mean?

A: They say I must tell the truth and nothing else but the truth.

…

Q: In response to [Mr.] Godfrey you were asked about a statement you gave in July 2016, the first one, you agreed that you did not say Mr Elliott gave you any cheques to encash, tell us why that was not in your statement?

A: I was not asked

Q: Who did not ask?

A: The sergeant who was asking me the questions

Q: [You] agreed that in your first statement you did not say that Mr [Sibblies] gave you several cheques to encash, why was it not in your statement?

A: Because I was not asked Miss

Q: [Counsel] asked you why it was not in your statement that you gave to the police that you encashed cheques and gave the money to Mr. [Sibblies]-

A: I wasn't being asked

> Q: [Your] second statement, [Mr.] Godfrey said in your 5½ pages, on the 15th of July 2016, would you agree that you did not mention that Mr Elliott gave you any cheques to encash why was it not in that statement?
>
> A: Because I wasn't being asked
>
> Q: Counsel asked in relation to your second statement that you didn't make mention of Mr [Sibblies] calling you to collect cheques. Why wasn't it included in that second statement?
>
> A: Because I never been [sic] asked
>
> Q: Carrying cash to [Mr. Sibblies], why wasn't it in your statement[?]
>
> A: Never been asked…"

[34] He then proceeded to affirm the version of events he gave during his examination-in-chief.

[35] The learned Judge of the Parish Court considered Mr Merchant's evidence and found him to be an accomplice, but still regarded him to be a credible witness. She recognised that there were omissions in his police statements when compared to his testimony and accepted his explanation that the information was missing from his police statement because he was never asked. The learned Judge of the Parish Court assessed Mr Merchant's evidence on page 702 of the record of proceedings in this way:

> "For this witness, there is also evidence on which the court could find that he was an accomplice…
>
> So he would have handled the illicit cash and I find that he was in fact an accomplice. I therefore warn myself as I did before of the dangers of relying on his evidence. His evidence was also uncorroborated. However, if the court is sure that he is truthful, meaning credible, believable, honest and reliable it would be open to the court to accept and to act upon his evidence.
>
> **There were some [omissions] from Mr. Merchant['s] statement when compared to his evidence. He [proffered] an explanation for the [omissions]. He**

> **said the things he didn't say in his statement was because he wasn't asked and that the first time he was being asked those questions was in court and that he was speaking the truth.**
>
> **I find these to be acceptable explanations. Mr. Merchant struck me as a simple man. He didn't resile from the answers he gave in [examination-in-chief] and was sturdy and consistent all through the tough questions asked of him in [cross-examination]. He answered readily. I found him to be truthful**." (Emphasis supplied)

[36] The learned Judge of the Parish Court, as the tribunal of fact, found Mr Merchant to be a credible witness, despite the difference in his accounts. She accepted his explanation, in keeping with the authorities. In any event, in relation to count 23 which involved Mr Merchant, the learned Judge of the Parish Court concluded that "there was Assumed Duplicity relative to Count 23" (see page 724 of the record of proceedings).

Ms Heron

[37] Ms Heron, in her police statement, on pages 1296 to 1297, said:

> "Afterwards **Sanja told me that he will take over my workers but I am still the contractor and as such the cheques will come in my name**. I discovered that my workers are not [being] used anymore and I don't know if any work was still going on.
>
> **Although I was not doing any work, I would get call from Sanja to go to [the Council] to collect cheques, [encash] them and gave the money to Dwayne as instructed by Sanja**. [Some time] afterwards **Sanja would call me and I would go to him at his office at the Road and Works Department in Mandeville where he would give me cheques with my name on them to encash at the Bank of Nova Scotia and I would then take back the cash to Sanja. At times he would give me a Ten, six or Fifteen Thousand Dollars for myself. This was about ten times that Sanja gave me cheques to encash and take back the money to him**. These cheques varies [sic] from Ten Thousand Dollars to Nine Hundred [o]dd

> Thousand Dollars. **I did not do any work for these cheques or I did not submit any documents to [the Council]** to do such work as Sanja told me that I am the contractor so the cheques has [sic] to come in my name." (Emphasis supplied)

[38] On pages 699-700 of the record of proceedings, the learned Judge of the Parish Court considered Ms Heron's evidence and ruled:

> "For this witness, there is also evidence on which the court could find that she was an accomplice.
>
> i. She said she had received 40 [of the Council's] cheques in her name and en-cashed them. Like Ms. McFarlane, she gave the proceeds to Mr. Sanjay Elliott or to a third party, at his instructions.
>
> ii. She was never a contractor for the [Council] and never performed any works for the [Council].
>
> iii. She made no enquiries of Mr Elliott as to why she was en-cashing the cheques knowing she did not work for them.
>
> I find that she was an accomplice.
>
> I therefore warn myself as I did before on the dangers of relying on her uncorroborated evidence and that the court may only convict, if after considering the warning, if it nonetheless believes her and only if the court is sure that she is truthful, meaning credible, believable, honest and reliable, would it be open to the court to accept and to act upon her evidence.
>
> Having warned myself, I still find Ms. Heron to be a credible and forthcoming witness and I accept her evidence as being truthful and find that there is no evidence that she was assisted with what she told the court. **She readily admitted the inconsistencies.**
>
> **It is true that there was a substantial portion of her statement which she now says are** [sic] **not true. However, I assessed her explanation as follows:**

- The untruths were not directly on point with what she said Mr Elliott told her to say; however, they were all intertwined and related to her being employed as a contractor.

- **I find her explanation to be reasonable and the inconsistencies have not made me doubt her credibility**. **She told the court that what she told the Court in evidence in chief is the truth and I accept it as such.**

- **Despite the several inconsistencies, she has maintained in evidence that Mr. Elliott had called her to collect and encash cheques, cheques for work she would not have performed. This goes to the heart of the Crown's case and also supports the [court's] view that she is a credible witness**.

- She has also maintained in evidence as in her statement before, that Mr. Elliott asked her for her TRN and full name whilst they sat in the car.

- **Consistent with what she told the Police**, Miss Heron in [cross-examination] maintained that she gave the cash both to Mr. Elliott and Dwayne Sibblies." (Emphasis supplied)

[39] The learned Judge of the Parish Court acknowledged that, in some respects, there was a variance in Ms Heron's evidence at trial from her police statement, but she accepted Ms Heron's position that the evidence that she gave in court was correct.

[40] It is accepted that there were differences between Ms Heron's evidence during the trial and her police statement. Ms Heron, during cross-examination, admitted that some of the information in her police statement was untrue. This is revealed in an exchange during cross-examination that is recorded on pages 139 to 140 of the record of proceedings:

> "Q: Did you say this in your statement

'I told the persons that they would be paid [$1,500] per day and they said that is too low'

A: I did

Q: Was that the truth[?]

A: No

Q: Did you in your statement say this

'[Sanja] Elliott then took me to the work location, in Hillside and show me where the work is to be done; this work is to do bushing of the road banks'

A: I did

Q: Was that the truth[?]

A: It was not

Q: Did you say this[?]

