JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO. 131/81

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Ross, J.A.

REGINA v. LLOYD GIBSON

B. Macaulay, Q.C., and Mrs. Margaret Macaulay for appellant, Lloyd Gibson

F.A. Smith, D.P.P. and Mr. Smellie for Crown

October 4-8 & 11-15, 1982
& December 18, 1986

WHITE, J.A.:

We set out hereunder the reasons for the judgment of the Court, which had dismissed the appeal by Lloyd Gibson against his conviction by the Resident Magistrate for St. Andrew, and the sentence of two years imprisonment at hard labour imposed upon him in respect of his conviction on each of the six counts of the indictment upon which he was arraigned. The indictment covers the period from 27th October, 1975 to 12th April, 1977.

The charges arose out of the operations of the appellant as a real estate agent which were conducted through two companies - Lloyd's Real Estate and Rental Bureau Limited, engaged in the buying and selling of real property, and Lloyd's Property Development Company Limited, concerned with two sub-divisions at Billy Dunn, St. Andrew, and at Clarendon Gardens in the parish of Clarendon. The appellant was the Managing Director of each of these Companies. Each company

could be described as a 'family company' to the extent that from the documents filed with the Registrar of Companies, the appellant and his wife, Hermine Gibson, were directors; other subscribers were Michael Gibson, Maurice Gibson, Morris Gibson and Godfrey Gibson, sons of the two directors, and Mrs. Winsome Barnaby-Moore who was Secretary for both Companies.

The evidence disclosed that the appellant himself was at all times in the effective, exclusive and dominant control over the affairs of the company. He, exclusively, made decisions on any question of company policy, especially the financial affairs of each of the companies. Whatever payments were made to the companies, they could be lodged to the accounts in the Bank only on the instructions of the appellant. No withdrawals from either account could be made without the approval of the appellant. It should also be pointed out that no separate client's account was kept as was requisite by proper business standards. Nor did the appellant operate a personal chequing account. Money for his personal expenses was always obtained from the funds of one of the above-named companies. What the evidence further disclosed was that deposits made by the complainants mentioned in the indictment were paid into the office of Lloyd's Real Estate and Rental Bureau Limited, these deposits were made with regard to parcels of land which the appellant advertised he had authority to sell as a real estate agent. However, on the instructions of the appellant, except for one instance, these deposits were lodged to the account of the other company, Lloyd's Property Development Company which from all the indications, was a separate entity in a different field of activity from that of the Lloyd's Real Estate and Rental Bureau Limited.

The six counts of the indictment charged the appellant with Fraudulent Conversion contrary to section 24(1)(iii)(a) of the Larceny Act, in that he received from several persons cheques which were to be applied to the purchase price of certain premises; but he converted the individual amounts of money thereby paid to his own use and benefit. In detail the complaints were as follows: In July 1975, Hyacinth Dunwell and Merle Dunwell deposited Six Thousand, Four Hundred Dollars ($6,400.00) with Lloyd's Real Estate and Rental Bureau Limited, on the purchase price of premises 14 Agualita Vale, Pembroke Hall. When the sale of these premises was not effected, the Dunwells deposited a further sum of Five Thousand Dollars ($5,000.00) with that company for the purchase of 3 Greendale Avenue, Kingston 10. This was on the suggestion of Miss Barnaby who was then the Secretary for both companies. (Hereafter she will be referred to as Mrs. Barnaby-Moore, she having given evidence for the Crown by the latter name). The total amount to be applied to that transaction was thus Eleven Thousand, Four Hundred Dollars ($11,400.00). This latter sale did not materialise. They were again advised to look at other premises to which they were not attracted. The deposit was demanded back, but up to the time of trial had not been refunded. At first Mrs. Barnaby-Moore promised that the company would refund the money, but whenever Merle Dunwell, acting on behalf of her daughter and herself, went to the company's office for the money, she was put off. Eventually, she said she saw the appellant himself who promised repayment. Although she attended at the office several times thereafter, she did not see him. This was Count 1 of the Indictment.

Count 2 of the Indictment related the complaint of

Agnes Beckford and Joetta Moo. In October 1976, they deposited a cheque for Three Thousand Dollars ($3,000.00) as down-payment for the purchase of 7 Mimosa Avenue, St. Andrew. They were promised that a mortgage would be raised for them. When this did not materialise after four months, they demanded their money back. A cheque for Three Thousand Dollars ($3,000.00) drawn on Lloyd's Development Limited and signed by the appellant and Mrs. Barnaby-Moore was sent to these complainants. It was dishonoured by the bank. Up to the time of trial no refund had been made.

Count 3 concerned the deposit of Three Thousand Dollars ($3,000.00) made by Cassia Grant on the 1st December, 1976 towards the purchase of premises, 7, Mimosa Avenue, St. Andrew. Cassia Grant obtained a mortgage from the Workers Savings & Loan Bank, but the sale fell through. She made several demands in person for repayment of the amount of Three Thousand Dollars ($3,000.00). Her demands were never met. It should here be stated that this complainant at no time dealt personally with Lloyd Gibson. She was always interviewed by Mrs. Barnaby-Moore.

