[2022] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00007

MICHAEL LORNE V R

Mikael Lorne for the appellant

Mrs Sharon Milwood-Moore and Mrs Nickeisha Young-Shand for the Crown

19 & 20 October, 15 November 2021 and 23 September 2022

V HARRIS JA

[1] The appellant, Mr Michael Lorne, an attorney-at-law, was convicted on 22 October 2020 by a judge of the Parish Court ('the learned Judge of the Parish Court') at the Kingston and Saint Andrew Parish Court (Criminal Division) for the offence of fraudulent conversion contrary to section 24(1) of the Larceny Act ('the Act'). On 19 March 2021, he was sentenced to pay a fine of $750,000.00 or serve 12 months' imprisonment at hard labour. The fine has been paid.

[2] The appellant was initially charged on an indictment containing six counts, namely conspiracy to defraud (count 1), fraudulent conversion (count 2), forgery (counts 3 and 5) and uttering a forged document (counts 4 and 6). However, at the end of the prosecution's case, following a submission of no case to answer, he was

acquitted and discharged on five counts of the indictment and called upon to answer the charge of fraudulent conversion only.

[3] The particulars of that offence, as set out in the indictment (and which are in line with section 24(1)(iii) of the Act), were that the appellant, on a day or days unknown in 2011, in the parish of Kingston, having been entrusted by Mr Howard Wilson to sell property located at 10 Fairbourne Road, Kingston 2, which was bequeathed to him and Mrs Olive Blake jointly in the will of Constance and Herbert Wilson, for the sum of $6,000,000.00, then fraudulently converted Mrs Olive Blake's portion of the proceeds of the sale for his own use and benefit or for the use and benefit of some other person or persons.

Background facts

[4] Sometime between 2000 and 2005, the appellant was retained to probate the last will and testament of Mr Herbert Wilson ('the will'). In the will, his children, Mr Howard Wilson (who died in 2016) and Mrs Olive Blake ('the complainant'), were named as the executors and beneficiaries of his estate. The only asset in Mr Herbert Wilson's estate was a dwelling house located at 10 Fairbourne Road, Kingston 2 in the parish of Kingston registered at volume 1452 folio 667 of the Register Book of Titles ('the property'). After probate was completed, the appellant was instructed to sell the property. Given the clear language of the will, the proceeds from the sale of the property ('the proceeds') were to be divided equally between the complainant and her brother, Mr Howard Wilson.

[5] According to the complainant, her brother had retained the appellant to probate the will and sell the property. However, the appellant contacted her for the first time in 2000 and asked her to send a copy of the will, the "deed" (or title) for the property, and some other notarised documents. She complied with his request.

[6] The sale of the property was completed in November 2011. It was sold to Mr Owen Hamilton for $6,000,000.00, and title was transferred to him on 22 November

2011. Mr Hamilton's evidence (which was agreed) was that he made the final payment on the sale of the property to his attorney-at-law on 24 November 2011. The undisputed evidence was that sometime in early 2012, the appellant paid over $3,500,000.00 to Mr Howard Wilson. This figure represented more than 50% of the total proceeds (and more than 90% of the net proceeds).

[7] During a conversation with her brother in 2011 (presumably after 24 November 2011), the complainant discovered that the property had been sold. After this conversation, the complainant stated that she tried to contact the appellant via emails, telephone calls, and letters to enquire about the purchase price of the property and her share of the proceeds. However, her efforts were in vain. The appellant did not respond to any of her correspondence or telephone calls.

[8] As a result, on 8 October 2012, the complainant made a complaint to the General Legal Council ('GLC'), alleging that the appellant had failed to account for funds that he had in hand for her, although she had "reasonably required" him to do so. According to the complainant, the appellant contacted her (by letter) after the complaint was made to the GLC. In that letter, the appellant informed her that he had sent her brother his portion of the proceeds, but sums were still outstanding on the sale. He also indicated that she would get her share as soon as he collected the rest of the money.

[9] On 12 July 2013, at the request of an attorney-at-law whom the complainant had retained to represent her at the GLC hearing, the appellant submitted a statement of account for the sale of the property ('the statement of account') and a cheque for $410,000.00, which, according to the appellant, represented the amount that was "available for" the complainant. The statement of account was admitted into evidence, on the prosecution's case during the cross-examination of the complainant, as Exhibit 6.

[10] On account of the complaint to the GLC, disciplinary proceedings against the appellant ensued. Arising from those proceedings, on 30 April 2014, the appellant

agreed to pay the complainant $2,500,000.00, being her portion of the proceeds plus interest and costs. These sums were to be paid incrementally over 12 months from 2 May 2014 to 2 May 2015. The document setting out this arrangement and headed "Agreement dated 30th April, 2014" was tendered into evidence and marked Exhibit 2 ('the Agreement'). However, the appellant failed to honour his obligations as set out in the Agreement.

[11] Being both out of patience and pocket, the complainant reported the matter to the police on 22 December 2014. Subsequently, the appellant was arrested and charged with several offences, including fraudulent conversion.

[12] The trial of the matter commenced on 4 September 2019. Up to that time, the complainant had not received any payment from the appellant. In fact, on 24 October 2019, the third day of trial, it was revealed during cross-examination of the complainant that the appellant had made payment of the outstanding sums (per the Agreement) to the complainant's attorneys-at-law. However, it is not clear exactly when this payment was made. Also, during cross-examination, the complainant agreed that she was shown a letter by the appellant (during the disciplinary hearing) written by her brother, containing instructions to the appellant not to pay over any of the proceeds to her.

[13] The appellant's defence at trial was a complete denial of the allegations. In his unsworn statement from the dock ('dock statement'), he relied on certain documents that were admitted into evidence on the prosecution's case to show that between 2000 and 2010, he had been in touch with the complainant (contrary to her evidence that the last time she had contact with the appellant before 2012 was in 2000). He also relied upon the statement of account, which he said was sent to the complainant through her attorney-at-law "long" before he was charged, to show that he had satisfactorily accounted for all of the proceeds. According to the appellant, the statement of account showed that he had made significant expenditures relating to the probate and sale from his own funds (which were later recouped by him from the proceeds) and that he had not fraudulently converted any of the proceeds, much less the complainant's portion.

The appellant also stated that the Agreement made during the GLC hearing was a "without prejudice" document meant to settle the matter and not an admission of guilt by him. The appellant called two witnesses who both spoke in glowing terms about his good character.

The decision of the learned Judge of the Parish Court

[14] The learned Judge of the Parish Court rejected the appellant's position that the Agreement was a "without prejudice" document on the bases that this issue was not raised before the document was tendered as an exhibit, and there was no reference to that term in the body of the document.

[15] Having considered the evidence, relevant statutory provisions and authorities, the learned Judge of the Parish Court found that the appellant was accountable to all the beneficiaries named in the will, even if he had been instructed by the complainant's brother, who had retained him, not to pay out any of the proceeds to her. She also found that although the appellant had communicated with the complainant during the "probate process", he failed to respond to her enquiries about her portion of the proceeds and, when required by her to do so, failed to provide a satisfactory account. As a result, the learned Judge of the Parish Court concluded that the requirements of sections 64(2)(b) and (c) of the Act (set out at para. [24] below) had been met, and the prosecution had established a prima facie case of fraudulent conversion.

[16] It was also the learned Judge of the Parish Court's finding that no reasonable or plausible explanation had been given for the eight-year retention of the complainant's portion of the proceeds and why the complainant had not received any payment even after the appellant had agreed in 2014 to do so. Concerning the statement of account, she concluded that it did not provide any satisfactory explanation why the appellant had waited for over a year and a half (from November 2011 to July 2013 when the sum of $410,000.00 was sent to the complainant's attorney-at-law along with the statement of

account) to pay over to the complainant the portion of the proceeds that he would have had in hand since November 2011.

[17] Ultimately, the learned Judge of the Parish Court decided that in all the circumstances, taking into account the appellant's "egregious, unprofessional and questionable" conduct in the manner he handled the distribution of the proceeds; his failure to respond to the complainant's enquiries and provide a satisfactory account to her about the proceeds when he was required to do so; the inordinate delay in paying the outstanding portion of the proceeds to her and the absence of an explanation for the delay, the appellant was guilty of fraudulent conversion and she sentenced him as indicated at para. [1] above.

The appeal

[18] Being unhappy with his conviction and sentence, the appellant, on 6 April 2021, filed his notice and grounds of appeal. We then permitted him to file an amended notice and grounds of appeal on 20 October 2021. However, having scrutinised the record, it would appear that the appellant did not file the amended notice and grounds in the registry but instead included them in a bundle bearing the title "Index to Appellant's Submissions and Authorities". We will take this opportunity to remind counsel that simply including a document in a bundle and filing that bundle does not constitute proper filing of the document itself. In order for documents to be properly put before this court, they have to be filed individually, and then copies of the filed documents can be included in a bundle where appropriate.

[19] We have nevertheless considered the contents of the appellant's documents titled "amended notice and grounds of appeal" in this instance because the appellant was permitted to file the amended grounds. Therefore, grounds 8, 9 and 10 will be treated as three supplemental grounds of appeal that the court allowed the appellant to argue.