'I then took the men to the to the work and show them what to do'

A: I did

Q: 'These men who did the work are known to me as Brownman, Otis, Fanso, Ass, Terror and Maracka' Did you say that[?]

A: Yes

Q: Was that the truth?

A: It was not

Q: And you also said this 'All these men are from Chantilly District'

A: I did

Q: 'I go to the worksite on the first day, 2 days after and the day when it is finished.' Did you say that in your statement?

A: I did

Q: Was that the truth[?]

A: No

…

Q: This work we are speaking about, the men whose names you told the police about, did you pay them for the work they did?

A: No, they didn't do any work" (Emphasis supplied)

[41] During re-examination, on pages 143 to 144, Ms Heron gave an explanation for the difference in account:

"Q: In answer to defence counsel when asked about you signing your statement you indicated to counsel that you had your reason what reason were you talking about for signing it as being true?

A: Before the investigation started, before I was brought before the police to answer the questions, [Sanja] approached me and he said that if anybody asked I am to say I did beauty work and was employed as a contractor[.]

Q: Based on this conversation did you follow those instructions you received from [Sanja]?

A: I did

Q: Any reason why you did?

A: He is a friend (witness began crying)

Q: This conversation you had with him was that the extent of the instructions he gave you?

A: Yes ma'am

…

Q: When [defence counsel] asked you [whether] the names of the men you said you paid whether they did any work, you said no they did not do any work and [what] was in your statement was not the truth, what was the reason for you saying that in your statement?

> A: Because I am still going along with what [Sanja] said I should say
>
> Q: In cross-examination [defence counsel] put certain portions of your statement to you, you said you did encash the cheques and that that was the truth, why did you tell the police the untruth?
>
> A: I have a reason
>
> Q: Why?
>
> A: I am still following what [Sanja] told me to say that I am employed as a contractor to do beauty work"

[42] From Ms Heron's statement to the police, it was clear that although she did not do any work for the Council or submit any invoice, Mr Elliott contacted her to collect cheques from the Council and encash them. Thereafter, he instructed her to give the money to Mr Campbell or Mr Sibblies. It was, therefore, evident that, from a reading of her police statement, Mr Elliott would be aware of the allegations against him, which would be used to substantiate the count.

[43] Nevertheless, there was clearly an inconsistency between what Ms Heron said in her police statement and the evidence she gave during the trial. Mr Godfrey advances that it is an entirely different account, but that is not the case. At the trial, Ms Heron admitted that some of the information in her police statement was inaccurate, such as the assertion that she got people to do work on behalf of the Council. More will be said of this in a subsequent ground of appeal. Notwithstanding the change in testimony, her evidence still implicated Mr Elliott.

[44] As indicated previously, if the evidence is not completely discredited and unreliable, the tribunal of fact can accept, as credible, a witness who gives inconsistent evidence, provided that the witness gives an explanation for the inconsistency, which the tribunal accepts. In **Negarth Williams v R**, Mr Williams was charged with murder and Mr Lord was the only eyewitness for the prosecution. Mr Lord's evidence contained issues surrounding whether he had a firearm on the evening before the incident and whether

he had a firearm on the evening of the incident. At a previous trial, Mr Lord admitted that he had a firearm but at the relevant trial he denied ever having a firearm on the date of the incident and denied ever holding a firearm. This amounted to a previous inconsistent statement. When he was cross-examined on this, he did not give an explanation for the inconsistency. The defence however admitted forensic evidence which revealed that Mr Lord's hand had gunshot residue shortly after the incident. This court found that the learned judge failed to give adequate directions to the jury as to "the magnitude and the gravity of the inconsistency and that the previous statements were also on oath". It ruled that the learned judge failed to highlight for the jury, the deficiencies in the Crown's case. As a result, it quashed the conviction.

[45] There are four key distinctions between that case and the present case. Firstly, the present case did not involve a jury, instead, it was before a judge sitting alone. Secondly, the statement to the police was not under oath. Thirdly, Ms Heron provided an explanation for her inconsistency, which the learned Judge of the Parish Court accepted. Fourthly, Ms Heron was not the only witness to speak to Mr Elliott's method of operation.

[46] The learned Judge of the Parish Court, as the tribunal of fact, determined that Ms Heron was a credible witness and accepted her explanations. There is no basis to disturb the exercise of her discretion.

Duplicity

[47] It is settled that a count should not charge more than one offence (see **R v Robertson**). However, there is an exception to this general rule. Where there are several acts over a period that could amount to a "continuous offence", those acts can be included in a single count. Kennedy LJ, in **Barton v DPP** [2001] EWHC Admin 223, in para. [6] determined that a "continuous offence" arises where:

> "…individual transactions are known but where there are many transactions of the same type, frequently individually of small value, against the same victim, and it is convenient in order to reflect the overall criminality to put them together in one

> information, or one count, so that if the criminality can be proved, without prejudice to the defendant and having regard to the known defence, then the court will be in a position to sentence appropriately…."

[48] In **Barton v DPP**, Ms Barton stole small amounts of money over 94 transactions amounting to £1,338.23. The stipendiary magistrate held that it was perfectly reasonable to find that the transactions were "evidence of a continuing course of the same sort of dishonesty". The Queen's Bench Division upheld the decision.

[49] Similarly, Lord Morris of Borth-y-Gest in **Director of Public Prosecutions v Merriman** [1973] AC 584, reasoned that a single charge may be brought where there is an activity involving more than one act. He said on page 593:

> "The question arises – what is an offence? If A attacks B and, in doing so, stabs B 5 times with a knife, has A committed one offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery C.J. in a case where it was being considered whether an information was bad for duplicity: see *Jemmison v. Priddle* [1972] 1 Q.B. 489, 495. **I agree respectfully with Lord Widgery C.J. that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act**. It must, of course, depend upon the circumstances." (Italics as in original; emphasis supplied)

[50] In that case, Lord Diplock agreed. He said, in part, at page 607:

> "The rule against duplicity…had always been applied in a practical, rather than a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in

> such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice as early as the eighteenth century to charge them in a single count of indictment."

[51] The learned editors of Archbold Criminal Pleading, Evidence and Practice 2014 stated that rule 14.2(2) of the Criminal Procedure Rules provides that:

> "…more than one incident of the commission of the offence may be included in a count **if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission**." (Emphasis supplied)

That rule, although it is not applicable to this jurisdiction, recognises the law that is expressed in the various cases cited above.

[52] This court considered the point in **Alistair McDonald v R** [2020] JMCA Crim 38 and upheld a count that involved 102 separate acts of larceny over the course of approximately five and a half years. The court acknowledged that such an approach to the count was "an unusual formulation", but, after considering various decided cases, held that the count was not bad for duplicity.