On Count 4 the allegation was that Dennis Lee deposited a cheque for Three Thousand, Five Hundred Dollars ($3,500.00) towards the purchase of premises at Bridgeport, St. Catherine. On 30th December, 1976 Mr. Lee had made a down-payment of Five Thousand, Five Hundred Dolalrs ($5,500.00) on these premises, only to be told two weeks after that something had gone wrong, and he was shown other premises, 9, Corrine Crescent, Edgewater, which he agreed to purchase. Since the price for this second place was Twenty-five Thousand Dollars ($25,000.00) compared to Nineteen Thousand Dollars ($19,000.00) for the first house, Mr. Lee was

advised that he had to pay a higher deposit. Consequently, he paid an extra amount of Three Thousand, Five Hundred Dollars ($3,500.00). When he went to sign the agreement for sale, he observed that Five Thousand, Five Hundred Dollars ($5,500.00) was stated therein as the deposit. He disputed this statement; he was promised a new contract, which he had not received up to the date of the trial. Mr. Lee's was the only purchase which had been effectuated, although his complaint was that what he was demanding was the repayment of Three Thousand, Five Hundred Dollars ($3,500.00) which had been overpaid, and which never had been repaid.

Then the complaint of Lloyd Biersay in Count 5 is to the effect that he paid two cheques totalling Two Thousand Dollars ($2,000.00) as down-payment of 41 Southern Cross Drive, Harbour View. No sale was effected, and no refund of money was made.

Finally, in Count 6, Paulette Jervis' complaint was that she deposited a cheque for Three Thousand Dollars ($3,000.00) on a lot of land in Bridgeport, but later requested that this amount be applied to the purchase of a lot in Williamsfield, Manchester. No sale was effected, and no refund was made. Mr. Austin Jobson, a Real Estate Developer, and sole vendor of lots in that sub-division, received the agreement for sale signed by Mrs. Jervis and sent to him by Lloyd's Real Estate, but as he had no dealing with them, he did not return the agreement for sale.

Note should be taken of the fact that evidence led by the Crown showed that, as regards the respective premises, Lloyd's Real Estate and Rental Company Limited did not have any authority to deal with or sell them. For instance,

although 3 Greendale Avenue, Kingston 10 had been advertised for sale in 'The Daily Gleaner' by the owner, Mr. Clarence Wilson, he had in fact sold the premises sometime in 1973, the new owner Mr. Vincent Matthews, was in possession at the time of trial. Neither of these witnesses had authorised Lloyd's Realty and Rental to advertise those premises for sale in 1976.

Likewise, Monica Chambers had in August 1976 instructed her lawyers, Messrs. Dunn Cox & Orrett, to sell premises 41 Southern Cross Drive, Harbour View. She had not authorised Lloyd's Real Estate and Rental Bureau Limited to sell those premises. She said she never received any deposits from Lloyd's Estate and Rental Bureau, or Lloyd's Property Development Company Limited. She had no business with either of them. She had since sold the premises.

In the same vein was the evidence of Mr. George Williams, who was the owner of 7 Mimosa Avenue, Waltham Gardens, St. Andrew, and which he decided to sell. In pursuance, he advertised the sale of the premises between December 1976 and January 1977. He had instructed his lawyers, Messrs. Dunn Cox & Orrett, to sell the premises as, like Monica Chambers, he did not wish to sell through a real estate agent. And in fact the place was sold in 1979. He had been spoken to by Mrs. Barnaby-Moore in relation to the advertised sale; he had told her this and she even sent a representative to him; but the representative was told to go to his lawyer. He had not given Lloyd's Real Estate and Rental Bureau written or oral instructions to sell his place. He had not received any deposit from Lloyd's Real Estate.

Mr. Reginald Fraser, attorney-at-law supported the evidence of Dennis Lee. Mr. Fraser said he was the attorney-at-law acting on behalf of Everard Gowie, the owner

of 9 Corrine Crescent. He said he received a deposit of Five Thousand, Five Hundred Dollars ($5,500.00) regarding the sale of those premises from Lloyd's Real Estate and Rental Bureau. That was the only deposit which he received from Lloyd's, although his request for an additional deposit of Three Thousand, Five Hundred Dollars ($3,500.00) was never acceded to. But he eventually received the deposit along with the balance of the purchase money from the mortgagee's attorney. Everard Gowie gave evidence of being visited by Dennis Lee, and a Mr. Gooden of Lloyd's. He signed an agreement with Lee. He visited Lloyd's Real Estate several times when the second payment was not forthcoming. He had difficulty in getting the first deposit. He eventually received the first deposit from Lloyd's and a portion of the second from Lee.

In so far as the evidence of Monica Chambers was concerned, Lincoln Eatmon, an attorney-at-law, informed the Court that he held discussions with Lloyd's Real Estate and Rental Bureau in respect of the premises at 41, Southern Cross Drive, Harbour View. He never received any money by way of deposit on those premises from that company. The sale of those premises was eventually concluded. No money was ever received from Lloyd's in relation thereto.

Although Desmond Bernard, attorney-at-law, representing the interests of Harold Sanguinetti, the owner of 257 Hodgeport, Bridgeport, - he did not have the carriage of sale - had discussions with Lloyd's Real Estate in respect of a contract of sale of those premises, he testified that no deposit was paid to him by Lloyd's nor, to his knowledge, did Mr. Sanguinetti receive any deposit.