[20] The verbatim grounds, as contained in the purported amended notice and grounds of appeal (which are the same as the original notice and grounds, except for grounds 8, 9 and 10), are as follows:

> "1. The Learned Parish [Court] Judge erred when she held that the [appellant] was guilty of fraudulent conversion under **section 24(1) of the Larceny Act**.
>
> 2. The Learned Parish [Court] Judge erred when she held that the amount owing to the Complainant, was not a figure stated by the Complainant, who in fact gave, three different figures owing to her, and which is contrary to the Law.
>
> 3. The Learned Parish [Court] Judge erred at the end of the *'No Case Submissions'*, she upheld the submission of five counts on the Indictment and ruled 'case to answer' on the Court [sic] 2 of fraudulent conversion. That the Learned Parish [Court] Judge made comments on all five counts that she upheld, before dismissing them. That Count 1 on the Indictment "conspiracy to defraud" considerably overlaps with Court [sic] 2 and therefore caused the [appellant] to raised [sic] strong views of his acquittal.
>
> 4. That the numerous discrepancies of the Complainant, was [sic] so fundamental, that a simple explanation of age, is not sufficient to ground a conviction, which discrepancies, was [sic] admitted by the Prosecution.
>
> 5. The verdict is completely against the weight of the evidence.
>
> 6. This Appeal is against both conviction and sentence.
>
> 7. The Appellant crave [sic] leave of this Honourable Court, to file additional grounds, as soon as the Transcript or Notes of Evidence is available.
>
> **AMENDED GROUNDS**
>
> The Appellant will crave leave to argue the following Grounds:
>
> 8. **The Learned Trial Judge erred in seeking to divide the evidence and to make some of it believable.**

9. **The Absence of the Investigating Officer contributed to Injustice being meted out in the case[.]**

10. **The learned Trial Judge was in error in disbelieving that a document in evidence, which was not labelled without prejudice, could in fact be a 'without prejudice' document. And in fact if she had treated exhibit 2 differently, her verdict will [sic] certainly be different.**" (Bold and Italics as in the original)

The issues

[21] As mirrored in the grounds of appeal, the appellant's case on appeal has given rise to four broad issues. These are:

(1) Whether the learned Judge of the Parish Court erred in her treatment of the evidence (grounds 2, 4, 8 and 10).

(2) Whether the appellant's right to a fair trial was affected by the absence of oral evidence from the investigating officer (ground 9).

(3) Whether the learned Judge of the Parish Court adopted the correct approach in ruling on the submission of no case to answer (ground 3).

(4) Whether the learned Judge of the Parish Court erred when she convicted the appellant for fraudulent conversion because the verdict is completely against the weight of the evidence (grounds 1 and 5).

[22] Before considering the issues, since it will be imperative to consider the statutory and legal regimes, these will now be set out for ease of reference.

The statutory and legal regimes

[23] The offence of fraudulent conversion is created by section 24 of the Act. Section 24(1)(iii), under which the appellant was charged, states as follows:

"24.- (1) Every person who –

(i) …

(ii) …

(iii) (a) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or

(b) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof,

shall be guilty of a misdemeanour, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years."

[24] Morrison JA (as he then was) in **Craig Walters v R** [2011] JMCA Crim 21 referring to section 24(1)(iii)(a) of the Act observed at para. [12] of the judgment:

> "[12] The section involves two factual elements, the entrustment to the accused of the property of another for a certain purpose or purposes and the fraudulent conversion by him of that property to his own use or benefit or to the use or benefit of some other person. …"

[25] Similarly, section 24(1)(iii)(b) of the Act also involves two factual elements, the receipt of any property for or on account of another person by the accused and the fraudulent conversion by him of that property, any part of it or any proceeds from the property to his own use or benefit or to the use or benefit of another person.

[26] Section 64(2) of the Act is also relevant where a person is on trial for fraudulent conversion. It sets out the statutory evidential requirements in respect of an accused who is called upon to answer such a case:

> "[64] …

> (2) On the trial of any indictment for the fraudulent conversion of any property, or the proceeds thereof, it shall be *prima facie* evidence of such conversion if it is established by evidence that the person to whom the property was entrusted-
>
> (a) absconded without accounting; or
>
> (b) kept out of the way in order not to account; or
>
> (c) having been duly called upon to account failed to give any satisfactory account of such property or the proceeds thereof.

[27] This provision creates a rebuttable presumption that the accused has fraudulently converted property or the proceeds from property entrusted to him where there is direct or inferential evidence that he has absconded without accounting, deliberately kept out of the way in order not to account or failed to give a satisfactory account when called upon to do so. After considering all the evidence, it is for the tribunal of fact to determine if the requirements of this section have been satisfied or not.

[28] Finally, on this point, the requisite elements that the prosecution must prove to obtain (and sustain) a conviction for the offence of fraudulent conversion are now well settled. In the seminal case of **Regina v Marshall Nicholas Bryce** [1956] 40 Cr App R 62 ('**R v Bryce**'), Hallett J, at page 63 of the judgment, observed:

> "…Where the charge is one of fraudulent conversion, it is essential that three things should be proved to the satisfaction of the jury; first, that the money was entrusted to the accused person for a particular purpose; secondly, that he used it for some other purpose; and thirdly, that such misuse of the money was fraudulent and dishonest."

This principle has since been applied in several decisions of this court: **Sonia Jones v Regina** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 8/2001, judgment delivered 25 June 2001 at page 56; **Shadrach Momah v R**

[2013] JMCA Crim 52 at paras. [32] – [35]; and **Oswald James v R** [2014] JMCA Crim 26 at para. [52].

[29] Having outlined the relevant legal framework, each issue on the appeal will now be addressed.

Discussion and findings

Issue 1 - Whether the learned Judge of the Parish Court fell into error in her treatment of the evidence (grounds 2, 4, 8 and 10).

Submissions

[30] We wish to observe at the outset that several submissions made under ground two are best suited to the issues canvassed under grounds one and five. Therefore, those arguments will be addressed later in the judgment when considering issue four.

[31] Regarding the issue being discussed, counsel for the appellant, Mr Mikael Lorne, has submitted that the learned Judge of the Parish Court's treatment of the evidence was flawed in several areas.

[32] Firstly, counsel posited that the learned Judge of the Parish Court erred when she identified the amount owing to the complainant from the proceeds in circumstances where the complainant was unable to so state and gave inconsistent evidence about the precise sum due to her. Relying on the case of **R v Audrey Gayle** (1987) 24 JLR 501, it was further submitted that since the principles applicable to the offence of larceny are relevant to a charge of fraudulent conversion, "it was essential that the Crown establish with accuracy the starting balances which were entrusted to the Appellant" because "if there was no accurate evidence about the initial balance, then there could be no charge of larceny to which the accused ought to be called upon to answer".

[33] Secondly, it was argued that the learned Judge of the Parish Court did not adequately address the numerous inconsistencies in the complainant's evidence. It was further contended that the learned Judge of the Parish Court erred when she found that the age of the complainant and the number of times she had to travel to the island to give evidence in the matter provided sufficient clarification for those inconsistencies. **Negarth Williams v R** [2012] JMCA Crim 22 was the cited authority to support this argument.

[34] Counsel Mr Lorne also advanced that the learned Judge of the Parish Court "divided the evidence" in order "to make some of it believable". According to counsel, in assessing the complainant's evidence, she "picked out the plums and left the duffs". The main complaint was that the evidence of the complainant was discredited in cross-examination (particularly by documentary evidence), which led to the appellant's acquittal and discharge on five of the six counts in the indictment at the end of the prosecution's case. Yet, the same discredited evidence was used to convict the appellant for fraudulent conversion. It was contended that, as a result, there had been a miscarriage of justice. Reliance was placed on the case of **R v Neville Brown and Danny Boothe** (1981) 18 JLR 78 in support of this submission.

[35] Finally, without reference to any authority, Mr Lorne submitted that the learned Judge of the Parish Court erred when she found that the Agreement was not a "without prejudice" document simply because it was not marked as such. Counsel further contended that since she relied heavily on that document to convict the appellant, had she treated the Agreement as being "without prejudice", drafted after the GLC hearing to settle that matter between the appellant and the complainant, the verdict would have been different.

[36] Learned counsel for the Crown, Mrs Milwood-Moore, argued that ample evidence was available to enable the learned Judge of the Parish Court to ascertain the sum owed to the complainant and that her reliance on the Agreement to arrive at this determination cannot be faulted. It was further contended that, in any event, this

information was exclusively within the purview of the appellant as he was the only person who could speak to the final figure that represented the net proceeds of the sale and the sum that ought to have been available to the complainant from those proceeds. The case of **R v Audrey Gayle** was also distinguished.

[37] In response to the submission concerning how the learned Judge of the Parish Court treated the variances in the complainant's evidence, as well as the assertion that she had divided the evidence to make some of it believable, Crown Counsel contended that it was open to the arbiter of fact to accept a part of a witness' evidence and reject another part, and this was what the learned Judge of the Parish Court did when she assessed the complainant's evidence. It was further submitted that the learned Judge of the Parish Court had correctly engaged this exercise, leading to the appellant's acquittal at the no case submission stage on five of the six counts in the indictment. It was also posited that the learned Judge of the Parish Court properly took into account the agreed (and undisputed) documentary evidence in arriving at her verdict.

