

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 1/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.  
THE HON. MR. JUSTICE WRIGHT, J.A.  
THE HON. MR. JUSTICE DOWNER, J.A. (Ag.)

REGINA

vs.

DEVON JONES  
&  
BALDWIN STEWART

Mr. Franklyn Beckford for Jones

Messrs. F. M. G. Phipps, Q.C. and Wentworth Charles  
for Stewart

Miss Jennifer Straw for the Crown

March 24, 25, 26, 1987 and January 18, 1988

WRIGHT, J.A.:

The appellant Jones during the relevant period August 1982 - January 1983 was employed as a Ledger Keeper in the Current Accounts Department at the Half Way Tree Branch of the Workers Savings and Loan Bank with responsibility for Accounts A-J. He was assisted by one Mrs. Paula O'Gilvie. Accounts K-Z were in the charge of Mrs. Judy Chambers assisted by Mr. Paul Anderson. At that time the appellant Jones lived at 5 Brompton Road, Kingston 5 while the appellant Stewart lived next door at No. 4 Brompton Road.

With the division of responsibilities as set out above the appellant Jones would not normally be required to deal with accounts K-Z. However, on August 26, 1982 a very

irregular thing took place at the bank. It breached all the rules and opened the flood-gate whereby the Bank between that date and January 31, 1983 was defrauded of \$71,936.52. The sequel was that seven persons including the Manager who were employed at the bank during the relevant period lost their jobs, one was demoted and both appellants and one Basil Johnson who was drafted into the fraudulent scheme were arraigned before the Resident Magistrate for St. Andrew on a twenty-one Count Indictment which charged them as follows:

"Jones and Stewart

1 Count for conspiracy (with persons unknown) to defraud the Bank of \$58,936.52 between September 1982 and January 1983.

4 Counts for obtaining:-

- (i) \$5,200 between 6.9.82 and 31.1.83
- (ii) \$10,000 between 1.10.82 and 31.1.83
- (iii) \$22,500 between 2.10.82 and 31.1.83
- (iv) \$21,236.52 between 10.12.82 and 31.1.83

Jones

3 Counts of Falsification of Accounts involving a total of \$119,236.52

Jones and Johnson

1 Count conspiracy to defraud the Bank of \$20,000

7 Counts of obtaining:-

- (i) \$2,000 on 4.10.82
- (ii) \$2,000 on 4.10.82
- (iii) \$2,000 on 5.10.82
- (iv) \$1,000 on 6.10.82
- (v) \$2,000 on 6.10.82
- (vi) \$2,000 on 6.10.82
- (vii) \$2,000 on 6.10.82."

In order to appreciate how the system at the Bank was manipulated to facilitate the fraud it is necessary first

of all to understand how the system was meant to work. The applicant to operate a Current Account would be interviewed by an officer who would witness the applicant's signature on the relevant documents viz. the Application Form, an Agreement Form, a Listing Card and a Lodgment Voucher. The applicant along with the forms would then be passed on to the Manager or the authorized officer in charge of the Credit Department who would determine whether the applicant would be accepted to operate a Current Account. In exceptional circumstances e.g. where the applicant could be recommended by a member of staff, the application might be accepted on the date it is made. Otherwise the necessary checks could take up to two weeks.

On August 26, 1982 Account 3128 was opened by one Baldwin Stewart in a manner which avoided the system. What is important is to identify such a person with the appellant Baldwin Stewart. Having regard to the system the appellant Jones should have had nothing to do with this account but the History Card of Account No. 3128 shows that he attended to the opening of the account:

"NAME: BALDWIN STEWART

Mailing Address: 4 Brompton Rd. Apt 1, Kgn 5

Residence Address: Same

Previous Bank Application: WSLB S/A #20779

References: Devon Jones WSLB HWT

Donovan Thomas  
Mutual Life  
Oxford Place."

Jones' handwriting is identified by Kenneth George Knibbs, who was Jones' supervisor during the material time. What is more, the only signatures appearing on the Application Form are those of the applicant and Devon Jones as the person <sup>authorising the</sup> opening of the account. There is no authorized signature. On an accompanying

form headed "Instalment Credit Department (Ex 1C)" there is this revealing information:

"Name and address of nearest ) Devon Jones  
friend who can recommend you ) c/o WSLB HWT"

This is signed by B. Stewart and the signature of Devon Jones appears against an amendment. Both signatures also appear on the form headed: "Agreement Re Operation of Account" ..

Devon Jones signing as the witness to the applicant's signature. It is patent that Jones substituted himself for all the authorised persons and the inevitable question is why? Why did he so circumvent the system and elevate himself to such a position of authority? By contrast the ledger keeper's job was to post cheques and lodgments to the customer's accounts after they had been <sup>duly</sup> assorted and to perform any other assigned duty.