It was the common feature of all the complaints that there came a time when the complainants demanded to be repaid the respective sums deposited. Although they did not deal directly with the appellant, they each dealt with the accredited sales agents of the company, and particularly with Mrs. Barnaby-Moore, who was the Sales Managress of the company. She had been originally charged along with the appellant, but she gave evidence for the Crown at the trial testifying to the day-to-day operation of the company and other matters, in particular with the way in which the deposits were dealt with. In the absence of the appellant she was in charge of the general running of the business. She dealt with clients, prepared agreements, accepted deposits and dealt with correspondence under dictation from him. In this regard she was amply supported by Una Darby and Cora-Ann Moodie, who worked with the companies up to January 1976.

The overall picture of day-to-day business was that every major decision was taken by the appellant. Every member on the staff was answerable to him. Under the system operated they had to bring in whatever deposits were made and personally inform Mr. Gibson at the end of the day how sales by the Real Estate Company had progressed during that day. Deposits were paid to members of staff, as the persons making the deposits never dealt with the appellant.

As to the disposal of the deposits, Una Darby testified that as Secretary of Lloyd's Real Estate, she executed a document dated 22nd August, 1974 authorising her to co-sign cheques along with the appellant and Mrs. Barnaby-Moore. As regards Lloyd's Property Development Limited, she executed a resolution as well as a Deposit Agreement relating to the account of the company. This resolution bore her signature as

Secretary, and the signature of the appellant. Also tendered in evidence was a resolution in respect of Lloyd's Property Development executed by the witness and Lloyd Gibson, he as Managing Director, and she as a Secretary. She could not sign cheques on her own. He would first sign and she would countersign. This was in respect of both companies. These documents were dated 26th August, 1974. The significance of these documents is seen clearly when the evidence discloses that if and when a lodgment was to be made the appellant gave instructions as to which account the lodgment should be made. She could not make a withdrawal of funds without his authority.

According to Miss Darby, the appellant would determine to which account a lodgment should be made. For instance, while the cheque for Six Thousand, Four Hundred Dollars ($6,400.00) paid by Gloria Dunwell was lodged to the account of Lloyd's Real Estate and Rental Bureau, the further cheque for Five Thousand Dollars ($5,000.00) represented a deposit to Lloyd's Real Estate, but it was lodged to the Billy Dunn Subdivision Account which Gibson had opened. The cheque for Three Thousand Dollars ($3,000.00) paid by Cassia Grant was lodged to the Billy Dunn Subdivision Account, although the cheque was payable to Lloyd's Real Estate and Rental Bureau. So too, the cheques for Three Thousand, Five Hundred Dollars ($3,500.00) and Five Thousand, Five Hundred Dollars ($5,500.00) paid in by Dennis Lee. The amounts paid by Roy Biersay were lodged to the account of the Billy Dunn Subdivision. The cheque paid in as deposit by Paulette Jervis was also lodged to the Billy Dunn Subdivision Account, as was the cheque for Three Thousand Dollars ($3,000.00) paid by Joetta Moo. After Miss Moo demanded repayment a cheque for the like amount was

drawn on the account of Lloyd's Property Development, but as already stated, this cheque was dishonoured.

It is permissible to observe from the way in which the payments received as deposits were dealt with on the instructions of the appellant, that there was evidence of mis-application and misuse of the various sums deposited. Instead of being applied for the purpose of purchasing lands and houses for the depositors, the payments were transferred to the account of Lloyd's Property Development Limited, concerned as it was with what was described as "his personal subdivisions, at Billy Dunn, and at Clarendon Gardens." With these projects he was personally involved. In the words of Una Darby "Having regard to the Billy Dunn Subdivision, Mr. Gibson had to be out of office often in connection with it and also in purchasing materials for the sub-division. A typical day: he would come into office; have a conference with the sales people, then off to Billy Dunn." In the circumstances, it was said, all decisions of policy and substance had to await his return to the office, when the sales staff were called to give an account of whether the procedures for showing listed houses for sale had been followed, to account for deposits made on that day, depending on the sales which had been made on that day. Although the sales staff sold houses, they did not close the sale, as they were concerned only with receiving deposits.

When the clients demanded their money back they were constantly put off by one pretext or another. The evidence discloses that most of them did not see the appellant, they dealt with Mrs. Barnaby-Moore and the sales staff. That this was so is shown by this quotation from the evidence of Mrs. Barnaby-Moore -

> "In my opinion the state of his accounts at the Bank was close to zero. Because from actions Mr. Gibson would just not see the clients. He was always trying to show the clients some property, and that he was trying to tell us to put the clients off as much as we can. He would try to tell us to instruct the salesmen to try and interest the client in some other property. These were people who had made deposits and wanted refunds at the time. When he left there were many such persons."

