C.A. CRIMINAL LAW - Breach of Exchange Control Act - S 4(1) - having money and failing to offer it to an authorised dealer - Interpretation? - Whether appellant was JAMAICA a person who was entitled to sell.

IN THE COURT OF APPEAL APPEAL DISMISSED (Carberry J. dissenting)

R.M. CRIMINAL APPEAL NO. 93/80

✓ comp

Legal Drafting and Interpretation

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Marsh, J.A. (Ag.)

R. v. MARGARET SMITH

F.M.G. Phipps, Q.C., & Mrs. M.S. Brown for the Applicant

F.A. Smith, Esq., & P. Sutherland, Esq., for the Crown

September 24, 25, 1980 & July 11, 1988

CARBERRY, J.A.

Very recently, discussing with the President of the Court of Appeal my efforts to try and complete all outstanding matters during my pre-retirement leave before my retirement became effective on 12th July, 1988 he reminded me of this case and two others. The case I remember well, but the papers in it got mislaid when our chambers were moved from the second floor to the third floor some few years ago in 1983.

I made a determined search for them and on finding them I was horrified to find that we had heard the matter some seven years ago. Judgment had been reserved on the 25th September, 1980.

Marsh, J.A. (Ag.) prepared more than one draft for consideration; his final draft was approved by White, J.A. in March, 1981 and we were to meet to see if my difficulties could be overcome. We never did meet; my two colleagues returned to their busy circuits, and all three of us at different times went on long leave. The responsibility, however, was and is mine. The majority judgment of Marsh, J.A. (Ag.) is now published. The reasons for my disagreement are shortly put.

This was a case in which two nurses were involved, one in Kingston, Mrs. Regennas and the other in Savanna-la-mar, Margaret Smith. In broad outline the former, a U.S. Citizen, employed at the Children's Hospital received some U.S. $6,500.00 from her boyfriend in the States, some 10 days before the main incident. Shortly after, on Friday the 1st September, 1978, she journeyed to Westmoreland with her friend Nurse Smith, stayed there, and left with her this money (in American dollars) while she journeyed on to Negril apparently in search of a house which she might buy. She found none, but returned to Kingston leaving the money with Smith. On Monday 4th September, Smith was involved in an altercation with a man who she claimed attempted to rape her, and then to take the money belonging to Regennas, She phoned the police. They came. Her assailant was picked up by the police along the way, and on being brought to Smith's house he countered her accusation by stating that he had given her some US$17,000.00 to change into J$34,000.00 and that she had kept his U.S. Dollars and had not given him the Jamaican equivalent. Smith denied this and offered to have the house searched. The police went away and returned with a search warrant. On search they found two parcels of U.S. dollars: a small one of U.S. $200.00 upstairs and a larger one of $6,456 hidden behind Smith's stove. She was arrested. Smith told the police that the US$200.00 was hers, a present given to her on August 31, but that the U.S.$6,546 belonged to Nurse Regennas. Under formal interrogation at the Police Station (written questions and answers) Smith claimed that all the money belonged to Nurse Regennas, and it had been given to her (Smith) to purchase a home.

Nurse Regennas was the very next day interviewed by the police, and she too answered ~~interrogatories and~~ made a statement. In ~~the~~ interrogatory (Exhibit 4) Nurse Regennas claimed that the money was hers, recently received from the States, and that she had left it with Nurse Smith "to keep in safe keeping for me while I look for a house." Nurse Regennas repeated this in her statement (Exhibit 5) saying she had asked Smith "to hold it for me until I was able to buy a house."

Both women were charged for breaches of the Exchange Control Law. Briefly they were charged under Section 4 (1) with having the money and failing to offer it to an authorized dealer; alternatively they were charged under Section 5 (1) with having the money and not notifying the Minister. Nurse Regennas was discharged during the trial, the Crown saying that they would offer no further evidence against her. No explanation has ever been forthcoming as to why this happened, and on what basis it took place. She had admitted that the money was hers, that she had had it for some ten days, and that she had left it with Smith, and had not offered it to any bank, and that she meant to use it to buy a house (whether through a bank or not).