[38] Concluding her submissions on the issue raised in the grounds as identified, Crown Counsel submitted that the learned Judge of the Parish Court was correct in her finding that the Agreement was not a "without prejudice" document as this principle was inapplicable in the circumstances of this case. This was so, the argument continued, because the appellant would have been duty-bound to hand over the portion of the funds that the complainant would be entitled to as a beneficiary under her father's will. Crown Counsel further submitted that the term "without prejudice" has been traditionally used in commercial negotiations (which this matter was not) where the parties may or may not arrive at an agreement. The Agreement, it was posited, given the context in which it materialised, was not a contract but an undertaking given by the appellant in his capacity as an attorney-at-law, which he was obliged to honour in keeping with Canon vi(d) of the Legal Profession (Canons of Professional Ethics) Rules. It was also submitted that even if the Agreement "could be countenanced" as a

"without prejudice" document, any privilege was waived when the parties agreed to it being an exhibit at trial.

Analysis

(a) The evidence concerning the amount owed to the complainant

[39] We find that the appellant's reliance on the case of **R v Audrey Gayle** to support his submissions on this issue is misconceived. The headnote in that case recites:

> "The appellant was charged on an indictment containing a single count for larceny as a servant. The particulars were that between 1st February and 13th April 1983, the appellant, being employed in the public service, stole approximately $86,000.00, received by her, by virtue of her employment.
>
> The evidence given at the trial showed that the appellant took over her duties in 1979, and before February 1983, the last check made of the accounts was in 1968.
>
> **Held**: (i) it was essential that the Crown established with accuracy the starting balance which were (sic) entrusted to the appellant, as it is from the deficiency if established, that a prima facie case of stealing is to be inferred. If there was no accurate evidence about the initial balance, then there could be no charge of larceny to which the accused ought to be called upon to answer.
>
> (ii) The Resident Magistrate should have acceded to the submission of no case to answer as in the light of the evidence it is difficult to understand on what basis the accused was called upon to answer the charge in the indictment."

[40] It is crystalline from this synopsis that there are significant distinguishing features between the cases. For example, in **R v Audrey Gayle** the appellant was convicted for larceny based on a deficiency. Therefore, the prosecution had to prove the initial amount entrusted to her because an inference of stealing could only be drawn

if a deficiency was shown. The prosecution's failure to produce this evidence led to this court allowing the appeal. However, in the present case, it is undisputed that the evidence of the initial sum entrusted to the appellant ($6,000,000.00) and the amount that ought to have been available to the complainant from the proceeds (required to be proved in the light of the particulars of the offence) was elicited on the prosecution's case. In any event, there is no legal requirement for the prosecution to establish a "starting balance" to obtain a conviction for fraudulent conversion.

[41] The evidence before the learned Judge of the Parish Court on this point came from two sources, the statement of account and the Agreement. The appellant was the author of the former and the only signatory to the latter. These documents were admitted into evidence on the prosecution's case. It is evident in the statement of account that from the sale price of $6,000,000.00, expenditures/costs of $2,128,173.19 were deducted, leaving a balance of $3,871,826.81 representing the net proceeds. Therefore, in the light of the terms of the will and assuming that the complainant and her brother would equally share the expenditures/costs, they would each be entitled to receive 50% of the net proceeds, which would be approximately $1,935,913.40 plus any applicable interest if the circumstances so necessitated. In the Agreement, it was stated that the appellant "agree to pay [the complainant] the amount of Two Million Five Hundred Thousand Dollars ($2,500,000.00) being her portion of the [proceeds of sale of the property]".

[42] In determining the sum due to the complainant from the proceeds, the learned Judge of the Parish Court was not confined to making this finding based only on the complainant's evidence and was entitled to consider all the evidence presented by the prosecution, which she clearly did. We also agree with the Crown's position that, practically, this information could only come from the appellant since he was the person who could indicate the figure for the net proceeds, which he eventually disclosed to the complainant on 12 July 2013 (some 20 months after the sale was completed) in the statement of account. Without the appellant informing the complainant of this fact

early on, it would be impossible for her to state the amount she was entitled to with any degree of accuracy. Given how this aspect of the complainant's evidence unfolded during cross-examination, it is also worth mentioning that she was being questioned about the various figures she had claimed to be entitled to receive from the proceeds before the appellant provided the statement of account and executed the Agreement.

[43] Accordingly, having regard to the evidence that was before the learned Judge of the Parish Court, it was open to her to find as she did that the amount that was due to the complainant was $2,500,000.00. In our judgment, the more important question, which will be deliberated later in the judgment, is whether the portion of the complainant's proceeds (be it $2,500,000.00 or $1,935,913.40) was fraudulently converted by the appellant. We find, therefore, that there is no merit in ground 2.

(b) Inconsistencies in the complainant's evidence

[44] The appellant complains that there were numerous material inconsistencies in the complainant's evidence which were either not explained or not satisfactorily explained. As such, the evidence could not support a guilty verdict. The following inconsistencies were highlighted:

i) In her evidence, the complainant indicated that after 2000, she did not have any contact with the appellant until 2012, after she had reported him to the GLC (presumably after 8 October 2012). However, undisputed documentary evidence showed that she was in touch with him up to at least the year 2010.

ii) In examination in chief, the complainant denied signing the first instrument of transfer (in relation to the sale of the property). In cross-examination, she stated that the signature appeared to be hers (along with acknowledging that the notary public who had witnessed her signature on that document had also witnessed her signature on several other documents that were not in dispute), but she could not remember signing it.

iii) In her police statement, the complainant said she gave her attorney the sales agreement, but in cross-examination, she stated that it was her attorney who had the document and had shown it to her.

[45] The questions for our consideration under this ground are whether the inconsistencies that arose on the complainant's evidence were material and so explanations would be required for them; whether the complainant gave any reasons/explanations for those inconsistencies; and whether the learned Judge of the Parish Court adequately addressed those inconsistencies. We find the cases of **Jermaine Burke v R** [2022] JMCA Crim 21 and **Negarth Williams v R** to be instructive in determining these questions.

[46] In **Jermaine Burke v R**, Simmons JA cited several authorities from this court, including **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, **Morris Cargill v R** [2016] JMCA Crim 6 and **Vernaldo Graham v R** [2017] JMCA Crim 30, that provided guidance to judges on how to approach and analyse conflicts in the evidence of witnesses (see paras. [33] – [37] of that judgment). The principles discerned from the authorities on this issue are now well known, but it is perhaps helpful to recite those that are relevant to the appeal. These are:

(1) Deficiencies (including inconsistencies and discrepancies) in the Crown's case are to be adequately placed before the jury by the trial judge (per Brooks JA (as he then was) at para. [17] in **Negarth Williams** applying **Mills and Gomes v R** (1963) 6 WIR 418, **Ibrahim and another v The State** (1999) 58 WIR 258 and **Eiley and others v The Queen** [2009] UKPC 40).

(2) A trial judge is expected to give directions on discrepancies and conflicts which arise in the case being tried before him or her, but there is no requirement to identify all the disparities that have occurred during the

trial. However, the trial judge should mention the inconsistencies and discrepancies that "may be considered especially damaging to the prosecution's case" (**R v Fray Diedrick**, **Morris Cargill v R**).

(3) Unless any admitted or proved inconsistencies are immaterial, explanations should be provided for them before the evidence in court can be accepted and relied on concerning the particular point. However, it is not for the trial judge to explain. Explanations should come from the witness (or the evidence as a whole) (**R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987, **Vernaldo Graham v R**).

(4) Where the prosecution relies on the evidence of a sole witness whose credit-worthiness has been completely eroded because of admitted untruths, blatant and unexplained contradictions, as well as inconsistencies that render his or her evidence so manifestly unreliable that no reasonable tribunal could safely act on it, it is justifiable for the trial judge not to leave the case to the jury (**R v Curtis Irving** (1975) 13 JLR 139 which was cited with approval in **Negarth Williams** at para. [20]).

[47] It is beyond debate that these principles are applicable to a judge sitting without a jury, including judges of the Parish Courts (see, for example, **Oliver Johnson & Karl Roberts v R** [2019] JMCA Crim 20 at para. [26] and **Vastney Harvey v R** [2014] JMCA Crim 58 at para. [39]).

[48] Turning now to the approach taken by the learned Judge of the Parish Court in addressing the inconsistencies that arose on the complainant's evidence. At page 6 of her "verdict" dated 22 October 2020 ('findings of fact'), she observed:

> "I will agree with [the appellant's attorney at trial] in part, that [the complainant] when giving her viva voce [oral] evidence had great difficulty in remembering specifics and flustered very easily on the stand.
>
> Given her age and having to fly many times to Jamaica for this matter and specifically in September and then again in October 2019 each time for a few days - in the normal course of events that is understandable.
>
> However, I am aware that no matter what side of the age divide you fall into – your evidence must be weighed to the same standard and as always the crown [sic] has the burden to prove."