But that was not the full record of events for that date August 26, 1982. This account was given the treatment reserved for those to which exceptional circumstances apply. The applicant did not have to wait for approval. The Cheque Book Register discloses that on the same day a Cheque Book with forty leaves (Nos. 283581 - 283620) was issued to B. Stewart. The account was opened with three cheques drawn on Bank of Commerce totalling \$1,104.16. With the prompt issue of the Cheque Book to B. Stewart he was enabled to draw cheques on the account in advance of the clearance of the cheques with Bank of Commerce - a process which would take several days. The applicant B. Stewart lost no time in furthering what must have been the purpose of all this machination. Among the encashed cheques in evidence the fifth in the series (No. 283585) is dated August 30, 1982 and was drawn for the amount of \$150. What is significant about these cheques as well as all the others - the number exceeds eighty - issued to Account No. 3128 is that the account number stamped

on them is No. 3127. This number is in some instances altered by changing the "7" to "8", or the whole number may be struck out and 3128 written in ink or 3128 is simply written on without any alteration of 3127 and many were encashed with only the number 3127 thereon. However, all these cheques bear what appears to be without any attempt at disguise, a signature identical to the applicant's signature on the Application Card for the Account. From these cheques and the documents relevant to the opening of the account there are over one hundred specimens of the signature "B. Stewart". Further evidence of the magnitude of the scheme being operated is supplied by the Cheque Book Register which shows that an issue of cheques (Nos. 294781 - 294820) was made on December 10, 1982 to Account 3127 encashed cheques from which series were in fact drawn by "B. Stewart".

The transactions in relation to each account at the Bank were recorded daily in triplicate viz, the Ledger Card which was sent out to the customer along with the cancelled cheques at the end of the month, the duplicate card kept among the Bank's records and a Machine Backing Sheet which carried the whole day's work done on the machine. These Backing Sheets disclose irregularities. Be it remembered that in the ordinary run of things Account No. 3128 (3127) ought not to appear among the A-J Accounts but among the K-Z. And by the same token the appellant Jones would not have to deal with this Account. The machine backing sheets and The Ledger Cards are important to an understanding of what transpired at the Bank.

The Ledger Card for Account 3128 shows an opening balance of \$784.66 on 1st September, 1982 i.e. on the 6th day after the account had been opened. For the month of September, 1982 the only two lodgments reflected on the Ledger Card are \$300.00 on 6th September, 1982 and \$933.33

on 27th September, 1982 - a total of \$1,233.33 - the \$933.33 being uncleared effects i.e. transactions having to do with other Banks. However, withdrawals by means of twenty cheques totalling in excess of \$6,000 only put the account in the red when a cheque for \$400 overdrew the amount by \$183.51 on 30th September, 1982. This is accounted for by the fact that on 6th September, 1982 a credit of \$5,200 was entered on the Account (See Ledger Card Ex. 3) but there is no corresponding lodgment slip.

The Ledger Card for October 10, 1982 reflects an opening balance to be the debit of \$183.51. The only lodgment shown on the Ledger Card (Ex. 8) is \$200 on October 4, 1982 - again uncleared effects (UE). But withdrawals totalling almost \$8,000 were made between October 10 and 26, 1982 at which latter date the account was in credit to the tune of \$2,086.13. The enabling factor was a credit entry of \$10,000 on October 10, 1982. By October 29 the credit helped along by another credit entry this time in the sum of \$22,000 on October 27 had risen to \$25,152.95 (See Ledger Card Ex. 9). But it was not long before this amount had vanished. The only other Ledger Card in evidence is Exhibit 17 for the period December 9 to 14, 1982. The opening balance is shown as a debit of \$73.55 and with another U.E. lodgment of \$300 on December 9, 1982 the balance at December 24 was a credit of \$1,101.57. Again the account had been kept alive by another Credit Entry. The amount was \$21,236.52.

The K-Z Backing Sheet for September 6, 1982 (Ex. 4) shows a balance of \$674.66 for Account 3128. Exhibit 5, the Backing Sheet for September 7, 1982, shows an opening balance of \$674.66 and a closing balance of \$924.66. Of significance is the fact that the Credit Entry of \$5,200 on

September 6, 1982 (supra) does not appear on the K-Z Backing Sheet for either September 6 or 7 where it would be expected to appear if it had been regularly made. Intriguingly, while the Ledger Cards for September 30, 1982 and October 10, 1982 show a debit of \$183.51 as the closing and opening balances, respectively, the A-J Backing Sheet for October 7, 1982 - where Account 3128(7) ought not to appear - reflects a credit of \$4,000, a debit of \$4,000 and a closing balance of \$nil. There is no Ledger Card for October 1-10, 1982 but is it not significant that the closing balance of a debit of \$183.51 for September 30, 1982 is the opening figure for October 10 during which interim the amount of \$4,000 had been abstracted from the Bank under cover of this same account No. 3128? The Ledger Card Entry of \$22,500 on October 27, 1982 does not appear on the K-Z Backing Sheet for that date. Nor does the Credit Entry of \$10,000 appear on the K-Z Backing Sheet for October 1, 1982. Also, the Credit Entry of \$22,500 is similarly absent from the corresponding K-Z Backing Sheet.

But just look at what was taking place in the A-J department during that time. The A-J Backing Sheet for October 1, 1982 contains a Credit Entry of \$20,000; the Sheet for October 4, 1982 contains two debit entries of \$2,000 each; the Sheet for October 5 has a brought forward balance of \$16,000 and a debit of \$2,000. The remainder of \$14,000 opens the account on the Sheet for October 6, 1982 on which date a debit of \$10,000 is recorded. What this clearly shows is that Account 3128 was being used as an instrument of fraud under the A-J cover where it does not belong. For effect it is repeated that the person in charge of the A-J Accounts was the appellant Jones assisted by Mrs. Paula O'Gilvie.

In the meantime the appellant Jones operated Savings Account No. 2415 at the Bank of Commerce at Twin Gates Shopping Centre, 25 Constant Spring Road. Mrs. Valerie Raymond, a clerk at that Bank, gave evidence of the system of opening a Savings Account and of making lodgments to and withdrawals from such an account. On opening the customer signs a signature card. A ledger card is also prepared with the customer's name, address and account number. A record of lodgments and withdrawals is kept on the ledger card. Lodgments are accompanied by lodgment slips which record the particulars of the lodgments including the names of any Bank from which cheques are included in the lodgments and these cheques would after due processing be forwarded to the relevant banks for re-imbusement. Details of withdrawals would be appropriately recorded on the withdrawal slips.