Nurse Smith was convicted on the count under Section 4 (1) with failing to hand the money to a bank or authorised dealer. She was fined $10,000.00 or 12 months hard labour, and the money in question was ordered to be forfeited. In the result then Regennas lost her U.S. $6,500.00 and Smith was fined $10,000.00, Smith appealed.

The relevant sections of the Exchange Control Act have been set out in the judgment of Marsh, J.A. (Ag.) above. I differ from the majority judgment in this respect. Nurse Smith was not in my view a person who was "entitled to sell". Both accused were firm that the money belonged to Regennas, and Regennas was acquitted! It is also clear that despite some conflict in the explanations given by Smith, i.e. that it had been given to her to buy a house for Regennas, as against the explanation that she was holding the money for Regennas who wished to buy a house, Smith was not "entitled to sell" this currency. It is suggested that the bailment under which she held was illegal and void, and itself in breach of the Exchange Control Act. This may be so, but it was a bailment nevertheless and the fact that it was void or illegal did not make the money hers or make her "entitled to sell." If it did, a receiver could never be liable for converting the stolen goods he received and resold. Suppose Smith had taken the money to the bank and sold it only to have the rate of exchange double next day! what answer could she give to Regennas? As to whether there had been an

"opportunity to sell" this money was received on a Friday night (though some evidence suggests Thursday), and the banks were open on Saturdays then for some two hours, and so too for Monday morning. The search took place on Monday afternoon. I agree that there was opportunity to sell, had she been entitled to do so, though the time available was small.

There was an alternative charge under Section 5 (1). This is the section that says in effect that where a person has specified currency but is not entitled to sell it, he is to notify the Minister and presumably to explain his position. This charge was not considered by the Resident Magistarte, and in any event having regard to the week-end during which the money was received or held, there was not in commonsense an opportunity to notify the Minister in Kingston (though it might be said that there was an opportunity to sell to the local bank.)

Accordingly, I would have allowed the appeal and set aside the conviction.

MARSH, J.A. (AG.)

On the 25th April, 1979 the appellant was convicted in the R.M. Court for the parish of Westmoreland, for a breach of Section 4 (1) of the Exchange Control Act, in that - 'being a person in the Island who is entitled to sell foreign currency and not being an authorised dealer (she) failed to offer foreign currency amounting to U.S. $6,456.00 for sale to an authorised dealer."

Section 4 (1) supra so far as is relevant reads as follows:

> "(1) Every person in the Island who is entitled to sell, or to procure the sale of, any .... foreign currency to which this section applies, and is not an authorised dealer, shall offer it, or cause it to be offered, for sale to an authorised dealer, unless the Minister consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Minister.
>
> The foreign currency to which this section applies is such foreign currency (hereinafter in this Act referred to as "specified currency") as may from time to time be specified by order of the Minister."

Section 4 is the section which applies to so called "hoarding" offences and U.S. currency is a "specified currency."

It is clear from the wording of the subsection that it applies to persons who by virtue of the circumstances of their possession of the currency are free to sell if they wish. If on the other hand, the currency is held merely as bailee, for some other person, then the holder would not be entitled to sell it or procure its sale, unless, of course, he had the permission of the owner to do so. It is for this reason that Section 5 of the Act makes provisions for persons such as bailees who are not entitled to sell because of the terms of the bailment. Persons falling under Section 5 are therefore not required to offer the currency for sale to an authorised dealer, but to inform the Minister in writing that they are in fact holding such currency.

It is obvious of course that in any proceedings by the Crown under the provisions of Section 4 (1), one of the obstacles in the way of the prosecution would be that of tendering direct evidence that the currency had not been offered for sale. To meet this, Parliament has provided an additional aid to the authorities under Section 4 (6) which provides:

> "In any proceedings in respect of failure to comply with the provisions of this section, it shall be presumed until the contrary is shown that the ..... currency in question has not been offered for sale to an authorised dealer."