[49] This excerpt captures the only remarks made by the learned Judge of the Parish Court that refer (perhaps somewhat indirectly) to the deficiencies in the complainant's evidence. Admittedly, she did not identify the inconsistencies on the complainant's evidence, their materiality or lack thereof and how she resolved them. Also, while she was entitled to take into account the age and any other relevant factors that could affect the quality of the complainant's evidence, the learned Judge of the Parish Court failed to indicate whether the complainant had given any explanations for the differences in her evidence; whether the explanations were reasonable and acceptable; and if there were no explanations, the impact (if any) this would have had on the complainant's credibility.

[50] However, a perusal of the record illustrates that some inconsistencies were immaterial. Therefore, although no explanations were given for them, this would not have been fatal to the complainant's credibility. For the most part, those that were material were in respect of the other charges on the indictment (in particular, whether she had signed certain documents that pertained to the offences of forgery and uttering forged documents). We agree with Crown Counsel that in the light of the outcome of those charges (the acquittal of the appellant at the no case submission stage), it cannot be reasonably advanced that the learned Judge of the Parish Court did not consider the variances in the complainant's evidence and, by extension, their impact on her

credibility. As advanced by the Crown, it is also well settled that it is entirely a matter for the tribunal of fact to determine what evidence is acceptable or not.

[51] Nonetheless, we feel constrained to observe that because the complainant's credibility was a focal issue in the case, and it is germane to the charge of fraudulent conversion, whether or not the appellant kept out of the way in order not to account to the complainant for the proceeds entrusted to him (as the learned Judge of the Parish Court found), an inconsistency which could be considered material, concerns the period that the complainant was in touch with the appellant (see para. [44] above). This was critical, considering the complainant's evidence that the appellant first spoke to her about the proceeds after she made the complaint to the GLC (after 8 October 2012), and he told her that he would turn over her portion after receiving an outstanding amount from the purchaser, Mr Hamilton. However, in a letter the complainant wrote to the appellant on 9 December 2012 (exhibit 8), she stated that the appellant gave her this information in an email dated 8 August 2012 (two months before the complaint was made). Naturally, the documentary evidence (exhibit 8) contradicted the complainant's oral evidence about when the appellant first contacted her about her share of the proceeds and called into question her credibility on this point. The appellant's case was that these assertions by the complainant were not true because he had always been in touch with her.

[52] The learned Judge of the Parish Court did not identify or resolve these variances in the complainant's evidence. Given the appellant's submissions and discussion outlined above at paras. [45] – [47], the question logically arises whether this omission has occasioned a miscarriage of justice requiring the court's intervention. While we thought it was important for the learned Judge of the Parish Court to demonstrate that she appreciated the significance of identifying and resolving the inconsistencies in the complainant's evidence, as well as their impact on her credibility, especially those that were pertinent to an essential ingredient of the offence or the statutory legal

requirements, which she failed to do, we ultimately determined that no miscarriage of justice has resulted for the following reasons.

[53] The complainant, in 2019, testified about events that spanned the period 2000 to 2012, seven to 19 years after they had occurred. It cannot be disputed that this represented a significant lapse of time. Furthermore, during cross-examination, when questioned about some matters, including the period she was in contact with the appellant, the complainant indicated several times that she could not recall certain details due to the passage of time. This was an explanation from the complainant that, coupled with her age (as observed by the learned Judge of the Parish Court who had the advantage of seeing her in person), could, in our judgment, justifiably clarify the reason for most of the deficiencies in her evidence on this point. Additionally, the significant aspect of the complainant's testimony, which she consistently maintained, was that from the time the property was sold to after she had filed the complaint with the GLC, the appellant, although required by her to do so, neither satisfactorily accounted for her share of the proceeds nor handed over the "correct" amount she was entitled to receive.

[54] Having had the advantage of seeing and hearing the complainant, as well as assessing her demeanour, the learned Judge of the Parish Court, as she was entitled to do, accepted this evidence and noted it as being essential to her consideration of the issues before her. We find no reason for concluding that she was plainly wrong for so doing. Accordingly, there is no merit in grounds 4 and 8, and they fail.

(c) The purported 'without prejudice' document

[55] The appellant has challenged, as contrary to principle, the following pronouncements and findings of the learned Judge of the Parish Court found at pages 4, 6 and 7 of her findings of fact:

> "Counsel for the defence in his submissions and indeed [the appellant] in his statement from the dock argued that the

> agreement – which apologizes to [the complainant] for the inconvenience caused to her was a without prejudice document.
>
> That submission is dis-ingenuity at its highest and is palpably untrue.
>
> One does not make a without prejudice document which implies liability and not indicate same on the document or any accompanying document. Thereafter ask a court to infer same without more.
>
> …
>
> It was in submission [sic] that counsel then stated that [the Agreement] was a without prejudice document – the inference being [that] I cannot rely on it or that it was made without liability attributable to the maker.
>
> As I said before that submission is disingenuous and it was not raised when counsel agreed to the document being submitted and tendered.
>
> I will also say here again that [the appellant's] statement from the dock where he had said the document is without prejudice is untrue.
>
> I note carefully that said document has no indication in writing that it is a without prejudice document and no accompanying document with any such notation was submitted. …"

[56] The appellant's argument, put succinctly, is that the absence of an endorsement of the words 'without prejudice' on a document is not decisive of that issue. We agree.

[57] The 'without prejudice' rule governs the admissibility of evidence. In essence, based on public policy reasons, where parties to a dispute engage in negotiations to settle the dispute, the rule makes communication between them during those negotiations privileged and inadmissible in court proceedings unless the parties consent (see **Rush & Tompkins Ltd v Greater London Council and another** [1988] 3 All ER 737 (**Rush & Tompkins**), applied in **Leeroy Clarke, Caulton Gordon et al v Life of Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court

Criminal Appeal No 59/2008, judgment delivered 12 August 2008 ('**Leeroy Clarke v LOJ**') at paras. 8 – 11; **Winston Finzi and Anor v JMMB Merchant Bank Limited** [2016] JMCA Civ 34 at para. [25]). In short, 'without prejudice' documents are generally subject to privilege and are immune from disclosure and admission in evidence unless the privilege is waived.

[58] In **Leeroy Clarke v LOJ**, Morrison JA (as he then was), adopting the dicta of Lord Griffiths in **Rush & Tompkins**, opined at para. 8:

> "…While it is usual to head all negotiating correspondence 'without prejudice', the use or absence of the time honoured phrase is not decisive and 'if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible' (per Lord Griffiths at page 740)."

[59] Based upon the principles articulated in the authorities cited above, it is obvious that the appellant has made a valid complaint since the learned Judge of the Parish Court erred in her finding in this specific regard. However, the significance of the complaint is drastically diminished when viewed against the fact that, as the learned Judge of the Parish Court correctly observed, the point that the Agreement was subject to privilege was not taken before or when the document was tendered as an exhibit, and was raised for the first time by the appellant in his dock statement and at the close of evidence in submissions on his behalf. We also repeat for convenience that it was admitted into evidence by agreement of the parties.

[60] Given these rather curious circumstances, we find it unnecessary to determine whether the learned Judge of the Parish Court was correct in her conclusion that the Agreement was not a 'without prejudice' document. We will now explain our reason for reaching this conclusion.

[61] Assuming without deciding that the Agreement is a 'without prejudice' document, in the light of the parties' agreement to its admissibility, we concur with the

submissions made by the Crown that any privilege would have been waived. Therefore, the learned Judge of the Parish Court cannot be faulted for taking it into account in arriving at her verdict. However, in our view, the more critical issue is whether the Agreement, *ipso facto*, is conclusive evidence that the appellant fraudulently converted the complainant's portion of the proceeds (which will be addressed later in the judgment). So, while we acknowledge the error made by the learned Judge of the Parish Court under this ground, no substantial miscarriage of justice has resulted. Ground 10, therefore, also fails.

Issue 2 - Whether the appellant's right to a fair trial was affected by the absence of oral evidence from the investigating officer (ground 9).

Submissions

[62] It was submitted on behalf of the appellant that the verdict of the learned Judge of the Parish Court ought to be set aside on the basis that the absence of oral evidence from the investigating officer, Constable Shawna Walker-Thompson, at the trial compromised his right to a fair trial. This was because, as the submission continued, the appellant was disadvantaged due to not being able, through cross-examination, to establish the investigating officer's ineptitude concerning how she investigated the charges against him. The focus of this submission involved the investigating officer's failure to obtain the statement of account and the appellant's inability to explore with her specific aspects of the documentary evidence. The case of **Delano Sweeting, Conrad Campbell and Toni Sweeting v The Commissioner of Police** (unreported), Court of Appeal, Commonwealth of The Bahamas, MCCrApp Nos 17, 18 and 19/2017, judgment delivered 8 August 2017 ('**Delano Sweeting**') was cited as authority for this proposition.

[63] Crown Counsel pointed out that the investigating officer was not present at the trial and that the appellant agreed to the admission of her statement into evidence. Accordingly, it was argued that the appellant, rather than adopting the course he did,

ought to have raised the issue of prejudice or his inability to have a fair trial before the learned Judge of the Parish Court so that the matter could have been addressed (whether by an adjournment to facilitate the investigating officer's attendance or the ventilation of some other solution). It was further contended that, in any event, the absence of the investigating officer did not foil the appellant's ability to establish his defence fully.

Analysis

[64] We agree entirely with the Crown that the appellant was not placed at an unfair disadvantage in presenting his defence due to the absence of the investigating officer at trial and his inability to cross-examine her for the following reasons.