[53] Among the cases considered was **DPP v McCabe** (1992) 157 JP 443; [1992] Crim LR 885, in which Mr McCabe was charged in one count of an indictment with stealing 76 books from a county council's library service over the course of approximately two years. The books could have been taken from as many as 32 locations. The Court of Appeal of England rejected the complaint that the indictment was bad for duplicity. In his judgment in that case, Watkins LJ said, in part:

> "…It is a count which, as has been acknowledged in the cases to which reference has been made by me, is appropriate in the kind of circumstances which were before the magistrate, namely, that over a protracted period of time, there had been a very large number of separate takings of books from a library or libraries in the city of Cardiff or roundabout, all those libraries being in the ownership of the county council."

[54] The reasoning is respectfully adopted as being applicable to this case.

Ms McFarlane

[55] Count 25 relates to Ms McFarlane and it charges Mr Elliott with obtaining money by false pretence between the period 1 December 2015 and 31 December 2015.

[56] Ms McFarlane, in her statement to the police dated 13 December 2016, outlined the circumstances that substantiated the claim against Mr Elliott. She said, on pages 770-771 of the record of proceedings:

> "I met and spoke with Detective Sergeant Simms who showed me copies of cheques from [the Council] with my name on it. **Sergeant Simms asked me if I had done any work for [the Council], I told him no neither did I submit any invoice for any work done. I have never been to [the Council] to conduct any business or to sign any documents. I have never submitted my TRN or identification card to [the Council].** I examined the cheques and saw Bank of Nova Scotia cheque #907623 with my name on it in the amount of four hundred thousand dollars dated 21/12/2015, I saw a stamp at the back of the cheque dated 22/12/2015 endorsed M. Mcfarlane I have never seen this cheque before now neither did I sign or encash it...
>
> I saw an invoice with my name on it and TRN… dated 11/01/2016 addressed to [the Council] to bush road banks in Christiana for Four Hundred thousand dollars. Signed M. McFarlane, I do not recognize the signature and I did not sign or submit this invoice… **I did not submit any invoice neither did I receive any of these monies[.] I did not give [anyone] permission to submit invoices on my behalf as I have never done any work for [the Council] as I am not a Road and Works Contractor.**" (Emphasis supplied)

[57] The case against Mr Elliott was evident from her statement to the police.

[58] During her examination-in-chief, Ms McFarlane spoke of Mr Elliott asking her to change a cheque and that he would send someone with the cheque. She noted that she received a cheque in the sum of $300,000.00, but she had never done work for the Council. She recounted this on page 125 of the record of proceedings as follows:

> "[Mr Elliott] said he was busy; he had a project doing. I think it was Mile Gully at the time. So he asked me if it was possible for me to cash a cheque for him that specific day. The day that he called so I said yes…he told me that he would have sent someone with the cheque. I said ok, so he sent a gentleman with the cheque. I have seen the gentleman around. I have seen him before, before that date he brought the cheque…
>
> I took the cheque. It was in my name, it was the sum of $300,000 and we drove to the bank, me and Dwayne…
>
> Me and Dwayne left the bank together. We went back to the vehicle and I gave him the cash as I was told by Mr. Elliott. I went back to work. Afterwards I received a call from Mr. Elliott telling me thanks…
>
> I have never been employed to [the Council]. I have never done any work for [the Council]. I did not enquire of Mr. Elliott or Mr. [Sibblies] how my name was on the cheque. At the time I didn't think of it because we were pretty close so he called and asked me for a favour and I grant the favour.
>
> I did ask, nothing came out of the conversation because I was curious about the TRN, cause he Mr. Elliott, asked me for my TRN. That was before I cashed the cheque. He asked me to cash the cheque for him and he would need my TRN to put on the cheque. I gave him the TRN…"

[59] The learned Judge of the Parish Court assessed Ms McFarlane's evidence and she concluded that she believed the cheque, although absent from the exhibits, existed. She added that Mr Elliott's signature on the payment voucher when Ms McFarlane did no work for the Council demonstrated his intention to defraud the Council. She said this on page 726 of the record of proceedings:

> "The documents that form part of Exhibit 6 [the invoice and payment voucher] were signed by Mr. Sanjay Elliott. That also was not challenged. **Why did he sign the Payment Voucher for her to be paid if she did no work for the Council? The court finds that this shows an intention to defraud the Council**.

> For the cash to have been given to Ms. McFarlane, the Council's account must have been debited. [The then Superintendent in charge of Roads and Works] Ms. [Hall's] evidence was that the [Council's] account cannot go into overdraft. **When Mr. Elliott signed the Payment Voucher, it would have represented to the Council that Ms. McFarlane had in fact worked for the [Council] and was to be paid. Ms McFarlane said that was not so**.
>
> **The Court is therefore satisfied and feels sure that Mr. Elliott obtained the $300,000 from the [Council], by falsely pretending that Ms. McFarlane was a legitimate contractor who had worked for the [Council], as described in Exhibit 6. It's because of that false pretence why he received the $300,000, he had the requisite intent and he knew the pretence was false. I do not believe that the absence of the cheque is fatal to the proof of the Count. The court was presented with her viva voce evidence of having received a cheque and changing it, as well as the Payment Voucher and Contractors Invoice that caused the cheque to be prepared and the court is satisfied and feels sure of its existence**.
>
> The fact that there were internal and external audits carried out over the period and that no irregularity being noted, does not diminish the culpability of Mr. Elliott, given the evidence of Melissa McFarlane. The fact that no one on the Finance Committee objected to the payment is irrelevant[.] Neither is the fact that no fraudulent cheque was brought to the attention of the Council." (Emphasis supplied)

[60] Mr Godfrey's complaint that the absence of a cheque made payable to Ms McFarlane is fatal to the count, cannot be accepted. It is accepted that the prosecution did not present a cheque in the sum of $300,000.00 payable to Ms McFarlane but, they presented other documentary evidence, supporting the existence of that cheque, with the supplier being Ms McFarlane. The invoice was recorded as being from Ms McFarlane, dated 17 December 2015 and addressed to the Council, with the description:

> "To provide for all tools and labour to bush road banks, clean side drains, cut overhangs from roadway, clean kerb and

> channels in the Craighead Division. Dispose of all debris and waste material."

[61] The total for that invoice was $300,000.00. The prosecution exhibited a payment voucher for "[p]rovision of labour and tools to do work as directed in the Craighead Division" dated 17 December 2015. This payment voucher was in the sum of $300,000.00. Mr Elliott signed both the invoice and the payment voucher.

[62] The prosecution also exhibited the bank statement of the Council for the period 30 November 2015 to 31 December 2015. The bank statement does not indicate a caption for the transactions, however, on 18 December 2015, the sum of $300,000.00 was withdrawn from the Council's account, by way of cheque. There was, therefore, sufficient evidence to substantiate the count.

[63] What is clear from the documentation is that the count, although covering a period of one month, is related to a single transaction. The absence of the cheque is irrelevant to that issue. The count is, therefore, not bad for duplicity.

Ms Heron

[64] Count 26 relates to Ms Heron and charged Mr Elliott with obtaining money by false pretence between 1 January 2015 and 31 December 2016 in the sum of $1,000,000.00 as payment for work Ms Heron performed on behalf of the Council.