Certified copies of the Ledger Card of Account No. 2415 provide direct evidence that out-flows from Account 3128 became inflows to Account 2415 viz:-

"Oct. 11, 1982 Credit \$3,000 WSLB cheque 283616  
 Dec. 16, 1982 Credit \$5,100 WSLB cheque  
 Dec. 22, 1982 Credit \$7,000 WSLB cheque

In addition there are other large cash lodgments viz. \$3,000 - 5/10/82; \$2,000 - 6/10/82; \$1,200 - 19/10/82; \$4,000 - 27/10/82; \$2,000 - 17/1/83. The balance in the account from 23/6/82 to 5/10/82 was \$6.00 (See Ex. 23 - Statement from Bank). The lodgment slip for the \$5,100 identifies cash cheque no. 294782 dated December 16, 1982 signed and endorsed by "B. Stewart" as the source of this amount. The cheque came from the series 294781-294820 issued to Account 3127 on December 15, 1982. On this cheque the "27" is struck out and "26" written above it. This lodgment was on the very day following the issue of the cheques to the



Account 3127. The cheque 283616 was also a cash cheque dated 11th October, 1982 signed and endorsed by "B. Stewart".

The lodgment slip for the \$7,000 signed by D. Jones identifies another cash cheque No. 294786 for \$7,000 signed and endorsed by "B. Stewart" as the source of that lodgment.

Another cash cheque No. 289198 for \$5,000 dated 3rd November, 1982 signed and endorsed by "B. Stewart" has the name D. Jones written twice on the back.

These disclosures reveal an undeniable togetherness between the appellants. And there is further evidence of such togetherness supplied by the witness Maxine Chin who testified in part:

"I know the accused Devon Jones, Baldwin Stewart and Basil Johnson. I knew the accused Stewart first. I used to live at apartment building at 4 Brompton Road. The accused Stewart lived at the same apartment .... The accused Stewart brought the accused Jones to me because I had a car for sale .... In 1982 I had a 1980 Toyota Corolla. Sold that car to Mr. Jones, that is the accused Devon Jones. He paid me by Manager's Cheque. Sold car for \$15,000. .... This is cheque for part of the sale. He paid me in two cheques (Manager's Cheque #09832 for \$7,500 in evidence Ex. 30)."

This cheque was purchased at the Workers Savings and Loan Bank, Half Way Tree. There is also a cheque No. 294787 for \$1,500 dated 20.12.82 payable to Maxine Chin drawn by "B. Stewart". This cheque is from the series 294781-294820 issued to Account 3127 on 20.12.82 but it is observed that 3127 has been struck out and 3128 written on in ink. The payment was completed by another Manager's Cheque for \$8,000.

It is important to bear in mind that this witness speaks of the three accused persons then before the Court. Marcia Lawrence the ex-girlfriend of the appellant Devon Jones testified that she "knew all three accused persons".

"The accused Stewart was introduced to me by Mr. Jones". Then she told of receiving from the appellant Devon Jones for lodgment to her account at National Commercial Bank WSLB cheque no. 283599 dated 24th September, 1982 for \$2,500 payable to E. M. Lawrence and drawn by B. Stewart (Ex. 21) as well as WSLB cheque no. 289201 dated 8th October, 1982 for \$2,000 payable to CASH drawn by B. Stewart. When she asked why, he told her he wished to put the money beyond his immediate control so as to restrict his drawing from it which would be the case if he put it into his own account. She queried the reason for his being paid these amounts and he said it was money being paid back to him. Subsequently she discovered that a lodgment of \$4,000 had been made to her account. She spoke to the teller about it and then to the appellant Jones and he admitted making that lodgment. She sought to know why and received the reason already advanced. However, when the police investigations involved her being interrogated she demanded to be told all about the cheques and received an answer, which, if her evidence is believed, carries tremendous weight. The answer was that "the cheques were being paid to him by Stewart after posting money to his ledger which didn't exist".

Cross-examination failed to blunt the force of this testimony. It gave her the opportunity to disclose that the appellant Jones and herself had lived together, that she worked with him in a canteen which he operated, that they were alone at the time of the disclosures in August/September 1983; that she had withdrawn some \$8,000 in cash and given it to the appellant Jones. She also revealed that due to worsening relationship he had assaulted and threatened her as a result of which she had him prosecuted. Thanks to Mr. Beckford, attorney-at-law for appellant Jones. But that

apart the question remains "Did Jones make that confession to her?". And if he did not how would she know what the Bank records actually disclose?

But that is not all the evidence. On 15th May, 1985 the seventh day of the trial which lasted fourteen days Basil Johnson changed his plea to one of Guilty of Conspiracy on Count 10. No evidence was offered against him on Counts 12, 13, 15, 18, 19, 20 and 21 which charged him jointly with the appellant Jones for obtaining a total of \$15,000 by false pretences. He was fined \$1,500 with an alternative of 3 months imprisonment at hard labour. Thereafter on 27th January, 1986 he gave evidence for the prosecution. There is this caveat against his evidence in that being the evidence of an accomplice the question of corroboration has to be borne in mind. But be that as it may he testified that he knows the two appellants. Said he:

"Accused Devon Jones and I were living on the same avenue. The accused Baldwin Stewart and I went to school together and we were both living on the same avenue."