This last sentence refers to the appellant's departure from the Island sometime in April - May 1977. Mrs. Barnaby-Moore accompanied him. They lived together in Miami up to the end of 1977. She gave evidence that when he left, although arrangements had been made for the payment of the staff, it was her understanding that he would still be conducting the business from abroad. He would be away for a couple of weeks, and he would return every now and then to see how things were going. She understood that to mean that he would probably be living in the U.S.A. In this regard, two matters of fact are notable; (1) he never returned to Jamaica of his own free will; (2) he was extradited therefrom at the request of the Government of Jamaica. In the meantime he had made several calls to the office in Jamaica. She said, "He told me that he had spoken to the office and that he was told that there was trouble out there. Purchasers coming to the office and demanding refunds, and they were breaking up the office and it would not be safe for him to go back right now." She declared that as far as she was concerned there was no intention not to give these people back their money. She added; "When Mr. Gibson and I left Jamaica he did not leave running as far as I am concerned. This is what I gathered in discussion with him. I formed the view that that was his honest intention. I know at

"London he called Jamaica. I don't know if he said his life was in danger, but he said there were problems and it would not be safe to return. I understood he would have suffered bodily harm unless he could find the funds for the purchase."

After an unsuccessful no case submission, the appellant in a lengthy unsworn statement said, inter alia:

> "I note that I am accused of six counts of fraudulent conversions Your Honour, I have never met any of these six persons except Moo. I have no knowledge of any of these persons visiting Lloyd's Real Estate and Lloyd's Property Development to purchase properties. I have never seen them except Moo. I have never received any deposit personally from any of the named clients. I have no intention to defraud any client by any of those means."

He acknowledged that he was a Director of both companies, and that he was involved in sub-divisions, relevantly Billy Dunn, and Clarendon Gardens. He tried to show that he did not have much to do with the day-to-day running of the Real Estate Company as he would have been out of office for the whole day, so that he had time only for half an hour's briefing in the morning as to what had taken place the day before, and what were the arrangements for the coming day. He would return at about 4:30 p.m. to 5:00 p.m. each day, as he would have been engaged in travelling between sites and inspecting and checking and consulting with the engineers. It was to be understood that he was underlining his day-to-day business activity as given by the witnesses for the Crown. He said his company was run by officers of the company, Lloyd's Real Estate, and he had nothing to do with it more than whenever a sale is closed and they needed to sign the documents, then he would do so. He had nothing to do with the sales of houses or the purchases.

He denied that Lloyd's Real Estate and Real Property

Limited were not in a position to make any refunds to clients who were to ask for the return of their deposits. He said "the only time you don't give a refund is where there is some legal problem." Nowhere in his statement does he say whether there were any legal problems. He did, however, say this:

> "My girlfriend has said none of these six clients with the exception of Moo, has ever come to me and requested a refund or even a simple discussion about these documents. They have never met me in their life neither have I met them in their lives. They have never been mentioned to me by Miss Barnaby or any of the officers as to those clients wanting a refund on making a change of mind. The only reason for these clients to go to the police, Your Honour, is that the offices of Lloyd's Property and Real Estate was closed in April by political violence, hostile people, and they didn't find anyone to go to, they go to the police department. I should say further all clients who made deposits to anyone of those companies mentioned have a legitimate claim. If I am given the opportunity to continue business with them, they all will be refunded their deposits because since I have been here in the last three months, I have contacted major banks, finance companies who have given me their words and would accept my assets and my house alone in Shenstone. I have a Surveyor's report, an appraisal figure by Pitter and Company that I could get up to half million dollars loan which I have taken the particulars to a Building Society and they have agreed to let me have a couple hundred thousand if and when I am ready for it. The said Citizens Bank has offered me loan of over one hundred thousand dollars with all that they own my house title which I bluntly refused. So you can see none of those clients complaining will have any problem in getting back their money."

In view of the evidence including the details of the Bank accounts and financial transactions with his Bankers, which the learned Resident Magistrate had heard and considered she was able to "find that there is abundant evidence in favour of the prosecution, and that the charges as set out

"six counts of this indictment have been proven." She thereupon pronounced him guilty on all counts.

Mr. Macaulay filed nine additional grounds of appeal to those which were originally filed by the appellant. These last were (1) that the verdict was unreasonable and cannot be supported having regard to the evidence. (2) That the sentence is manifestly excessive. The additional grounds were :

> "3. The learned trial Magistrate proceeded on the footing that if the persons mentioned in counts 1 to 6 of the Indictment, did not receive a refund when requested, there was a fraudulent conversion and therefore treated that circumstance as an intent to defraud by relation back, whereas the intent necessary for the offence ought to be determined at the time of the conversion. The learned trial Magistrate erred in treating a conversion per se as fraudulent conversion for the purpose of Section 24 (1) (iii)(a) of the Larceny Act.
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> 4. The learned trial Magistrate further proceeded, impliedly, on the basis that a separate bank account should have been opened by Lloyd's Real Estate and Rental Bureau Limited for deposits made to it and treated the payment of cheques made to that company and paid into the account of Lloyd's Property Development Limited and the Billy Dunn Subdivision account as fraudulent conversion within the meaning of Section 24 (1) (iii)(a) of the Larceny Act. The learned trial Magistrate did not at anytime consider not make (sic) any finding of fraudulent intent within the meaning of Section 24 (1) (iii)(a) of the Larceny Act.
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> 5. The learned trial Magistrate treated any conversion as proof of the offence charged and did not advert her mind to the fact that the deposits paid and accepted constituted a contract, the breach of which made the company a debtor of the client; in which case, the remedy would be by civil action in the civil courts and not criminal proceedings. The learned trial Magistrate failed to appreciate that in Grubb's case, there was a finding of fraud, which was not challenged on appeal. The question in Grubb's case was whether or not the Appellant had control of the property and nothing more.