[65] There was no single transaction on the prosecution's case, which amounted to $1,000,000.00. Instead, it contended that Mr Elliott was engaged in a criminal enterprise over the two-year period, involving several transactions. Some of the transactions, it asserted, involved Ms Heron. The transactions, about which the prosecution led evidence linking Ms Heron, amounted to in excess of $1,000,000.00. The prosecution disclosed to him, prior to the trial, the material on which the count would be based.

[66] Section 61 of the Criminal Justice (Administration) Act allows this court to amend an indictment where it would be in the interests of justice. It states:

> "The Court of Appeal may, if it shall think fit, amend all defects and errors in any indictment or proceeding brought before it under this Act, whether such amendment could or could not have been made at the trial, and all such amendments as may be necessary for the purpose of determining the real question in controversy shall be so made."

[67] At least four cheques were admitted into evidence which bore Ms Heron's name as the payee. They are exhibits 124, 165, 166 and 167. The learned Judge of the Parish Court referred to exhibits 124, 166 and 167 in her analysis of count 26. The amounts involved were $400,000.00, $400,000.00, and $450,000.00 respectively, totalling $1,250,000.00. The indictment should be amended to reflect the amounts in the three cheques that formed part of the prosecution's case against Mr Elliott in respect of this ground. The material was disclosed to him before the trial and therefore he knew the case that he was to meet in that regard. He would not be prejudiced by an amendment that is consistent with the evidence that was led. The particulars of the indictment should be amended to read:

> "**Sanja Elliott** on dates unknown between the 1st day of January, 2015 and 31st day of December, 2016 in the parish of Manchester, with intent to defraud obtained the sum of One Million Three Hundred Thousand Dollars ($1,250,000.00) from the Manchester Parish Council by falsely pretending that the said monies were bona fide payments for work done by Natasha Heron on behalf of the Manchester Parish Council."

Ground 2: Submission of no case to answer

Submissions

[68] Mr Godrey argued that the learned Judge of the Parish Court erred in her failure to uphold the submission of no case to answer relating to counts 23, 25 and 26. He added that the testimony of Mr Foster should also have resulted in Mr Elliott having no case to answer. He again emphasised that there were inconsistencies between some of the witnesses' testimony as well as misconduct by the police and prosecuting counsel which resulted in an untenable situation for Mr Elliott and so the counts should not have been

permitted to be considered by the tribunal of fact. Learned counsel added that when the case is put in the context of the evidence of Ms Brenda Ramsay, who testified that:

a. audits were conducted at the Council from 2013 to 2016 and there were no irregularities; and

b. there was a Finance Committee at the Council between 2013 and 2016 and there were no complaints from that Committee that the Council's accounts were compromised,

there was no case for Mr Elliott to answer.

[69] Mr Godfrey stated that counts two to 14 related to money laundering offences. He argued, however, that the prosecution had failed to prove, beyond a reasonable doubt, that Mr Elliott had committed those offences. Learned counsel stressed that there was no evidence that the impugned cheques related to the monies in Mr Elliott's account and so there is no evidence that he committed a money laundering offence. He asserted that since the prosecution has failed to establish a predicate offence or identify other property which amounts to criminal property, Mr Elliott should not have been required to answer to counts two to 14. He cited sections 92 and 93 of the Proceeds of Crime Act ('POCA') and **R v GH** [2015] UKSC 24 for this position.

[70] In contrast, Ms Ormsby contended that the learned Judge of the Parish Court had sufficient evidence before her to have found that Mr Elliott had a case to answer for the counts for which he had been convicted. Learned counsel submitted that the prosecution, at the end of its case, only needs to establish a *prima facie* case against Mr Elliott and the prosecution had done so. She cited **R v Rupert Miller and Another** (1973) 12 JLR 1263, **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56 and **R v Galbraith** [1981] 1 WLR 1039. Learned counsel detailed that the weight of the evidence was such that the learned judge had before her, Mr Elliott's "lavish" lifestyle, wherein he purchased luxury clothing, took numerous trips, amassed numerous assets including

several motor vehicles and real estate bearing no lien or mortgage, yet his income could not support this level of expenditure. Learned counsel submitted that the evidence supports the learned Judge of the Parish Court's finding that Mr Elliott had a case to answer.

[71] Ms Ormsby argued that Mr Elliott's position that the prosecution has not proved that the monies in his account are criminal property is flawed. Learned counsel asserted that a person commits a money laundering offence under sections 91 and 93 of POCA if that person possesses criminal property knowingly or has reasonable grounds to believe that the property is criminal property. She went further to state that section 91 of the POCA defines "criminal property" as property that a person obtains from criminal conduct. She went further to indicate that "criminal conduct" is defined as conduct on or after 30 May 2007 which is an offence in Jamaica or if occurred outside of Jamaica, would amount to an offence if it happened in Jamaica.

[72] Learned counsel argued that Mr Godfrey's argument in relation to the money laundering offences is unfounded. She asserted that it was unnecessary to prove a specified predicate crime in order to establish money laundering. All the prosecution is required to do, the submission ran, is to adduce evidence, from which it can be inferred that Mr Elliott was engaged in criminal conduct. She relied on numerous cases, including **R v Anwoir and others** [2008] 4 All ER 582 and **The Director of Public Prosecutions of Mauritius v A A Bholah** [2011] UKPC 44. Learned counsel highlighted that the learned judge determined that the criminal conduct in the instant case was the fraud committed against the Council. She added that the learned Judge of the Parish Court further found, after accepting the evidence of the "contractors", that the benefit that Mr Elliott gained from the conduct, constituted cheques and cash. Learned counsel insisted that the learned Judge of the Parish Court was correct in finding that Mr Elliott's conduct amounted to criminal or unlawful conduct. Learned counsel contended that even when the monies derived from the scheme were deposited into Mr Elliott's accounts, they still amounted to criminal property and he knew this. Learned counsel underscored that the

authority of **R v GH**, on which Mr Godfrey relies, supports the Crown's case as it highlights that the proceeds are criminal property since it was derived from fraud against the Council.

[73] Learned counsel asserted that the learned Judge of the Parish Court reviewed the evidence and found that Mr Elliott's known income or sources of income did not explain his wealth. Learned counsel argued that even in the absence of evidence from the "contractors", there was other evidence to support his conviction. These included his known income and the absence of other identifiable or traceable income, his quick accumulation of real estate and the frequency and pattern of large amounts of cash being deposited into his bank accounts.

Discussion and analysis

[74] When the prosecution closed its case, Mr Elliott was one of the defendants whose counsel made a submission of no case to answer. The learned Judge of the Parish Court ruled in favour of his submission of no case to answer in respect of some counts and refused it in respect of others.

[75] Several authorities have addressed the relevant law for assessing the prosecution's case in the context of a submission that there is no case for the accused to answer.