(Maxine Chin had also testified that "Johnson and Stewart were at CAST at the time i.e. while she lived at 4 Brompton Road where Stewart also lived")

Continuing, Johnson said that he had a Savings Account at the Workers Savings and Loan Bank but never a Current Account. However, sometime in October 1982 he had a discussion with the appellant Jones in which the latter made a proposition. The appellant Jones told him, he said, that he had some money which he could not put in his account at the bank so would Johnson agree to an account being opened in his (Johnson's) name into which the money could be lodged. An agreement was arrived at and though he does not mention going through the process of opening such an account he accepted a number of

cheque leaves given him by the appellant Jones who told him that he could lodge some of the cheques drawn to his Savings Account and give the others to the appellant Jones. He proceeded to draw cheques - about ten in all - in amounts of \$1,000 and \$2,000, some of which he lodged to his Savings Account and the others he handed to the appellant Jones.

The Bank operated a system whereby cheques processed were micro-filmed and a register kept. From this source copies of seven cheques (Exs. 32A-G) drawn by the witness were identified by him as being some of the cheques involved in his dealing with the appellant Jones. They are all "cash" cheques. With the exception of one on which no account number is discernible they carry the account number 3128 but they do not belong to the series which the Cheque Book Register shows were in use at that time i.e. 283581 - 293620. They are from the series 146724---. It is plain that the witness lost no time in making use of the facility. Five of the cheques are dated 4.10.82 for a total of \$11,000; one dated 5.10.82 for \$2,000 and one dated 6.10.82 for \$1,000 - a total of \$14,000 withdrawn in three days. But this tends to fit in with one facet of the evidence of the witness Kenneth George Knibbs. He had testified that there had been no break-in at the bank and that a number of cheque leaves to which the appellant Jones, as well as others had access had disappeared.

The witness Johnson was a natural target for cross-examination but Mr. Beckford's efforts concentrated on comparing his evidence with a statement he had given under caution during the Police investigations. He admitted he had not told all but he now believed he had done wrong; hence his change of mind.

Though a rather reluctant witness Keith Reynolds who was a teller at the Bank during the period involved testified that from time to time the appellant Jones would hand him cheques for encashment and that on these cheques he would affix his teller's stamp, which carries a number, as well as his initials. He also knew Jones' initials which he had seen affixed to various cheques. However, when he was shown Exhibit 32 (the cheques drawn by Johnson) he could neither identify the initial nor the teller's number although he had had his teller's number for at least one year and from the nature of his answers had apparently given assistance previously on the matter. Recalled later after he had refreshed his memory from the Teller Stamp Book which he had signed, the witness Reynolds was able to identify his Teller Stamp No. 2 on cheque no. 294783 (Ex. 33) dated 16.12.82 drawn by B. Stewart for \$2,000 and on cheque no. 146724 (Ex. 32A) dated 4.10.82 drawn by Johnson for \$2,000 the proceeds of which he paid to the appellant Jones whose initials he also identified on both. However, another teller Ms. Hillary Spence who testified that she had on occasions encashed cheques passed to her by the appellant Jones identified the Teller's Stamp No. 4 on Exhibit No. 32B (cheque 146729 for \$2,000 drawn by Johnson on 4/10/82) as hers and the initials as the appellant Jones'. Here then is evidence as to how these irregularly drawn cheques could beat the system because it was the Ledger Keeper who had to certify a sufficiency of funds before the cheques were honoured. But it seems at least strange that the A-J Ledger Keeper could have certified so many K-X cheques without prompting any query.

The rapid withdrawal of funds via the Johnson cheques undoubtedly accounted for the rate of disappearance during the period October 1-6, 1982 of the \$20,000 Credit

Entry made on the A-J Backing Sheet on October 1, 1982. And if it seems puzzling that Miss O'Gilvie who assisted the appellant Jones in the A-J department did not detect the Credit Entries on the Backing Sheets that puzzle is answered by her evidence that she checked only the Ledger Cards - never the Backing Sheets.

The several cheques in evidence bear the crossing stamps of the banks where they were tendered thus confirming that the various sums for which they were drawn were actually paid out.

Detective Corporal Norman Gordon, the investigating officer, testified that on 7th January, 1983 he received a report from the Bank. He attended there the next day and spoke with Miss Beverley Salabie, the Assistant Branch Operation Officer who handed him several documents. Thereafter he said:

"I went to 4 Brompton Road, Kingston 5 where I saw the accused Baldwin Stewart. I identified myself to him. Told him that Workers Bank reported that he in conjunction with the accused Devon Jones defrauded the bank of money. I cautioned the accused. I asked him if he knew Devon Jones. He said yes. I also asked him if he operated account 3128 at Workers Savings and Loan Bank Half Way Tree. He said yes. Asked him if he had returned cheques in his possession drawn against the account. He said yes. Asked him to hand over the returned cheques he had and he gave me a quantity of cheques issued on the account between August 1982 and January 1983."

The total number of cheques is 73. A breakdown shows:-

- 4 cheques issued in August 1982
- 16 cheques issued in September 1982
- 24 cheques issued in October 1982
- 15 cheques issued in November 1982
- 9 cheques issued in December 1982
- 5 cheques issued up to January 15, 1983.

He took the appellant Stewart into custody.