[65] Firstly, in our judgment, the appellant's reliance on **Delano Sweeting** to support his arguments under this ground is woefully unhelpful. In **Delano Sweeting**, the investigating officer gave oral evidence at the appellants' trial for several drug-related offences. He was to be recalled by the prosecution for "the purely technical purpose of exhibiting certain items". The items in question were put into evidence by another witness, with the result that the investigating officer was not recalled by the prosecution and, therefore, not cross-examined. The appellants were convicted at the conclusion of the trial without either the magistrate, prosecution or defence recollecting that the investigating officer had not been cross-examined. The appellants' convictions were quashed on appeal, and a retrial was ordered. This was on the basis that since the reason for the investigating officer not being cross-examined was not due to the defence not wishing to do so but because he was not recalled, there had been a breach of the appellants' constitutional right to examine in person or by their legal representative the witnesses called by the prosecution before the court as provided by Article 20(2)(e) of the Constitution of the Commonwealth of The Bahamas.

[66] In the present case, the contrast is stark. The investigating officer, Constable Walker-Thompson, did not give oral evidence at the trial. Instead, by agreement of the

parties, her statement was admitted into evidence as Exhibit 17 (page 1 of notes of evidence dated 22 June 2020). There is also nothing in the record to indicate that the appellant had requested that the investigating officer be present for cross-examination. Therefore, in our view, the appellant, having unequivocally adopted this course (bearing in mind that he is an attorney-at-law of some seniority and would have well appreciated the implication of doing so and was also represented by counsel who would have acted on his instructions), cannot now be seriously advocating that he was placed at an unfair disadvantage in presenting his defence because he was not able to cross-examine the investigating officer. We agree with the Crown that this issue ought properly to have been canvassed before the learned Judge of the Parish Court, who would have been in the best position to address it properly.

[67] Secondly, not only was Constable Walker-Thompson's evidence entirely formal (speaking to the report made by the complainant and the appellant's subsequent arrest and charge), but we have also considered the issues the appellant posited he wished to explore with the investigating officer in cross-examination. These were: (i) her ineptitude in not securing the statement of account (although the appellant has not stated how this would have aided his defence at trial), and (ii) the signature of the complainant and the date "Dec 22, 2014" inscribed at the foot of the Agreement (which to the naked and untrained eye seemed to have been written by the complainant on 22 December 2014, the day she made the report to the investigating officer and indisputably not on the same date, that is, 30 April 2014, when the Agreement was executed).

[68] However, while we acknowledge the submissions made by the appellant under this ground, it seems to us that they do not advance the appeal in any meaningful way. This is so as the appellant has not highlighted for our benefit how his inability to cross-examine the investigating officer, in and of itself, has rendered his trial unfair, especially when this argument is viewed in the context that he implicitly agreed that there was no need for him to do so. Also, as previously stated, nothing in the record indicates that he

wished for her to attend for cross-examination despite agreeing for her statement to be admitted into evidence. Accordingly, this ground is without merit, and it fails.

Issue 3 - Whether the learned Judge of the Parish Court adopted the correct approach in her ruling on the submission of no case to answer (ground 3).

Submissions

[69] The gist of the submissions, made on behalf of the appellant, was that the learned Judge of the Parish Court erred in law when she gave reasons for not calling upon the appellant to answer five of six counts in the indictment. Specifically, it was submitted that the offence of conspiracy to defraud "considerably overlaps" with the offence of fraudulent conversion. As a result, not only did the appellant expect that he would also have been acquitted of the latter charge, but the reasons given by the learned Judge of the Parish Court for not calling upon him to answer the conspiracy to defraud charge would have been equally applicable to the charge for fraudulent conversion. Therefore, it was improper and erroneous for her to have given reasons since the appellant was, in fact, called upon to answer the fraudulent conversion charge. In support of this submission, the case of **Oscar Serratos v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 26/2004, judgment delivered 28 July 2006, was cited.

[70] In response, it was submitted on behalf of the Crown that the offences of fraudulent conversion and conspiracy to defraud are distinct. Therefore, the appellant's position that he expected to be acquitted of the former offence was entirely unfathomable. It was further submitted that while the learned Judge of the Parish Court gave reasons for not calling upon the appellant to answer the charge of conspiracy to defraud, she did not state why she had found that the appellant had a case to answer for fraudulent conversion. As a result, **Oscar Serratos v R**, on which the appellant relied, was distinguishable.

Analysis

[71] We agree with counsel for the Crown that this ground must fail for two reasons. Firstly, fraudulent conversion and conspiracy to defraud are discrete offences, with each offence having its own specific ingredients that the prosecution is required to prove. Therefore, the appellant's expectation of being acquitted for fraudulent conversion at the no case submission stage simply because he was not called upon to answer the charge of conspiracy to defraud is best described as fanciful.

[72] To secure and sustain a conviction for conspiracy to defraud, the prosecution must prove "the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means". In doing so, "the prosecution must prove not only an agreement between the alleged conspirators to carry out an unlawful purpose, as signified by words or other means of communication between them, but also an intention in the mind of any alleged conspirator to carry out the unlawful purpose" (per Panton P in **Conrad Walters v R** [2013] JMCA Crim 18 at para. [18]). In cases of this kind, the unlawful purpose would be to defraud the complainant of his or her property and/or money.

[73] As stated in count one of the indictment preferred against the appellant, the unlawful act would be that the appellant had conspired with person or persons unknown to defraud the complainant of her due portion of money from the proceeds of the sale of the property. These are entirely different elements from those of fraudulent conversion, as clearly illustrated by the discussion at paras. [23] – [28] above and the particulars of that offence set out above at para. [2]. In our view, the appellant's argument on this point is flawed.

[74] Secondly, we reject the appellant's submissions (which were somewhat obfuscated and oblique but nonetheless required our attention) that any comments made by the learned Judge of the Parish Court to provide an explanation for not calling upon the appellant to answer the charge of conspiracy to defraud could reasonably be

construed as being applicable to the charge of fraudulent conversion; and that in determining that the appellant had a case to answer for the offence of fraudulent conversion, her ruling breached the principle enunciated in **Oscar Serratos v R**.

[75] In **Oscar Serratos v R,** it was held that there had been a miscarriage of justice because the learned Resident Magistrate (as judges of the Parish Courts were then designated) in her ruling on the submission of no case to answer made findings of fact (that an essential ingredient of the offence of possession of cocaine had been proved) without first hearing the appellant's defence. Citing with approval the cases of **Regina v Eric Mesquita** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 64/1978, judgment delivered 9 November 1979 and **R v Falconer-Atlee** (1974) 58 Cr App R 348, Panton JA (as he then was) at para. 12 of **Oscar Serratos v R** remarked:

> "…It is perhaps appropriate to remind judges that in ruling on a no case submission, there should be no comment on the evidence or on the credibility of witnesses. …"

[76] What then was the approach of the learned Judge of the Parish Court at the end of the no case submission? After referring to Lord Parker's **Practice Note** [1962] 1 WLR 227, **R v Galbraith** [1981] 2 All ER 1060 and **Taibo (Ellis) v R** (1996) 48 WIR 74 as the proper authorities to guide her determination at this stage, she made the following pronouncements (at page 3 "RULING SNCTA" on 29 July 2020) concerning the conspiracy to defraud and fraudulent conversion charges, which we accept as representing the accurate record of what transpired at this stage of the trial, and although somewhat lengthy are worth setting out in full, bearing in mind the appellant's assertions on this point:

> "**Conspiracy is**, at common law, an agreement between two or more persons to commit an unlawful act or to accomplish a lawful end by unlawful means. The prosecution must prove not only an agreement between the alleged conspirators to carry out an unlawful purpose, as signified by words or other means of communication between them, but

> also an intention in the mind of any alleged conspirator to carry out the unlawful purpose. Conspiracy is perhaps the most amorphous area in criminal law. (Conrad Walters v R)
>
> Generally, there is no particular form that the agreement must take to constitute conspiracy. Conspiracy is still largely inferred from circumstantial evidence. The individual conspirators need not even know of the existence or the identity of all the other conspirators. Two persons may be found to have conspired with each other simply by making separate agreements with a third party. Conspiracy is chameleon-like in composition and it takes special colouration from the many independent offences on which it may be overlaid. It is a mental crime which deals with proving an intent and a meeting of the minds. In trying to lay the foundation for conspiracy – one would need to see – and the list is not exhaustive – letters, emails, social media presence, clandestine meetings, money changing hands in a way not conducive to the job you are mandated to perform – something!
>
> No prima facie case has been made out on this charge[.]
>
> Fraudulent conversion is contrary to section 24(1)(iii)(a) of the Larceny Act. [`](iii) (a) being entrusted either solely or jointly with any other person with any property in order that he may retain safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof; or (b) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years.'
>
> The accused has a case to answer in relation to this charge[.]" (Emphasis as in the original)

[77] Unlike in **Oscar Serratos v R**, it is pellucid that the learned Judge of the Parish Court neither commented on the evidence nor the credibility of the complainant and the other witnesses. We agree with the Crown that it was also not reflected in her ruling that the learned Judge of the Parish Court gave an explanation for her decision to call

upon the appellant to answer the charge of fraudulent conversion. Instead, she merely recited the law relevant to each charge and thereafter succinctly ruled, as required, whether the appellant had a case to answer or not. Therefore, the criticisms levelled against her on this issue are unmeritorious.