"6. The learned trial Magistrate failed to take into account the system whereby Lloyd's Property and Rental Bureau operated in securing property for its clients which system necessarily involved making enquiries and inspecting advertisements and making necessary contracts with the advertisers. In consequence, the learned trial Magistrate treated the failure to arrange a sale successfully or at all as an obtaining of money by false pretenses, (with which offence the Appellant was not charged); in which case, the intent must be shown to exist at the time of the obtaining.

7. The learned trial Magistrate was wrong in law in holding that Winsome Moore's (Miss Barnaby) evidence was corroborated in every material particular by the witnesses Una Darby and Cora-Ann Moodie and failed to address her mind to the fact that the corroboration must be in a matter which implicated the accused of the crime with which he is charged and that the witness Winsome Moore (Miss Barnaby) had an interest to serve.

8. The learned trial Magistrate applied the wrong standard of proof in stating as follows:-

> 'I find there is abundant evidence in favour of the prosecution and that the charges as set out in the six counts of this Indictment have been proven.'

9. The learned trial Magistrate failed to consider the defence of lack of intent to defraud which arose from the prosecutions' evidence and the unsworn statement of the accused."

Of these, ground 8 was abandoned. But Mr. Macaulay delivered the full force and effect of his arguments against the specifics of the findings of the Resident Magistrate as indicated by the other grounds. In fact he argued Ground 3, 4 and 9 together. His composite argument was that she did not consider the effect of lack of intent to defraud. It was argued, she wrongly assumed, impliedly, that any conversion was sufficient proof of the offence charged and therefore she did not make any finding of fact as to whether there was or

was not an intention to defraud. Such a finding was necessary, he said, as the test of an intention to defraud is not objective but subjective, in the sense that it is whether the appellant had an honest belief that no such demand was made. He developed his arguments on this that there was nothing in the evidence to show that the Moo dishonoured cheque was put through the account at all.

It is clear to us, however, that the Resident Magistrate had to take into account the fact that, what was common knowledge, and not denied, the appellant had left the Island in April 1977. According to him he was going to London via Miami, for the purpose of buying pumps for the Sewage Scheme which he had laid out at the Clarendon Gardens Subdivision. He said he phoned through from London on the Friday of the week of his departure, to enquire whether the pay bills from the construction site had been paid to the workers and employees. He said he had received information then that gunmen had invaded the offices of the company, and he was advised that it would be inopportune and inadvisable to return to Jamaica at the time. He evidently took this last piece of advice very seriously, and cogently, did not return to Jamaica, until the 11th June, 1980, when by a court order he was extradited from Miami in the U.S.A.

He was escorted back to the Island by Detective Acting Superintendent Franklin Ruddock, who said that from his observations as part of his investigations, consequent on the complaints made by several persons named in the indictment, in the early part of April 1977 he saw the appellant in Miami. Gibson, he said, was there residing in an exclusive Florida Gardens residential area, and in a big house. During the period of his observations - the 16th January, 1979

18th January, 1979 the Detective Acting Superintendent said he saw the appellant driving a 1977 White Pontiac Transom bearing a Fort Lauderdale Registration number. It was one of two cars on the premises. This information is mentioned here to pinpoint two other facts (1) the account of Lloyd's Real Estate and Property Company Limited, was frozen by the Citizens Bank on the 6th May, 1977; and overdraft facilities were withdrawn on both accounts; (2) About the same time when the police in pursuance of their investigations visited the Bank, the Bank was not able to locate or contact Gibson. He was written to, in respect of the accounts and Time Loan. The Bank did not receive a reply.

Placing those facts in context demands other facts to be iterated. Firstly, apart from Joetta Moo, Merle Dunkley said that when she first requested the return of the Eleven Thousand Dollars ($11,000.00) which she had deposited, Mrs. Barnaby-Moore would put her off. Eventually she saw the appellant, who put her off. When she returned she did not see him, but she saw Mrs. Barnaby-Moore. At a later date she again saw Gibson; he told her he was asking her to come back as he was excepting to receive some money from May Pen. As advised by him she returned, but she did not see the appellant. She was told that he was not there, and despite her going back there on several other occasions she was not successful, These two instances belie the argument founded upon the absence of personal contact with the appellant. In these two instances, there was evidence upon which the Resident Magistrate could find that there was a prima facie case for the appellant to answer. In fact, what is quite clear in each of the six counts is that by some stratagem the appellant managed to evade the questioning demands of

his clients, whether he was in Jamaica or not. And indeed his not accounting to, as well as avoiding, them must have been powerful factors in the conclusion of the Resident Magistrate. Significantly, too, is the fact that after the appellant left, the place was invaded, not only by the bailiffs, but by the sales representatives of the companies who took away property belonging to the company.