[76] Lord Parker CJ in **Practice Direction (Submission of No Case)** [1962] 1 WLR 227 outlined the test to be applied for no case submissions in cases tried without a jury. He said:

> "A submission that there is no case to answer may be properly made and upheld: (a) **when there is no evidence to prove an essential element in the alleged offence**; (b) when the **evidence adduced by the prosecutor is so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it**…" (Emphasis supplied)

[77] In respect of matters tried before a jury, the English Court of Appeal, in the oft-cited case of **R v Galbraith** explored, on page 1042, a judge's approach to a submission of no case to answer:

> "How then should the judge approach a submission of 'no case'? (1) **If there is no evidence that the crime alleged has been committed by the defendant**, there is no difficulty. **The judge will of course stop the case**. (2) **The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence**. (a) **Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury**…. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge." (Emphasis supplied)

[78] Closer to home, in **The State v Kerlan George** (unreported), Court of Appeal, Trinidad and Tobago, Crim App No P 002 of 2011, judgment delivered 17 February 2023, the Court of Appeal of Trinidad and Tobago, in addressing the approach of a district court judge, with similar jurisdiction to a judge of the Parish Court in this country, said in part at para. 54:

> "In relation to submissions of no case to answer in trials before district court judges, this Court is in agreement with the position articulated by the authors of [Butterworths Stone's Justices' Manual 2022]… In such cases, there is no rationale to depart from the test which would be applicable in a case involving a judge and jury. The proper test to be applied would be the one enunciated in the decision in **Galbraith**,

> with any attendant adjustments insofar as references to the jury in the stipulated test are concerned…."

[79] Mr Godfrey submitted that there were "contractors" who testified about matters that were absent from their police report. This has been discussed under the first ground dealing with inconsistency (see paras. [27] – [46]), where this court has determined that there was sufficient evidence in the police statements to make Mr Elliott aware of the charges being levelled against him. Mr Merchant and Ms Heron gave additional information at the trial but also gave explanations for their divergence in accounts that the learned Judge of the Parish Court accepted.

[80] Mr Godfrey's contention that the fact that audits had been conducted and revealed no irregularities casts a shadow over the "contractors'" evidence, cannot be accepted. There were fraudulent invoices to match the cheques that were drafted. An audit would not necessarily detect the fraud. The following analysis demonstrates that there was a *prima facie* case to answer.

[81] Mr Merchant's first statement dated 1 July 2016 outlined that he had known Mr Elliott since 2013 and that he worked at the Council. In 2014, Mr Merchant did welding work for the Council. He stated however that the police showed him a cheque from the Council dated 23 June 2016, in the sum of $400,000.00, but he did not do any work for the Council. The police showed him numerous other documents with his name, taxpayer registration number ('TRN') and/or signature but he was never aware of them.

[82] Mr Merchant made a second statement on 15 July 2016. He stated that when he does work for the Council it is always welding work yet the documentation with his information involved work other than welding. He noted that of all the documents shown to him, he only recognised his signature on two of the documents.

[83] These statements would not have established a *prima facie* case against Mr Elliott as Mr Merchant's statements to the police had not implicated Mr Elliott. It was not until the trial that Mr Merchant indicated that he encashed cheques on Mr Elliott's request and

returned the money to him. The learned Judge of the Parish Court accepted the explanation for the omission, and it was on that basis that the case proceeded against Mr Elliott. Mr Elliott, however, suffered little prejudice from this since the learned Judge of the Parish Court ultimately ruled that the count was duplicitous.

[84] A reading of Ms McFarlane's police statement reveals that she knew Mr Elliott and that he worked at the Council. On 18 December 2015, he contacted her and asked her to change a cheque for him and requested her TRN. He sent a gentleman with the cheque, and it had her name on it in the sum of $300,000.00. He informed her that she should "cash the cheque and give the money to the man who will in turn take the money to him". She went to the bank with the gentleman. The bank teller did not ask for her identification but changed the cheque. She then gave the cash to the gentleman.

[85] By 9 December 2016, Detective Sergeant Donovan Simms from the MOCA contacted her in relation to an investigation. Detective Sergeant Simms showed her cheques from the Council bearing her name. She indicated to him that she did not submit any invoice for work done, she did not go to the Council to do any business or sign documents and she has never done any work for the Council. Yet, Mr Elliott signed off on the invoice and contacted her to collect and encash the cheque, for the gentleman to return the money to him. Her testimony at the trial was consistent with her statement to the police.

[86] Ms Heron indicated in her police statement dated 26 October 2016 that she was a nail technician and that she knew Mr Elliott since 2013 and knew that he worked at the Council. She said that in 2013 or 2014 he asked her if she was interested in some road work. The following day he told her she only needed the workers but she would not actually do the work. He collected her full name, TRN, NIS and driver's licence. Later, he told her he had some work for her and that she should get the workers and they would be paid. They negotiated $3,000.00 per day. When the work ended, Mr Elliott contacted her to go to the Council to collect the cheque. She collected the cheque with her name on it. She went to the bank to encash the cheque. While at the bank, Mr Elliott called her

and informed her that Mr Campbell would pay her and then collect the rest of the money. When she received the money, she paid the workers and Mr Campbell paid her.

[87] A month later, Mr Elliott contacted her once more to do work for the Council. She repeated the process, except that it involved two cheques, and it was Mr Sibblies who collected the money from her. Mr Elliott continued contacting her to change cheques valued at between $10,000.00 and over $900,000.00 but she did not do any work for the cheques or submit any invoice. It is, therefore, evident from her police statement, that Mr Elliott was aware of the allegations against him, in this regard.

[88] During the trial, she testified that she did not employ anyone to do work on behalf of the Council and that the men did not do any work. She admitted the information in the police statement was inaccurate. The aspects which were inaccurate did not prejudice Mr Elliott. An example is recorded on page 140 of the record of proceedings:

> "Q: This work we are speaking about, the men whose names you told the police about, did you pay them for the work they did?
>
> A: No, they didn't do any work."

[89] Another example is outlined on pages 142 to 143 of the record of proceedings:

> "Q: Yesterday you told the court that you encashed about 41 cheques
>
> A: I said 40 but I said something to the judge at the same time
>
> Q: Was that the truth[?]
>
> A: No [it's] not
>
> Q: [']He then went away with the rest of the money['] did [you say] that?
>
> A: I did tell the police that
>
> Q: Is that the truth[?]

A: No [it's] not"

[90] She insisted that Mr Elliott gave her cheques to collect for work that was never done. This is recorded on page 143 of the record of proceedings:

> "[Q]: At no time did [M]r Elliott cause you to collect cheques for work not done
>
> A: He did call me to collect cheques for work not done"

[91] Mr Godfrey later asked about the number of cheques and she said there were 40 cheques:

> "[Q]: [It's] not true that you collected some 40 cheques from the [Council] between 2013 and 2015
>
> A: I did"

[92] The prosecution had, therefore, adduced sufficient evidence to establish a *prima facie* case that Mr Elliott committed these offences against the Council. The learned Judge of the Parish Court did not err in rejecting the submission of no case to answer in this regard.