By relying therefore on this statutory presumption to shift the evidential burden, the prosecution is relieved from what would otherwise have been an extremely onerous task. However, it is clear that for the presumption to be sensibly applied it must be shown that there was, within reason, opportunity to make an offer in terms of the Act. The accused must be offered a reasonable time to comply with the law, and, if he came into possession of the currency when the banks and other authorised dealers are not open for business, no blame ought to attach if he delayed the offer until the next working day of the bank or other institution.. The presumption is therefore rebuttable by evidence that:

> "(1) an offer was made, or
>
> (2) there had been no reasonable opportunity to do so.

See Regina v. David Lowe R.M.C.A. No. 147/78 dated 18th January, 1979.

I turn now to the evidence in this case. The chief witness for the prosecution was Constable Ebanks. He told the court that at 2.00 p.m. on 4th September, 1978 he received a report and in the company of two other police officers he went to the district of Smithfield in Westmoreland where he saw the appellant - she appeared to be hysterical and was crying. She complained of having been assaulted earlier that day by a man whom she described to Constable Ebanks and his fellow officers and requested them to accompany her to her home which was nearby. On the way there

Constable Ebanks came upon a man who fitted the description given by appellant and who was personally known to Ebanks as one Owen Lawrence. Ebanks therefore asked the man to accompany him to the house of the appellant. On arrival there, this man Lawrence, told the police officers, in the presence of the appellant, that he had given the sum of U.S. $17,000.00 to her under an arrangement whereby she was to hand him J. $34,000.00 in exchange, but, that the appellant having taken his U.S. currency, had refused to hand over the agreed Jamaican equivalent. The appellant, however, denied all this, and said:

> "Officer, you can search the house, I have no such money for him in the house."

The appellant further accused Lawrence of having come to her house earlier that day and attempting to sexually assault her, that there had been a tussle in which she barely succeeded in ejecting him from the house and shutting the door against him. She also said that she had not known him previously but that he had came there that morning seeking medical treatment. The appellant is a State Registered Nurse.

As a result of all this, Constable Ebanks decided to obtain a search warrant and proceed to search the premises that same day i.e. the 4th September, 1978. In the course of the search, which was conducted by Ebanks and the two other police officers in the presence of the appellant, a sum of $200.00 U.S. was found in the drawer of a wardrobe in the bedroom occupied by the appellant; when asked about it, appellant said it was hers and that she had received it the previous Thursday as a present from a friend (she later denied this). The search continued and in the course thereof a further sum of $6,256 U.S. was found behind a stove in the kitchen. When confronted with this, appellant said if she had mentioned it to the police officers they would have given it to Lawrence. When asked whose money it was, she said "It belonged to a nurse name Charlotte Regennas who works at the Children's Hospital." The appellant was then taken to the Station where the money was counted in her presence; and she was eventually arrested and charged.

In her evidence below, the appellant said that on the 1st September, 1978, she arrived home from Kingston around 9.00 p.m. in the company of Nurse Regennas who infact spent the night at the home of the appellant. During this visit, appellant testified, Nurse Regennas asked her to keep the money which was in a package and the total amount of which was U.S.$6,456.00 until she Regennas returned from Negril. Appellant also said that she had told the police before the search that she had a package in the house but that it did not belong to her. She also admitted in cross-examination that she had not offered the currency for sale to any bank; that she was holding it for Nurse Regennas.

In a written statement taken from the appellant on the day following her arrest and which is at page 39 of the record, appellant explained her possession of the currency in the following terms:

> "It was given to me on 1st September, 1978 by a friend to purchase a home - Charlotte Regennas of 203 Grange Mansion, Kingston 5."

A written statement was also taken from Nurse Regennas. This is at page 37 of the record. In that statement Nurse Regennas confirmed that she had left the money with the appellant and instructed her to hold it until she (Regennas) was able to buy a house.