There was, therefore, a situation which effectively countered the argument by Mr. Macaulay that the offence under Section 24(1)(iii)(a) of the Larceny Act cannot be said to have been committed vicariously. He argued that a demand must have been made on Gibson personally. If the demand was made on him and he did not make a refund within a reasonable time, and he kept away, there would then be a commission of the offence of fraudulent conversion. This would be so because the offence is one which requires a specific intention, which must be proven by the prosecution. He carried the argument further by submitting that in this case the appellant had expressed an honest belief that no such demand was made on him. On a balance of probabilities, said he, the crime would not have been committed by him as he reiterated: the specific intention in the particular case must be demonstrated by the prosecution showing that the demand was made on him personally, because it is his specific intention and honest belief which is in contention. A lacuna existed in the evidence in this case, as there was no such demand by a specific person to him, nor was there proof of any communication of the demand by a specific person or by any person named in the indictment.

These arguments were put forward even against the findings of the Resident Magistrate, when she expressed the principle of law by which she would be guided to decide whether the appellant was guilty. She said:

> "A person may be 'entrusted' with property, or may 'receive' it for or an account of another person within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner, and that the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person in circumstances whereby he becomes entrusted or whereby his receipt becomes a receipt for and on behalf of another person and fraudulently converts it or the proceeds, then he has committed an offence within the section. Reference R. vs. Grubb [1914] 2 KB 683; [1914-15] All E.R. Rep. 667; 11 Cr. App. R. 153. It is contended by the Defence that the decision in R. vs. I.C.R. Haulage [1945] 30 Cr. App. R. 31, has cast doubt on the above principle. It is my view that the latter case merely established that a company may also be indicted because the act of the Director is the act of the Company and the fraud of the Director, that of the Company. A fortiori, the Managing Director may be indicted where it is shown he exercises exclusive control of the Company."

This case was not concerned with the prosecution of the Company, but was founded on the allegation that the appellant by the impugned transactions used the company as the instrument to carry them out.

Significantly, the judgment of Lord Reading, C.J. at page 669 in R. v. Grubb (supra) answers the arguments of Mr. Macaulay set out earlier. The Lord Chief Justice was emphatic that -

> "for the purpose of determining whether the offence has been committed, the words 'being entrusted' should not be read as being limited to the moment of the sending or delivering of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property. Equally, the words 'having received' may cover the receipt at any time by a person who receives the property for or an account of another."

With regard to the requisite intent in the offence of fraudulent conversion, the Lord Chief Justice pointed out -

> "A Company has no mind, and cannot have an intention; if the person directing and controlling the affairs of the Company and by whose instructions the property has passed into the possession of the company and has been converted, intended to convert it fraudulently, he would be guilty of an offence whether the property was fraudulently converted to the use and benefit of the company or to his own benefit. If he did the acts with an intent to defraud, it would not be an answer to prove that he did them as the servant or agent of another person whether a Company or an individual. Moreover, if the company was used by his directions as the instrument, so as to enable him in the name of the company to become possessed of the property, and by means of the company to convert it fraudulently to his own use and benefit, he would be guilty of an offence under this statute."

It is clear from the evidence in the instant case that the appellant did not use the moneys deposited for the purpose in view; except for one amount, the evidence disclosed that he placed all moneys collected by Lloyd's Real Estate and Rental Bureau into the bank account of Lloyd's Property Development Limited from which, without a doubt, he financed his sub-division scheme at Billy Dunn, not to speak of his personal expenses. According to Mrs. Barnaby-Moore, the appellant built a house at Shenstone Drive, Beverley Hills, which was financed through the two companies, she said she had questioned her co-signing of cheques for the accused which had nothing to do with the company. His unredeemable position is emphasised by the refusal and/or inability to repay the refunds when demanded so that appropriately Section 64(2) of the Larceny Act could be called in aid. Certainly, in so far as a prima facie case was made out, the words of that section bear stating:

> "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."

The facts of this case exhibit those types of reaction by the appellant, and at the end of the day none of them was refuted by anything which he said in his unsworn statement.

In that unsworn statement the appellant declared that he had "no intention whatsoever of stealing a dime, of fraudulently converting the money." He pointed to the state of his account and his assets which he said placed him in a position of being able to make refunds, and therefore he did not commit any of the offences charged. It is, however, a peculiar circumstance that he never contacted the bank while he was away, nor even when he said he phoned, did he say to any member of staff that payment of staff salaries and depositors' moneys would be made.

As regards the state of his accounts, the Resident Magistrate had to give due weight to the Ledger Cards. Exhibits 34-35 produced from the Bank bore eloquent testimony of the state of the accounts in both Companies. These accounts had been transferred from an active to an inactive ledger. They had been frozen on the 6th May, 1977, according to the evidence of Mrs. Shirley Riley, an official from the Jamaica Citizens' Bank. And, in fact, the Bank had stopped paying the cheques of both companies for sometime, because they were not able to locate the appellant. The argument was urged that the other financial transactions which the appellant had with the Bank indicated that he had surplus funds

from which he could draw. On this, the Resident Magistrate commented: "But the evidence of Mr. Anthony Smith, the General Manager of the Jamaica Citizens' Bank is that the Time Loan - Exhibit 33 - is regarded as a Promissory Note. It did not represent disbursement of new funds to the appellant." She continues: "The defendant's attorney contended that the bank had been in communication with Mr. Gibson, because exhibit 42 - Time Loan - indicated that final payment was made on the 8th February, 1980. But the evidence of Mr. Smith in this regard, is that the debt of Five Hundred Dollars ($500.00) weekly was made against the account of Lloyd's Real Estate by way of a Standing Order. There is evidence that the bank received the proceeds of sales in respect of certain assets which it held.