In continuation of his investigations (it was about 5:00 p.m. he saw and spoke with Stewart). Detective Corporal Gordon said he visited the Lock-ups at Half Way Tree where he saw the appellant Jones to whom he identified himself and disclosed the report from the Bank. After being cautioned he told the officer that he did have at his home in Pembroke Savings Account Pass Book 2495. Surprisingly, however, upon objection by Jones' attorney-at-law the Counsel for the prosecution led no further evidence about this Book. Later he took Basil Johnson into custody and upon separate dates arrested and charged the three for conspiracy.

The witness was giving evidence more than three years after events about which he spoke and not unnaturally as regards certain peripheral matters his memory was dulled by the passage of time. In that situation he admitted under cross-examination that contrary to his testimony that he had taken Stewart into custody from 4 Brompton Road there was the possibility (he said he did not wish to state a falsehood) that Stewart had reported to him at his office on his request. He insisted that he did see Stewart on 8th January, 1983 though he was not charged until 14th February, 1983 and he could not recall whether Stewart was in custody and released sometime before he was charged. However from further cross-examination it appears that Stewart was taken into custody from 8th January, 1983 to 14th February, 1983. During cross-examination by Mr. Phipps there was admitted into evidence as Exhibit 39 a list of fifty questions which the witness had recorded in writing and put to Stewart on 26th September, 1983 which he quite naturally refused to answer though he signified his refusal by initialling his response to each question viz. "not answering" and then signing at the foot of seven of the eight pages occupied by the questions in

addition to signing the caution at the head of the first page, thus providing eight authentic signatures. But of this more anon. Cross-examined by Mr. Beckford appearing for appellant Jones the witness said he asked Jones his side of the matter but that Jones said nothing at all.

After both defence attorneys had made unsuccessful submissions of no case to answer the appellant Stewart made a brief unsworn statement occupying four lines of notes in which he denied seeing Detective Corporal Gordon but that he and Donovan Thomas and Maxine Chin went to Mr. Phipps' office and thence to see Gordon at the Police Station and was there detained. Thereafter Donovan Thomas testified that early in 1983 the date he could not recall he was present at 4 Brompton Road when he saw Detective Corporal Gordon and others arrive in a Toyota Motor Car. Gordon enquired whether he was Baldwin Stewart - Stewart was not there. The following day the witness along with Stewart and Maxine Chin attended at Mr. Phipps' office and then they went to the Central Police Station where Stewart was detained. Further the witness said that at the Station he was asked questions, which were apparently written, and he signed to them.

In cross-examination Detective Corporal Gordon was questioned about Stewart, Thomas and Chin coming to the Station. He answered that he could not recall the first time the three of them had come to the Station together but he knew that after Stewart had been taken into custody and released the three of them had paid several visits to his office enquiring about Stewart being charged. He could not recall when was the first time he had seen Thomas and Chin.

After the witness Thomas had testified there was a strange intervention. Mr. Phipps, counsel for Stewart, expressed the wish to make a statement at the bar as follows:-



"Just to say that Stewart, Thomas and Chin did attend my chambers. After they left only Chin and Thomas returned. I subsequently interviewed Stewart in custody. I cannot specify the dates."

That closed the case for Stewart.

Devon Jones also made an unsworn statement in which he listed his duties as Ledger Keeper with responsibilities for Current Accounts A-J. His duties he said were the actual posting to the Ledger Cards of the information presented to him by the Current Account Counter Clerk, the Branch Proof Department and the other assistant Ledger Keeper. He denied any responsibility for Stewart's account which was the responsibility of the K-Z Ledger Keeper. Said he, it could hardly be so as alleged that he had inflated Stewart's account by fictitious Credits because at the end of every day there was a balancing exercise between the machine figures and the postings. Further weekly trial balances ensured that all Ledger Cards were balanced. What is more, in his entire stay at the Bank the trial balances had shown the Ledger Keeping to be correct. As regards Basil Johnson he said he was in his Ledger. He denied any conspiracy or other irregularity on his part.

The learned Resident Magistrate returned the following verdicts:-

"Jones - Guilty on Counts 1,2,3,4,5,6,7,  
8,9,10

Not Guilty on Counts in Counts 11-21

Stewart - Guilty on Counts 1,3,5,7,9."

In effect therefore, Jones was convicted on 2 Counts charging Conspiracy, 4 Counts charging Falsification of Accounts and 4 Counts charging Obtaining by False Pretences. These counts all relate to transactions having to do with Baldwin Stewart with the exception of the Conspiracy together with Johnson charged in Count 10. Save for this latter Count he was

acquitted on all the Counts relating to Johnson. On each Count he was sentenced to two years imprisonment at hard labour. (Sentences to run concurrently). The car which he had purchased from Maxine Chin was ordered to be delivered to the Bank.

Stewart was convicted on 1 Count for Conspiracy and 4 Counts for Obtaining by False Pretences and was sentenced to 12 months imprisonment at hard labour. (Sentences to run concurrently).

From these convictions and sentences both have appealed. For Stewart Mr. Phipps filed four Grounds of Appeal which are as follows:-

- "Ground 1. The verdict is unreasonable and cannot be supported having regard to the evidence. There was no evidence, or acceptable evidence, to prove beyond reasonable doubt that the appellant operated the account at the Bank which was the subject of the charge. There was no evidence to support the particulars in the indictment where it is averred that the appellant was a party to the Credit entries in the account.
- Ground 2. The indictment was bad for duplicity in that two offences were charged in each of the substantive Counts.
- Ground 3. The learned Resident Magistrate wrongly convicted the Appellant on the Count of Conspiracy and also on the Counts charging the substantive offence of Obtaining by false pretences.

The evidence in proof of the conspiracy was by inference drawn from the primary facts which established, if anything, the substantive Counts.