[93] In relation to the money laundering offences, with which Mr Elliott was charged, section 91 of the POCA provides the definition of criminal property and money laundering. It reads:

> "91. —(1) For the purposes of this Part—
>
> (a) **Property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly** (and it is immaterial who carried out or benefitted from the conduct);
>
> (b) money laundering is an act which—
>
> (i) constitutes an offence under section 92 or 93;
>
> (ii) constitutes an attempt, conspiracy or incitement to commit an offence specified in sub paragraph (i); or

(iii) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in sub-paragraph (i);…" (Emphasis supplied)

[94] Section 2 defines "criminal conduct" as:

> "…conduct occurring on or after the 30th May, 2007, being conduct which—
>
> (a) constitutes an offence in Jamaica;…"

[95] Section 92 underscores what constitutes an offence. It reads:

> "92.—(1) Subject to subsection (4), a person commits an offence if that person—
>
> (a) Engages in a transaction that involves criminal property…
>
> and the person knows or has reasonable grounds to believe, at the time he does any act referred to in paragraphs (a), (b) or (c), that the property is criminal property.
>
> (2) Subject to subsection (4), a person commits an offence if that person enters into or becomes concerned in an arrangement that the person knows or has reasonable grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person…
>
> (4) A person does not commit an offence under subsection (1) or (2) if—
>
> (a) Before doing any act described in subsection (1) or (2), the person makes an authorised disclosure and had the appropriate consent to act;
>
> (b) the person-
>
> (i) intended to make such a disclosure before doing the act and has a reasonable excuse for not doing so; and
>
> (ii) does make such a disclosure on his own initiative as soon as is reasonably practicable after doing the act; or

(iii) the person acts in good faith in the exercise of a function relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct."

[96] Section 93 goes further to state:

> "Subject to subsections (2) and (3), a person commits an offence if that person acquires, uses or has possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property."

[97] The monies deposited in Mr Elliott's account from the "contractors" through the fraudulent scheme are, therefore, to be considered "criminal property" as he obtained them from acts that constitute an offence in Jamaica, and he knew or reasonably believed that it was criminal property. The assets that he acquired using those monies are also criminal property.

[98] In **R v GH**, B was a fraudster who created four "ghost" websites falsely advertising cut-price motor insurance. He had assistants who opened bank accounts to receive the proceeds of the scheme. Members of the public paid money into two of the bank accounts but did not receive any insurance coverage. GH was charged pursuant to section 328(1) of the Proceeds of Crime Act, 2002 (UK). The section provided that:

> "A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

[99] The issue for the House of Lords was whether the section contemplated that the tainted property had to have already been in existence for the purposes of the offence.

[100] Lord Toulson, with whom the rest of their Lordships agreed, highlighted the *actus reus* and the *mens rea* of the offence. He said in part, at para. [16]:

> "…The *actus reus* of the offence is entering or being concerned in an arrangement which in fact facilitates the acquisition of criminal property, and the *mens rea* required is knowledge or suspicion…." (Italics as in original)

[101] He went further at para. [20] to consider the authorities on criminal property. He underscored that criminal property must be "obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself". He distilled that offences under certain sections, including section 328, are hinged on the commission of another offence which produces the proceeds that create a money laundering offence. Lord Toulson at para. [47] illustrated the change in character of money. He said:

> "…The character of the money did change on being paid into [GH's] accounts. It was lawful property in the hands of the victims at the moment when they paid it into [GH's] accounts. **It became criminal property in the hands of B, not by reason of the arrangement made between B and [GH] but by reason of the fact that it was obtained through fraud perpetrated on the victims**." (Emphasis supplied)

[102] Section 328, though framed differently, is similar in import to section 92 of POCA, except that it refers to "suspects" while POCA uses the phrase "reasonable grounds to believe". The reasoning in **R v GH** would, therefore, apply to this case. In other words, the Council's funds became criminal property in Mr Elliott's hands "by reason of the fact that it was obtained through fraud perpetrated on the [Council]".

[103] In **R v Iiham Anwoir and others**, Latham LJ in para. [21] outlined that there were two ways that the Crown can prove that property is criminal property:

> "(a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime."

[104] In the present case, the witnesses, to whom Mr Godfrey referred, indicated that, by virtue of Mr Elliott's actions, they received money derived from Council cheques, which emanated from false claims made to the Council that they had done work. In their

testimony, they identified invoices, said to have been prepared by them, which they had not prepared, and signatures said to be theirs, but which were not. Mr Elliott's hand was shown to be involved in all those activities. The learned Judge of the Parish Court was correct to reject his submission of no case to answer in relation to the stated counts.

Ground 3: Prosecutorial Misconduct

Submissions

[105] Mr Godfrey submitted that the learned Judge of the Parish Court erred when she found that the interference with the witnesses by the police officers and the prosecutors did not amount to prosecutorial misconduct. He highlighted that it was an offence to influence witnesses to give specific evidence and particularly egregious that that impugned evidence is relied on to convict Mr Elliott. He advanced that the entire case against Mr Elliott should be quashed due to the overwhelming prosecutorial misconduct. He relied on **R v Maxwell** [2010] UKSC 48.

[106] Ms Simpson submitted that for a defendant to succeed in his quest to prove prosecutorial misconduct, he must satisfy this court that the conduct complained of is "gross", "persistent", "prejudicial" or "irremediable". She relied on **Barry Victor Randall v R** [2002] UKPC 19, **Christopher Thomas v R** [2011] JMCA Crim 49 ('**Christopher Thomas v R (No 1)**') and **Christopher Thomas v R** [2018] JMCA Crim 31 ('**Christopher Thomas v R (No 2)**'). She argued that the learned Judge of the Parish Court applied her mind to the conversation between the police officers and Mr Merchant, considered the relevant law and correctly concluded that it did not amount to prosecutorial misconduct. She, therefore, relied on his evidence, which was important to understanding the fraudulent scheme.

[107] Learned counsel accepted that it was improper for police officers to converse with Mr Merchant while he was still testifying but argued that it was an isolated incident and that it did not rise to the level of prosecutorial misconduct. Learned counsel contended that the police did not assist Mr Merchant in terms of what testimony he should give. She asserted that **R v Maxwell**, on which Mr Godfrey relied, is unhelpful in this situation

since, in **R v Maxwell**, the police incentivised the appellant for his testimony and failed to disclose certain information to the court, which clearly amounted to prosecutorial misconduct. In relation to the conversation that the prosecution had with Mr Merchant before he testified, learned counsel stated that the prosecution is allowed to talk to its witnesses before they give evidence and that is what occurred.

Discussion and analysis

[108] It is important to note that fraud trials are said to be particularly cumbersome. Their Lordships made this point in **Randall v R** in paras. [9] and [10]:

> "[9]…Witnesses on both sides may be accused of exaggerating or even fabricating their evidence. Defendants may choose to act in an obstructive and evasive manner. Opposing counsel may find each other easy to work with or they may not. It is not unusual for tempers to become frayed and relations strained. **In a fraud trial the pressure on all involved may be even more acute than in other trials. Fraud trials tend to involve a great deal of documentation, which is particularly cumbersome to handle in a jury trial. They tend to involve much unfamiliar detail, often of a technical nature, which it is difficult for many people to understand, assimilate, retain and recall. And fraud trials tend to be very long, which in itself tends to increase the strain on all involved, whether the defendant, witnesses, jurors, counsel or the judge**…
>
> [10] **There is, however, throughout any trial and not least a long fraud trial, one overriding requirement: to ensure that the defendant accused of crime is fairly tried. The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence. To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair**. These rules are well understood and are not in any way controversial..." (Emphasis supplied)

[109] This court, in **Shawn Campbell and others v R** [2020] JMCA Crim 10 in para. [260], has reiterated that for conduct to amount to prosecutorial misconduct, it must be "gross"; "persistent; "prejudicial" or "irremediable".