I accept the evidence of the two bank officials that the financial position of the companies is as set out in the relevant documents. Mr. Brown who has been Auditor for both companies for a number of years, gave evidence concerning their financial standing. He told me that if on examination of the bank statements he saw where cheques, payable to Lloyd's Real Estate had been lodged to the account of Lloyd's Property Development, he would ask the officer responsible for an explanation. He had, on occasions, reported to management certain irregularities, but this did not include the act of one company's funds into the banking account of another. I do not place much reliance on Mr. Brown's evidence. I prefer the evidence of the officers of the bank to that of Mr. Brown."

This finding of fact is unassailable despite the argument that the bank recognised the credit-worthiness of Gibson to the extent of Three Hundred Thousand Dollars ($300,000.00) and that all securities were treated as applicable

to both bank accounts. It cannot be gainsaid that the Resident Magistrate was in duty bound to pay careful attention to the accounts of the two companies and to take note of the fact that up to the date of the trial, his indebtedness to the bank had not been liquidated. All in all, there was from the evidence, material for the Resident Magistrate to conclude that the accused had not the wherewithal to refund or return the deposits. It must be borne in mind that the capacity to repay where that is proven does not necessarily by itself cancel out the intention to defraud, where the Court accepts that property entrusted was fraudulently converted by the appellant.

This is made quite clear by the judgment of Lord Goddard, L.C.J., in Williams & Williams [1953] 37 Cr. App. R. 71 at pages 79-80; [1953] 1 All E.R. 1068 at page 1071A, when he dealt with the submission that if the appellant intended to repay the money which they had been charged with stealing and had reasonable ground for believing they would be able to make repayment, that would be an answer to the charge. His words are -

> "We have to point out, as has been pointed out more than once in the course of the argument, that we are here dealing with the case of coins, and there is no question here that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. That is the first thing. Does it make any difference, then, that they intended to repay, which can only mean in this case that they hoped they would be able to repay? In considering whether this court is to give effect to the rider of the jury, we must bear in mind the case which, as we have said before, is the locus classicus in this matter, Channell J.'s charge to the jury in CARPENTER (1911)22 Cox C.C. 618, referred to by this court in the case of KRITZ, 33 Cr. App.R. 169; [1950] 1 K.B. 82. In that case we quoted the direction of the learned judge,

> "which was given in a charge of false pretences, but on this point about honest intention it is just as apposite as in the case of larceny. Channell J. said this at (at p.624): 'If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money because you may by fraud get hold of the money, even if you mean to repay it, and thoroughly believe that you can repay it - you are still defrauding the depositor. You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and the question as to the intent to defraud substantially comes to this: Whether or not the statements were honestly made.' For 'statements,' in this case we have to substitute 'actions,' because the money was taken; it was not obtained by statements. Here the money was taken and the appellants intended to use the money for purposes different from those for which they were holding the money and for which the persons who paid the money intended it to be used; ....."

There is, then, no validity in the argument that since the appellant had personal assets totalling Two Million, One Hundred and Sixty-six Thousand, Eight Hundred and Seventy Dollars ($2,156,870.00), it was ridiculous to think that he could not have found a mere Twenty-four Thousand Dollars ($24,000.00). The real question in the case was whether a demand having been made, the appellant's answer was to repay the amounts demanded. The Resident Magistrate did advise herself, as is clear from her stated findings, that she

looked at the appellant's statement regarding his telephone calls from Heathrow Airport to his office, and the information given him about the condition of his affairs in Jamaica. She must at the same time have noted that, despite all this, he did not himself return to set matters right. Instead he sent, according to him, his son as an emissary to the banks and his attorney-at-law, with instructions to pay over the moneys to the respective claimants. Her conclusion must mean that she rejected his plea that "I am making the effort to satisfy the clients who have paid deposits to Lloyd's Real Estate and there was no intention whatsoever of stealing a dime, or fraudulently converting the money." The submission that it was always the intention of the appellant to refund when he learnt of the demands of persons who had made deposits at the office, is not borne out by any factual evidence from him to the contrary. His whole attitude even at the trial was to shield himself behind the actions and activities of the senior employees in the companies, which he agreed he controlled. Not only did he use them as a shield, but he did admit and confirm the evidence by the Crown that he was a co-signor to every cheque drawn by the companies. Nothing that he said therefore was intrinsically contrary to what was told by Miss Cora-Ann Moodie, about the temporising and evasions which took place from time to time. Her observation is in the following words: "When the clients come to get their money back, they always wanted to see Miss Barnaby or Mr. Gibson. If we couldn't pacify them ..... they would force their way upstairs to Miss Barnaby or Mr. Gibson. These people didn't get their refund. They were put off till next week and put off to next week. They were put off all the time." There was certainly no explanation from him why this was so, albeit he did deny that he had anything to do with them.