At the trial Mr. Lawrence was never called as a witness and there had been no suggestion in the case that the sum of U.S. $6,456.00 formed any part of the U.S.$17,000.00 which that gentleman was supposed to have handed to the appellant. It is convenient to point out also, at this stage, that the indictment originally charged the appellant was well as Nurse Regennas in separate counts (1 and 2) with a breach of Section 5 (1) in a third count. However, for reasons which remain obscure the Crown elected during the trial, to offer no further evidence against Nurse Regennas. She was therefore dismissed and the trial proceeded against the appellant on the remaining two counts, based upon Section 4 (1) and Section 5 (1) respectively.

Against that background the appellant's trial ended with her being convicted on count 2 of the indictment for a breach of Section 4 (1) of the Exchange Control Act.

At page 24 of the Record the findings of the Learned Trial Judge are stated thus:

> "Defendant's answer contained in the interrogatories - It was given to me by a friend to purchase a home" (presumably on behalf of the friend) incompatible with her assertion in evidence that she was holding the money (presumably in specie) for Miss Regennas who would repossess same at will - Does not indicate any present intention to dispose of foreign currency to an authorised dealer.
>
> Hence guilty of retention as per Count 2."

This finding has been challenged by counsel for the appellant. It was submitted that since the Crown's case had been presented below on the basis that Miss Regennas was the owner of the currency and the appellant a mere bailee thereof, it was not open to the Learned Trial Judge to convict on count 2, since a necessary ingredient of that count, namely, appellant's capacity to sell, was missing, on the evidence, and she could not therefore be guilty of contravening Section 4 (1), since that provision applied only to persons in possession of currency who were "entitled to sell" same. Counsel further submitted that if a conviction was at all possible this could only have been in respect of count 3 relating to Section 5 (1); but that in the absence of any specific finding on that count, the appeal should be allowed.

This is a superficially attractive argument, and as this court pointed out in R. v. David Lowe supra, there may be cases where the terms under which specified currency is held are such as to preclude the holder from selling, in which event the proper procedure would be to inform the Minister pursuant to Section 5 of the Act. That, however, is not the case here. In the first place there is no specific evidence before us as to the terms of any alleged bailment. In particular we do not know, assuming such terms existed, whether they precluded the appellant from selling.

Merely to say that the money was left to purchase a home is hardly to the point. Specified currency cannot be lawfully used in Jamaica to purchase a house, so even if that explanation were accepted it takes us no further. Where is the bailment and what were its terms? Was it that the appellant was to convert the currency into Jamaican coinage and use that to purchase the home, or was she merely to convert it and keep it to be later repossessed by Miss Regennas, who would then use it to purchase a home? There are several permutations possible. It is all a matter of speculation.

The Exchange Control Act is designed to control and restrict dealings in foreign currency in protection of the economy. Its provisions make it clear that persons who deal in or with such currency must do so with deliberate circumspection. Such currency may be bought, sold or otherwise dealt with only in the manner prescribed by statute. There is no liberty in the citizen to treat such money as if it were his exclusively - the State acting through the Minister, has an interest in all such transactions. Any person therefore who comes into possession of specified currency can only treat with it in the manner laid down by the statute. If he is entitled to sell same, then he must do so to an authorised dealer or seek the Minister's permission to do otherwise. If he is not entitled to sell, then he must inform the Minister in writing that he is holding such currency. It is not a chattel that he can dispose of or keep as the mood moves him. "Specified currency," in terms of this Act is not strictly speaking legal tender in Jamaica and persons who seek to so treat it, do so at their peril. So much is this the case that Parliament in Section 4 (6) of the Act has, by statutory presumption, shifted to the accused the evidential burden which would otherwise have rested quite heavily on the shoulders of the Crown, in proceedings under that Section.