- Ground 4. The sentence is excessive."

By way of example of the duplicity complained of in Ground 2, Mr. Phipps referred to Count 3 of the indictment which reads as follows:

"Devon Jones and Baldwin Stewart on divers dates between the 6th of September and 31st January, 1983, in the parish of St. Andrew with intent to defraud caused the sum of \$5,200.00 to be paid to yourselves and for your benefit by purporting to show that Current Account number 3128 for Baldwin Stewart was credited with the sum of \$5,200.00 on the 6th September, 1982."

The submission which also enures for the benefit of Jones is that the charge is completely stated up to the word "benefit" and that what follows is another fraudulent activity which would be the subject of a charge under Section 36 of the Larceny Act. We find that there is no merit in this ground for the simple reason that the words following "benefit" are merely the particulars to which the defence would have been entitled if it was not to be taken by surprise. This ground of appeal fails.

We are not unaware of the oft repeated criticism of the practice whereby specific offences are charged in an indictment for conspiracy. But we are equally cognizant of the fact that there is no inflexible rule against the practice which is even thought to be desirable in certain instances (See Archbold 38th Edition at para. 4073). In this case, having regard to the nature of the evidence, we are of the view that the interests of public justice are best served by the inclusion of the Counts about which complaint is made. Accordingly, Ground 3 also fails.

Ground 1 can be conveniently considered with the single ground against conviction filed on behalf of the appellant Jones viz:

"The verdict is unreasonable and cannot be supported having regard to the evidence."

And, indeed, while on principle the evidence against each must be considered separately it must be borne in mind that conspiracy involves concert and it would be a misdirection to discuss the case against each appellant separately

without reference to the alleged concert; (See R v Bailey & Underwood 9 C.A.R. 94).

In support of this ground of appeal Mr. Phipps submitted that there was no evidence to connect B. Stewart with Current Account 3128 at Workers Savings and Loan Bank which account and the activities thereon were the subject of the charges. Said he, only Detective Corporal Gordon, with particular reference to the alleged admission by Stewart that he operated Current Account 3128 at the Workers Savings and Loan Bank, spoke on the point. Further, he submitted that that evidence was contradicted by the unsworn statement of the appellant Stewart supported by Donovan Thomas and an attorney who spoke from the bar. The important question is where did Detective Corporal Gordon get the cheques? He referred to the relevant finding on this point by the learned Resident Magistrate, viz:

"Ex. 37 - 73 cheques were allegedly received by A/C Gordon from the accused Baldwin Stewart. All were drawn on the account 3128"

(The correct Exhibit number is 38)

then he commented that the learned Resident Magistrate had merely repeated without accepting the evidence.

Apparently as an indication of the nature of the evidence which may be expected from Donovan Thomas the learned Resident Magistrate recorded an observation that four of the 73 cheques comprising Exhibit 38 were drawn in favour of Donovan Thomas - apparently the same Donovan Thomas whose name appears on the documents opening Account 3128. Of the role played by the attorney to which Mr. Phipps alluded we shall have more to say at a later stage but at this point we content ourselves to say it is of no probative value. As regards an unsworn statement of an accused person we are not obliged to accord to such

a statement made from the shelter of the dock a probative value equivalent to **that** of sworn testimony tested by cross-examination. Observations in decided cases are not wanting on the nature of statements which have from time to time been made in this manner with impunity. As was said in R v Conghlan [1976] 64 C.A.R. 11 any witness who wishes to have his evidence accorded the respect contended for must be prepared to testify from the witness box so that his evidence can be tested by cross-examination.

For his part Mr. Beckford drew attention to the system as it was said to operate and submitted that having regard to that system there would have been no opportunity for the acts attributed to Jones - they could not have gone undetected. Such a submission ignores the fact that the efficiency and effectiveness of any system depends upon the persons operating the system. Want of diligence will leave open the door for fraud as occurred in the instant case. Further he submitted, that there was no link between Jones and the Backing Sheets (Exs. 4,10,11) nor with the falsification of the accounts even if he reaped benefits from the falsification. The microfilm evidence should not have been admitted he said. But the evidence shows this to be a method by which the Bank recorded evidence of transactions and the witnesses who made the microfilms were called to give evidence. Further, Jones and B. Stewart lived on the same street and the concession of Mr. Beckford that when "he (Stewart) came to the Bank we assisted with the opening of the Account 3128", we consider to be a rather damaging admission having regard to the evidence relating to the opening of the Account. Concerning Marcia Lawrence Mr. Beckford conceded that her evidence is very important but contended that her evidence was given because of

bitterness - the relationship with Jones had by then broken down. The witness Marcia Lawrence did say she was happy that she and Jones were no longer living together and that as a result of her prosecuting him he had been locked up. However, it was never specifically put to her that she was actuated by malice to give the evidence that she had given and the appellant Jones did not even mention her in his unsworn statement let alone denying the admission which she alleges he made to her.