One of the structures raised by Mr. Macaulay was the holding that Winsome Barnaby-Moore's evidence was corroborated in every material particular by the witnesses Una Darby and Cora-Ann Moodie. He complained that the Resident Magistrate failed to address her mind to the fact that the corroboration must be in a matter which implicated the accused of the crime with which he is charged, and that the witness, Winsome Barnaby-Moore, had an interest to serve. Here all three witnesses agree as to the over-riding and exclusive role which the appellant had over the affairs of the company. He agreed with the evidence that he was Managing Director of the Companies. His account of a day's operation in the business did not differ from that given by those three witnesses. Mrs. Barnaby-Moore said in her evidence that she had no intention of defrauding anyone, and she was always willing to make a refund. If this at first sight is self-serving, it must be remembered that all important transactions, for example, the nature and volume of the days work, the agreements for sale, and the deposits collected, the disposal of the funds, the drawing of cheques, must be given their due place in a consideration of the relationship of Mrs. Barnaby-Moore to the companies and the appellant. True it is they left Jamaica together, and lived together in Miami for a period, and they had been both arrested and extradited to Jamaica. Accordingly, the Resident Magistrate said "Miss Barnaby may be regarded as an accomplice vel non and I hold that her evidence is corroborated in every material particular by the witnesses Darby and Mrs. Moodie."

We are not able to accept that neither the evidence of Darby nor Moodie corroborated the witness, Barnaby-Moore.

The label on the witness Barnaby-Moore, suggests very strongly that the Resident Magistrate, of experience, must have taken into account the attendant legal principles of that finding. While it is a matter of law what is capable of corroboration, it is a question of fact whether there was corroboration. She warned herself of the danger of convicting on the evidence of Miss Barnaby alone, but the other evidence in the case was sufficient for a conviction, especially bearing in mind that the appellant nowhere displaced the evidential burden which rested on him when he was called upon to answer. It is not absolutely correct to say that a conviction should be quashed because the Resident Magistrate is said to have treated as corroboration evidence which could not be so regarded. It is our view that even if the Resident Magistrate was wrong on this, the evidence was such that even without the aspect of corroboration she would likely have come to the same conclusion of the guilt of the appellant.

Surprisingly, Mr. Macaulay argued that where an appellant expresses his intention in clear terms in an unsworn statement, an appellate court cannot make a finding of fact that that intention was not so, for in doing so it would be finding an intention from the printed word, and upon a matter upon which the trial Court has made no finding. In any event, that state of mind is one which formed an ingredient and is set up as a defence. He said it matters not what the appellate Court thinks unless the trial Court has not considered that defence.

He went on to submit that this Court cannot make a finding of fact on an unsworn statement. He developed on that remark by saying that an unsworn statement of an accused person is not evidence in the case, and this Court can only

make findings on evidence in the case. It is not clear whether in his further submissions, Mr. Macaulay wishes to treat the unsworn statement as inadmissible evidence or no evidence at all. He referred us to the cases of R. v. Anwar & Storey [1968] 51 Cr. App. R. 334 and R. v. Barberry [1976] 62 Cr. App. R. 349-350 which record the approach of the English Courts to the efficacy of the unsworn statement of an accused person. But we are reminded of the observation by Kerr, J.A., in R. v. Hart [1978] 7 W.I.R. 229, "that it is unnecessary and often undesirable to categorise an unsworn statement as 'evidence' or 'non-evidence'."

This may be one of those cases referred to by Lord Salmon in giving the advice of the Privy Council in Leary Walker 21 W.I.R. 416; 12 J.L.R. 1369 on "the objective evidential burden of an unsworn statement" -

> "..... in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence."

He thereupon intimated the course which the judge should take in instructing the jury on the efficacy and force of the unsworn statement.

When the trial judge advises a jury on the effect of the unsworn statement of an accused, it is permissible for him to instruct the jury that the accused having exercised his right to make the unsworn statement, it is of some possible value to the accused. Such a statement should be taken to have such weight as the jury thought fit, paying due regard to the fact that it was unsworn and untested by cross-examination. It is clear that in this case the

potential effect of an unsworn statement is persuasive rather than evidential, and that while such a statement could not prove facts not otherwise proved by the evidence before the jury, it may, nevertheless, make the jury see the proved facts and the inferences to be drawn from them in a different light. See The State v. Mitchell [1977] 29 W.I.R. 381 per Hyatali, C.J., at page 393. It is true that the Resident Magistrate did not state specifically whether she had warned herself on the various questions that arose on the evidence, but she did express her findings in so far as her acceptance of the value of the evidence of Mrs. Winsone Barnaby-Moore, Mrs. Cora-Ann Moodie, Miss Ann Darby. She must have accepted the evidence of each of the complainants who said they have not received the refunds as demanded. She found that the financial affairs of the appellant and of the two Companies as described by the sworn evidence of the bank officials was such that she could accept those officials in preference to the witness called by the defence - the Auditor of the company. Inferentially, it must be accepted that she took all those facts into account when she said "I find there is abundant evidence in favour of the prosecution and that the charges as set out in the six counts of this indictment have been proven."

In our view, no miscarriage of justice has occurred in the findings of guilt, thus recorded by the Resident Magistrate. Although there was much argument about the application of the proviso to Section 14(1) of the Judicature (Appellate Jurisdiction) Act, we do not think that resort need be made to that proviso considering the tenor of this judgment, and the opinions expressed above. In the final

analysis, this Court has not been persuaded that the verdict is palpably wrong. When one looks at the totality of the evidence as regarded by the Resident Magistrate, the only proper verdict on the counts of the indictment is the one which was handed down by her.