Turning once more to the question of the alleged bailment one has to consider two aspects of the matter. Firstly, was there any specific evidence of its terms? Secondly, even if such evidence existed, would not any contract based therein be void or illegal? What are the circumstances? Miss Regennas is given a present by her boyfriend from America of an amount of U.S. Currency, about 10 days prior to the arrest of the appellant (see p. 33). At that stage Miss Regennas was required, at the first reasonable opportunity, to offer that currency for sale to an authorised dealer. She does not. Instead she gives it to her friend in Savanna-la-mar to keep, purportedly with the intention of using it to buy a house. One pauses here to point out that at this stage Miss Regennas, assuming that the story is true, had no legal authority to hand the money to the appellant and the latter had even less to receive it, since she was not an authorised dealer. In other words, there is no basis in terms of the statute upon which such a transaction could have been lawful. Miss Regennas was required in terms of Section 4 (1) to offer the currency for sale to an authorised dealer, of which the appellant was not; or, to seek the Minister's permission to otherwise deal with it, which she did not. In such circumstances it is difficult to see what lawful contractual basis could have existed, on those facts, so as to place appellant in the category of a bailee. There was no capacity in Miss Regennas to hand over currency to the appellant in terms of any bailment; and (subject to her falling within Section 5, as to which there is no evidence) there is equally no capacity in the appellant to retain it on such terms.

The result therefore is that even if the appellant's explanation about being given the money by Miss Regennas, were accepted, she the appellant would nonetheless be in contravention of Section 4 if she failed to dispose of it to an authorised dealer. This is so because the alleged contract of bailment would be either void or illegal, and in such circumstances the appellant would simply be in the position of a person in

possession of specified currency who is entitled to sell same and who, subject to reasonable opportunity existing, failed to do so. When the property being dealt with is specified currency, then it seems no question of bailment can arise unless there is no evidence before the court which is of such a nature as to bring the case within Section 5 of the Act. There is no such evidence in this case. Merely to hand specified currency to a friend to keep in the circumstances suggested herein is not a bailment in the sense relied on by counsel. On the evidence therefore both Miss Regennas and the appellant, might well, if that evidence were accepted in its entirety, have been guilty of contravening Section 4 (1) of the Act.

All of which brings us back to the findings of the Learned Trial Judge. In those findings he has rejected the explanations proferred by the appellant as to how she came into possession of the currency, as being inconsistent, or as he put it, "incompatible." The reasonable inference to be drawn from this is that he has rejected both explanations and concluded that the currency did in fact belong to the appellant. A view which is to some extent supported by the fact that no further evidence was offered against Miss Regennas.

A closer look at the facts disclosed by the evidence will show clearly why it is not correct to say that the Crown's case was presented on the basis that Miss Regennas was the owner of the foreign currency, and the appellant a mere bailee thereof. What the Crown did was to place before the Court all the circumstances of the case including the whole account which the appellant gave of how she came in possession of the foreign currency. By doing so the Crown did not confine itself to one and only one approach as is evident from the counts in the indictment in respect of which it was common ground that counts 2 and 3 are alternative counts and infact there was much argument whether the Court in all the

circumstances could substitute a verdict of guilty on Count 3 against that the appellant, if we found that the decision of the Resident Magistrate to convict on Count 2 was wrong. The offer of no further evidence against Miss Regennas when the trial resumed on the second day of the trial certainly excluded from consideration any statement pertaining to the enquiry which she might have given. Therefore there was no independent evidence admissible against the appellant whereby it could be effectively argued that the contention as set out above was valid.

Thereafter the Resident Magistrate had to concern himself only with the question whether in all the circumstances of the case the appellant was in possession of specified currency, so as to be in Breach of the Exchange Control Act, bearing in mind the comments of Robinson, P., in the judgment of this Court in David Lowe, supra. At page 6 thereof he said:

> "In cases of this nature rarely will the prosecution be able to adduce evidence of the time when the money came into the hands of the accused. Accordingly both the existence of the opportunity to make the offer and the failure to do so has to be based on presumptive evidence. In that regard consideration should be given to all the relevant circumstances including the amount of currency, the person's situation in life, his occupation, the place where the foreign currency was found and any explanation offered by the accused."