Issue 4 - Whether the learned Judge of the Parish Court erred when she convicted the appellant for fraudulent conversion because the verdict is completely against the weight of the evidence (grounds 1 and 5).

Submissions

[78] Mr Lorne, for the appellant, forcefully submitted that the learned Judge of the Parish Court was in error when she convicted the appellant because her verdict was based on the false premise that the failure of the appellant to honour the terms of the Agreement without providing an explanation either to the complainant or the court, and the payment of the sum stated in the Agreement being made after the trial had commenced, meant that the proceeds from the sale had been fraudulently converted. It was also submitted that the learned Judge of the Parish Court's reliance on the Agreement to convict the appellant was misplaced because that document was a proposal and not an agreement between the parties, and neither was it an admission of guilt.

[79] Counsel for the appellant contended that on the totality of the evidence, the prosecution failed to establish that the appellant dishonestly and fraudulently misused any portion of the proceeds that belonged to the complainant. It was further argued that this was an essential element of the offence of fraudulent conversion, which, if not proved, would render the conviction unsustainable. Mr Lorne developed this submission in the following manner. The entrustment of the sale to the appellant was made by the complainant's brother, who was an executor of his father's estate. The appellant, being an attorney-at-law and a "creature of instructions", complied with his client's instructions by handing over all the (net) proceeds to him. When the appellant did so,

his role in the matter ended. As executor, it was then the duty of the complainant's brother to distribute the proceeds to the complainant (she being a beneficiary). Therefore, the appellant acted in full compliance with "the purpose of which the sale was entrusted to him by virtue of his instructions". Counsel further submitted that the appellant also provided a statement of account to the complainant (through her attorney-at-law), which detailed all the relevant expenditures, as well as costs in respect of the probate and the sale, before he was charged with the offences. As a result, a *prima facie* case of fraudulent conversion, as provided by section 64(2) of the Act, was not made out on the evidence. Accordingly, he contended that the verdict is completely against the weight of the evidence. The cases of **R v Craig Walters** [2011] JMCA Crim 21, **R v Jean McLean** (1967) 10 JLR 273 and **R v Bryce** were relied on in support of these submissions.

[80] Mrs Milwood-Moore, on behalf of the Crown, submitted that it was open to the learned Judge of the Parish Court to accept the oral and documentary evidence on the prosecution's case to convict the appellant. There was ample evidence, it was further submitted, from which she could find, that the appellant failed to provide a satisfactory account of the proceeds when he was required to do so by the complainant. In addition, in accordance with section 64(2) of the Act, the evidence of the appellant's intentional delay in paying the complainant her portion of the proceeds and his failure to account for that delay supported the conclusion that he had fraudulently converted those proceeds. Therefore, the learned Judge of the Parish Court's findings were based on the evidence led by the prosecution, and the verdict was not entirely against the weight of the evidence as argued by the appellant. Reliance was also placed on **R v Bryce** and **R v Joseph Lao** (1973) 12 JLR 1238 to support these submissions.

Analysis

[81] We regard the issues raised under these two grounds as the critical questions to be resolved on the appeal.

[82] The appellant has argued that the learned Judge of the Parish Court's findings of fact are against the weight of the evidence, providing the gateway for the court to overturn his conviction. However, it is acknowledged and well settled that this court is fettered when called upon to set aside a conviction based upon findings of fact made by trial judges (including judges of the Parish Courts). The very helpful exposition of Brooks JA (as he then was) in **Everett Rodney v R** [2013] JMCA Crim 1 (applied recently in **Seymour Cole v R** [2022] JMCA Crim 35 at para. [24]) makes this abundantly clear:

> "[21] Where findings of fact are made by the tribunal entrusted with that duty, this court is reluctant to disturb such findings, as long as there is credible evidence to support such a finding. This approach was enunciated by Smith JA in **Royes v Campbell and Another** No SCCA 133/2002 (delivered 3 November 2005). His Lordship said at page 18 of his judgment:
>
> > 'It is now an established principle that in cases in which the Court is asked to reverse a judge's findings of fact, which depend upon his view of the credibility of the witnesses, the Court will only do so if satisfied that the judge was 'plainly wrong'.'
>
> Smith JA relied on **Watt v Thomas** [1947] AC 484 in support of that statement of the law. That principle would also apply to [judges of the Parish Courts] who make findings of fact.
>
> [22] This court has also found that an appellant, seeking to overturn a conviction based on findings of fact, must 'show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable' (see **Joseph Lao v R** (1973) 12 JLR 1238). This principle also applies to a [judge of the Parish Court's] findings of fact."

[83] It is now necessary for us to examine the findings of fact made by the learned Judge of the Parish Court against the background of the evidence and the applicable law to determine whether the appellant's position on this issue has any merit.

[84] We commence by referring to the case that was advanced by the prosecution at trial, as stated in the indictment and summarised in the particulars of the offence, that the appellant had fraudulently converted "to his use and benefit or to the use and benefit of some other person or persons" all of the complainant's portion of the proceeds that had been entrusted to him.

[85] We reiterate that the appellant's conviction can only be sustained if the evidence led by the prosecution (and which was accepted by the learned Judge of the Parish Court) established, beyond a reasonable doubt, all three elements of the offence of fraudulent conversion. In the context of the facts of this case, these are:

(1) That the proceeds of sale were entrusted to the appellant for a particular purpose;

(2) That the appellant used the proceeds for some other purpose, that is, the prosecution must prove that the proceeds were converted for a purpose other than what was intended; and

(3) That the misuse of the proceeds was fraudulent and dishonest, in other words, proof of the appellant's fraudulent and dishonest intent is required.

[86] Additionally, we emphasise that while section 64(2) of the Act is relevant at the trial of a person for fraudulent conversion, the presumption created by that section can be rebutted by the alleged offender providing a satisfactory account for the property or proceeds entrusted to him. Therefore, in the instant case, the learned Judge of the Parish Court, in her analysis of the evidence, was obligated to demonstrate whether or not the appellant had done so.

[87] In her findings of fact, the learned Judge of the Parish Court amply demonstrated that she was cognizant of the relevant statutory provisions (sections 24(1)(iii) and 64(2) of the Act) and case law that were relevant to her determination of the issues being considered by her (see pages 5 and 6 of the findings of fact). Although

the learned Judge of the Parish Court made multifarious findings of fact, most of which have been summarised at paras. [14] - [17] above, her critical findings in relation to the appellant's conviction for fraudulent conversion (at pages 8 - 10 of the findings of fact) were:

> (1) The proceeds were converted because it was not in dispute that the appellant "paid out to one beneficiary and having failed with proper accounting to pay what was due and owing to the complainant. Thereafter having admitted to owing the complainant and promising to pay same in writing, had the funds again in his possession and failed to pay same up to the start of trial".
>
> (2) The proceeds were fraudulently converted because the appellant, "having been duly called upon to account by the complainant [failed] to give any satisfactory account of the proceeds from the sale [also worded elsewhere in the findings of fact as "did not give a satisfactory account for the funds in his possession"] and "no reasonable or plausible explanation was given to the complainant or the court by the appellant for the eight-year delay in paying the outstanding sum to the complainant. Therefore, the intentional delay in paying the outstanding sums to the complainant and the appellant's failure to account for the delay were fraudulent".

[88] In arriving at her findings above, the learned Judge of the Parish Court opined that the appellant had provided a statement of account in July 2013 to the complainant setting out expenditures and costs that could have been reasonably incurred in probating the will and selling the property. However, she found the statement of account to be "wanting" because, firstly, "good practice dictates that both beneficiaries (the complainant and her brother) should have received pay-out at the same time or the funds should be paid over in full to the executors for disbursements to the beneficiaries" and secondly, it "went against the tenets of good practice" as the appellant ought to have paid out the portion of the proceeds due to the complainant in

keeping with the law of probate. The learned Judge of the Parish Court also found that as a senior attorney-at-law, the appellant would have been well aware of how he should have handled the proceeds and had breached his fiduciary duty to the complainant as a beneficiary.

[89] Applying the relevant law to the findings of the learned Judge of the Parish Court, we have distilled her conclusions to be: (a) the appellant was entrusted with the proceeds of sale for the purpose of contemporaneously paying over to the complainant and her brother (as beneficiaries and/or executors) equal shares of the net proceeds in keeping with the terms of the will and the law of probate; (b) the appellant used the proceeds for some other purpose when he paid the complainant's brother $3,500,000.00 (almost all of the net proceeds) and $410,000.00 to the complainant (after the deduction of all expenditures and costs from the complainant's portion) and (c) this was a dishonest and fraudulent misuse of the proceeds because the appellant had inordinately delayed in paying over the correct portion of the proceeds that the complainant was entitled to (even after agreeing to do so in 2014) and had failed to provide a satisfactory explanation for the delay.

