

C.A. CRIMINAL LAW - Fraudulent Conversion - Sec 24(i)(iii)(a) Larceny
Act. - Appellant attorney-at-law convicted of three counts of fraudulently
converting cash and cheques entrusted to him - whether prosecution
failed to establish that appellant entrusted with sums mentioned in
counts - whether Crown had failed to prove that any cheque handed
over to appellant which he had encashed - whether evidence
of fraudulent conversions

JAMAICA

Appeal allowed, conviction quashed, sentence set aside.

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 2/87

✓comp.

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

(STATUS?)??

No case referred to

R. v. ADRIAN FREDDIE BROWN

Mr. Richard Small instructed by Mr. Sylvester Morris for Appellant

Mr. C. Daye for Crown

October 15, 16, 1987 & July 11, 1988

CAMPBELL, J.A.

The appellant is an attorney-at-law who states that he carried on practice as an investment attorney-at-law. He was charged on an indictment containing ten counts for fraudulent conversion of sums of money allegedly entrusted to him by various persons contrary to Section 24 (1) (iii) (a) of the Larceny Act. He was convicted on three counts and sentenced to six months imprisonment concurrent on each count. Section 24 (1) (iii) (a) provides that:

"Every person who being entrusted 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 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 three counts namely counts 5, 9 and 10 on which the appellant was convicted alleged so far as is relevant that -

(a) On 15th October, 1982 he fraudulently converted to his own use and benefit \$49,000.00 entrusted to him by Mrs. Miriam Williams for him to invest on her behalf (count 5);

(b) On 5th January, 1982 he fraudulently converted to his own use and benefit the proceeds of cheque No. 03190 for \$16,800.00 drawn on National Commercial Bank Ltd which Ermine Lovell entrusted to him to be used by him in paying the deposit on the purchase price for premises 54 Havendale Drive in the parish of Saint Andrew. (count 9);

(c) On 14th June, 1982 he fraudulently converted to his own use and benefit the proceeds of a cheque for \$50,000.00 drawn on the account of Victoria Mutual Building Society which Ermine Lovell entrusted to him for use by him in paying the balance of the purchase price for 54 Havendale Drive (Count 10).

The entire evidence given in support of counts 9 and 10 came from Ms. Ethel White a resident of Brooklyn, New York, U.S.A. She said she agreed in 1981 to sell her premises No. 54 Havendale Drive, Saint Andrew to Mr. & Mrs. Lovell who contacted her in New York. The agreed purchase price was \$72,000.00. She subsequently received a sales agreement which she signed and "sent it back to the lawyer representing Mr. & Mrs. Lovell." Thereafter she gave one Mr. White, a resident of New York, a letter for delivery to the appellant and she herself also sent a letter to him. After this, she said she heard nothing concerning "the money for the sale of the house." She instructed her sister, who also resides in the U.S.A. to go to the appellant "for the money". Her sister later gave her a cheque for \$72,000.00 which cheque was dishonoured. She came out to Jamaica, went to the appellant, asked for her money and the appellant gave her a document which was exhibited as Exhibit 8. She later made a report to the police.

It is plain that Ms. White's testimony provides no evidence that the cheques mentioned in the said counts were ever handed over to the appellant by Ermine Lovell who was not called to testify.

Victoria Mutual Building Society and National Commercial Bank from whom evidence was adduced in respect of other counts, gave no evidence in relation to these counts more particularly of having issued the said cheques. The appellant's personal banking account was tendered in evidence but no evidence was adduced identifying any deposit therein of these cheques. The retired cheques were not produced in evidence to establish their existence and the person who encashed them.

The learned Resident Magistrate in finding the appellant guilty on these counts said thus:

"Court found clear evidence of accused acting on behalf of purchaser in these counts; and further found that the alleged payments to the accused were in fact acknowledged by him, and that these (proceeds of sale) were not paid over to vendor. In all the surrounding circumstances court is of the view that accused fraudulently converted the sum alleged on each count to his own use and benefit."

Before us, Mr. Small has submitted that even if the prosecution's case is accepted as truthful in its entirety, it has failed to establish that the appellant had been entrusted with the sums mentioned in the ^{counts} courts

by Ermine Lovell or any other purchaser from Ms. White. He submitted further that the giving of a cheque for \$72,000.00 by the appellant which was dishonoured and the subsequent execution of the document Exhibit 8 by the appellant in favour of Ms. White cannot provide inferential evidence that the purchaser namely Ermine Lovell had handed over any cheque to the appellant which he had encashed. We agree with Mr. Small. It may well be that the appellant having secured the execution of the transfer by

Ms. White in the absence of the receipt of the purchase price from Mr. & Mrs. Lovell, felt he was obliged to pay Ms. White or alternatively that he arranged to pay for the property himself in circumstances where he could make a profit out of a deal with the nominal purchaser. It may be that the mortgage finance had lapsed and the appellant had decided to lend the purchaser the amount needed. In the absence of evidence from Mr. & Mrs. Lovell or from Ermine Lovell as named in the indictment, that the cheques were procured by her and entrusted to the appellant to be cashed and the proceeds paid over by him to Ms. White, or evidence from National Commercial Bank and Victoria Mutual Building Society that these cheques were delivered to the appellant on the instructions of Ermine Lovell, he cannot in our view be properly convicted on these counts. Certainly the evidence fell short of proof of the charges as laid.

As regards Count 5, Miriam Williams gave evidence that on October 15, 1982 on her visit to Jamaica from the U.S.A. where she resides, she consulted the appellant and agreed to his proposition that an amount of \$47,000.00 then payable to her by him should instead be put by him into an investment fund and invested by him on her behalf. She handed over to him a further \$2,000.00 to be added to the \$47,000.00 for investment. She obtained a receipt which was exhibited as Exhibit 5. She recalled signing a document Exhibit 6 but says she does not recall the circumstances surrounding the signing of it. She said that on a subsequent visit to Jamaica on April 29, 1983, she requested the appellant to pay over to one Mr. Lothian the amount of her investment with accrued interest and the appellant agreed to do so. In or about April 1984 she received information from Mr. Lothian which caused her to return to Jamaica. She visited the appellant's office on several occasions but did not meet him. She took legal advice and made a report to the Fraud Squad.

The learned Resident Magistrate in convicting the appellant on this count said:

"Court found clear fiduciary relationship between the accused and the complainant and in view of all the circumstances found that the accused fraudulently converted the sum alleged to his own use and benefit."

We are of the view that the evidence of Miriam Williams discloses no more than a contractual arrangement under which she entrusted funds to the appellant for investment. She later requested the realisation of the investment which appellant agreed to do. The appellant may have been tardy in implementing his agreement to pay over to Mr. Lothian the amount due to the complaint, but tardiness per se is not proof of any fraudulent intent on his part to convert to his own use and benefit the funds which he admitted receiving from the complainant. We were unable to ascertain from the evidence what circumstances existed from which the learned Resident Magistrate concluded that there was a fraudulent conversion.

It was for the above reasons that we on October 16, 1987 allowed the appeal, quashed the conviction and set aside the sentence.