Mr. Beckford's final submission was that the Crown's case rose no higher than suspicion and that the substratum of the case rested on evidence which in his opinion had been improperly admitted. Such submissions could only have been made without due regard for the evidence against Jones, viz:

1. The admitted association between Jones and the appellant Stewart.
2. The unauthorized opening of Account 3128 which was never subsequently approved.
3. The hasty issue of cheques to facilitate the operation of the account.
4. The receipt by Jones of cash for cheques drawn on this unauthorized account in addition to cheques drawn on Account 3128 and lodged to Jones' Account 2415 at Bank of Commerce.
5. The purchase of the car from Maxine Chin by means of a Manager's Cheque purchased with the proceeds of a cheque for \$7,500 drawn on Account 3128 and a Manager's Cheque for \$8,000 purchased at Bank of Commerce Twin Gates by cash withdrawn from Account 2415 into which thousands of dollars from Account 3128 had been diverted.
6. The evidence of Basil Johnson whom the learned Resident Magistrate found to be a witness of truth whose evidence the learned Resident Magistrate found to be supported by Exhibit 20 - Johnson's Signature Card and Ledger Card for his Savings Account 22138 - and Exhibit 32E - cheque drawn by Johnson for \$2,000 on 4/10/82 for which Jones received cash.

7. The uncontradicted evidence of Marcia Lawrence which co-incided exactly with what the Bank records show and which the learned Resident Magistrate accepted.
8. The inference of the existence of a conspiracy involving Jones and B. Stewart to be drawn from the fact that there were several withdrawals which should have put the account in debit but did not because of the various Credit Entries without any supporting lodgments. What answers are given to the three pertinent questions:-
  - (a) If Jones was not a party to the conspiracy what explanation is there for the fact that he benefited to the tune of several thousand dollars and in so short a time?
  - (b) If there was no conspiracy involving Jones and B. Stewart requiring the false entries to be made how did B. Stewart expect the several cheques drawn on Account 3128 to be met?
  - (c) Why should some third party - not a co-conspirator - falsify the accounts to enable Jones to profit as he did?

Then there is the further inference to be drawn that the cheques could not have been tendered regularly at the counter for encashment for then when the appropriate checks were made in the K-Z Ledger the insufficiency of funds would have been detected. Basil Johnson testified he handed cheques to Jones and none was ever returned to him. And indeed they could not because he did not have a Current Account at the Bank which would require the cancelled cheques to be returned to him at the end of the month along with his monthly statement. None was due to him.

9. How is the presence of Stewart's account on the A-J Ledger explained except by the inference that the manipulation of the Bank's finances would be kept covered by Jones who was responsible for that Ledger? There is no doubt that his machinations were duly assisted by negligence of the grossest magnitude and that he took advantage of the situation.

After recounting certain portions of the evidence the learned Resident Magistrate said at page 135:

"However, I find that the accused Devon Jones was the architect of the scheme and he is able to do so because of his position in the bank. The account 3128 was opened on 26th August, 1982. Soon after cheques for large amounts were drawn on the account some of which were for large amounts. Ex 38 - 73 cheques. Other exhibits show large amounts were drawn on this account which involve both the accused Stewart and Jones as outlined above."

From this finding which is justified on the evidence it is obvious that the learned Resident Magistrate was persuaded that the accused Stewart and Jones before her were the persons of whom the evidence spoke. That Jones is inextricably enmeshed by the evidence there can be no doubt. His conviction is unassailable.

Turning now to the appellant Stewart it is borne in mind that Mr. Phipps' submission is that there is no evidence to connect this appellant with account 3128 apart from the alleged admissions to Detective Corporal Gordon viz:

"That he knew Devon Jones; that he operated Account 3128 at Workers Savings and Loan Bank; that he had in his possession returned cheques drawn against the account;"

subsequent to which admissions he handed over to Detective Corporal Gordon a number of cheques. At the trial a list of these cheques numbering 73 was identified by the witness and admitted in evidence along with the cheques. What appears to give Mr. Phipps some comfort is the admission by Detective Corporal Gordon that these were not the only cheques he had collected in relation to the case. And indeed there are cheques on hand which for reasons which do not appear were not put in evidence. The witness did not say from whom he had received those cheques whether it was the Bank or not.

To say the least, it is infelicitous that the learned Resident Magistrate did not express her finding on



the Corporal's testimony as to where he got the 73 cheques in more positive language. Further, the case cannot escape the stricture that the prosecution did not make optimum use of the available evidence. Nevertheless, the system at the Bank required that the cancelled cheques along with the monthly statement be returned to the person operating the account. The evidence, both oral and documentary shows that Baldwin Stewart lived at 4 Brompton Road, Kingston 5. Both Marcia Lawrence and Maxine Chin knew him personally and referred to him in their evidence as the accused Baldwin Stewart. It would have been a remarkable co-incident if there was another Baldwin Stewart living at 4 Brompton Road at that time. There was not even a suggestion of this happening. Then, too, what is to be made of Mr. Beckford's submission -

"Will admit that B. Stewart lived on same street as Jones and when he came to the bank we assisted with the opening of the account i.e. the person in relation to A/C 3128."

There is the very strong inference that B. Stewart of 4 Brompton Road is the person to whom the cancelled cheques and Bank Statements would be sent. There has been no allegation that the Police entered Mr. Stewart's apartment in his absence. Miss Straw submitted that the evidence from which the necessary inference can be drawn was there before the learned Resident Magistrate viz. that the cheques must have come from the appellant Stewart.

On Miss Straw's submission all is not lost by the failure of the prosecution to call evidence as to the handwriting of B. Stewart because in her opinion this Court is competent to compare the signatures numbering eight on Exhibit 39 - the list of unanswered questions with the signatures on the cheques. But in addition there would also

be the two signatures on the documents opening the account.

It is trite law that proof of handwriting by calling an expert witness though much relied on is not the only means. Proof can be made by a person who has knowledge of the handwriting as well as comparison by witnesses. Here we have the undisputed signatures on Exhibit 39. These were before the learned Resident Magistrate along with the two signatures on Exhibits 1b and 1c - the documents opening the account and the 73 cheques (Ex. 38) supplying over 100 specimens of the handwriting of the operator of the account.