[90] It is understood that the learned Judge of the Parish Court was trying a case with some unusual or nuanced features, which we will now highlight. Before the commencement of disciplinary proceedings against the appellant, the complainant had called upon him to account for the proceeds. The learned Judge of the Parish Court accepted the complainant's evidence that the appellant initially failed to respond to her enquiries and found that the appellant was keeping out of the complainant's way in order not to account, invoking section 64(2)(b) of the Act. The complainant then initiated disciplinary rather than criminal proceedings against him on 8 October 2012. She deposed that the appellant contacted her after she had made the complaint to the GLC and told her that he had sent her brother's portion of the proceeds to him and there was an outstanding balance on the sale that would be turned over to her when he received it. We pause here to observe that the learned Judge of the Parish Court's

failure to address this area of the evidence raises unanswered questions. These questions include, specifically, whether she accepted this aspect of the complainant's evidence and its relevance to the issues she was considering. This is especially so in the light of Mr Hamilton's evidence that he had paid over to his attorney-at-law two cheques made payable to the appellant for the balance of the purchase price on 24 November 2011 (that is, whether or not after considering all the evidence, this was evidentiary material of dishonest conduct on the appellant's part that was capable in law of proving his fraudulent intent).

[91] That being said, the undisputed evidence was that on 16 April 2013, ahead of the hearing of the complaint by the GLC's disciplinary committee and before criminal charges were brought against the appellant, the complainant once more called upon the appellant (through her attorney-at-law) to provide an account of the proceeds. On 12 July 2013, the appellant responded to that request by forwarding the statement of account, along with a cheque for $410,000.00 (net balance of proceeds of $371,826.81 plus 10% interest of $37,182.68, totalling $409,009.49, which was rounded up to $410,000.00) being the amount that was "available" for the complainant. The statement of account revealed in detail the costs and expenditures concerning the probate and sale as $2,128,173.19 (not disputed by the complainant or found to be unreasonable and/or fraudulent by the learned Judge of the Parish Court), leaving a net balance of $3,871,826.81, of which $3,500,000.00 was paid over to the complainant's brother and the balance with interest of $410,000.00 was sent to the complainant (which was duly rejected and returned to the appellant).

[92] On 30 April 2014, while his disciplinary proceedings were pending, the appellant signed the Agreement to pay the complainant $2,500,000.00 plus expenses and costs, which he said was meant to settle the matter and not an admission by him that he had fraudulently converted the complainant's portion of the proceeds. However, when he failed to fulfil the terms of the Agreement, the complainant made a report to the Fraud Squad on 22 December 2022, and thereafter criminal proceedings commenced.

[93] The learned Judge of the Parish Court not only relied heavily on the Agreement in arriving at her verdict, but her approach, it seems, was to conflate the sum the appellant agreed to pay the complainant under the terms of the Agreement ($2,500,000.00) with the net proceeds ($410,000.00) that the complainant returned to the appellant. She then, it appears, incorrectly elevated the Agreement to the status of providing proof of the appellant's fraudulent intent to convert the proceeds to his own use and benefit or to the use and benefit of another. We say so because of her finding (which was puzzling) that the appellant, "having admitted to owing the complainant and promising to pay in writing **had the funds again in his possession** and failed to pay same up to the start of trial" (emphasis supplied), and there was an unexplained "eight-year" delay in paying this sum.

[94] On a perusal of the evidence, given the learned Judge of the Parish Court's somewhat vague reference, it was difficult for us to decipher what funds she was alluding to that the appellant would have had "again in his possession", which he failed to pay to the complainant until after eight years had passed. Firstly, we took the view that she could not have been referring to the net proceeds of $410,000.00, although we acknowledge that these were the only "funds" that came close to the description of being "again" in his possession. However, by her refusal, the complainant had made it clear that she had no intention of accepting that sum as the "correct" portion of the proceeds due to her. Therefore, it was pointless for the appellant to have returned it to her. Secondly, there was absolutely no evidence (direct or inferential) that the appellant had somehow regained possession of any part of the proceeds for $2,500,000.00 and had it in hand for eight years before paying same to the complainant. Even so, if the term "funds" referred to the $2,500,000.00 the appellant had committed to pay under the terms of the Agreement, the decision to do so was put in writing on 30 April 2014. Therefore, the delay in paying this amount to the complainant would also be considerably less than eight years, it would be about five and a half years.

[95] In the end, we find favour with the appellant's position that in the light of the circumstances giving rise to the Agreement, it was not symbolic of an admission of guilt by him. Contrary to the findings of the learned Judge of the Parish Court, it is our view that the evidence tends to show that the Agreement was an arrangement by the appellant to compensate the complainant for his professional gaffe in handling the disbursements of the proceeds and certainly not incontrovertible evidence of his fraudulent intent to convert them. Therefore, there was no evidential support for her conclusions on this subject, with the result that the learned Parish Court Judge was plainly wrong for so finding.

[96] It is convenient to consider next the learned Judge of the Parish Court's finding that the proceeds were converted because the appellant paid out the proceeds to one "beneficiary" and "failed with proper accounting to pay what was due and owing to the complainant". In arriving at this conclusion, she also emphasised the appellant's treatment of the complainant and how he disbursed the proceeds as being "unprofessional, questionable and egregious".

[97] We share the view of the learned Judge of the Parish Court that the professional and prudent approach, given the appellant's seniority and experience as an attorney-at-law, as well as the prevailing circumstances, was to have contemporaneously paid the complainant and her brother equal shares of the net proceeds. The appellant would have been aware that, ironically, the complainant had indicated that she was to receive $4,000,000.00 of the net proceeds while he was to remit $500,000.00 to her brother (see exhibit 8). The positions the complainant and her brother took about the disbursement of the proceeds (both contrary to the terms of the will) gave added force to the shared observation that the appellant ought to have exercised better professional judgment in disbursing the proceeds.

[98] However, whereas it may well be that, contextually, the appellant's approach to the allocation of the proceeds was "unprofessional, questionable and egregious", respectfully, without more, those are matters that fall within the province of the

disciplinary committee of the GLC and not the criminal courts. The mandate of the learned Judge of the Parish Court was to determine, having considered the evidence in the round, whether the prosecution had proved to the requisite standard the three essential elements of the offence of fraudulent conversion, particularly the fraudulent and dishonest intent of the appellant (as stated at para. [85] above).

[99] The evidence shows that the complainant's brother (who was appointed an executor in his father's estate along with her) retained the appellant to probate the will and sell the only asset in the estate, which was done. On written instructions from that executor, the appellant turned over most of the net proceeds ($3,500,000.00 of $3,871,826.81) to him. While we recognise that the appellant's decision to do so may have been misguided or, worse, professionally negligent, it was difficult for us to reconcile, based on the totality of the evidence and the law of probate (which was referred to in passing by the learned Judge of the Parish Court), how the payment of the proceeds to one of two executors of an estate (even though equal beneficiaries), without more, could be construed as a conversion, much less a fraudulent one.

[100] It is trite law that it is the duty of an executor "to bury the deceased, make an inventory of assets, pay the duties, just debts and testamentary expenses of the deceased, pay legacies, distribute the residue of the estate to persons who are entitled and keep accounts" (see **Re Stewart, Smith and another v Price and others** 5 ITELR 622 at page 630). As the learned Judge of the Parish Court acknowledged (at page 7 of the findings of fact), the appellant's duty was to pay over the net proceeds to the beneficiaries "**or pay to the executors under the Will for disbursements to the beneficiaries**" (emphasis supplied). Whereas it would have been the professional and wise approach for the appellant to have shared the net proceeds equally between the complainant and her brother, the fact that he remitted most of those proceeds to the complainant's brother (who also occupied the dual position of executor and beneficiary, and was the primary person instructing him), is not conclusive of fraudulent and dishonest misuse of the proceeds without supporting evidence.

[101] It is worth mentioning that on the prosecution's case, the evidence revealed that in their application to the Supreme Court for appointment as executors of their father's estate, the complainant and her brother each took an oath to "faithfully collect, get in and administer according to law, the real and personal estate of [their father]" and "to render a just and true account of [their] Executorship whenever required by law to do so" (see paras. 8 and 9 of the Supplemental Oath of Executors admitted into evidence as exhibit 13, by agreement of the parties). Therefore, as an executor and trustee of the assets of their father's estate, the complainant's brother, similarly, had a duty to account to her as a co-equal executor and beneficiary. He was also required to faithfully administer the assets of the estate in accordance with the law. The converse is also true.

[102] Consequently, regardless of any duty (professional, fiduciary or otherwise) that the appellant had, this would not have extinguished the obligations of the complainant's brother, on receipt of the proceeds from the appellant, to account to the complainant for them and to distribute those proceeds in accordance with the terms of the will. So, given the circumstances, while the appellant's conduct in the manner he ultimately settled the proceeds may have fallen below the standard required of an attorney-at-law, there is a dearth of evidence that he had fraudulently and dishonestly misused the complainant's portion of the proceeds of sale. Consequently, the learned Judge of the Parish Court was plainly wrong when she so found.

[103] Although our decision that the prosecution's evidence failed to prove a crucial component of the offence (that is, the appellant's fraudulent and dishonest misuse of the proceeds) effectively disposes of the appeal, we have nonetheless considered the findings of the learned Judge of the Parish Court that the appellant "failed to give any satisfactory account of the proceeds from the sale of the property" and that "the intentional delay in paying the outstanding sums to the complainant and the appellant's failure to account for the delay were fraudulent".