Analysing the evidence in the instant case the first point which attracts attention is that, unlike in David Lowe, the appellant admitted that she had received the currency some days before it was found by the police. There is therefore, in our view, no need to invoke presumptive evidence in this case to aid the resolution of when she received the currency, and of the existence of the opportunity to make an offer and the failure to do so. Indeed, due weight must be given to the fact when the amount of U.S.$200.00 was found in the drawer of the wardrobe, by Constable Woodhouse, the appellant reportedly said that that money was hers and that she had received it as a present on

Thursday, the 31st day of August, 1978. Curiously enough, when the sum of U.S. $6,246.00 was found behind the stove in the kitchen, the appellant did not then tell Constable Peter Ebanks when she received it into her possession. Although she told him upon his enquiry that it belonged to a nurse name Regennas who works at the Children's Hospital, she did not say when Regennas had given it to her. Even if this failure so to state was because no appropriate question was asked, at that time, note must be taken of her statement in the interrogatories administered by Superintendent L.A. Buchanam on the 5th September, 1978, she then said she had been given the money by a friend, Regennas, "on Friday 1st September, 1978" to purchase a home. She denied being the agent of Miss Regennas; she was just a friend. She elaborated on this receiving of the currency by relating how they both travelled from Kingston to Savanna-la-mar. "She remain there that night, gave me a package with U.S. $6,456.00 she asked me to keep the contents until her return from Negril." This money was counted before the appellant drove Miss Regennas to her stop. Significantly, her evidence states: "Money found in the drawer and in the stove all part and parcel of the same package". A telling remark which, inevitably, would induce the thought that in fact she received all the currency on Thursday, the 31st August, 1978 and not on Friday the 1st September, 1978. Be that as it may, even if it is accepted that she did in fact acquire the currency on the latter date, the enquiry is whether the learned Resident Magistrate was right in finding her guilty on Count 2 for retention of specified currency.

The sequence of events leading up to the discovery of the sum of specified currency is interesting for the light which it throws on the question of opportunity to make an offer as well as failure to make an offer. She took the money with her every night when she left home to perform nursing duties at the Savanna-la-mar Hospital. On her return home next morning she would put the money under her pillow. When she retired to sleep, she said, "I removed the package and put it in the drawer of the

wardrobe." Infact on Monday the 4th September, 1978 after the tussle with Owen Lawrence "she removed the money from the drawer and hid it underneath the stove where I thought he could not find it." This remark is juxtaposed with the evidence wherein she said that after she had ejected Owen Lawrence from the house he was at the gate from where he walked away. She then said this:

> "Immediately I went to neighbour's house and phoned for police. Mr. Ebanks I phoned. I phoned and asked for Mr. Ebanks! I removed the money from the drawer and hid it underneath the stove where I thought he could not find it. Police came later. I again make a report to them."

Contextually, one is lead to enquire whether she was hiding the money from the police. If so, why?

Owen Lawrence had first come to her premises at 9.00 a.m., on the 1st September, 1978. He left, but returned at 11.00 a.m. on the same day. The appellant made her report to the police at 2.00 p.m. on the same day. After the police arrived with Owen Lawrence, who reported that he had given the appellant U.S.$17,000.00 in the expectation that she would give him J$34.000.00 in return, she denied having any such money for Lawrence, and invited the police to search her house. According to her the search started immediately after her denial about having money for Lawrence. When the money was discovered, and the police challenged her denial in the light of this discovery, she explained her denial as based on the fact that the police would have given Lawrence the money. She repeated in her evidence the observation by one of the policemen who believed that the three parcels of the currency belonged to Owen Lawrence. Peculiarly, under cross-examination she stated "I doubt that I had remembered the presence of the foreign currency". Conflictingly with the assertion: "I told them I had a package in the house, that the package did not belong to me."

Although she denied that any search warrant was read to her, there is in evidence a search warrant (Exhibit 9) which Constable Ebanks and Woodhouse said was read to her before they carried out the authorised search of her home and in her presence. In any event it is inconceivable that the appellant could have been so quickly oblivious of the specified

currency in her house given the traumatic occasion which she said in the first place occasioned her complaint to the police. No right thinking legal tribunal assessing the evidence in this case could have disregarded the importance of this piece of evidence. Certainly her answers as noted in the interrogatories, where they referred to her actions after she had ejected Lawrence from her house tells a powerful story against her doubting whether at the material time of search she remembered the foreign currency. She said she "put the money in a folder and put the folder in a drawer in my wardrobe, then got in touch with police."