[110] A vivid example of prosecutorial misconduct involving police officers is gleaned from **R v Maxwell**. Mr Maxwell and his brother Mr Mansell were convicted of offences. Mr Chapman, the prosecution's main witness was described as a professional criminal. Mr Chapman and Mr Maxwell were in prison together. Mr Maxwell was released from prison and two robberies took place, which led to the death of a Mr Joe Smales. The robbers were masked on both occasions. Mr Chapman gave the police information implicating Mr Maxwell and his brother in the robberies and murder, and they were charged with the robberies. At the trial, Mr Chapman was the prosecution's main witness. The defence argued that Mr Chapman gave the evidence because he would receive benefits from the police if Mr Maxwell and his brother were convicted. Mr Chapman denied this assertion. Mr Maxwell and his brother were convicted and shortly afterwards, information emerged that the police were going to pay Mr Chapman a large sum whenever he was released from prison.

[111] The Criminal Cases Review Commission ordered that the North Yorkshire Police investigate the matter. The investigation revealed that the police misled the court and other stakeholders as they hid and lied about the benefits Mr Chapman and his family would receive. The details were that senior police officers in the investigation of the robberies and murder:

a. conspired to pervert the course of justice by concealing information from the court;
b. colluded in perjury at trial;
c. lied during inquiries after the conviction; and
d. perjured themselves at an *ex parte* application for leave to appeal that was held in the court of appeal.

The Court of Appeal determined that the conviction had to be quashed and the United Kingdom Supreme Court upheld that decision.

[112] An illustration of prosecutorial misconduct in the context of prosecuting counsel is highlighted in **Randall v R**. Mr Randall complained that the prosecutor made repeated interpolated prejudicial comments when examining the prosecuting witnesses, interrupted the process of cross-examination of the prosecution witnesses as well as interrupting the examination-in-chief and re-examination of Mr Randall. The prosecution counsel also made prejudicial comments during Mr Randall's cross-examination and interrupted the judge during the summing up. Their Lordships determined that when taken together, the complaints amounted to a gross departure from good practice and therefore denied Mr Randall a fair trial.

[113] While there are prosecutorial standards that must be observed, their Lordships, in **Randall v R** in para. [28], clarified that not all departure from the proper standards of prosecutorial conduct will amount to an unfair trial:

> "While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. **There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.** The right to a fair trial is one to be enjoyed by the guilty as well the innocent, for a defendant is

> presumed to be innocent until proved to be otherwise in a fairly conducted trial." (Emphasis supplied)

[114] In **Christopher Thomas v R (No 1)**, counsel for the prosecution, three times during cross-examination of a defence witness, put to the witness that she was paid to give evidence to support the applicant. She denied it and the prosecution did not apply to call evidence to rebut the denial. The judge merely informed the jury that they should judge the case only on the evidence and not the unsubstantiated suggestion. Harris JA, in that case, at paras. [13] and [14], warned that an accused must be afforded a fair trial and so those who marshal evidence for the prosecution, along with the trial judge must ensure that the trial is conducted properly. She, however, acknowledged that a trial will not always be flawless, but recognised that some procedural breaches may not prejudice the fairness of the conviction. Harris JA pointed out that if the breach is serious the conviction should be quashed for being unsafe. The court determined that the prosecution counsel's conduct was improper, and the judge's warning was insufficient to cure the error.

[115] In **Christopher Thomas v R (No 2)**, Mr Thomas criticised the prosecuting counsel's approach to the examination-in-chief of Superintendent Phipps, the investigating officer, in repeatedly seeking to adduce hearsay evidence and also his approach to the cross-examination of Mr Thomas. The learned judge's quick and firm action as well as his direction to the jury, in that case, mitigated the possible prejudice to Mr Thomas.

[116] Mr Godfrey's complaint in relation to prosecutorial misconduct is two-fold. He complained that the police officers interfered with Mr Merchant's evidence and told him what evidence he should give at the trial. He added that prosecuting counsel were present at the time the police spoke to Mr Merchant.

[117] Mr Merchant, during cross-examination, informed that police officers spoke with him and discussed the type of evidence he was expected to give. The exchange is recorded on pages 176 to 177 of the record of proceedings:

"Q: Police took you to the court?

A: Yes sir

Q: They had discussions with you before they took you to court?

A: Yes

Q: Discussions included the type of evidence you are expected to give in court?

A: Correct

Q: Which officers had these discussions with you?

A: I don't know their names

…

Q: The officer to whom you gave [your first statement] is he one of the persons you had discussions with last week about the type of evidence you are required to give?

A: Yes sir

…

Q: Was there a female officer there?

A: Yes sir

Q: [Were] you told what could happen to you if you don't give the evidence you are expected to give?

A: Yes sir

Q: Is it as a result of what you were told would happen why you are here giving the evidence you gave?

A: Yes sir " (Emphasis supplied)

[118] Mr Merchant also indicated that prosecution counsel were present and that even after he had been sworn in, the police still spoke to him. He said this at page 178 of the record of proceedings:

"Q: Apart from the police and the female officer did you have discussion with anyone else connected to this case and the Court proceedings about the evidence you are expected to give?

A: Yes sir

Q: Any one of those persons sitting at this desk?

A: This lady and this lady (he pointed to Crown Counsel … and … Counsel from [MOCA])

…

Q: Even after the swearing-in the police still talking to you?

A: Yes sir" (Emphasis supplied)

[119] During re-examination by the prosecuting counsel, Mr Merchant elucidated that when he said the police told him the type of evidence he is expected to give in court, it meant he should speak the truth. This is recorded on pages 180 to 181 of the record of proceedings:

"Q: In response to Mr. Godfrey you said he was correct that discussions you had with the police included the type of evidence you are expected to give in court, what do you mean?

A: They say I must tell the truth and nothing else but the truth.

…

Q: When you were asked about discussions you had with other persons in the matter and you said persons were sitting at the table, myself and [counsel from MOCA] were included?

A: Yes Miss

Q: Where were those discussions held?

A: One in the park and one at Porus Park right at the court house

Q: The discussions you had here with myself and my colleague when was that?

A: One on Friday of las week

Q: The 21st of June?

A: Yes Miss

…

Q: In relation to those discussions with me were you at any point told by me what to say in relation to this matter [in] question

A: No Miss

Q: Those discussions you had with me how would you describe those discussions?

A: [D]iscussions based on I must speak the truth of how the case is and what I have done

Q: When you had the discussion with [counsel from MOCA] at Porus when did it take place?