[104] We affirm, in principle, that it was entirely a matter for the learned Judge of the Parish Court to decide, after considering all the evidence, whether the appellant had provided a satisfactory account of the proceeds to aid her determination of whether he was guilty of fraudulent conversion. However, on a review of the evidence and applicable law, we are compelled to the view that her conclusion on this issue was likewise erroneous. We set out our reasons for saying so below.

[105] The complainant's evidence, which was accepted by the learned Judge of the Parish Court, was that despite making enquires of the appellant by several means about the sale of the property and her portion of the proceeds, he did not respond until after she had commenced disciplinary proceedings (which was contradicted by documentary evidence (exhibit 8)). As a result, she found that the appellant was keeping out of the complainant's way in order not to account. There was also the complainant's evidence that the appellant had informed her that he was waiting for the purchaser to pay him an outstanding balance before remitting her share of the proceeds (the learned Judge of the Parish Court made no findings about this evidence as discussed at para. [90] above).

[106] We accept that the composite effect of the appellant's initial reluctance and failure to account to the complainant when requested to do so, as well as the complainant's evidence that the appellant had informed her that he was awaiting the payment of an outstanding balance from the purchaser of the property, would have been sufficient to raise a presumption that he had fraudulently converted the complainant's portion of the proceeds. However, that presumption can be rebutted if it is determined on an assessment of the evidence that the appellant has satisfactorily accounted for the proceeds of sale entrusted to him (see **Regina v Sonia Jones** and **R v Lloyd Gibson** 1983 23 JLR 499 at 509).

[107] Therefore, in our view, it was important for the learned Judge of the Parish Court to show that she understood the significance of (a) the appellant providing a statement of account to the complainant's attorney in July 2013 addressing the entire proceeds of

sale before he was charged; (b) the account given to the court by the appellant in his dock statement; (c) specifying whether or not the statement of account and the account given by the appellant in his dock statement provided a satisfactory account about the proceeds and the reason for her conclusion; and (d) the payment of the balance of the net proceeds before criminal proceedings commenced. Regrettably, for the reasons set out below, we have found that she did not give sufficient thought to these factors, resulting in findings of fact that are palpably wrong.

[108] Following the learned Judge of the Parish Court's ruling that the prosecution had made out a *prima facie* case of fraudulent conversion, the appellant provided an account of the proceeds to the court in his dock statement. He asserted:

> "In this matter before the court right throughout and from the very beginning I have acted with complete honesty and at no times [sic] have I converted any funds at all entrusted to me for my own use and benefit nor for the use and benefit of any other person. In fact, so committed I was in this matter that there were tremendous expenditures that came out of my own pocket such as the valuation report, payment of property taxes and quite a number of the bills like water [sic] electricity and so on that were outstanding.
>
> I also paid a contractor to look into the possibility of repairing the premises rather than have it sold.
>
> A lot of this is outlined on EXB 6 in my statement of account which I had sent to the complainant's lawyer way back in the year 2013. The statement of account shows all the monies that came into hand and how it was spent, and outlined the amount and nature of the work done. … In other words, that statement of account was sent to [the complainant's] lawyer along [with a] cheque for the amount indicated thereon. And this predates even before I was charged. ...
>
> In all the circumstances right throughout from beginning to end honestly all monies collected was [sic] lodged to my client's account to be distributed thereafter and at no time I converted anything to my own use or for the use of anyone else."

[109] It was necessary for the learned Judge of the Parish Court to properly assess this facet of the appellant's dock statement, in conjunction with the statement of account, to determine whether he had given a satisfactory account of the proceeds entrusted to him (see **R v Lloyd Gibson** at page 509). Concerning the same, the learned Judge of the Parish Court made several findings (at pages 7, 8 and 9 of the findings of fact) that are set out below for convenience and ease of reference:

> "I am not here to decide whether the prices for the activities associated with the probate and the sale of the property were reasonable or not – that is not an issue for me. I will also state here that most of the activities listed in that statement of account could have properly occurred in the actions to probate a Will and Sell a property.
>
> …
>
> I will say here that the 2013 statement of account did not explain why he waited for over a year and a half to pay [the complainant] that portion of the proceeds which he would have had in his possession since on or about November 2011.
>
> [The appellant] said in his statement from the dock that he accounted for same before the criminal trial – this is true – he gave an account in July 2013 and the criminal trial started by way of taking evidence in September 2019 – the criminal matter in this court [sic] since 2015. He also told this court that inter alia after accounting he paid her portion to her lawyer - $410,000.00 – also true – that a payment was made in that amount.
>
> …
>
> [The appellant's] statement of account was in July 2013 – the charges for which he came before this court were not proffered until 2015. …
>
> To be fair and to be clear in his accounting of the money in 2013, I will say again most of the items listed are items which could have occurred while probating a Will and selling a property. However good practice dictates that both beneficiaries should have received their pay-out at about the

> same time or – the funds should be paid over in full to the executors. No other option, without good cause, is acceptable.
>
> …
>
> I find that the accounting in 2013 was wanting, it went against the tenets of good practice and ultimately could not have been an acceptable pay out to [the complainant] in line with all [the] provisions under the law of probate. …"

[110] From these findings (some of which we find incongruous), we have extracted that the learned Judge of the Parish Court found that the appellant had accounted to the complainant by way of the statement of account, albeit not when he was initially requested to do so, but before he was charged; the expenditures and costs could have occurred during the probate of the estate and sale of the property (although remarkably stating that she was not required to determine their reasonableness since, in the circumstances, this would have been one of the determinants of a satisfactory account); the appellant had paid over $410,000.00 to the complainant in July 2013, but the statement of account failed to provide a reason for the delay in making that payment and; the statement of account was "wanting" because it went against the tenets of good practice as the appellant ought to have divided the net proceeds equally between the complainant and her brother.

[111] In view of our discussion regarding the failure of the prosecution to establish the appellant's fraudulent and dishonest misuse of the proceeds and the findings made by the learned Judge of the Parish Court about the appellant's unprofessional conduct (paras. [97] – [102] above), we find the reasons given by her in support of her finding that the appellant had failed to give any satisfactory account of the proceeds were, respectfully, flawed. Having found that the appellant provided an account of the proceeds, the learned Judge of the Parish Court was required to focus her analysis on the qualitative effect of the contents of the statement of account and the appellant's dock statement rather than on his professional shortcomings. Therefore, her failure to do so calls into question her findings of fact on this issue.

[112] The account given by the appellant in his dock statement was supported and amplified by the statement of account, which formed part of the prosecution's case. From our standpoint, the statement of account sets out, in great detail, precisely how the entire proceeds were allocated. There was no evidence that the complainant disputed the expenditures and costs, and the learned Judge of the Parish Court made no unfavourable findings about them. The complainant's disgruntlement was primarily with the appellant's disbursements of the net proceeds because they were not in conformity with the provisions of the will. Along with the statement of account, the appellant also sent a cheque for the balance of the net proceeds plus accrued interest. The appellant submitted the statement of account and cheque to the complainant almost two and a half years before his prosecution for the offence. On these bases, we believe that the appellant provided a satisfactory account of the proceeds entrusted to him.

[113] We agree with the learned Judge of the Parish Court that the appellant was dilatory in accounting to the complainant, as well as paying over the balance of the net proceeds as per the statement of account and the amount stated in the Agreement. We also agree that the statement of account (and indeed the appellant in his dock statement) did not explain the delay. However, "tardiness *per se* is not proof of fraudulent intent" on the appellant's part to convert the proceeds to the use and benefit of himself or another person (per Campbell JA in **R v Adrian Freddie Brown** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 2/1987, judgment delivered 11 July 1988 at page 5).

[114] While dilatoriness and a lack of explanation for delay may raise a presumption of fraudulent conversion, as the authorities confirm, that presumption is susceptible to rebuttal by the provision of a satisfactory account from the accused, which we have found, was done in the instant case. As a result, the *prima facie* evidence of fraudulent conversion was refuted by the satisfactory account the appellant gave about the

proceeds entrusted to him, and any spectre of a fraudulent conversion of those proceeds had long vanished by the conclusion of the trial.

[115] Therefore, there is merit in these grounds, and they succeed.

[116] Before concluding, we observe that it seems the complainant, being extremely dissatisfied (and understandably so) with the appellant's intractable reluctance to pay her the sum agreed under the terms of the Agreement, pursued criminal instead of civil proceedings. However, in view of the distinctive nature of this case, the latter option might have been the more appropriate course.

Conclusion

[117] For the preceding reasons, the prosecution failed to prove an essential ingredient of the offence of fraudulent conversion, that is, the fraudulent and dishonest misuse of the proceeds realised from the sale of the property by the appellant. In addition, there was also a misapprehension of the applicable law by the learned Judge of the Parish Court, resulting in incorrect findings of fact. The verdict, therefore, is against the weight of the evidence, and the appellant's conviction is unsustainable. Consequently, we make the following orders:

1. The appeal is allowed.

2. The appellant's conviction and sentence are set aside.

3. Judgment and verdict of acquittal entered.

4. The sum of $750,000.00 paid by Mr Michael Lorne (the appellant) is to be refunded to him forthwith.