This last was given on the 7th September, 1978 when she was seen by Supt. L.A. Buchannan who administered the interrogatories on that occasion. The question then arises when was it really that she put the currency behind the stove? Was it immediately after she phoned the police? Or was it in the interval of time between when Constable Ebanks and Woodhouse left the appellant's home, went back to the Savanna-la-mar Police Station, obtained a search warrant, and the time when they returned to effect the authorised search? At whatever time it would raise in the mind of the tribunal seized of the evidence the question of why this endeavour to conceal, and whether it is not a cogent consideration regarding the truthfulness of the appellant, with regard to the underlying purpose of her possession of the foreign currency.

Along with this must be considered her statement that when Miss Regennas gave her the money, it was on the understanding that the appellant would keep it for Regennas until the latter returned from Negril. There is no evidence whether Regennas did go back to the appellant's home at all after this, but significantly she was interrogated in Kingston on the 7th September, 1978. A factor which inferentially, would put the lie to the claim by the appellant that she was handed the money to hold for a specific purpose; which as far as all the available information goes was

unlimited by time. In the meantime the appellant did not offer the money to any bank; although there were two banking dates - Saturday and Monday available for her to transact lawful business. It is noted that during his submission to the Resident Magistrate Mr. Phipps said that in Savanna-la-mar the effective banking period is two hours on a Saturday. This was in 1978. The money was discovered after 2.00 p.m. on Monday at which time the hours of banking for the day had expired.

Section 5 (1) of the Exchange Control Act reads as follows:

> 5 (1) "Every person in the Island by whom or to whose order (whether directly or indirectly) any ..... specified currency in the form of notes is held in the Island but who is not entitled to sell or procure its sale shall notify the Minister in writing that he so holds that ..... currency." (emphasis mine)

In the circumstances the conviction on Count 2 was an appropriate and proper conclusion to the trial.

We were asked to give consideration to the question whether it would be open to the Court, at this stage to substitute (pursuant to Section 24 of the Judicature (Appellate Jurisdiction) Act a verdict of guilty on Count 3 which refers to Section 5 (1) of the Exchange Control Act for that made in the Court below pursuant to Section 4 (1) thereof. It was agreed by both sides that these are alternative counts.

Section 5 (1) of the Exchange Control Act reads as follows:

> "5 (1) Every person in the Island by whom or to whose order (whether directly or indirectly) any .... specified currency in the form of notes; is held in the Island but who is not entitled to sell or procure its sale shall notify the Minister in writing that he so holds that ..... currency" (emphasis mine)

In view of our decision on Count 2 we do not see the necessity to make any definitive decision on this point.

We would only point out that clearly the duty imposed by Section 5 is not to sell, but to inform the Minister in writing, that specified currency is being held. Furthermore, the statutory presumption contained in Section 4 has no application to the prosecution of an offence under Section 5 and the Crown is therefore obliged to lead evidence the purpose of which would be to establish that the Minister had not been informed in writing. Common sense would also suggest that some reasonable opportunity must be shown to have existed for the accused to inform the Minister.

To summarize therefore the position is as follows:

(1) There was no evidence to substantiate the claim that appellant was not a person entitled to sell the currency.

(2) What evidence exists indicates that any purported contract of bailment apart from any lack of precision as to its precise terms, would in any event in terms of the statute be either void or illegal.

(3) On such a basis it was open to the Learned Trial Judge to convict even if he had accepted the explanation given by the appellant as to how she came into possession of the money.

(4) In the event, he rejected the explanations, concluded that the money belonged to the appellant and quite properly held her to be in contravention of Section 4 of the Act.

WHITE, J.A.

I agree. Accordingly, the appeal is dismissed. Conviction and sentence affirmed.