There is some authority against a jury being left without guidance to resolve authorship of disputed handwriting: R v Smith [1909] 3 C.A.R. 87; R v Tilley [1961] 45 C.A.R. 360; R v Harden [1961] 1 C.B.D. 8. But R v Tilley was considered in R v O'Sullivan [1969] 53 C.A.R. 274 at page 283 where Winn LJ said:

"..... it should be accepted these days that Tilley (supra) cannot always be in its literal meaning exactly applied; nevertheless every possible step and regard should be had to what was said by the Court in that case ....."

In O'Sullivan there was no expert witness and although there was the risk of the jury attempting to make comparison without such assistance it was recognised that once the documents are properly before the jury making comparisons by them is really unavoidable. It was held that there was ample evidence to support the conviction and the appeal was dismissed. Of interest is a citation from R v Harvey (1867) 11 C.A.R. 546 where Blackburn J (a judge of unquestioned authority) in dealing with the contention that the police witnesses not being experts were not competent to make the necessary comparison said at page 548:

"But the jury can inspect them and compare them with the forged document."

In R v Rickard [1918] 13 C.A.R. 140 the Court of Criminal Appeal while quashing the conviction for want of evidence referred to R v Harvey (supra) thus:

"This Court does not decide that expert evidence in such cases is necessary and the observations of Blackburn J in Harvey do not so decide but it is clear from the nature of things that to leave a question of handwriting to a jury without assistance is a somewhat dangerous course. Here, the similarities and dissimilarities were not discussed by counsel or witnesses nor by the judge. The documents were handed to the jury for them to form what opinion they could from them. This Court has before now examined documents in such a case, and has done so here ....."

The Court then proceeded to examine the documents and then stated that though there were similarities there were more striking dissimilarities and consequently the similarities were not sufficient to enable the Court to say that it must support the conviction.

In the instant case, however, the signatures from the three sets of documents viz:

- (a) Documents opening the account
- (b) The list of unanswered questions with the unquestioned signature of B. Stewart
- (c) The 73 cheques - Ex. 38

show a marked consistency in all the signatures. Indeed, certain features stand out like a trademark. The appellant Stewart did not categorically deny that the signatures on the cheques were his. Accordingly, the inference is inescapable that he signed the cheques as drawer and that in so doing he played the supporting role in the conspiracy in which Jones occupied the centre stage.

In that regard there is the inference to be drawn from the admission which the appellant Jones made to Marcia Lawrence. Indeed, the question bears repeating ..

"Since no supporting lodgments were found for the several thousands of dollars withdrawn by cheques drawn by B. Stewart how, apart from the manner related by the appellant Jones, were funds to be provided?"

Mr. Phipps made no submissions on the question of sentence. Mr. Beckford referred to his submissions made before the learned Resident Magistrate -

"Jones was 24 years old. Had no previous conviction. Was bread-winner of family. Crime not one of violence. Option of paying a fine should be given."

Additionally he urged before us that despite seriousness of the offence incarceration is not the appropriate punishment.

The maximum punishment which could have been imposed is 5 years imprisonment. Jones received 2 years imprisonment (doubtlessly reflecting his key role) and Stewart 12 months. This sentence could not by any stretch of the imagination be said to be excessive bearing in mind the seriousness of the crimes and the potential for wreaking havoc in the banking system of this country.

We accordingly dismiss the appeals of both appellants and affirm the convictions and sentences.

But before parting with the case we must revert to what we had earlier termed the strange intervention by counsel for Stewart. And indeed, we could not let the matter pass without comment because of the submission made before us by Mr. Phipps that the evidence of Detective Corporal Gordon was contradicted by the unsworn statement of the appellant Stewart supported by the evidence of Donovan Thomas and a statement by an attorney who spoke from the bar. It is evident, therefore, that this "statement by an attorney" relating as it does to a material aspect of the case against the appellant Stewart is regarded as evidence. It is certainly not a formal matter. And what provision is there for an attorney to give such

evidence in such a manner? The learned Resident Magistrate, though she let the matter pass without comment, must at least have suffered some embarrassment. The relevant local provision is Canon V paragraph (p) of the Legal Profession (Canons of Profession Ethics) Rules made by the General Legal Council by virtue of the provisions of section 12(7) of the Legal Profession Act and published in the Jamaica Gazette Supplement dated 29th December, 1978 which read as follows:

"While appearing on behalf of his client an Attorney shall avoid testifying on behalf of that client, except as to merely formal matters, or when essential to ends of justice, and his testimony is material to the cause he shall, whenever possible, leave the conduct of the case to another Attorney."

That position is clear beyond the need for comment.

The English provision is in similar vein:

q "A barrister should not act as counsel and witness in the same case; and he should not accept a retainer in a case in which he has reason to believe he will be a witness and if, being engaged in a case it becomes apparent that he is a witness on a material question of fact he ought not to continue to appear as counsel if he can retire without jeopardising his client's interests."

(See 3 Hals. Laws of England Vol 3 at para. 107)

Again there is no need for comment beyond noting the uniformity between the two systems, a uniformity which is reflected in the American system as well though there are stated exceptions. The general provision stated in Canon 19 is as follows:

qq "When a lawyer is a witness for his client, except as to merely formal matters, such as attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client."

(See Legal Ethics by Henry S. Drinker at page 158)

30.

We trust that it is now abundantly clear that the course adopted by Counsel at the bar is impermissible and express the fervent hope that no Court in this country will again be faced with a similar situation.