A: Yesterday

Q: Was that before you went into the witness box down in Porus?

A: Yes Miss

Q: Before you started giving your evidence?

A: It was before

Q: Did my colleague in those discussions yesterday tell you what to say when you go into the witness box?

A: No miss"

[120] Once more in re-examination, on page 184 of the record of proceedings, prosecuting counsel inquired of Mr Merchant if anyone told him what evidence to give and he stated that he was told to speak the truth and that is what he did.

[121] After the re-examination of Mr Merchant, the learned Judge of the Parish Court granted Mr Godfrey permission to ask further questions of Mr Merchant based on a recent photograph of him speaking with an investigating officer. Mr Merchant explained that he was talking to them about grills, before and after the adjournment on the previous day.

[122] The learned Judge of the Parish Court considered the evidence as it related to prosecutorial misconduct concerning the evidence of Mr Merchant and she determined that none of the conduct that Mr Godfrey complained of amounted to prosecutorial misconduct. She made these remarks at pages 703 to 704:

> "Authorities show that '…the conduct complained of in any given case would have to be 'gross'; 'persistent'; or 'prejudicial' in nature in order for an allegation of prosecutorial misconduct fairly to be made…'
>
> Tyrone Merchant was sworn on Monday, the 24th June, 2019 when he gave his evidence in chief, completing it shortly after court resumed the following day. On June 25, he was cross-examined.
>
> **The witness admitted to conversations with police officers and prosecutors on Friday the 21st June, before he was sworn.** There is nothing wrong with prosecutors in the presence of police officers or with police officers, speaking to a witness for the Crown, before the witness is sworn.
>
> The witness does say in [cross-examination] that the evidence he gave in [examination-in-chief] was because of what the police said would happen to him if he did not. This was however clarified in re-examination when he said that what he was told was that he was to tell the truth and nothing else but the truth. That's also what he would have sworn to do on being sworn so I do not find that it constitutes an interference.
>
> In relation to the conversation after court adjourned on the 24th it can hardly be disputed that it was inappropriate and ought not to have taken place. However, having perused his explanation under [re-examination], which I accept as true, I am of the view that the content of the conversation did not assist the witness in the witness box.

> **I therefore find that none of the conduct complained of was gross, persistent nor prejudicial and so cannot be accurately described as [p]rosecutorial [m]isconduct**." (Emphasis supplied)

[123] Based on the principles of law set out above and the learned judge of the Parish Court's assessment of Mr Merchant's evidence, her conclusion that there was no prosecutorial misconduct, cannot be impugned.

Ground 4: Absence of a fair trial

Submissions

[124] Mr Godfrey accepted that the learned Judge of the Parish Court was correct when she determined that Mr Elliott had no burden of proof. He argued, however, that the learned Judge of the Parish Court fell into error when she ruled that Mr Elliott did not address certain allegations against him, thereby placing an evidential burden on him. He also added that in the context of all that transpired in the trial, the different accounts given by the witnesses, the interference by the investigating officers and prosecuting counsel, the cumulative effect is that Mr Elliott was deprived of a fair trial and so the conviction should be quashed, a verdict of acquittal entered, and the sentence set aside.

[125] Ms Ormsby submitted that the learned Judge of the Parish Court afforded Mr Elliott a fair trial. She argued that the learned Judge of the Parish Court, on numerous occasions, noted that the prosecution bore the burden of proof to the standard that the proof of guilt should be beyond a reasonable doubt.

Discussion and analysis

[126] The learned Judge of the Parish Court, on page 684 of the record of proceedings acknowledged that the burden of proof rested on the prosecution and had to be discharged to the criminal standard. She said:

> "…it is for me to decide whether each of the unsworn statements has any value and, if so, what weight should be attached to it.

> Even if I find that they have no value it is still for the evidence provided by the prosecution to satisfy the court of the [accused's] guilt beyond reasonable doubt."

[127] She then proceeded, at page 685 of the record of proceedings, to state that Mr Elliott had no burden to prove but noted that he did not address some allegations against him. She said:

> "However, despite that warning, and though **Mr. Elliott has no burden of proof**, **he has not addressed some of the material allegations made against him**…"

[128] This was clumsy language on the part of the learned Judge of the Parish Court since Mr Elliott had nothing to prove. The learned Judge of the Parish Court cured that inelegant formulation at page 693 of the record of proceedings as she indicated once more that the accused has no burden of proof and does not have to say anything to defend himself:

> "**CONCLUSION:**
>
> Having reviewed the Unsworn Statements, though I warn myself that there is no burden of proof on the accused and so **they have no obligation to convince the Court of the truth of their Defences**, there are numerous allegations made against each of the defendants that were not addressed in the Statements.
>
> **Therefore, because they have nothing to prove, I returned to the [Crown's] [c]ase**.
>
> 42. <u>BURDEN AND STANDARD OF PROOF</u>
>
> The burden of proof rests on the Crown to prove its case beyond a reasonable doubt. That is to say, to make the court feel sure that the accused persons did in fact do the acts alleged in the indictment. To that end, the Crown must put sufficient evidence before the court so as to discharge its burden.
>
> The Defence has no burden of proof and all the defendants are presumed to be innocent. Therefore, they are not obliged to say anything in their defence, as it is the Crown who has

> brought them before the court." (Emphasis supplied; underlining as in original)

[129] In this context, it is manifest that the learned Judge of the Parish Court was aware that Mr Elliott was not obliged to say anything and had nothing to prove and so she went on to consider the prosecution's case. It is therefore evident that she did not impose either a legal or evidential burden on Mr Elliott. This ground also fails.

[130] Mr Godfrey submitted that considering the several complaints that Mr Elliott made, the conviction should be quashed. Mr Elliott, however, has been unsuccessful on every ground and so has failed to establish that he was not afforded a fair trial. This ground also fails.

Conclusion

[131] For the reasons outlined in this judgment, the court finds that the learned Judge of the Parish Court did not err in arriving at the verdicts in this case. The documentary evidence in combination with the evidence of the witnesses painted a compelling case against Mr Elliott. The various counts of the indictment were proved to the requisite standard. Accordingly, Mr Elliott's appeal against the convictions should be dismissed.

[132] The learned Judge of the Parish Court must be commended for her management of the trial with an indictment containing such a large number of counts and so efficiently summarising and analysing the mass of evidence that was presented during the trial.

Order

[133] The order of the court is as follows:

1. Count 26 of the indictment is amended so that it shall read instead:

> "**Sanja Elliott** on dates unknown between the 1st day of January, 2015 and 31st day of December, 2016 in the parish of Manchester, with intent to defraud obtained the sum of One Million Two Hundred and

Fifty Thousand Dollars ($1,250,000.00) from the Manchester Parish Council by falsely pretending that the said monies were bona fide payments for work done by Natasha Heron on behalf of the Manchester Parish Council."

2. The appeal against conviction is dismissed.

3. The judgment and verdict of the learned Judge of the Parish Court is affirmed.

4. The sentences are affirmed and are to be reckoned as having commenced on 27 July 2020.